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2017-04-28

Principle 10 and Access to Justice

Abstract
Principle 10 of the Rio Declaration provides for the three "pillars" of environmental democracy, that is, the right of the public to obtain environmental information, to participate in environmental decision-making procedures and to have access to justice in environmental matters. This article (deals with some key issues concerning the third pillar's rights on access to justice. First, it covers the relevant historical background and outlines developments in international law in this area. Following on from setting the context, access to justice in different regional human rights conventions is discussed in respect of their strengths and shortcomings. Although there has been a significant "greening" of the provisions therein relating to the protection of family and home, as well as the requirement for a fair trial, most of these conventions are confined to "individual's rights" in a more traditional sense. As for the protection of general environmental interests, the international human rights instruments remain far less effective. Instead, the most advanced instrument on environmental democracy currently is the regional 1998 Aarhus Convention from UNECE with 47 signatory Parties. Under Article 9 of this Convention, the public is entitled to have access to justice to challenge refusals to make environmental information accessible, decisions and omissions about permits for large installations and operations which may have a significant impact on the environment, as well as other kinds of activities which may breach environmental legislation. These provisions and their implementation in EU law are analysed, using recommendations from the Aarhus Compliance Committee and case-law of CJEU as sources of interpretation. The main focus is on standing for individuals and environmental non-governmental organisations (ENGOs), the requirement for a review on both substantive and procedural legality, the effectiveness of the review procedure and costs. The article is concluded with a short note on future prospects for access to justice for the public concerned in order to protect a healthy environment, on a more regional and global level.

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1. Introduction

In this article, the concept of "access to justice in environmental matters" means that representatives for interests that enjoy protection under the law are able to defend those interests by taking legal action in an independent and impartial court or tribunal. This can be realized by way of having the possibility available to them to either challenge administrative decision-making in that area, or to make a request to the independent body for intervention directly against the environmental activity in question. The underlying rationale for providing wide access to justice in environmental matters is twofold. First, a democratic aspect, entailing that the public concerned should have a say in matters concerning its living conditions; and second, the assumption that the quality of environmental decisions will improve if there is transparency and an exchange of arguments and data from many actors in the decision-making procedures. There is also the aspect of legal certainty, as all arguments are put on the table from the beginning and the environmental decision will ultimately be legitimized.

This article contains a short history of the development towards "environmental democracy" over the past 50 years and an overview of international instruments on access to justice in environmental matters (2), a description of access to justice obligations through human rights law (3) and an analysis of the most important international instrument in this area, the 1998 Aarhus Convention in the UNECE region. The focus lies on the key elements of that Convention relating to access to justice in environmental matters.

2. The development towards "environmental democracy"

Access to justice in environmental matters varies greatly between countries and regions. In some legal systems, all members of the public – whether individuals, groups or organisations – are able to take legal action in court to challenge environmental activities and administrative acts and omissions by way of *"actio popularis".* In other systems, only those who are affected by an activity in a very direct way are able to defend their interests in a court of law. Here, important sectors of environmental law – such as nature conservation law, the permitting of chemicals and climate law – are basically areas where the administration is the sole representative for the environmental interests. Such a legal order also commonly excludes environmental non-governmental organizations (ENGOs) from having a say in the matter. However, even when the public concerned is allowed to challenge the administrative decision-making in environmental cases, other factors are of vital importance for access to justice, such as the effectiveness of the review, time issues, the fairness of the trial, costs, and so on. In addition, the procedure in the court or tribunal can be decisive, as well as the competence of the reviewing body. In a few countries, the review is conducted by a specialized court or tribunal with environmental experts and with the competence for making an independent decision. More commonly though, the trial takes place in a general court that has little knowledge of the area, and the process mostly involves scrutinizing the formal issues in the particular case and – if there are flaws in the decision-making – ends with the remitting the case back to the administration, leaving the way open for yet another (bad) decision.

Environmental law is firmly founded in international agreements and standards. But as the reader is well aware, the enforcement of international obligations in the environmental area is weak.[1] With the exception of provisions with "self-executing" or "direct" effect, it is basically up to the signing Parties to a multi-lateral environmental agreement to arrange for its implementation into national legislation.[2] This, of course, has effects on the possibilities open

[1] Ulfstein in *Making treaties work*, p. 115.
[2] Ebbesson in *Compatibility of international and national environmental law*, p. 56ff.

to the public to take part in the enforcement of international obligations, as access to justice for the public concerned is left to be dealt under each national legal system according to the notion of "procedural autonomy". Moreover, the surveillance committees of most environmental conventions are populated by governmental representatives that can only deal with complaints from signing states. However, some modern environmental instruments have independent and impartial commissions, which are able to receive submissions directly from the public concerned, including ENGOs ("public trigger").[3] Examples of such compliance mechanisms can be found in the 1979 Bern Convention,[4] the 1991 Alpine Convention,[5] the 1999 Protocol on Water and Health,[6] and the 2010 Nagoya Protocol.[7] Of course, recommendations from such committees are still not binding upon the states, but according to the Vienna Convention on the Law of the Treaties (VCLT) they shall be taken into account. In addition to this, so long as the Party has not rectified the situation at stake, the case rests on the agenda of the Meeting of the Parties, which may have an embarrassing effect. It is also quite obvious that at least some conventions play an important role as "international standards" on certain areas, not least in the field of environmental law. It therefore seems reasonable to include those means available for the public concerned to submit complaints to an international body under the access to justice concept.

A further step has been taken in international human rights law. These instruments exist in almost all regions of the world, but commonly lack "environmental rights". This can be explained partly by reasons of age – they were formulated in times when the environmental notion did not exist as a protected interest in legislation – and partly from political resistance. However, many of the rights expressed in those conventions – such as the right to property, to private and family life, the rights of children and, not least, a fair trial – have undergone a certain "greening" in the jurisprudence of the commissions and courts responsible for enforcement in this area. Environmental protection – at least concerning pollution – has become an important issue under human rights law. As those instruments commonly include an opportunity for victims of breaches of human rights to directly address the conventional bodies in order to obtain material or punitive damages, clearly this can be described as a means of access to justice in environmental matters. While it is true that this kind of action is mostly reparative it can still bring about a certain change, not only because of such sanction possibilities. Commonly, the recommendations of adjudicatory bodies established under international human rights conventions have a high "status" or impact in the national systems of the Parties. However, international human rights law represents only an indirect way of access to justice in environmental matters, due to its connection to traditional rights and individual victims of breaches of those rights.

