

ARTICLES

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Environmental Human Rights: Is the EU a Leader, a Follower, or a Laggard?

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INTRODUCTION

The concept of “environmental human rights” is gradually gaining support in wider academic and policy circles, but it remains an emerging and essentially contested notion. While there is little argument about the existence of a number of individual environmental rights protected by domestic law, whether constitutional or not, and by supra/transnational and classical international law, some human rights scholars are reluctant to give them the “human right”/ “fundamental right” quality label, for reasons on which I will not dwell in this Article. For the sake of argument, and merely for the purposes of this Article—without taking a position in this particular controversy—I will use the designation “environmental human rights” to refer to the following set of rights, the first three of a procedural nature and the fourth substantive:

- The right of access to environmental information;
- The right to public participation in environmental decision-making;
- The right of access to justice in environmental matters; and, finally,
- The (still contested) substantive human right to a healthy environment.

In Europe, the interface between environmental protection and human rights is characterized by a strong incidence of legal pluralism. The field of environmental human rights is governed by a range of overlapping legal orders, namely: domestic law, the supranational law of the European Union (obviously applicable only for those European States which are members of the EU) and two different areas of conventional public international law, i.e., international environmental law (especially the Aarhus Convention) and the European regional system for the protection of human rights. This system was set up after the second World War under the auspices of the Council of Europe (an older organization with a wider membership than the EU) by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and developed through the case-law of the European Court of Human Rights (ECtHR), not to be confused with the Court of Justice of the EU, generally referred to as European Court of Justice (ECJ) which sits in Luxembourg, not Strasbourg like the ECtHR).

The purpose of this Article is to analyze these overlapping and interlocking legal orders in their complex interactions, focusing on the question whether the EU can be considered a leader in the field of the legal recognition and protection of environmental human rights, or should rather be seen as a follower or even an outright laggard when comparing its law with the relevant rules of public international law. Issues of interactions between *national* law and both EU and international law fall largely outside the scope of this Article. We will examine each of the rights considered in turn, after some introductory considerations aimed at placing the relevant issues in perspective.

I

AN EMERGING EUROPEAN MODEL OF ENVIRONMENTAL DEMOCRACY AND CITIZENSHIP CENTERED AROUND THE AARHUS CONVENTION

Together with the notion of “environmental democracy”, the concept of “environmental citizenship” gained currency in international political discourse in the wake of the adoption of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention), at the ‘Environment for Europe’ ministerial conference in Aarhus on June 25, 1998. This pan-European regional treaty, at the interface of environmental law and human rights law, was negotiated within the institutional framework of the United Nations Economic Commission for Europe (UNECE). It marked the beginning of what could be termed a legal and political revolution in which the very relations between European States and their own citizens in the field of environmental policy became subject to international regulation.

The Aarhus Convention entered into force more than ten years ago, on October 30, 2001, following ratification by sixteen states. The Convention now has forty-six contracting parties, including the European Union and its twenty-seven member states, ten countries in transition from the Eastern European, Caucasus, and Central Asian (EECCA) region (with the notable exception of Russia and Uzbekistan), and all candidate and potential candidate countries for accession to the EU in the Western Balkan region (with the exception of Kosovo, which cannot currently accede to the Convention since it is not a member state of the United Nations). Of the other two current EU candidate countries, Iceland signed the Convention in 1998 but

did not ratify it until 2011, while Turkey did not sign but actually announced in 1998 that it had no intention of becoming a party.

The latter country may have to reconsider its position towards the Convention in the context of its bid for EU membership, like Iceland did. Other laggards in Western Europe, among the member states of the Council of Europe, are Switzerland, Monaco, and Liechtenstein; all three are signatories to the Convention. While Switzerland has announced it is currently considering ratification, the two microstates have remained silent and absent ever since signing the Convention in 1998, and are apparently facing no domestic political pressure to become contracting parties.

The United States and Canada, though full members of UNECE, elected not to participate in the negotiation of the Convention and have stayed outside the Aarhus regime since its inception, though they did participate in the negotiation of the Convention's Protocol on Pollutant Release and Transfer Registers (PRTR), without eventually signing it.

Before Aarhus, rules on access to environmental information, consultation, and participation of citizens in environmental decision-making by public authorities and access to justice in environmental matters had gradually emerged in the national environmental law of most western European states and, subsequently, in the environmental law of the then European Economic Community (EEC), which later became the European Community (EC) and was the predecessor organization of the European Union (EU).¹ The 1992 Rio Declaration had already elevated this triptych of procedural environmental rights to the status of soft law principles at the global level. But it was the

¹ The term "European Union" was formally introduced by the 1992 Treaty of Maastricht. From the entry into force of that treaty, it became established in the media, political discourse as well as common language as the preferred term to the legally still correct European Community (EC), which, from Maastricht, became the official name of the former European Economic Community (EEC). This places legal scholars—in their work on EEC/EC/EU law—before a difficult methodological choice: that between legal accuracy and readability. The former option would strictly adopt the legally correct method of systematically referring to the institutions of the EU and the EU itself in the term which was legally valid at any given point in time, and to apply the same approach to the numbering of treaty articles, which has also changed repeatedly during the process of enlargement, deeper integration, and increasing institutional complexity. In this article, I have opted to prioritize readability for the reader who is not familiar with the chronological intricacies of EU law, by systematically having recourse to the latter term, regardless of time. Formally "EU law" does not cover the same thing today as it did in 1992, 1997, or as it does now since the entry into force of the Treaty of Lisbon in 2009.

Aarhus Convention which completed the process of juridification² and Europeanization³ of citizens' environmental rights as the standards laid down in an international legal instrument were in turn further articulated and consolidated in EU environmental law.

The Aarhus catalogue of procedural environmental rights is intrinsically linked to a fundamental rights-based approach to environmental governance. Throughout Europe, both within and beyond the borders of the EU, individual citizens and especially environmental groups have used the Aarhus Convention and the resulting EU Directives and Regulations in their efforts to increase the transparency and accountability of environmental public policies at all levels and enforce substantive environmental norms in litigation against both public authorities and private actors. Aarhus effectively constitutes the bridge—hopefully not the ultimate one “at the edge of the world,” to paraphrase an important recent book by former CEQ Chair and current Yale Dean Gus Speth⁴—between international environmental law and international human rights law in the European legal space. There are several arguments supporting this thesis, the most important of which is no doubt that the Convention explicitly recognizes, in its preamble as well as its Article 1 (stating its “Objective”), the existence of a substantive human right to a quality environment, and it states that a set of three procedural environmental rights are to be guaranteed precisely to enable citizens to “assert” this substantive right.

We will return to this complex issue at the end of this Article. But let us first turn to each of the procedural rights, while bearing in mind that each of these rights should itself be viewed by human rights lawyers as linked to certain civil and political rights well-recognized under international human rights law, i.e., respectively, freedom of information, the right to political participation in its various forms, and, last but not least, access to justice in the event of alleged violations of substantive rights of a civil or political nature, which arguably includes most environmental rights granted to individuals by domestic law as well as the internal law of the EU.

² See Winfried Lang, *Die Verrechtlichung des internationalen Umweltschutzes: vom “soft law” zum “hard law,”* 22 ARCHIV DES VÖLKERRECHTS 283 (1984) (Ger.).

³ See Johan P. Olsen, *The Many Faces of Europeanization*, 40 J. COMMON MKT. STUD. 921 (2002).

⁴ JAMES GUSTAVE SPETH, *THE BRIDGE AT THE EDGE OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY* (2008).

II

EU LEADERSHIP: SEPARATING FACT FROM FICTION

The Aarhus ministerial declaration—subscribed to enthusiastically by the EU and its then fifteen member states—praised the Aarhus Convention as “a significant step forward both for the environment and for democracy.”⁵ In their “renewed” EU Sustainable Development Strategy (SDS), adopted in June 2006,⁶ EU heads of state and government stressed the significance of the Convention for the Union’s objectives in the field of sustainable development in the following terms:

The EU welcomes civil society initiatives which aim at creating more ownership for sustainable development and will therefore intensify dialogue with relevant organisations and platforms that can offer valuable advice by drawing attention to the likely impact of current policies on future generations. *In this context, the EU will also continue to promote full implementation of the Aarhus Convention Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.*⁷

The ultimate aim of the Convention is to increase the openness and democratic legitimacy of government policies on environmental protection and to develop a sense of responsibility among citizens by giving them the means to obtain information, to assert their interests by participating in the decision-making process, to monitor the decisions of public bodies, and to take legal action to protect their environment. The “engaged, critically aware public”—as the Aarhus declaration calls it—is seen as both an essential player and a partner—or stakeholder, to use a fashionable term—in the formulation and implementation of environmental policies.