The increasing awareness of the need for environmental protection and sustainable development has therefore called for an international standard on information, public participation and access to justice in environmental matters. In fact, the notion of "environmental democracy" has developed over the past 50 years, built upon these three pillars. [8] In the 1966 International Covenant on Civil and Political Rights (ICCPR) the right of access to information had already been emphasized (Article 19). In the final document from the Stockholm conference in 1972 – the Declaration of the United Nations Conference on the Human Environment – the link between human rights and the environment was noted. The

[3] See Veit Koester, p. 713ff.
[4] Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).
[5] Convention Concerning the Protection of the Alps (1991).
[6] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water Courses and International Lakes (1999).
[7] Protocol on Access to genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention of Biological Diversity (2010).
[8] *The Aarhus Convention – An implementation Guide*, p. 16f, also Ebbesson in *Principle 10*, 56ff.

Brundtland Commission also identified such democratic issues in its final report Our Common Future in 1982. The idea of public participation was further developed in the UNECE region by the adoption of the first EIA Directive (85/337) in EU law and the signing of the Convention on Environmental Impact Assessment in a Transboundary Context - the 1991 Espoo Convention. Finally, the three pillars of environmental democracy were expressed in Principle 10 of the 1992 Rio declaration (italics added):

> 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.*

Also Principle 17, stating the need for EIA procedures in environmental decision-making, was of great importance. In 2002, a Global symposium of judges was held in South Africa, resulting in the Johannesburg declaration on the role of law and sustainable development, which emphasised the key role of the judiciary in the environmental area. And finally, at the Rio+20 Conference in 2012, the Parties were encouraged to implement Principle 10 at regional level.

In the UNECE region, the first attempt to formulate binding rules in order to provide the public with the means to enforce environmental rights came with the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment - the 1993 Lugano Convention. However, as this convention never obtained wide support, efforts to create a general international instrument covering all three pillars developed further. Guidelines for this task were drawn up on the Third Ministerial Conference of UNECE in Sofia in 1995, which was concluded in 1998 with the signing of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters - the Aarhus Convention.

As of the beginning of 2017, the Convention has 47 Parties (ratifications): the European Union, all of its Member States, and 18 other countries in Europe, Caucasus and Central Asia. One can safely say that the Convention, with its unique compliance mechanism, serves as a model in international law for the promotion of environmental democracy. Since 1998 several international agreements have been signed that confirm this development; for example, the Johannesburg Principles on the Role of Law and Sustainable Development 2002. In 2010, UNEP adopted the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters - the "Bali Guidelines". The purpose of these voluntary guidelines is to provide general guidance – primarily to developing countries – on how to implement Principle 10 in their national legislation. Access to justice is dealt with in Section III (Guidelines 15-26), basically reflecting the provisions in the Aarhus Convention on the same subject. There are also ongoing efforts to create a similar convention on a regional basis, most importantly in Latin America. A Declaration on the application of Principle 10 was signed by a number of Latin American countries and negotiations have advanced with the support of ECLAC for a regional agreement. Similar efforts have been made under the ambit of ASEAN - where, however, the outcome is more uncertain.

3. Access to justice in environmental matters through human rights law

International instruments on human rights and freedoms exist in most regions of the world. However, both the Arab Charter on Human Rights (2008) and the ASEAN Human Rights Declaration (2012) lack public triggers and independent surveillance commissions. The only human rights convention containing provisions expressly relating to the environmental sphere is the African Charter on Human and People's Rights - the "Banjul Charter". However, those provisions are regarded as being not enforceable "collective rights". There is an African Court of Human and People's Rights, which, however, has not gained wide accession and the statements of the African Commission of Human and People's Rights are only advisory. However, the Commission has the competence to deal with complaints from individuals, which have been used in environmental cases, most importantly concerning the rights of indigenous people.[9]

The Inter-American system is built upon the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969) and the Additional Protocol to the American Convention in the area of economic, social and cultural rights (Protocol of San Salvador, 1988). In this system, individuals can submit complaints to the Inter-American Commission on Human Rights (IACHR), which can refer cases to the Inter-American Court of Human Rights (IACtHR). Article 11 of the San Salvador Protocol recognizes both a human right "to live in a healthy environment" and a duty on states to "promote the protection, preservation, and improvement of the environment", but this provision is not justiciable through the complaints procedure. However, both the IACHR and the IACtHR have found environmental protection in a number of the Articles under the Inter-American instruments; for example, concerning the right to life, the right to property, the right to health, the rights of the child and on equality before the law. As with the similar instrument in Europe, one can actually talk about a substantial "greening" in case-law concerning those traditional rights. In the Americas, this trend has also been especially apparent in cases concerning the rights of indigenous people.[10] There is also a number of forthcoming cases concerning climate change and human rights.[11]

The European Convention on Human Rights and Fundamental Freedoms (ECHR) is the oldest human rights convention, with the largest number of Signatories.[12] As with most of the other human rights conventions, it does not expressly recognize environmental rights. This issue has been raised throughout the years in different cases, but the European Court of Human Rights (ECtHR) has consistently held that the Convention cannot be read to include an environmental right in itself.[13] Having said that, it is also quite obvious that there has been a substantial expansion in that direction through other ECHR provisions, most notably those concerning the protection of private and family life according to Article 8. Also Article 1 of

[9] Shelton in *Legitimate and necessary*, p. 144.

[10] The cases commonly referred to in the legal doctrine are *Yanomani Indians v. Brazil* (IACHR 1985), *Awas Tingni Mayagna (Suma) Community v. Nicaragua* (IACtHR 2001), *Maya Indigenous Community of the Toledo District v. Belize* (IACHR 2004) and *Saramaka People v. Surinam* (IACtHR 2007); see *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment;* also Shelton in *Remedies in international human rights law.*

[11] See Averill in *Linking Climate Change Litigation and Human Rights.*

[12] The ECHR became operational in 1953 and all 47 of the members of the Council of Europe – among them Turkey and Russia – are Parties to the Convention. As for the Inter-American system, IACHR has been operating since 1960, 23 and 20 of the members to OAS have recognized the jurisdiction of the Commission and the IACtHR, respectively.

[13] *Hatton ao v. UK* (2003), *Kyrtatos v. Greece* (2003), *Fadeyeva v. Ryssland* (2005) and *Karin Andersson ao v. Sweden* (2014). In the *Hatton* case, the third chamber of the Court made a far-reaching statement in that direction (ECtHR 2001-10-02, para 97), but this was altered by the Grand Chamber that meant that environmental protection as such fell under the discretion of the administration.

Protocol 1 on property rights, Article 2 on the right to life, and Article 6 on fair trial have been used in environmental cases.[14] Severe disturbances through air pollution, water contamination, noise, odour, smoke and other nuisances have been found to be in breach of the requirement for protection of the home and family life. In *Di Sarno v. Italy* (2012), a number of inhabitants of a community sued the Italian government for not having solved the "waste crises" problems that prevailed in the Campania region between 1994 and 2009, thus forcing them to live in an environment polluted by refuse left in the streets. For a period of that time, the Court considered that the situation had led to a deterioration of the applicants' quality of life, which was in breach of Article 8 of the ECHR. Furthermore, *Bor v. Hungary* concerned serious noise emissions from a railroad station, disturbances that the ECtHR found had affected the quality of life of a man who lived nearby and therefore in breach of Article 8. As the authorities had been passive over the years and had not intervened to protect the man's interests, there was also a breach of Article 6. This last finding was in accord with previous case-law, clarifying that the legal systems of the Parties must include the legal means for the public concerned to challenge administrative actions and omissions concerning people's living conditions.[15] It can also be noted that Article 8 includes a duty for the administration to inform about disturbances from environmental activities. Furthermore, administrative decisions on activities that may have an impact on the quality of life for those who live in the vicinity must be based on satisfactory investigations and EIAs, where their interests are accounted for.[16]

As for procedural rights in the ECHR, a basic requirement for fair trial is set down in Article 6, which is supplemented by the provision on effective remedies in Article 13. The latter provision was triggered in *Di Sarno*, where there were no remedies available according to Italian law for the waste situation. The requirement for fair trial in Article 6 is even wider than the substantial protection in Article 8 and other provisions of the Convention, as it applies in "the determination" of someone's civil rights and obligations according to the Convention. Thus, when those concerned have an arguable case, they may claim unlawful interference with, for example, Article 8 – as was the case in *Karin Andersson* – and then invoke the requirement for a fair trial. Finally, one must not forget the basic demand for "equality of arms" that lies within Article 6, as illustrated by the famous *McLibel* case.[17] High costs and lack of legal counsel cannot be allowed to create barriers for those who choose to take legal action to protect their rights and freedoms, a consideration which is also valid in environmental cases.

The European Convention has a strong public trigger, as any "victim" – after having exhausted national remedies – can sue the government of the Party involved. Articles 8 and 2 can only be invoked by individuals, whereas Article 1 of Protocol 1 and Article 6 are also available for organisations and groups.[18] However, class actions are not permitted, at least not yet.[19] According to Article 41 ECHR, the ECtHR shall afford the injured party with "just

[14] Alongside the cases already mentioned, the following are the most prominent concerning environmental issues: *Pine Valley Developments Ltd ao v. Ireland* (1991), *Lopez Ostra v. Spain* (1994), *Guerra v. Italy* (1998), *Taşkin ao v. Turkey* (2004), *Moreno Gomez v. Spain* (2004), *Öneryldiz v. Turkey*, *Giacomelli v. Italy* (2006), *Öçkan ao v. Turkey* (2006), *Tãtar v. Romania* (2009) , *Deés v. Hungary* (2010), *Dubetska ao v. Ukraine* (2011), *Grimkovskaya v. Ukraine* (2011), *Powell and Rayner v. UK* (1990), *Hardy and Maile v. UK* (2012), *Di Sarno ao v. Italy* (2012), *Ayden ao v. Turkey* (2012), *Bor v. Hungary* (2013), *Dzemyuk v. Ukraine* (2014).
[15] *Grimkovskaya v. Ukraine* (2011), *Hardy and Maile v. UK* (2012).
[16] *Grimkovskaya v. Ukraine* (2011).
[17] *Steel and Morris v. UK* (2005).
[18] As was illustrated by the cases *Taşkin ao v. Turkey* (2004), *Di Sarno v. Italy* (2012), *Taskin* and *Öçkan ao v. Turkey* (2006).
[19] The High Level Conference meeting at Brighton in 2012 requested the introduction of some kind of "representative action" in the ECHR, see https://www.google.se/#q=Brighton+Declaration+2012

satisfaction". Commonly, this includes pecuniary damages, but can also include moral damages in certain instances.[20]

Despite the good sides of the European human rights system, one must not omit the apparent drawbacks of the system. Human rights procedures are often (very) prolonged, and do not intervene in the actual situation for those whose rights have been infringed. Nadezhda Fadeyeva received compensation, but the Severstal steel plant in Cherepovets still operates, and the railroad close to Karin Andersson's house has already been built. These situations will not be remedied by the judgements of the ECtHR. Even if those judgements are closely followed by the national courts of the Party concerned, the system is still mainly reparative. Finally, only "victims" of human rights of breaches in a still quite narrow sense are able to seek refuge in the Convention. Many environmental cases certainly concern other kinds of protected interests, such as nature conservation and species protection. For them, the ECHR does not afford any consolation. This is the reason why the discussion on an international standard concerning access to justice in environmental matters has developed from Principle 10 to a binding convention.

4. The Aarhus Convention and its implementation

4.1 The Aarhus Convention in general

The Aarhus Convention aims to improve the democratic legitimacy of decision-making in environmental matters through providing *access to information* about environmental issues, the opportunity to *participate* in decision-making itself and to gain *access to legal procedures to appeal* decisions concerning the environment. The preamble to the Convention emphasises the importance of a close relationship between environmental rights and human rights, and further stresses that all three pillars are of decisive importance for sustainable development. The ideas forming the pillars are intertwined to form an entirety, a basic viewpoint advanced in the Implementation Guide of the Convention:[21]

> "Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar."

The Aarhus Convention is relatively short, containing only 22 Articles. Like many international instruments, it starts with a general part, including a provision laying down its objectives (Article 1), which largely reflects what was earlier stated in the preamble. In this part, there are also some definitions (Article 2) and general provisions (Article 3). The definition of environmental information is broad, including information from decision-making procedures. Of particular interest for this article are the definitions of the "public" and the "public concerned" (Articles 2.4 and 2.5). The broader concept "public" is defined as "*one or more natural or legal persons, and, in accordance with national legislation and practice, their associations, organizations or groups*". The "public concerned" means "*the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*". The general provisions make clear that the provisions of the Convention

[20] See *Öçkan* o *Dzemyuk v. Ukraine* (2014), whereas this claim was rejected in *Di Sarno v. Italy* (2012). Even punitive damages may be awarded in very serious cases of repeated breaches of the Convention, see *Cyprus v. Turkey* (2014).
[21] *The Aarhus Convention – An Implementation Guide*, p. 119.

constitute a floor ("minimum provisions") that do not prevent the Parties from maintaining or introducing enhanced information, wider participation and more effective access to justice than that required by the Convention (Article 3.5). Article 3.9 essentially prohibits discrimination on the basis of citizenship, nationality, domicile or registered seat.