As a popular target of citizen activism in the EU and its member states, environmental policy has become a testing ground for efforts to transcend traditional models of representative democracy in Europe. Thus, developments in the environmental field have prefigured the wider debate on “[t]he principle of participatory

⁵ United Nations, Econ. & Soc. Council, Fourth Ministerial Conference, Environment for Europe, Report on the Conference ¶ 40, U.N. Doc. ECE/CEP/41 10 (June 23–25, 1998).

⁶ For a detailed analysis of this Strategy, see Marc Pallemmaerts, *The EU and Sustainable Development: An Ambiguous Relationship*, in *THE EUROPEAN UNION AND SUSTAINABLE DEVELOPMENT: INTERNAL AND EXTERNAL DIMENSIONS* 19 (Marc Pallemmaerts & Albenaz Azmanova eds., 2006).

⁷ Council of the European Union, Renewed EU Sustainable Development Strategy, EU Council Doc. 10917/06, Annex, at 26 (2006) (emphasis added).

democracy”⁸ that was enshrined under this heading in Article 46 of the draft treaty establishing a constitution for Europe in 2003, and subsequently in Article I-47 of the now defunct treaty establishing a constitution for Europe in 2004.

Though the title of the relevant article and hence the term “participatory democracy” eventually disappeared from the Treaty of Lisbon as signed in 2007—and in force since 2009—its substantive provisions themselves were inserted into Article 11 of the amended Treaty on European Union (TEU), which now provides, *inter alia*, that “[t]he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.”⁹ Similarly, an “open and democratic society” and “involvement of citizens” are explicitly listed among the “policy guiding principles” of sustainable development endorsed by the European Council in the 2006 SDS.¹⁰ According to those provisions, clearly inspired by the Aarhus Convention, the EU seeks to “[g]uarantee citizens’ rights of access to information and ensure access to justice,” to “[d]evelop adequate consultation and participatory channels for all interested parties and associations,” and to “[e]nhance the participation of citizens in decision-making.”¹¹

Ironically, the EU and its member states, which like to style themselves as champions of environmental democracy in global fora, constituted only a small minority of the contracting parties to the Aarhus Convention until the enlargement of the EU to twenty-five member states on May 1, 2004. At the time of the first Meeting of the Parties (MOP-1), hosted by Italy in Lucca, in October 2002, only two other member states of the then EU-15 were actually parties to the Convention. It is thanks to the new member states, most of which had already ratified it prior to their accession to the EU, that a majority of the Union’s member states had the status of contracting parties at the time of the second MOP (MOP-2) in Almaty, Kazakhstan, in May 2005. The European Community itself barely managed to deposit its instrument of approval in time to be represented at that meeting as a party, and actually did so long before the entry into force of the

⁸ Draft Treaty Establishing a Constitution for Europe art. 46, Jul. 18, 2003, CONV 850/03, available at <http://european-convention.eu.int/docs/treaty/cv00850.en03.pdf>.

⁹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art 8b(2), Dec. 13, 2007, 2007 O.J. (C306) 1.

¹⁰ Renewed EU Sustainable Development Strategy, *supra* note 7.

¹¹ *Id.* at 4–5 (3rd & 4th Guiding Principle).

internal legislation designed to ensure the Convention's application by its own institutions.¹²

The overall political, economic, and environmental context in which the Aarhus Convention, with its organized system of procedural environmental rights, emerged as the international legal flagship of “environmental democracy” in post-Cold War Europe in the late 1990s—soon to find its enthusiastic signatories on both sides of the former Iron Curtain confronted with various implementation problems as the political and economic circumstances evolved due to interrelated factors such as economic transition and liberalization, globalization, and EU enlargement.¹³

As will be shown in this Article, the EU's legal commitment to the Aarhus Convention and its principles has not always actually been as strong as the political rhetoric of its institutions might have suggested. In fact, ever since the drafting of the Convention in the late 1990s, there have been many legal ambiguities and tensions in the relationship between the Aarhus Convention regime and the EU legal order, as well as the internal legal order of many EU member states. At the same time, nevertheless, there has also been a dynamic interaction, and sometimes beneficial cross-fertilization, between EU law and the rules of conventional international law laid down in the Convention, at least in some areas.

The Aarhus Convention regime continues to interact with European Union law almost continually. Over the last few years, the Court of Justice of the European Union (the Luxembourg-based ECJ, not to be mixed up with the ECtHR in Strasbourg) has ruled on important questions concerning the interpretation of provisions of EU Directives adopted to implement the Convention, and, most recently, on the interpretation of the access to justice provisions of the Convention itself, which it considers to be “an integral part of the legal order of

¹² Council Regulation 1367/2006, 2006 O.J. (L264) 13 (EC).

¹³ See Stephen Stec, *EU Enlargement, Neighbourhood Policy and Environmental Democracy*, in *THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW* 35, 35–54 (Marc Pallemarts ed., 2011) [hereinafter *THE AARHUS CONVENTION AT TEN*]; Francesco La Camera, *Ecology, Economy and Environmental Democracy*, in *THE AARHUS CONVENTION AT TEN*, *supra*, at 17–34; Albena Azmanova, *The Legal and Political Economic Imperatives of Sustainable Development in Eastern Europe: Reconciling Post-Communism with EU Membership*, in *THE EUROPEAN UNION AND SUSTAINABLE DEVELOPMENT: INTERNAL AND EXTERNAL DIMENSIONS*, *supra* note 6, at 313–36.

the European Union”¹⁴ Several more relevant cases are still pending before the EU courts,¹⁵ and an increasing number of requests for preliminary rulings on all three ‘pillars’ of the Convention and its implementing legislation are referred to the ECJ by national courts in EU member states.

At the same time, there are also new developments on the legislative front. As already noted above, the entry into force of the Treaty of Lisbon on December 1, 2009, has further enshrined participatory principles in primary EU law, and moreover conferred legally binding status on the provisions of the EU Charter of Fundamental Rights, which includes an article on environmental protection and another on everyone’s right to an effective remedy before a tribunal against violations of rights guaranteed by EU law.¹⁶

Though the Treaty of Lisbon, by modifying the former Article 230 EC (now Article 263 of the Treaty on the Functioning of the European Union (TFEU)), has somewhat enlarged the right of access to justice for natural and legal persons seeking to challenge the legality of certain acts of EU institutions before the EU courts, these limited changes, in themselves, are not sufficient to remedy the serious problem of inadequate access to the Union judiciary for members of the public in the light of Article 9, paragraph 3 of the Aarhus Convention. Will the restrictive jurisprudence of the Court of Justice evolve to ensure “effective protection of EU environmental law”,¹⁷ not only by national courts but also at the level of the EU judiciary or will further treaty changes and legislative initiatives be required?

These are some of the questions raised by the interactions between EU law and conventional international law in the field of environmental rights. In the following sections of this Article we shall explore these interactions for each of the three procedural environmental rights, as well as for the autonomous, substantive right

¹⁴ Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 2011 E.C.R. nyr, ¶ 30. The implications of this ECJ ruling on the interpretation of Article 9(3) of the Convention are further discussed in Jonas Ebbesson, *Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law*, in *THE AARHUS CONVENTION AT TEN*, *supra* note 13, at 245–70.

¹⁵ See, e.g., Case C-266/09, *Stichting Natuur en Milieu v. College voor de toelating van gewasbeschermingsmiddelen en biociden*, 2010 E.C.R. I-13119; Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Eur. v. European Comm’n*, 2012 E.C.R. nyr (appeal pending before the ECJ, Case C-404/12 P).

¹⁶ Charter of Fundamental Rights of the European Union arts. 37, 47, Mar. 30, 2010 O.J. (C 83/389).

¹⁷ Case C-240/09, *Lesoochránárske zoskupenie*, *supra* note 14, at ¶ 49.

to a healthy environment. By comparing the state of EU law with the relevant rules of international law, we shall examine whether the EU is a leader in the recognition of environmental human rights, or rather lags behind the standards laid down in international law. As we shall see, the overall picture that emerges from this analysis is rather complex.

III

EARLY PROVISIONS ON ACCESS TO INFORMATION IN THE EU

The decision to elaborate an international, legally binding instrument on citizens' environmental rights within the framework of the UNECE, taken at a pan-European conference of environment ministers in Sofia in October 1995, was prompted by earlier developments in EC environmental law, such as the 1985 Directive on environmental impact assessment (EIA)¹⁸ and, above all, the 1990 Directive on freedom of access to environmental information.¹⁹

Since its adoption and signature in June 1998, the Aarhus Convention has clearly influenced the further development of EU environmental law and even contributed to the on-going debate on the transparency and accountability of EU institutions, as well as to a number of wide-ranging reforms in European governance, such as the adoption of Regulation No. (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents.²⁰ The latter Regulation, which is currently undergoing revision,²¹ is the EU equivalent of the U.S. Freedom of Information Act (FOIA), albeit one with considerably fewer 'teeth' and weaker enforcement than its transatlantic counterpart.²²

Specifically, in order to implement the Aarhus Convention, the EU has adopted a series of new legislative acts and revised several existing ones since 2003. Directive 2003/4/EC of January 28, 2003,

¹⁸ Council Directive 85/377/EEC, on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40 (EC).

¹⁹ Council Directive 90/313/EEC, of 7 June 1990 on the Freedom of Access to Information on the Environment, 1990 O.J. (L 158) 56 (EC).

²⁰ Regulation 1049/2001, of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43 (EC).

²¹ *Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents*, COM (2008) 229 final (Apr. 30, 2008).

²² For a critique of EU access to documents policy, see Deirdre M. Curtin, Chair of Professor of Law at the University of Amsterdam, Inaugural Lecture: Top Secret Europe (Oct. 20, 2011).

on Public Access to Environmental Information²³ replaced the earlier Directive 90/313/EEC and expanded citizens' rights of access to environmental information held by public authorities in member states. Directive 2003/35/EC of May 26, 2003,²⁴ provided for public participation in respect to the drawing up of certain plans and programs relating to the environment in the member states and strengthened the provisions on public participation in the 1985 EIA Directive and in Directive 96/61/EC on Integrated Pollution Prevention and Control (IPPC),²⁵ which was recently recast as Directive 2010/75/EU on Industrial Emissions (IED).²⁶

The 2003 PRTR Protocol led to the adoption by the European Parliament and Council, on January 18, 2006, of Regulation No. (EC) 166/2006 establishing the European Pollutant Release and Transfer Register (E-PRTR),²⁷ even before the entry into force of the Protocol itself. Finally, Regulation No. (EC) 1367/2006, adopted on September 6, 2006, deals with the application of the procedural rights guaranteed by the Aarhus Convention at the level of EU institutions and bodies.²⁸

IV TENSIONS BETWEEN UNION LAW AND INTERNATIONAL LAW ON ENVIRONMENTAL RIGHTS

The interaction between the Aarhus Convention and EU law has not always been without problems. Tensions have in fact risen

²³ Council Directive 2003/4/EC, on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, 2003 O.J. (L 41) 26.

²⁴ Council Directive 2003/35/EC, of the European Parliament and of the Council of 26 May 2003 Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, 2003 O.J. (L 156) 17.

²⁵ Council Directive 96/61/EC, of 24 September 1996 Concerning Integrated Pollution Prevention and Control, 1996 O.J. (L 257) 26.

²⁶ Directive 2010/75/EU, of the European Parliament and of the Council of 24 November 2010 on Industrial Emissions (Integrated Pollution Prevention and Control), 2010 O.J. (L 334) 17.

²⁷ Regulation (EC) No 166/2006, of the European Parliament and of the Council of 18 January 2006 Concerning the Establishment of a European Pollutant Release and Transfer Register and Amending Council Directives 91/689/EEC and 96/61/EC, 2006 O.J. (L 33) 1.

²⁸ Regulation (EC) No 1367/2006, of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006 O.J. (L 264) 13.

between normative developments within the framework of the Aarhus Convention and the internal legislation and policies of the EU.

For instance, an EU Commission proposal for a directive on access to justice in environmental matters,²⁹ aiming to harmonize national legislation on the subject in the member states in the spirit of the Convention, remains stalled in the Council of the EU since 2004, despite the European Parliament's support for such legislation. While prospects for the adoption of this proposal for a general directive on access to justice in environmental matters remain bleak, the Commission has proposed to include detailed rules not only on access to information and public participation, but also on access to justice in its proposal for a revision³⁰ of the 1996 "Seveso II" Directive³¹ on the control of major-accident hazards involving dangerous substances, which it presented to the European Parliament and Council in December 2010. This proposal was adopted on July 4, 2012 as Directive 2012/18/EU of the European Parliament and of the Council on the control of major-accident hazards involving dangerous substances.³² In its final form, it includes an access to justice provision, though the Commission's original proposal was substantially modified on this point.

From 2001 to 2005, the European Commission and a group of member states actively opposed, and forced the EU to obstruct negotiations on proposals to amend the Aarhus Convention in order to provide for public participation in decision-making on the placing on the market and deliberate release into the environment of genetically modified organisms (GMOs). They did so on the grounds that these proposals would interfere with existing EU legislation on the subject (Directive 2001/18/EC³³ and Regulation (EC) No 1829/2003³⁴) and

²⁹ *Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, COM (2003) 624 final (Oct. 24, 2003).

³⁰ See *Proposal for a Directive of the European Parliament and of the Council on Control of Major-Accident Hazards Involving Dangerous Substances*, art. 13, 14, 22, COM (2010) 781 final (Dec. 21, 2010).

³¹ Council Directive 96/82/EC, of 9 December 1996 on the Control of Major-Accident Hazards Involving Dangerous Substances, 1997 O.J. (L 10) 13.

³² Directive 2012/18/EU, of the European Parliament and of the Council of 4 July 2012 on the Control of Major-Accident Hazards Involving Dangerous Substances, Amending and Subsequently Repealing Council Directive 96/82/EC, art. 23, 2012 O.J. (L 197) 1.

³³ Directive 2001/18/EC, of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2001 O.J. (L 106) 1.

³⁴ Regulation (EC) No 1829/2003, of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed, 2003 O.J. (L 268) 1.

conflict with the softer approach to public participation laid down in the global Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD), a multilateral environmental agreement (MEA) to which the EU is firmly committed.³⁵

And, in April 2011, the Aarhus Convention Compliance Committee (ACCC) issued findings and recommendations pursuant to a communication from a member of the public, the environmental law NGO ClientEarth,³⁶ in which it reviewed the EU's compliance with its obligations on access to justice under the Convention. It came to the conclusion that, if the restrictive jurisprudence of the EU courts on access to justice were to continue, the EU, as a Party, would fail to comply with the requirements of Article 9, paragraph 3 of the Convention, unless the inadequate access to the Union judiciary for members of the public were fully compensated by adequate administrative review procedures.³⁷

Meanwhile, the ECJ is increasingly being called upon to examine questions of access to justice under the provisions of the EIA and IPPC Directives, as well as under the provisions of the Aarhus Convention itself, that are referred to it by national courts in EU member states. These developments are symptomatic of the fact that the situation with respect to access to environmental justice for citizens and environmental NGOs remains far from satisfactory in most member states as well as at the level of the Union itself.

³⁵ Council Decision 2002/628/EC, of 25 June 2002 Concerning the Conclusion, on Behalf of the European Community, of the Cartagena Protocol on Biosafety, 2002 O.J. (L 201) 48; Regulation (EC) No 1946/2003 of the European Parliament and of the Council of 15 July 2003 on Transboundary Movements of Genetically Modified Organisms, 2003 O.J. (L 287) 1.

³⁶ See European Community, Communication ACCC/C/2008/32, submitted on 1 December 2008 by ClientEarth and others, available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html>.

³⁷ United Nations, Econ. & Soc. Council, Econ. Comm. for Europe, Report of the Compliance Committee: Findings and Recommendations with Regard to Communication ACCC/C/2008/32 (Part I) Concerning Compliance by the European Union, U.N. Doc. ECE/MP.PP/C.1/2011/4/Add.1 (Apr. 14, 2011) [hereinafter Compliance Committee Report], available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.Add.1.e.pdf>.