The "third pillar" of the Convention is contained in its Article 9. According to Article 9.1, any person whose request for environmental information has been refused shall have access to a review procedure in a court or tribunal. Article 9.2 stipulates that the public concerned shall have access to a similar procedure to challenge the substantive and procedural legality of any decision, act or omission subject to permit decisions on activities that may have a significant impact on the environment. In addition, Article 9.3 requires 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. There is also a general requirement for the environmental review procedure to be effective, fair, equitable, timely and not prohibitively expensive (Article 9.4).

4.2 The Compliance Mechanism of the Aarhus Convention

The Convention is equipped with a compliance mechanism that is rather unusual. There is a Compliance Committee, consisting of nine members, nominated by the Parties and ENGOs and elected at the Meeting of the Parties. The Committee is independent, because its members are judges and legal scholars and sit in their personal capacities for six years. The compliance mechanism also has a "public trigger", meaning that the public can communicate complaints about breaches against the provisions in the Convention. All communications and meetings among the Committee, the complainant and the Party are open to the public.[22] From 2004 to date, the Commission has received 144 communications from the public, out of which more than 50 have been concluded with recommendations. One must not underestimate the importance of committee decisions. Though its statements are not binding, they play an important part in the understanding of the Convention and – when endorsed by the Meeting of Parties – work as "interpretive factors" in the building of international norms in the field of environmental democracy.

4.3 The Aarhus Convention and EU law

Article 37 of the European Charter of Fundamental Rights states that "*(a) high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*".The basic provision on access to justice within the EU lies in Article 47 of the Charter, stating that everyone whose rights or freedoms are violated is entitled to an effective remedy, meaning a fair and public hearing within a reasonable time by an independent and impartial tribunal. This provision is complemented by the Article 19 in the Treaty of the EU, requiring the Member States to provide with remedies sufficient to ensure effective legal protection in the fields covered by Union law. Read together, these provisions express the two underlying reasons for the access to justice on a general level. First, to protect rights and freedoms, and second, to enforce the "rule of law".

The European Union and its Member States are parties to the Aarhus Convention. Most of the provisions in the Convention are implemented in the Union by various directives, most importantly by amendments to the EIA directive (2011/92). For decision-making by the institutions of the Union, the Convention is implemented by Regulation No. 1367/2006. However, concerning the implementation of Article 9.3, the EU declared that Union legislation does not cover all provisions of the Convention and that "*its Member States are*

[22] All documents are published on the Aarhus Convention's web site (http://www.unece.org/env/pp/).

responsible for the performance of these obligations (…) and will remain so unless and until the Community, (…), adopts provisions of Community law covering the implementation of those obligations.[23] However, as of today, any such legislation at Union level has not seen the light of day. A proposal for a directive on access to justice was launched by the Commission in 2003,[24] but withdrawn in 2014 due to resistance at Member State level. Since then, the efforts of the Commission have instead focused on launching a guidance on access to justice.

However, this indecisiveness from the EU administration has been counterweighed by a very activist approach from the Court of Justice of the EU (CJEU). Even before the ratification of the Aarhus Convention in 2005, important standpoints were taken by the Court on issues such as the "direct effect" of EU directives and the principles of effectiveness and judicial protection under EU law. Examples of landmark cases in this respect are C-431/92 *Grosskrotzenburg* (1995), C-72/95 *Kraaijeveld* (1996), C-435/97 *WWF* (1999) and C-201/02 *Delena Wells* (2004). Since 2005, the development of case-law on access to justice has been expansive.[25] A number of landmark cases have been delivered by the CJEU, covering all aspects on access to justice in environmental matters. Concerning standing for individuals and ENGOs, C-237/07 *Janecek* (2008), C-75/08 *Mellor* (2009), C-263/09 *Djurgården* (2010), C-115/09 *Trianel* (2011), C-128/09 *Boxus* and C-182/10 *Solvay* (2012), C-72/12 *Altrip* (2014), C-404/13 *ClientEarth* (2014) and C-243/15 *LZ II* (2016) are the most important. A number of cases have dealt with the cost issue in environmental proceedings; C-427/07 *Irish costs* (2009), C-260/11 *Edwards* (2013) and C-530/11 *Com v. UK* (2014). As mentioned above, Article 9.4 of the Aarhus Convention requires that the national procedures are fair, equitable and timely, an issue which was dealt with in C-416/10 *Križan* (2013).[26] Finally, in C-240/09 *Slovak Brown Bear* (2011), the CJEU made clear that even though Article 9.3 of the Aarhus Convention is not implemented in EU law, it is a Union law obligation for the Member States' courts to interpret, to the fullest extent possible, the national procedure in order to enable ENGO standing in environmental cases.

To conclude, this body of case-law relates directly to the provisions of the Aarhus Convention. In this way, the various standpoints of the CJEU have become an important source for an understanding of the Convention, not only for its implementation in EU law, but also on a general level. At the same time, the Aarhus Convention's Compliance Committee has issued a number of important decisions about the third pillar of the Convention. Commonly, the standpoints of the CJEU and the Committee coincide, but not always.[27] Even so, these judgements and decisions taken together are instrumental when analysing key issues on access to justice in environmental matters.

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[23] See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec

[24] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (COM/2003/0624 final).

[25] See Brakeland: *Access to justice in environmental matters – development at EU level*.

[26] A summary of the CJEU cases from *Djurgården* and onwards is published on the website of the Task Force on Access to Justice under the Aarhus Convention, see http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/jurisprudenceplatform.html.

[27] For example, the Compliance Committee has been seriously critical of CJEU case law concerning the possibilities available for the public concerned to challenge decisions within the EU administration; where the Court has taken an opposite and very restricted view, see Findings and recommendations of the Compliance Committee with regard to communication C/2008/32 (Part II) concerning compliance by the European Union, 17.03.2017 , https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html, compared with C-401/12 P to C-403/12 P and joined cases C-404/12 P and C-405/12 P; see also Krämer in JEEPL 2016, p. XX. Compared with the generous attitude concerning the possibilities open to the public to go to national courts, it is no exaggeration to talk of the Janus face of the CJEU.

5. Key issues related to access to justice in environmental matters

5.1 Introduction

Discussion on "access to justice" tends to focus on just "*standing*"; that is, the determination of the class of people – affected parties, stakeholders, the public concerned, actors with *locus standi*, or whatever expression used – who are allowed to appeal or otherwise take action in court in order to challenge an administrative decision or illegal environmental activity. This issue is, of course, decisive as it is a prerequisite for access to justice. But effective access to justice for members of the public includes many more factors than just standing. Another crucial question concerns what they are entitled to when they come to court. Will the court review *both substantive* and *procedural issues* at stake in the contested decision? Moreover, the *effectiveness* of the environmental proceedings is also crucial; that is, the duration of the process, the possibilities available for obtaining an injunction against administrative decisions and illegal activities. Also, what remedies are available for environmental damage? Finally, the *cost issue* is decisive in order to avoid a "Ritz democratic" system - that is, everyone has the right to go to court, but very few can afford it. These are the key issues on access to justice to be dealt with in the following sections.