V

**EU IMPLEMENTATION OF THE FIRST ‘PILLAR’ OF THE AARHUS
CONVENTION: DIRECTIVES 90/313/EEC AND 2003/4/EC ON
ACCESS TO ENVIRONMENTAL INFORMATION AND THE
ESTABLISHMENT OF POLLUTANT RELEASE AND TRANSFER
REGISTERS**

As early as 1990, the then European Economic Community (EEC) adopted a Directive (90/313/EEC) on the freedom of access to information on the environment, whose Article 3 stipulated that “[s]ave as provided in this Article, Member States shall ensure that *public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.*”³⁸ However, the procedures for the implementation of this newly granted right were originally left largely at the discretion of the individual member states, or, at any rate, described rather summarily in the instrument, resulting in quite uneven levels of implementation in different member states.³⁹

Eight years later, the Aarhus Convention further elaborated the international legal basis of access to environmental information through a combination of two complementary approaches:

- *Access upon request* (passive role for public authorities)—Article 4:
 - Right for any member of public to obtain environmental information without having to show an interest (within 1 month)
 - Requests for information can be refused only on limited, specified grounds⁴⁰
- *Active transparency requirements* (proactive role for public authorities)—Article 5: i.e. an obligation for public authorities to systematically collect and disseminate environmental information of their own initiative through several means, such as through publically accessible websites.⁴¹

³⁸ Council Directive 90/313/EEC, of 7 June 1990 on the Freedom of Access to Information on the Environment, art. 3, 1990 O.J. (L 158) 56 (emphasis added).

³⁹ See ACCESS TO ENVIRONMENTAL INFORMATION IN EUROPE: THE IMPLEMENTATION AND IMPLICATIONS OF DIRECTIVE 90/313/EEC 459 (Ralph E. Hallo ed., 1996).

⁴⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 4, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

⁴¹ *Id.* art. 5.

The new 2003 Directive, which replaces Directive 90/313/EEC, has the following stated objectives:

(a) to *guarantee the right of access to environmental information held by or for public authorities* and to set out the basic terms and conditions of, and practical arrangements for, its exercise; [i.e. ‘passive’ transparency]

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public (. . .). [i.e. ‘active’ transparency]⁴²

It applies to all environmental information held by *or for* public authorities in the Member States (though not by EU institutions and bodies, for which a separate set of rules applies).

Like under the previous regime of Directive 90/313/EEC, the basic requirement of the successor instrument, Directive 2003/4/EC, is to provide access to environmental information upon request. Article 3, paragraph 1 provides: “Member States *shall ensure that public authorities are required*, in accordance with the provisions of this Directive, *to make available environmental information* held by or for them *to any applicant at his request and without his having to state an interest.*”⁴³ Only limited exceptions to this right of access are allowed, an exhaustive list of which is laid down in Article 4, paragraphs 3–4.⁴⁴

In any event, whenever a national public authority considers there are legitimate grounds for it to derogate from the principle of transparency, it has a legal obligation under EU law, based on the corresponding provisions of the Convention, to perform a balancing of interests test: “The grounds for refusal mentioned in paragraphs 1 and 2 *shall be interpreted in a restrictive way*, taking into account for the particular case the *public interest served by disclosure.*”⁴⁵ If the grounds for refusal apply, partial disclosure of the requested information must be considered, whenever possible. In any event, the reasons for any refusal are to be stated in writing and notified to the applicant.

⁴² Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, art. 1, 2003 O.J. (L 41) 26.

⁴³ *Id.* art. 3, ¶ 1 (emphasis added).

⁴⁴ *Id.* art. 4.

⁴⁵ *Id.* art. 4, ¶ 2 (emphasis added); *see also* Aarhus Convention, *supra* note 40.

Even before the Convention's entry into force, its Meeting of Signatories recommended the launch of negotiations on an additional Protocol to the Convention on Pollutant Release and Transfer Registers (PRTR), building upon the framework provisions of its Article 5, paragraph 9.⁴⁶ The UNECE Committee on Environmental Policy established a formal working group to this end at its seventh session in September 2000. The negotiations were successfully concluded in January 2003 and the PRTR Protocol was formally adopted and opened for signature at an extraordinary MOP in Kiev on May 21, 2003, on the occasion of the fifth "Environment for Europe" ministerial conference held in the Ukrainian capital. It entered into force on October 8, 2009, and currently has thirty-one contracting parties, including the EU and most of its member states, except Greece and Italy, but no EECCA countries.

VI

EARLY EEC PROVISIONS ON PUBLIC PARTICIPATION

Unlike in matters of free access to environmental information, the EU was only a rather modest leader in the field of public participation. Before the Aarhus Convention, there was no EU legislation specifically addressing this issue, comparable to Directive 90/313/EEC. However, the early and very influential Directive 85/337/EEC on EIA,⁴⁷ adopted sixteen years after NEPA in the U.S., contained rather rudimentary provisions on consultation of the public on proposed activities subject to EIA procedures under EU law. The original Article 6, paragraph 2 of the 1985 Directive provided:

Member States shall ensure that:

- any request for development consent and any information gathered pursuant to Article 5 are *made available to the public*,
- the public concerned is given the opportunity to express an opinion before the project is initiated.⁴⁸

⁴⁶ See United Nations, Econ. & Soc. Council, Econ. Comm. for Europe, Report of the Second Meeting of the Signatories 7, U.N. Doc. CEP/WG.5/2000/2 (July 19, 2000).

⁴⁷ Council Directive 85/337/EEC, of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40, was repeatedly amended and recently codified as Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 2012 O.J. (L 26) 1.

⁴⁸ Council Directive 85/337/EEC, of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, art. 6, 1985 O.J. (L 175) 2 (emphasis added).

These early provisions in fact provided for a dual right for members of the public: the *right to be informed* of any application for consent for the development of activities subject to EIA, as well as of the EIA report itself, and a weakly formulated *right to be consulted* “before the project is initiated,” i.e., not necessarily before the permit is issued to the developer by the competent public authority. Under this 1985 Directive, some member states actually had the practice of giving the public an opportunity to express its views on projects only after they had already been authorized by the competent authority. Needless to say, the right of public participation is rather meaningless in such cases.

However, the public participation procedures of the EIA Directive were strengthened during the negotiation process of the Aarhus Convention. As a result, EU public participation standards were further elaborated after the EU had signed the Convention.

VII THE CONTROVERSIAL ISSUE OF PUBLIC PARTICIPATION IN GMO-RELATED DECISION-MAKING: NOT A SHINING CASE OF EU LEADERSHIP

A major development was the adoption of an amendment to the Aarhus Convention at MOP-2 in Almaty in 2005, extending its scope of application to decisions on the deliberate release into the environment and placing on the market of GMOs and making such decisions subject to public participation requirements. The GMO issue had already been a controversial matter during the negotiation of the Convention, with NGOs and several governments pressing for the inclusion of GMO-related environmental decision-making processes within the scope of the instrument, a proposal that was at the time strongly resisted by the EU, which did not have mandatory public participation provisions in its internal legislation on GMOs at the time.

The EU was in the process of reviewing its legislation while the negotiations on the Aarhus Convention were drawing to a close, in the face of an escalating trade dispute with the United States, Canada, and Argentina, which resulted in dispute settlement proceedings being brought by those countries against the European Community before

the World Trade Organisation (WTO).⁴⁹ The European Commission feared that any re-opening of Directive 2001/18/EC would further exacerbate that dispute and lead to difficult negotiations inside the EU. As a result of EU opposition, the provisions of Article 6 and Annex I of the Aarhus Convention were drafted in 1998 so as to make the application of public participation procedures to GMO-related decisions optional for the parties.

Article 7 of Directive 90/220/EEC, as it then stood, merely provided for optional consultation of the public at each Member State's individual discretion: "*Where a Member State considers it appropriate, it may provide that groups or the public shall be consulted on any aspect of the proposed deliberate release.*"⁵⁰ Accordingly, a similar measure of discretion was given to Aarhus contracting parties by Article 6, paragraph 11, of the Convention which merely provided: "Each Party shall, *within the framework of its national law, apply, to the extent feasible and appropriate, provisions of [article 6] to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.*"⁵¹

The matter was further examined by the Meeting of the Signatories following the adoption of the Convention. Eventually, MOP-1 in Lucca adopted non-binding "Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms" in 2002, while mandating further consideration of legally binding options in an expert working group.⁵²

In this forum, the EU for a long time continued to oppose the adoption of a formal amendment to the Convention, before eventually giving in to mounting political pressure, both internal and external. When Moldova, in the run-up to the Almaty meeting, officially proposed an amendment to add a new article and annex to the Convention providing for minimum standards of public participation in decision making on the placing on the market and deliberate release into the environment of GMOs, the Almaty Amendment could ultimately be adopted by the Second Meeting of the Parties to the

⁴⁹ Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R & WT/DS293/R (Sept. 29, 2006).

⁵⁰ Council Directive 90/220/EEC, art. 7, 1990 O.J. (L 117) 33 (emphasis added).