5.2 The "double approach" on standing

The issue of "standing" is about who is entitled to appeal a decision or to take action directly in court in order to challenge actions or omissions by the administration or operators of activities having an impact on the environment. The Aarhus Convention builds on a "double approach" to this class of persons, stating that those members of the public concerned who either have a "*sufficient interest*" in the matter or maintain an "*impairment of a right*" shall have standing in environmental cases. This reflects the fact that within the Parties to the Convention, there are great variations between those systems that allow anyone to challenge administrative decisions and omissions on environmental matters (*actio popularis*) and those that restrict the possibility of judicial review only to those members of the public who can show that their individual rights have been affected. Examples of *actio popularis* can be found in many states. The wide possibilities open to the public to challenge environmental decisions in Latvia and to bring individual private prosecutions in the United Kingdom, Spain and Poland are perhaps the most important examples in Europe. In some countries, all inhabitants in a municipality can challenge the legality of certain decisions by political boards and civil servants. In contrast, a strict form of the right-based system is expressed in the protective norm theory (*Schutznormtheorie*), which applies in other countries. Here, the complainants have to show that the decision or omission may concern their "individual rights". For example, in the case of a permit for an industrial installation, affected persons can only challenge those parts of the decision that are designed to protect their individual interests in a very limited sense, commonly concerning discharges known to be hazardous to human health. Even if they are allowed to appeal the decision, all other arguments invoked in favour of the cause are dismissed as being outside the scope of the trial. General issues of environmental protection are thus regarded as the prerogative of the administration and can never be brought before the courts for review. However, most countries use a more or less "interest-based" approach when determining standing. Even if the distinction between the two systems is not always easy to identify, the "interest-based" countries may be said to have a more liberal approach to standing. If potential litigants live or spend time in the vicinity of the above-mentioned industrial activity and there is a risk that they will be affected by emissions, disturbances and other inconvenience from that activity, they are allowed to challenge the permit decision in court. In addition to this, there is commonly little or no restriction as to the

scope of the trial, meaning that any argument can be used to advance their cause, including general compliance with environmental law.

5.3 Access to justice in information cases

In Article 9.1 of the Aarhus Convention, it is stated that any person who considers that his or her request for environmental information has been wrongfully refused or inadequately answered has access to a review procedure before a court or another independent and impartial body established by law. As "anyone" can ask for information, "standing" is perhaps not an accurate term for describing that the requester can ask for review of a negative decision. The administration cannot ask the requester to state an interest or to give reasons for his or her demand, unless it is needed to determine whether a ground for refusal is merited. Neither can the administration discriminate against the requester because of his or her nationality or legal status.[28] A refusal must be in writing, stating the reasons for the decision and information on how to appeal. There is also a compulsory requirement for the administration to reconsider its refusal in an expeditious manner. Many countries have specially designed administrative bodies for this, some of which are independent and impartial (see below under 5.9). The final decision or judgement in an information case must be binding upon the administration.[29]

5.4 Standing in other cases according to Aarhus

Standing to appeal the administration's position in environmental cases or to challenge an activity directly in court is regulated in Articles 9.2 and 9.3 of the Aarhus Convention. According to these provisions, the public concerned should have the right of access to a review procedure before a court of law, or other independent body established by law, to challenge the substantive and procedural legality of decisions, acts or omissions concerning certain larger activities covered by Article 6. Those are either listed in an appendix, or other kinds of activities which may have a "significant effect" on the environment (Article 9.2). However, this provision does not exclude the possibility of a preliminary administrative review procedure or a requirement of exhaustion of such procedures prior to judicial recourse. In addition, members of the public should have the opportunity of access to administrative or judicial procedures to challenge any acts or omissions by private persons and public authorities believed to have contravened national law concerning the environment (Article 9.3). The remedies thus demanded must be both adequate and effective, including the possibility of injunctive relief. They must also be fair, equitable, timely and not prohibitively expensive to pursue (Article 9.4).

As noted, Article 9.3 is wider than Article 9.2, covering all kinds of activities, as well as all kinds of administrative acts and omissions. Such decisions may concern city planning, other kinds of plans and programmes, environmental taxes, chemicals and much more, as long as they have an impact on the environment.[30] Clearly, it is also wider in the definition of standing. Even though the Compliance Committee has stated that the Convention does not require "actio popularis", it still must be possible for someone to challenge administrative decisions and omissions.[31] Furthermore, the Convention is silent on *what kind of case* the public concerned can bring to court. In many legal systems, the courts' control of the

[28] Decision by the Aarhus Convention's Compliance Committee in C/2008/1 *Kazakhstan*, also *Implementation Guide*, p. 191.
[29] C/2008/30 *Moldova*, also *Implementation Guide*, p. 192.
[30] C/2005/11 *Belgium* and C/2011/58 *Bulgaria*, *Implementation Guide*, p. 197.
[31] See for example C/2005/11 *Belgium*, paras 35–37, C/2006/18 *Denmark*, paras 29–31, C/2011/63 *Austria*, para 51, also the *Implementation Guide*, p. 198.

administration is mainly triggered in relation to specific decisions. In others, the public concerned also has access to "abstract norm control".[32] However, the Convention does not require such a procedural order, a position which is shared with the ECtHR for that matter.[33] Even so, the national system must provide *some effective legal remedy* in similar situations.[34] Furthermore, the Aarhus Convention does not require the Parties to grant that individuals and NGOs have the possibility open to them to take *direct action in court*. It requires access to justice, but is silent on the matter of how the Parties arrive at different solutions. This can be met by the existing procedural orders, but they must be able to fulfil the requirements of Articles 9.2-9.4. The requirements should also be regarded in relation to the system in its entirety. When deciding on whether a national system is in compliance with the Convention, one must consider both the opportunity to challenge decisions through appeal on the merits of the case, as well as through judicial review of legal issues. One must also understand the aims and purposes of the Aarhus Convention, and accordingly, terms and definitions used in the Convention must be "translated" and transformed into their equivalents in the procedural order that prevails in the country concerned.[35]

5.5 Standing for individuals

Articles 9.2 and 9.3 use different terms when defining the class of persons who should have access to justice. The first provision uses "public concerned", as defined in Article 2.5, whereas Article 9.3 uses the wider concept the "public" (Article 2.4). There is little reason for this and if there ever was any idea behind this distinction, it is today lost in the mists of time. In any event, it is sensible to believe that Parties have a wider discretion under Article 9.3, but some sort of connection may be required between those individuals who take legal action and the environmental impacts of a certain decision or activity in order to allow for standing. Commonly, these persons are described as being "affected" by the activity in question.[36] This is also how the similar expressions in the Espoo Convention and the EIA Directive are understood. However, what constitutes such a connection between the individual and the activity is not easily determined and – as has already mentioned – varies from one country to another. Basically, this has been an issue which has been left to the national courts to decide. In fact, many countries do not allow standing for individuals to appeal decisions concerning "green issues" – for example, on nature conservation or species protection. Still, one cannot immediately say that these systems are inconsistent with the Aarhus Convention. This was expressed by the CJEU in *Trianel*, confirming that Member States have significant discretion to determine the conditions for the admissibility of actions taken by individuals. In doing so, standing can be confined to those with *individual public law rights*.[37] However, the Court did not explain in more detail what this expression means, as the case concerned ENGO standing. On the other hand, there is another vein in the case-law of the CJEU that is worth emphasising, and that is that standing is more about "environmental obligations" than "rights". If there are clear obligations in a provision of the law, those who are concerned shall have the possibility made available to them to challenge the decision-making under those provisions in court. This reasoning is clear from *Janecek*, where the CJEU derived "rights" from a provision in a directive on air quality which went further than just protecting the

[32] For a European example, see the French case in CJEU C-381/07 *Association nationale pour la protection des eaux et rivières – TOS.*
[33] ECtHRs judgments in the cases *Klass v. Germany* (1978), *Norris v. Ireland* (1988), and *Västberga taxi v. Sweden* (2002).
[34] C-432/05 *Unibet*, para 37.
[35] C/2004/06 and C/2007/20 *Kazakhstan*.
[36] *Implementation Guide*, p. 58.
[37] C-115/09 *Trianel*, paras 45 and 55.

person's interests, namely the drawing up of an action plan for improving ambient air quality. And in *Stichting Natuur en Milieu*, the CJEU stated that, concerning provisions with direct effect, "*natural and legal persons directly concerned must be able to require the competent authorities, if necessary by bringing the matter before the national courts, to observe and implement such rules*".[38] Obviously, this line of reasoning is based on the "rule of law", which is another important principle to take into account when discussing access to justice. Also, one must not forget that according to the Aarhus Convention, what constitutes a sufficient interest and impairment of a right shall be determined consistently with the objective of giving the public concerned wide access to justice, also concerning individuals. Finally, the double approach to individuals' standing is not an invitation to limit their available possibilities to challenge administrative decisions concerning the environment. If the national rules on standing basically do not go beyond protection of property rights, this does not meet the requirements of the Aarhus Convention.[39] According to *Janecek*, health issues on a very general level also trigger standing for those who are concerned. Together with the rule of law, this is used as an argument as to why the individual's standing must be made wider than a traditional rights-based approach.

5.6 Standing for ENGOs

As noted, ENGOs shall be deemed to either have a sufficient interest or to maintain the impairment of a right. In other words, they have standing in environmental cases in their own capacity.[40] Both the Compliance Committee and CJEU have emphasised the important role of ENGOs in environmental cases and that the national procedural rules must not put up obstacles for their standing.[41] A landmark CJEU case in this respect is *Trianel*, where the German system was found to be in breach of EU law and the Aarhus Convention. The case concerned the EIA Directive, but the provision at stake mirrored Article 9.2 of the Aarhus Convention. First of all, the Court made clear that whichever option Member States choose for standing, ENGOs are entitled to have access to a review procedure in court to challenge the substantive or procedural legality of decisions, acts or omissions covered by the administration. The Court continued (italics added):[42]

> Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337 (*cf. Article 9.2 of the Aarhus Convention*), what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive (*cf. Article 2.4 of the Aarhus Convention*) of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.

Some criteria for ENGO standing may be given in national procedural law.[43] However, they must be formulated in a way consistent with the aim of the Aarhus Convention, namely to guarantee the public concerned a wide standing in environmental matters. To begin with, it

[38] C-165/09 *Stichting Natuur en Milieu* [2011], para. 100.
[39] C/2010/50 *Czech Republic*, para 76.
[40] Different expressions are used for this; "automatic standing", privileged standing" or "standing de lege".
[41] C/2004/5 *Turkmenistan*, C/2011/18 *Belgium* and C-263/08 *Djurgården* (2010), *Implementation Guide*, p. 58.
[42] C-115/09 *Trianel* (2011), para. 44.
[43] C-264/08 *Djurgården*, see also C-243/15 *LZ II*, para 48, where the CJEU stated: "*It is true that the latter provision states that the application of Article 6 of the Aarhus Convention is governed by the domestic law of the contracting party concerned. However, that statement must be understood as relating solely to the manner in which the public participation specified by Article 6 is carried out, and does not call into question the right to participate which an environmental organisation such as LZ derives from that article*."

may be required that the aim of the organisation is clear from its statutes or activity. Conditions for registration, length of existence or activity and that the organisation should be non-profit-making are common and may be acceptable. Of these, the time criterion is the most common and the most debated. Among the Parties to the Aarhus Convention, criteria in this respect range from one or two years to five years. This may be problematic, as the time criterion is an effective barrier to access to justice for ad hoc organisations. However, as the CJEU stressed in the *Djurgården* case, local organisations play an important role in public participation in environmental decisions. The effects of using a time criterion may, in fact, be inconsistent in certain situations with the objective of giving the public concerned wide access to justice. For example, this may occur when it is required that the organisation must already have been active for a certain period of time at the beginning of an EIA procedure, even for the challenging of decisions made under that procedure many years later. To this backdrop, , it would not be surprising if the Court set restrictions on what Member States can do in this respect. Finally, one must not forget that the non-discrimination clause in Article 3.9 is especially relevant for ENGO actions. Many environmental activities have transboundary effects and thus foreign ENGOs cannot be barred from taking legal action if they are active in such an affected area in another country.[44]

5.7 Substantive and procedural legality

According to Article 9.2, the scope of the review on appeal shall include both the formal and the substantive legality of all kinds of decisions under environmental law. This has been elaborated upon by the Compliance Committee in a series of decisions.[45] The case-law of the CJEU has not been so developed in this respect, at least not directly dealing with the Aarhus Convention. Even so, in relation to the EIA Directive, one can safely say that the statements made by the CJEU in those cases show that the review must concern all aspects of the legality of the administrative decisions under that legislation. And more, if one looks in wider circles and takes into account a multiplicity of cases, the picture becomes clearer. First, a combination of *Stichting Natuur en Milieu, Janecek, ClientEart* and the *Slovak Brown Bear* show that the case-law of the CJEU is developing towards the purpose of assuring that the aim of the law is attained (the rule of law). In another case that concerned access to information, C-71/14 *East Sussex* (2015), the CJEU made clear that a national judicial review procedure must allow for the control of the lawfulness in the application of the relevant principles and rules of EU law in the Member State.[46] And in nature conservation law, it is also a common feature that the administration may authorise certain activities only if no reasonable scientific doubts remain as to whether the activity will damage the protected interest.[47] Accordingly, when a court reviews those decisions, it must determine whether the technical and nature scientific evidence relied upon by the administration leaves any such doubts. Thus the court is obliged to assess this evidence of its own accord and cannot leave this to the administration's discretion. Furthermore, in some occasions, the court may even have an *ex officio* duty to apply the relevant law, irrespective of what the parties to the proceedings invoke.[48]