⁵¹ Aarhus Convention, *supra* note 40, art. 6, ¶ 11 (emphasis added).

⁵² United Nations, Econ. & Soc. Council, Econ. Comm. for Europe, Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms, U.N. Doc. MP.PP/2003/3 (adopted by Decision I/4 of the Meeting of the Parties, U.N. Doc. ECE/MP.PP/2/Add.5 (Apr. 2, 2004).

Convention in May 2005, with the EU and its member states joining in the consensus.

Once adopted, the amendment was rather speedily ratified by the European Community in February 2008.⁵³ It has meanwhile been approved by twenty-seven parties to the Convention, including twenty-five member states of the EU (France and Greece are the laggards), Norway, and Moldova, but not a single other EECCA country so far.⁵⁴ A further five formal approvals – including at least four from EECCA countries that were already contracting parties at the time of adoption of the amendment in May 2005—are required for it to enter into force. This is a consequence of the parties’ agreed interpretation of the provisions of Article 14 of the Convention on the entry into force of amendments.⁵⁵

The provisions of Directive 2001/18/EC on the deliberate release of GMOs for purposes other than their placing on the market contain an Article 9, entitled “Consultation of and information to the public,” which stipulates that “Member States shall . . . *consult the public* and, where appropriate, groups on the proposed deliberate release. In doing so, *Member States shall lay down arrangements* for this consultation, including a *reasonable time-period*, in order to give the public or groups the *opportunity to express an opinion*.”⁵⁶ The Almaty Amendment inserts a new Article 6bis in the Aarhus Convention, which provides that: “In accordance with the modalities laid down in annex I bis, *each Party shall provide for early and effective information and public participation prior to making decisions* on whether to permit the *deliberate release* into the environment and

⁵³ The Community’s instrument of approval was deposited on February 1, 2008, pursuant to: Council Decision 2006/957/EC of December 18, 2006, on the Conclusion, on Behalf of the European Community, of an Amendment to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. 2006 O.J. (L 386) 49, 46.

⁵⁴ United Nations, Amendment to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (May 27, 2005). The current status of formal approvals of the Amendment can be found at the United Nations website. UNITED NATIONS TREATY COLLECTION (last visited Apr. 10, 2013), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13-b&chapter=27&lang=en.

⁵⁵ See United Nations, Econ. & Soc. Council, Econ. Comm. for Europe, Report of the Third Meeting of the Parties, Decision III/1, U.N. Doc. ECE/MP.PP/2008/2/Add.3 (Sept. 26, 2008).

⁵⁶ Council Directive 2001/18/EC, art. 9, 2001 O.J. (L 106) 44 (emphasis added).

placing on the market of GMOs.”⁵⁷ Specific modalities of public participation are to be laid down in the national regulatory frameworks of the parties, taking into account the minimum requirements of the Convention’s new Annex Ibis. However, the EU’s GMO legislation was not amended as a result of the Almaty Amendment, as the wording of the latter was carefully crafted so as to accommodate the provisions on information and consultation of the public that were already in force in the EU prior to its adoption.

VIII PUBLIC PARTICIPATION PROVISIONS OF THE AARHUS CONVENTION

The public participation provisions of the Convention apply to three distinct types of environmental decision-making:

- Decisions on **specific activities** listed in Annex I to the Convention (which was largely based on the EU EIA and IPPC Directives as they stood in 1998)
- **Plans, programs and policies** “relating to the environment” (Article 7)
- The preparation of executive **regulations** and other generally applicable legally binding **normative instruments** (Article 8)

The first and most detailed set of Aarhus provisions focus on specific, place-bound activities subject to environmental authorization and impact assessment procedures at the national level. When a particular proposed activity falls within the scope of those provisions, an elaborate set of procedural rules designed to ensure public participation applies. The rules relating to plans and programs which may have significant environmental effects, as laid down in Article 7 of the Convention, are more rudimentary and leave parties considerable leeway in determining the actual modalities of public participation. It should be noted that the concept of plans and programs is not defined in the Convention, though it is generally understood as encompassing plans and programs relating to such matters as town and country planning, transport, and energy. The

⁵⁷ United Nations, Econ. & Soc. Council, Econ. Comm. for Europe, Report of the Third Meeting of the Parties, Decision II/1, U.N. Doc. ECE/MP.PP/2005/2/Add.2, Annex (Jun. 20, 2005) (emphasis added).

same measure of national discretion exists for public participation in rule-making processes subject to the provisions of Article 8.⁵⁸

In order to implement the public participation provisions of the Aarhus Convention, the EU adopted Directive 2003/35/EC.⁵⁹ This legislative act includes amendments to the EIA and IPPC Directives in order to make their procedures Aarhus-compliant. Article 7 of the Convention was already implemented by the SEA Directive⁶⁰ with respect to decisions subject to strategic environmental assessment, as well as in the field of water management by the Water Framework Directive.⁶¹ Further provisions introduced by Directive 2003/35/EC refer to six additional EU Directives requiring member states to draw up various kinds of environment-related plans and programs.⁶²

IX

ACCESS TO JUSTICE IN EU COURTS: THE EU AS A LAGGARD

The third pillar of the Aarhus Convention, access to justice, remains by far the most controversial. In this area, the EU and many of its member states can only be described as laggards, as they fail to comply with the high standards laid down in Article 9 of the Convention. Under that provision, access to justice is to be guaranteed by Parties in three areas:

- With respect to access to information, members of the public shall have access to a review procedure where their requests for environmental information have been denied in whole or in part by public authorities (Article 9, paragraph 1)
- With respect to public participation, members of the public shall be given access to administrative or judicial review procedures to challenge the substantive or procedural legality of

⁵⁸ For a detailed analysis of the public participation provisions of the Convention, see Jerzy Jendroška, *Public Participation in Environmental Decision-Making: Interactions Between the Convention and EU Law and Other Key Legal Issues in Its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee*, in THE AARHUS CONVENTION AT TEN, *supra* note 13.

⁵⁹ Directive 2003/35/EC, 2003 O.J. (L 156) 46.

⁶⁰ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, 2001 O.J. (L 197) 44.

⁶¹ Directive 2000/60/EC, of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, 2000 O.J. (L 327) 43.

⁶² Directive 2003/35/EC, 2003 O.J. (L 156) 46, Annex I.

decisions taken by public authorities on activities subject to the public participation requirements of Article 6 of the Convention (Article 9, paragraph 2)

- In other areas, parties are to provide access to administrative or judicial procedures that enable members of the public meeting the criteria, if any, laid down by their domestic law, to challenge acts or omissions which contravene provisions of domestic law relating to the environment (Article 9, paragraph 3)⁶³

The first two cases were explicitly addressed by the EU legislator by including appropriate provisions requiring the member states to provide access to justice in accordance with the terms of Article 9, paragraphs 1 and 2 of the Convention in Directives 2003/4/EC and 2003/35/EC respectively. Thus EU law, pursuant to the Aarhus Convention, guarantees access to justice at the level of the member states in respect of decisions on access to environmental information and specific place-bound projects or activities subject to public participation requirements. The relevant provisions of EU law have been successfully invoked before national courts by environmental plaintiffs against conflicting provisions of national law, and the ECJ has ruled that national courts have the obligation to set aside such conflicting provisions.⁶⁴

When it expressed its consent to be bound by the Aarhus Convention, the EU (at the time still formally known as the European Community (EC)) made a declaration of “the extent of [its] competence with respect to the matters governed by [the] Convention,” in accordance with the requirements of Article 19, paragraph 5 of the Convention.⁶⁵ This declaration of competence states, in relevant part:

[T]he European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the

⁶³ Aarhus Convention, *supra* note 40, art. 9, ¶¶ 1–3.

⁶⁴ See, e.g., Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, 2009 E.C.R. I-9967; Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, 2011 E.C.R. Not Yet Published *available at* <http://curia.europa.eu/juris/liste.jsf?pro=&lgrec=en&nat=&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-115%252F09&td=ALL&pcs=O&avg=&page=1&mat=or&jge=&for=&cid=83790>.

⁶⁵ Aarhus Convention, *supra* note 40, art. 19, ¶ 5.

Depository in accordance with Article 10 (2) and Article 19 (5) of the Convention. In particular, the European Community also declares that *the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2 (2)(d) of the Convention*, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.

Finally, the Community reiterates its declaration made upon signing the Convention that the Community institutions will apply the Convention within the framework of . . . relevant rules of Community law in the field covered by the Convention.