[44] *Implementation Guide*, p. 57 with reference to C/2004/04 *Ukraine*.
[45] C/2010/48 *Austria*, para 66, C/2008/33 *United Kingdom*, para124, C/2011/63 *Austria*, paras 52-53 and 66, also *Implementation Guide*, p. 207.
[46] C-71/14 *East Sussex*, para 56.
[47] This is, for example, the case with activities that may have a significant impact on Natura 2000 sites in Europe, see C-127/02 *Waddenzee*, para 59.
[48] See C-72/95 *Kraijeveld*, para 56-57.

5.8 Effectiveness

In many legal systems, an appeal has suspensive effect, meaning that the decision at stake cannot be utilized until the case is finally judged upon. In other situations, it is for the applicant – commonly members of the public – to apply for an injunction to pause an environmentally damaging decision or activity while other remedies are pursued. The criteria for obtaining an injunction vary, but they fall into four basic categories: *periculum in mora* (danger in delay), *prima facie* case (likelihood of success on its merits), personal harm and the weighing of interests.[49] In quite a few countries, the limited possibility for obtaining injunctive relief in due time is regarded as an important procedural problem when challenging environmental decision-making. Together with the slowness of the procedure and a general lack of effective enforcement mechanisms, this seems to be an important barrier to gain access to justice. This is why such a phenomenon known as "cases won in court, but lost on the ground" occurs in environmental cases, meaning that the challenged decision or activity is already undertaken when the court decides that it is illegal.[50] In addition, in some legal systems, the complexity of the environmental legislation and the procedural system is highlighted as a major concern, together with lack of confidence in the court system.

To counteract these barriers to justice, Article 9.4 requires that the environmental procedure shall provide adequate and effective remedies – including possibilities for obtaining injunctions – and to be fair, equitable and timely. This provision applies to all access to justice remedies covered by Article 9. To begin with, the provision expresses a basic requirement for "equality of arms" between the parties to environmental proceedings.[51] Furthermore, "effective remedies" obviously means effective enforcement and the possibility to obtain a stop of the decision or activity at stake.[52] Injunctive relief should be granted when appropriate, which the CJEU underlined in C-416/10 *Križan* (2013). Here, the Court stated that the effectiveness criterion means that members of the public concerned must be able to ask the reviewing court or tribunal to order interim measures such as injunctive relief to suspend the application of a permit, pending the final decision.

In some legal systems, a requirement for obtaining an injunction is that the applicant deposits a sum as security. The rationale for this bond is that the operator shall be compensated if the application for appeal is unsuccessful and the project is delayed by the proceedings. The sums involved can be substantial, clearly amounting to a barrier to justice. A bond system is not in accord with effective environmental procedures and there is little reason for such a requirement. If the court grants injunctive relief, it has reason to do so and, accordingly, it follows that the operator should then have to wait for the final outcome of the proceedings. This perspective dominates in most countries, or alternatively, it is regarded as being unwise to proceed with an operation if judicial review has been granted.[53]

Effective remedies may also include the possibility of having the court to order a certain action to be taken to prevent environmental damage from occurring, as well as an order for remediation or compensation when damage has occurred. Furthermore, in some countries, ENGOs may ask for compensation "on behalf of the environment".[54] The remedies thus

[49] For more information on suspensive effect and injunctive relief, see Epstein: *Access to Justice: Remedies* p. 86ff.
[50] See *Effective Justice 2013*, p. 23.
[51] See *Aarhus Implementation Guide*, p. 203ff, also ECtHR in *Steel and Morris v. UK* (2005).
[52] C/2006/17 *EU*, see *Aarhus Implementation Guide*, p. 196.
[53] Interestingly, this is also the opinion of the Association of European Administrative Judges (AEAJ) in their Recommendation on Interim Relief in Environmental Matters (adopted in Vilnius 22 September 2011; http://www.aeaj.org/spip.php?rubrique52), where the organisation expresses: "(T)he working group objects any liability of the appellant, when interim relief is granted and the court decides adversely in the main proceedings. Such a liability affects the right of effective legal protection".
[54] See *Study on the possibilities for non-governmental organisations* (UNECE 2015).

available are compensation for costs incurred for undertaken remedial actions, compensation designated for certain remedial or compensatory actions, as well as moral damages to a certain extent.

The time issue is very important in environmental cases, though jurisprudence is sparse. The Aarhus Compliance Committee has emphasized that the appeals procedures should not be too lengthy.[55] On a general level, some guidance can also be found in the case-law of the ECtHR.[56]

5.9 Court of law or another independent and impartial body

Normally, access to justice provisions relate to the possibility for the public concerned to bring legal action in a "court or another independent and impartial body established by law". Due to its close connection to scientific and technical issues, the general complexity of cases with many actors and interests and the need for a non-bureaucratic procedural order, environmental cases on appeal are often handled by specialized bodies or tribunals outside the ordinary courts system. Sometimes, these are equipped with their own experts. For those tribunals, to be able to satisfy the requirements of being an "independent court or tribunal", certain criteria need to be met. As the expression used in Article 9.2 of the Aarhus Convention closely relates to the ones used in Article 6 ECHR and EU law, guidance can be found in the jurisprudence of both the ECtHR and CJEU. The ECtHR regards the expression "tribunal" to be an autonomous concept, meeting certain criteria.[57] First, the tribunal must be established by law and undertake its functions of determining matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner.[58] Secondly, its members must be independent and impartial. The independence of a body is to be determined in the light of the manner of appointment of its members, the duration of their terms of office, and guarantees against outside pressures. It is also important whether or not the body is seen to be independent by impartial spectators.[59] Lay assessors are generally acceptable, but in specific cases their objectivity may be challenged.[60] Furthermore, it is acceptable that the first decision in a case is taken by an authority, so long as the possibility exists of having that decision appealed to a court, without restriction on the scope of examination. Finally, the decision of the "court" must be binding, prohibiting the government or other authorities to have it set aside.[61] As for the CJEU, it has its own, closely related jurisprudence on these issues under Article 267 TFEU.[62]

Interestingly, Article 9.3 of the Aarhus Convention only demands access to "administrative or judicial procedures". This requirement seems to satisfy itself with administrative appeals; that is, an appeal to a higher level within the administrative system or

[55] In C/2008/24, Spain was found to be in breach of Article 9.4, as the appeals procedure went on for eight months and injunction was denied; see also *Aarhus Implementation Guide*, p. 201.
[56] *Matti Eurén v. Finland* (2010) and cases referred to therein.
[57] Thus the following tribunals were accepted by the European Court of Human Rights: a board for deciding compensation for criminal damage in Sweden, *Rolf Gustafsson v. Sweden* (1997); an authority for real estate transactions in Austria, *Sramek v. Austria* (1984); a prison board for visitors in UK, *Campbell and Fell v. UK* (1984); and an appeals council of the Medical Association of Belgium, *Le Compte et al v. Belgium* (2000).
[58] *Sramek v. Austria*, para. 36; see also *Coême and others v. Belgium* (2000).
[59] *Campbell and Fell* para. 78
[60] In the case of *Langborger v. Sweden* (1989), the Housing and Tenancy Court was not accepted in a case concerning the right of the applicant to stay outside the organisations that had nominated the lay assessors. However, in this case, the European Court also commented that such members "appear in principle to be extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes". (para 34).
[61] *Zander v. Sweden* (1993).
[62] C-9/97 and C-118/97 about the Finnish Maaseutuelinkeinojen Valituslautakunta (Rural Business Appeals Board) and C-205/08 about the Austrian Umweltsenat; see also *Synthesis Report, p.* 44.

to a specific appeal body or tribunal, even if that body does not meet the criteria of being "independent and impartial". However, the procedure still has to be fair and effective according to Article 9.4. This is a strange legal construct, which really does not lie in line with the ordinary perception of access to justice. Also, as there is little case-law on the relationship between Articles 9.3 and 9.4, the understanding of this concept is less developed. This can partly be explained by the fact that such an order clearly breaches EU law, which is built on the cooperation between national – independent and impartial – courts and tribunals and the CJEU.[63]

Many countries have an Ombudsman institution, usually selected by the legislative bodies of the states. The Ombudsmen are generally independent review institutions that aid individuals and entities in disputes with administrative bodies. Commonly, an Ombudsman can investigate complaints and report on its findings. The institution tends to be quite flexible, inexpensive, and simple to gain access to. Due to the fact that the Ombudsman's powers are usually limited to non-legally binding activities such as investigating, reporting, mediating and recommending, they are commonly disqualified from being considered to be an effective remedy in accordance with Article 9.4.[64] In practice they are often nevertheless very useful and therefore considered to be a complementary safeguard of environmental rights. Political pressure to follow the recommendations of the Ombudsman generally leads to compliance.

5.10 Costs

Last, but certainly not least, some words on the cost issue. According to Article 9.4, the environmental proceedings must not be *prohibitively expensive*. The meaning of this expression has been discussed in a number of cases in the Compliance Committee and the CJEU. The background is that in many countries, environmental proceedings involve high costs for the public concerned, especially when the Loser Pays Principle applies.[65] Such costs include participation or administrative appeal fees, court fees, the fees of lawyers, expert witnesses and other witnesses, as well as bonds for obtaining injunctive relief. In case-law, the CJEU has emphasized that the assessment as to what is prohibitively expensive cannot be carried out solely on the basis of the financial situation of the person concerned. It must also be based on an objective analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. The "prohibitively expensive" criterion also covers all financial costs resulting from participation in the judicial proceedings in order to assess them as a whole. In deciding that figure, other factors are relevant, including whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and the protection of the environment, as well as the complexity of the relevant law and procedure. The existence of legal aid or a cost protection regime should also be taken into account.[66] Furthermore, the CJEU has clarified that mere judicial practice in a Member State without any other guidance on the cost issue is uncertain by definition and cannot therefore be regarded as a valid implementation of the cost requirement in Article 9.4 of the Aarhus Convention.[67] The findings of the Compliance Committee are similar on this issue.[68] Finally, the Committee has also made clear that criteria for legal aid must not be too restrictive.[69]

[63] See EU Commission in XX.
[64] Se e.g. C/2011/63 *Austria*, paras 58-61 ; also *Implementation Guide*, p. 189, 191.
[65] See *Effective Justice*, part 2.4.
[66] C-427/07 *Irish costs* (2009) and C-260/11 *Edwards* (2013).
[67] C-530/11 *Com v. UK* (2014)
[68] C/2008/27 *UK* C/2008/33 *UK* and C/2011/57 *Denmark*, see *Implementation Guide*, at p. 203ff.
[69] C/2009/36 *Spain.*

6. Into the future

In most legal systems, access to justice possibilities for the public concerned are connected to administrative decisions and omissions or activities *in individual cases*. There are certain possibilities to challenge plans and programmes under Aarhus and other international instruments, but they are commonly much weaker than those connected to individual decisions and activities. Similarly, access to justice possibilities commonly decrease or disappear at higher levels of the administration, not least in relation to governmental actions and inactions. At the same time, major environmental issues, such as climate change, air pollution, the release of chemicals and dangerous substances into the market, destruction of the oceans, are not connected to individual decisions or activities, but instead involve many factors of great complexity, often at international level. Furthermore, the instruments carrying obligations for the states in these areas often also lie at international level, such as the climate agreements. Thus many of the most important environmental issues can never effectively be brought to court by the public, as the legal means to challenge administrative acts and omissions are provided for only at national level. Obviously, such a system allows for a situation where the public is left with no legal alternatives, even where governments clearly act in breach of their international obligations. It is true that we have seen a number of climate actions in recent years, which have raised much international attention, such as the Urgenda case in The Netherlands[70] and the Children's Trust in Washington State.[71] However, these actions could be brought because the national legal systems allowed them. The first case relied on a broad provision in the Dutch Civil Code and a specific notion of the state's responsibility towards its citizens. The second example is a constitutional action, typical for the USA. In contrast, similar lawsuits in other countries – such as the climate actions brought by Greenpeace in the Pacific and Barents Sea – will be met by procedural obstacles or, at least, clear challenges. To this, one can adopt different attitudes. One approach, of course, is to simply take note that this is the normal state of affairs, as it only reflects the general relationship between international law and national law. Another would be to recognise the severity in the environmental situation and to remember the old saying that procedural law's main function is to be a provider for substantive law, aiming at its full effect and enforcement. This latter attitude seems to belong to the future and it would therefore not be very surprising if the clear trend towards increased access to justice possibilities for the public gains new territory in the coming years. But that, of course, requires that legal thinking expands beyond the traditional.

[70] http://www.urgenda.nl/en/climate-case/
[71] https://www.ourchildrenstrust.org/us/federal-lawsuit/

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