The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force. . . .⁶⁶

There are at present no provisions of EU law addressing access to environmental justice in the cases referred to in Article 9, paragraph 3 of the Convention. To be sure, the Commission submitted a proposal for a directive in this field to the Council and European Parliament in 2003,⁶⁷ but this proposed legislation has not been adopted to date due to strong opposition from member states within the Council. The member states opposing the proposed directive consider that this question should be properly addressed by national law and that it is up to the member states individually to take whatever measures they deem necessary in their domestic legal systems to comply with the obligations deriving from Article 9, paragraph 3, exercising national discretion as regards the setting of criteria for *locus standi*. While some member states provide access to justice in environmental cases in accordance with the Convention's provisions, a comprehensive comparative study commissioned by the European Commission in 2006 showed that access to environmental justice for citizens and NGOs remains inadequate in the majority of member states.⁶⁸

⁶⁶ Council Decision 2005/370/EC, 2005 O.J. (L 124) 48, Annex (emphasis added).

⁶⁷ *Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, COM (2003) 624 final (Oct. 24, 2003).

⁶⁸ The results of this study provide a detailed analysis of the state of the law in 25 Member States as regards standing, costs, remedies and transparency. *Inventory of EU*

Though the EU unquestionably has the power under Article 192, paragraph 1 of the TFEU to adopt legislation covering this matter,⁶⁹ it has, thus far, chosen not to exercise this power, because a majority of member states are opposed to the adoption of the proposed directive, despite the favorable opinion which the European Parliament expressed on the Commission's proposal years ago. It falls outside the scope of this Article to assess the state of individual member state compliance with the access to justice provisions of the Aarhus Convention.

The problem of access to justice, however, does not arise only before national courts, but also at the EU level. What if EU institutions themselves contravene provisions of EU environmental law? Is there access to justice at Union level for individuals or NGOs to challenge illegal acts or omissions of institutions? By ratifying the Aarhus Convention, the EU took upon itself the obligation to ensure that members of the public have access to administrative or judicial review procedures to challenge acts and omissions by EU institutions that contravene provisions of EU law relating to the environment. The procedures in question shall be available to all natural or legal persons, including NGOs, which "meet the criteria, if any, laid down in" EU law,⁷⁰ shall "provide adequate and effective remedies", and shall "be fair, equitable, timely and not prohibitively expensive."⁷¹

Article 263 of the TFEU provides for review, by the ECJ, of the legality of acts of EU institutions "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to its application, or misuse of powers."⁷² Actions for annulment may be brought by individual claimants under this Treaty provision subject to strict conditions:

Member States' Measures on Access to Justice in Environmental Matters, EUROPEAN COMMISSION (Jan. 11, 2013), http://ec.europa.eu/environment/aarhus/study_access.htm.

⁶⁹ Provisions on access to justice have already been adopted by the Community legislator based on Article 175, para. 1, of the EC Treaty (the provision corresponding to Article 192, para. 1 of the TFEU). See Directive 2003/4/EC, of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, art. 6, 2003 O.J. (L 41) 26; Directive 2003/35/EC, of the European Parliament and of the Council of 26 May 2003 Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, art. 3–4, 2003 O.J. (L 156) 17.

⁷⁰ Aarhus Convention, *supra* note 40, art. 9, ¶ 3,

⁷¹ *Id.* art. 9, ¶ 4.

⁷² Treaty on the Functioning of the European Union art. 263, Mar. 30, 2010, 2010 O.J. (C 326) 1 [hereinafter TFEU].

“Any natural or legal person may . . . institute proceedings against an act addressed to that person or which is *of direct and individual concern* to them. . . .”⁷³

The requirement of “direct and individual concern” has been interpreted by the ECJ in a very restrictive manner since 1963. According to the Court’s judgment in the *Plaumann* case, “persons other than the addressees [of the contested act] may claim that a decision is of direct concern to them only if that decision affects them . . . by reason of *certain attributes which are peculiar to them*, or by reason of *factual circumstances which differentiate them from all other persons* and thereby distinguish them individually in the same way as the person addressed.”⁷⁴

The paradigmatic environmental case on access to justice in the ECJ is the *Greenpeace* case, in which Greenpeace International, together with local NGOs and individuals residing in the Canary Islands, brought an action for annulment of a Commission decision to provide EU funding to Spain for the construction of a coal-fired power plant for which no proper EIA had been performed.⁷⁵ Applying the *Plaumann* doctrine, the Court of First Instance (CFI) declared the action inadmissible.⁷⁶ On appeal, the ECJ affirmed the decision, arguing that the contested Commission decision concerned the applicants only in a general and abstract fashion and that they could not be regarded as individually and directly concerned. The Court found that Article 263 of the Treaty does not grant *locus standi* to NGOs representing the collective interests of persons who are not themselves directly and individually concerned within the meaning of *Plaumann*.⁷⁷

In a more recent case, a number of environmental NGOs and trade unions brought an action for annulment of Commission Directive 2003/112/EC including the herbicide paraquat in the EU list of active substances authorized for use in plant protection products.⁷⁸ The CFI held that the “provisions [of the Directive] affect [applicants] in their objective capacity as entities active in the protection of the environment or workers’ health . . . in the same manner as any other

⁷³ *Id.* (emphasis added).

⁷⁴ Case 25/62, *Plaumann & Co. v. Comm’n*, 1963 E.C.R. 199.

⁷⁵ Case T-585/93, *Stichting Greenpeace Council v. Comm’n*, 1995 E.C.R. II-2205.

⁷⁶ Case T-585/93, *Stichting Greenpeace Council v. Comm’n*, 1995 E.C.R. II-2205.

⁷⁷ Case C-321/95 P, *Stichting Greenpeace Council v. Comm’n*, 1998 E.C.R. I-1651.

⁷⁸ Case T-94/04, *European Env’tl. Bureau v. Comm’n*, 2005 E.C.R. II-4919.

person in the same situation” and that they could not, therefore, be regarded as individually concerned.⁷⁹

With a view to ensure compliance with the EU’s obligations under the Convention, the European Parliament and Council, on September 6, 2006, adopted Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (Aarhus Regulation).⁸⁰ This Regulation introduced an “internal review procedure” whereby environmental NGOs meeting certain criteria can request an EU institution or body to reconsider an “administrative act” taken under EU environmental law or rectify an omission to take such an act. It also provides that, if the NGO is not satisfied with the institution’s response to its request for internal review, or if the institution fails to respond altogether within a certain period of time, it can “institute proceedings before the [European] Court of Justice in accordance with the relevant provisions of the [EC] Treaty.”⁸¹

The lack of access to environmental justice before the EU judicature has recently been the subject of a “communication from a member of the public” i.e., a complaint brought by an environmental NGO before the Aarhus Convention Compliance Committee against the EU concerning alleged non-compliance with the Aarhus Convention’s provisions. In its findings and recommendations adopted on April 14, 2011, the Compliance Committee held:

With regard to access to justice by members of the public, the Committee is convinced that if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention. While the Committee is not convinced that the Party concerned fails to comply with the Convention, given the evidence before it, it *considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention.*⁸²

The administrative review procedures referred to by the Committee were instituted by the 2006 Aarhus Regulation, ostensibly to ensure compliance by the Union with the principles and provisions of the Aarhus Convention in so far as they apply to EU institutions and bodies. Within the scope of this Article, it is not possible to dwell at

⁷⁹ *Id.* ¶ 53.

⁸⁰ Regulation (EC) No 1367/2006, *supra* note 28.

⁸¹ *Id.* art. 12.

⁸² Compliance Committee Report, *supra* note 37 (emphasis added).

length on the long-standing issue of access to the EU judiciary for individuals and organisations seeking judicial review of acts of EU institutions which infringe provisions of EU environmental law. In a contribution published elsewhere, I argue that the Aarhus Regulation, that was adopted by the European Parliament and Council with a view to applying the principles of the Convention, including access to justice, at the level of the EU's own institutions, *inter alia* by introducing an "internal review" procedure enabling environmental organizations meeting certain criteria to request reconsideration by these institutions, of acts or omissions, contrary to EU environmental law, is unlikely to be sufficient to ensure compliance by the Union with its Aarhus obligations, as long as the restrictive case-law of the ECJ on *locus standi* for natural and legal persons remains unchanged.⁸³ The Compliance Committee is yet to rule on the adequacy of the internal review procedure from the perspective of Article 9, paragraph 3 of the Convention, but is expected to do so in the near future.

The EU thus has a major problem of non-compliance with its obligations under Article 9, paragraph 3 of the Aarhus Convention. There is effectively no standing for either NGOs or individuals to challenge acts or omissions of EU institutions and bodies in judicial review procedures at the EU level, as long as the ECJ continues to apply its settled *Plaumann* case-law on *locus standi*, as it has continued to do ever since the EU became a party to the Aarhus Convention. Some administrative review procedures are available, but the main one ostensibly introduced by the EU legislator in order to comply with Aarhus obligations—the internal review procedure instituted by the Aarhus Regulation—falls far short of what would be required to achieve full compliance. It is only accessible to some environmental NGOs, and there is as yet no evidence that it provides an effective remedy, since any proceedings instituted by an NGO following an unsuccessful request for internal review addressed to an EU institution or body are likely to be judged by the ECJ according to the same restrictive criteria for standing as have been applied since 1963.⁸⁴

⁸³ Marc Pallemarts, *Access to Environmental Justice at EU Level: Has the Aarhus Regulation Improved the Situation?*, in *THE AARHUS CONVENTION AT TEN*, *supra* note 13, at 271–312.

⁸⁴ The limits of access to justice under Regulation No 1367/2006 are currently being tested in Case T-396/09, *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v. Comm'n*, 2012 E.C.R. nyr. The Order of the General

X

**THE SUBSTANTIVE RIGHT TO A HEALTHY ENVIRONMENT: NOT
RECOGNIZED IN EU LAW**

After reviewing the status of the procedural environmental rights in EU law, we will now consider the substantive fundamental right to a healthy environment.

There are no legally binding provisions recognizing the autonomous right to a healthy environment in EU law. Yet that right was duly acknowledged in a high-level political declaration of the European Council adopted on July 7, 1990. In this Dublin Declaration on “The Environmental Imperative,” the heads of state and government of the member states of the then European Community proclaimed that the objective of Community action for the protection of the environment “must be to guarantee citizens the right to a clean and healthy environment.”⁸⁵ This political statement, however, was never translated into a binding provision of primary or secondary EU law.

The EU Charter of Fundamental Rights, which was originally proclaimed in Nice on December 7, 2000, but became legally binding only upon the entry into force of the Treaty of Lisbon nine years later, includes a provision on “Environmental protection” (Article 37) in its Chapter IV (“Solidarity”). However, this clause was deliberately phrased as an objective of public policy rather than an individual human right:⁸⁶ “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.*”⁸⁷ Although some members of the Charter convention proposed the recognition of the autonomous right to a healthy environment in this instrument, such a step was not acceptable to all. There was an obvious refusal to recognize even

Court in this case—ruling that certain restrictive provisions of the aforementioned Regulation are inconsistent with Article 9 of the Aarhus Convention and therefore unlawful—is being appealed before the ECJ by the Commission, European Parliament and Council. *See* Case C-401/12 P 2012 E.C.R.

⁸⁵ Presidency Conclusions, Annex II: The Environmental Imperative, Dublin European Council at 24 (July 7, 1990).

⁸⁶ *See* HENRI SMETS, *Une Charte des droits fondamentaux sans droit à l’environnement*, in: Conseil européen du droit de l’environnement, *Le droit à l’environnement, un droit fondamental dans l’Union européenne*, Funchal, 7–50 (2001) (critiquing the Charter from an environmental perspective).

⁸⁷ European Union Charter of Fundamental Rights, ch. 4, art. 37 (Dec. 7, 2000) (emphasis added).

procedural environmental rights within a human rights instrument. What is the added value of Article 37? It is very limited, as its wording is essentially a restatement of language taken from existing treaty provisions, especially the former Article 6 EC, now Article 11 of the TFEU, enshrining the integration principle.

There are no explicit environmental provisions in the ECHR and its additional protocols either. In the early 1970s, some proposals were made to elaborate a protocol to this Convention recognizing the right to a healthy environment, but these initiatives were unsuccessful. However, this has not prevented the development of significant and still growing case-law, in which the European Court of Human Rights (ECtHR) has firmly established a link between certain serious forms of environmental impairment with severe harmful consequences for individuals, and the violation of rights explicitly protected by the Convention.⁸⁸

Within the ECHR system, environmental issues have generally been analyzed in terms of the right to respect for home and family life, as guaranteed by Article 8 of the Convention. In a number of judgments, the ECtHR has found that serious forms of environmental disruption affecting people in their places of residence can constitute violations of their right to respect for their home and family life. Under Article 8 of the Convention, its parties have an obligation to take the necessary environmental protection measures to prevent any interference in the exercise of this right.⁸⁹

In the seminal *Lopez Ostra* case, concerning pollution from a tannery, the Court found Spain guilty of violating Article 8 of the Convention owing to a lack of measures to prevent environmental conditions adversely affecting the quality of life of a person living near the plant in question, recognizing that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”⁹⁰ In a more recent judgment, following a complaint made by people living near a chemical production plant, constituting a major accident hazard in Italy, the Court ruled that merely depriving a

⁸⁸ S.T. Ramnewash-Oemrawsingh, *Human Rights and the Environment Interlocked: Dealing with Environmental Problems in a Human Rights Setting* (Nov. 11, 2008) (Ph.D. dissertation, University of Amsterdam).

⁸⁹ COUNCIL OF EUROPE, *MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT* (2nd ed. 2012).

⁹⁰ *Lopez Ostra v. Spain*, 303 Eur. Ct. H.R. (1994).

person of “essential information” about the nature and extent of an industrial accident hazard in his or her immediate environment, to which he or she and his or her family are exposed, could constitute a violation of that person’s right to respect for his or her privacy and family life.⁹¹

A significant number of cases brought under the ECHR concern noise pollution suffered by people living near airports. The line of cases begins in 1990, when the European Commission of Human Rights declared complaints from local residents under Article 8 of the Convention admissible.⁹² It accepted that, in principle, significant noise pollution could affect a person’s physical well-being to the extent that it impairs his or her private life. However, it also acknowledged that interference in the exercise of the right to private life could be justified by the general economic interest served by the operation of an airport.⁹³ Therefore, there was no violation of Article 8 of the Convention provided that the principle of proportionality had been respected in weighing different interests.⁹⁴

In a more recent, highly publicized case concerning Heathrow Airport, however, the Court first concluded that Article 8 had been violated, finding that the United Kingdom had permitted an increase in the noise pollution produced by night flights without giving serious consideration to the impact of this increased pollution on local residents’ sleep, and without seeking the least detrimental solution in terms of human rights.⁹⁵ In this case, the country’s economic interest had not been properly weighed against the rights of the applicants, who were victims of the noise pollution.⁹⁶ However, this judgment was overturned on appeal by the Grand Chamber of the Court, finding that the UK had not exceeded the “wide margin of discretion” it was entitled to in balancing the conflicting interests at stake.⁹⁷

In another landmark case, *Öneryildiz*, the ECtHR affirmed “that a violation of the right to life can be envisaged in relation to environmental issues, . . . liable to give rise to a serious risk for life or various aspects of the right to life.”⁹⁸ It found Turkey guilty of

⁹¹ *Guerra et al. v. Italy*, Eur. Ct. H.R. (1998).

⁹² *Powell & Rayner v. United Kingdom*, 172 Eur. Ct. H.R. (1990).

⁹³ *Id.* at 14.

⁹⁴ *Id.* at 16.

⁹⁵ *Hatton et al. v. United Kingdom*, 172 Eur. Ct. H.R. (2001).

⁹⁶ *Id.* at 12.

⁹⁷ *Hatton et al. v. United Kingdom (Grand Chamber)*, Eur. Ct. H.R. (2003).

⁹⁸ *Öneryildiz v. Turkey*, Eur. Ct. H.R. (2002).

violating the right to life of the residents of a shanty town located next to a landfill, who had lost their lives when their homes were buried in a landslide caused by an explosion of methane gas that had built up in the landfill due to the decomposition of the waste dumped there. The Court found that the Turkish authorities had failed to take the necessary measures recommended by technical experts to remove the methane gas, stabilize the landfill, and inform the slum dwellers of the serious hazards to which they were exposed.

In the *Tatar* case, the ECtHR eventually expressly recognized the right to a “healthy and protected” environment.⁹⁹ Nevertheless, even though this ruling acknowledged the existence of such a right, no obligations binding on states have yet been clearly identified by the Court as specifically flowing from the substantive right in question. The *Tatar* case did not specify any clear normative content or consequences of this right.

Whatever the deficiencies in the recognition of the substantive right in the European human rights system, this system is clearly more advanced than EU law as regards the legal protection of the fundamental right to a healthy environment. The same can be said of the environmental rights regime established by the Aarhus Convention.

The preamble to the Aarhus Convention, paraphrasing language from the 1972 Stockholm Declaration’s preamble, “recogniz[es] that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.” It establishes a conceptual link between substantive and procedural environmental rights by stating that “citizens must have access to environmental information, be entitled to participate in decision-making and have access to justice in environmental matters” in order “to be able to assert” their right to live in an environment adequate to their health and well-being, as well as to “observe” their concomitant duty “to protect and improve the environment for the benefit of present and future generations.”¹⁰⁰

Article 1 of the Aarhus Convention, under the heading “Objective,” then provides:

⁹⁹ *Tatar v. Romania*, EUR. CT. H.R. ¶¶ 107, 112 (2009). On the *Tatar* case, see Séverine Nadaud & Jean-Pierre Marguénaud, *Chronique des arrêts de la CEDH 2008–2009*, 2010 REVUE JURIDIQUE DE L’ENVIRONNEMENT 61, 62–67 (2010).

¹⁰⁰ Aarhus Convention, *supra* note 40.

In order to contribute to the protection of *the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.¹⁰¹

The explicit recognition of the right to a healthy environment in the Aarhus Convention adds weight to its operative provisions for the implementation of the procedural rights of access to information, participation in decision-making and access to justice, by articulating the legal and philosophical underpinning of these rights. It indicates that they are not ends in themselves, but are meaningful precisely as means towards the end of protecting the individual's substantive right to live in a healthy environment.

It does not, however, have immediate legal consequences, as the provisions of Article 1 do not, as such, impose on the contracting parties any specific obligations beyond those laid down in the other provisions of the Convention.¹⁰² Indeed, the protection of the right to a healthy environment is presented as an *objective* to which the Aarhus Convention is intended to contribute, not as a substantive obligation distinct from the specific obligations with respect to access to information, participation and access to justice which it imposes on its contracting parties. It should also be noted that the language used in Article 1 of the Aarhus Convention implies that the parties acknowledge that guaranteeing the procedural rights laid down in the Convention will not in itself be sufficient to ensure the protection of the substantive right, but will only “contribute to” the achievement of that ultimate objective.

¹⁰¹ Aarhus Convention, *supra* note 40, art. 1 (emphasis added).

¹⁰² This was stressed by the United Kingdom in a declaration made upon signature of the Convention. According to this declaration, “[t]he United Kingdom understands the references in Article 1 and the seventh preambular paragraph of this Convention to the ‘right’ of every person ‘to live in an environment adequate to his or her health and well-being’ to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under Article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.” See Aarhus Convention, *supra* note 40. While it is self-evident that the specific international obligations imposed on the contracting parties by the operative provisions of the Convention relate only to those procedural rights, this does not necessarily imply that, as the UK suggests, the provisions of the preamble and of Article 1 relating to the substantive right can be dismissed as merely expressing an “aspiration.” This contradicts the very wording and title of Article 1, which refer to an “objective.” In legal terms, an objective is clearly not the same as an aspiration. It can inform and guide the interpretation of the other provisions of the Convention.

While conventional international law is clearly more advanced than EU law in this field, the former may well have legal consequences in the ambit of Union law and could ultimately influence the latter's interpretation and evolution.

Firstly, the human rights as guaranteed by the ECHR and interpreted by the ECtHR can actually be regarded as part of EU law on several grounds. On the one hand, they are to be regarded as general principles of EU law. Article 6, paragraph 3 TEU, as amended by the Lisbon Treaty, provides:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.¹⁰³

On the other hand, the rights guaranteed by the EU Charter of Fundamental Rights (which has acquired legal force pursuant to Article 6, paragraph 1 TEU) that correspond to rights recognized in the European Convention must be given the same meaning and scope as they have under the ECHR.¹⁰⁴

Secondly, the EU is currently engaged in the process of acceding to the ECHR as a contracting party. This accession is required under Article 6, paragraph 2 of the TEU as amended by the Lisbon Treaty. The ECHR itself has recently been modified in order to make EU accession legally possible.¹⁰⁵ The accession process is yet to be formally completed, but once the Union will have become a contracting party to the ECHR, all the fundamental rights enshrined in the ECHR will automatically be incorporated in the EU legal order. The same already applies to the provisions of the Aarhus Convention, as the ECJ has had the opportunity to affirm in a recent judgment, in

¹⁰³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1.

¹⁰⁴ This results from Article 52, para. 3 of the EU Charter of Fundamental Rights, which provides: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." Charter of Fundamental Rights of the European Union, *supra* note 16, art. 52.

¹⁰⁵ Article 59 ECHR, as amended by Article 17, para. 1 of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, Council of Europe Treaty Series No. 194. This Protocol entered into force on June 1, 2010.

which it ruled that the access to justice provisions of the Convention form “an integral part” of the legal order of the European Union.¹⁰⁶

CONCLUSIONS

Notwithstanding its claim to global leadership in environmental policy and law, the EU has a mixed record as regards the recognition of procedural and substantive environmental rights. While it has led in some areas, it has lagged behind in others. EU law evolved in close interaction with the relevant rules of conventional international law, especially those of the Aarhus Convention and the ECHR. In many instances the latter rules were more advanced than the internal law of the Union, and the EU had to adapt its legislation to comply with the international standards. In other cases, EU law actually led the way and served as a model for the development of conventional international law.

The first Aarhus “pillar,” access to information, is a case in point in which reciprocal influences between EU law and the emerging international standards of the Aarhus Convention have occurred. The 1990 EU Directive on access to environmental information and the experience in its implementation strongly influenced the Convention’s first “pillar” provisions. The Aarhus provisions, in turn, had a significant impact on the European Commission’s proposal for a revision of that directive, which not only incorporated the improvements introduced by Aarhus but also went further and proposed new provisions not found in the Convention. Access to environmental information is an example of EU leadership.

The other procedural environmental rights, public participation in decision-making and access to justice, were recognized in international law before being adopted in EU law. While the EU had some rudimentary provisions on information and consultation of the public in EIA and environmental permitting procedures from the mid-1980s and mid-1990s respectively, the Aarhus Convention went way beyond EU law in articulating the right of participation in a range of environmental decision-making procedures in a detailed manner. Inspired by the Convention, the EU undertook a wholesale revision of a number of environmental directives to incorporate international participation standards in its internal law. In this instance, the EU acted as a follower rather than a leader. In the specific area of GMO-related decision-making, the EU even behaved as an outright laggard,

¹⁰⁶ Case C-240/09, *Lesoochránárske zoskupenie*, *supra* note 14, at ¶ 30.

actively opposing the development of participatory requirements while the Aarhus Convention was being negotiated. It was only in 2005, under strong internal and external pressure, that the EU gave up its opposition and accepted an amendment to the Convention setting out minimum requirements for public participation in decision-making on the deliberate release of GMOs.

Another important area in which the EU is an unrepentant laggard is access to justice. It has adopted access to justice provisions only in respect of the right of access to environmental information, and in the context of public participation procedures under the EIA and IPPC Directives, in order to comply with Article 9, paragraphs 1 and 2 of the Aarhus Convention. But, so far, it has failed to adopt any legislation to implement the more general access to justice requirements of Article 9, paragraph 3 of the Convention. In the absence of harmonized EU standards, it falls on individual member states to guarantee such access to justice, but most of them have dragged their feet and provide only limited access to review procedures for citizens and NGOs. Finally, the EU has not yet taken all the steps required to ensure access to justice at the level of its own institutions. The ECJ, based on a well-established case-law dating back to 1963, systematically denies access to judicial review to private claimants who are not “individually and directly concerned” by the acts of EU institutions and bodies they seek to challenge.

As regards the legal recognition of a substantive human right to a healthy environment, the EU is not leading the way either. No such right is inscribed in the Union’s Charter of Fundamental Rights. Whatever recognition of the substantive right exists in Europe has been achieved by conventional international law, first and foremost by the Aarhus Convention. Despite the lack of any explicit environmental provisions, the European system for the protection of fundamental rights based on the ECHR has also contributed to the gradual affirmation of environmental human rights, through the progressive case-law of the ECtHR, which has recognized that serious environmental impairment may violate such rights as the right to home and family life and even the right to life itself. As a result, the EU’s impending accession to the ECHR is bound to strengthen the protection of environmental human rights in the Union’s legal order. Here too, the EU has been a follower rather than a leader.

