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INTERNATIONALES  
NETZWERK  
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# elni

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**The Aarhus Convention at Ten: Interactions and Tensions  
between Conventional International Law and EU Environmental Law**  
Summary report of a conference held at the University of Amsterdam,  
Netherlands, 25 June 2008

*Marc Pallemmaerts*

*On 25 June 2008, it was exactly ten years ago to the day that the UNECE Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters was signed by representatives of 35 States and the European Community at a pan-European ministerial conference in the Danish city of Aarhus. This treaty, which became known as the Aarhus Convention, entered into force on 30 October 2001, and now has 41 Contracting Parties in Europe, Central Asia and the Caucasus region. It represents the most comprehensive and ambitious effort to establish international legal standards in the field of environmental rights to date, and has had a considerable impact on national systems of environmental law and administrative practices in many countries of Europe and beyond, as well as at the level of the institutions of the European Union and even in other international organisations and fora.*

*To mark the 10<sup>th</sup> anniversary of the Aarhus Convention and reflect on its interaction with EU environmental law, an international conference was organised in Amsterdam by the Centre for Environmental Law of the University of Amsterdam, Netherlands, on 25 June 2008. The conference, entitled "The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law", focused in particular on the relationship between the provisions of the Convention and the development of EU environmental law. The conference brought together 54 participants coming from some fifteen European countries, including leading experts and junior researchers from many universities, judges, barristers, civil servants and other practitioners, representatives of non-governmental organisations, representatives of the European Commission and the Convention's Secretariat, as well as several members of the Aarhus Convention Compliance Committee. They discussed implementation issues, synergies and conflicts across the three 'pillars' of the Aarhus Convention and examined the broader legal and institutional implications of the Convention for the development of both EU law and international environmental law.*

## 1 The Aarhus Convention and EU law

The ultimate aim of the Aarhus Convention is to increase the openness and democratic legitimacy of public 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 authorities and to take legal action to protect their environment. Its provisions are structured in three so-called 'pillars', covering access to environmental information, public participation in selected environmental decision-making procedures and access to justice respectively.

In order to implement the Convention, the EU has adopted a series of new legislative acts and revised several existing ones since 2003. Directive 2003/4/EC of 28 January 2003 on public access to environmental information replaced the earlier Directive 90/313/EEC and expanded citizens' rights of access to environmental information held by public authorities in the Member States. Directive 2003/35/EC of 26 May 2003 provided for public participation in respect of the drawing up of certain plans and programmes relating to the environment in the Member States and strengthened the provisions on public participation in Directives 85/337/EEC on environmental impact assessment and 96/61/EC on integrated pollution prevention and control. The 2003 Kiev Protocol to the Aarhus Convention on Pollutant Release and Transfer Registers led to the adoption by the European Parliament and Council, on 18 January 2006, of Regulation 166/2006/EC establishing the European Pollutant Release and Transfer Register, even before the entry into force of the Protocol itself. Finally, Regulation 1367/2006/EC, adopted on 6 September 2006, deals with the application of the procedural rights guaranteed by the Aarhus Convention at the level of EU institutions and bodies. It organises a new public participation procedure which shall apply whenever these institutions and bodies prepare, modify or review plans and programmes likely to have significant effects on the environment, and provides for a special internal review procedure whereby NGOs meeting certain criteria can request the European Commission or any other Community body to reconsider any administrative act it has adopted pursuant to EU envi-

ronmental law, or to adopt such an act where it was legally required to do so but failed to act.

The elaboration of an international, legally binding instrument on citizens' environmental rights within the framework of the UNECE was prompted by earlier developments in EC environmental law, such as the 1985 Directive on environmental impact assessment (Directive 85/337/EEC) and the 1990 Directive on freedom of access to environmental information (Directive 90/313/EEC). 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 ongoing 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 1049/2001/EC regarding public access to European Parliament, Council and Commission documents.

However, the interaction between the Aarhus Convention and Community law has not always been unproblematic, and, more recently, tensions have arisen between normative developments within the framework of the Convention and the internal legislation and policies of the EU. For instance, a Commission proposal for a Directive on access to justice in environmental matters, aiming to harmonise 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. From 2001 to 2005, the European Commission and a group of Member States opposed 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 GMOs, on the grounds that these would interfere with existing EU legislation on the subject (Directives 2001/18/EC and Regulation 1829/2003) and conflict with the 'softer' approach to public participation laid down in the global Cartagena Protocol on Biosafety, to which the EU is firmly committed. Nevertheless, 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, proposed by Moldova, was eventually adopted by the 2<sup>nd</sup> Meeting of the Parties to the Convention in May 2005, with the EU and its Member States joining in the consensus. The amendment was ratified by the European Community in February 2008, and has meanwhile been approved by 17 Parties to the Convention, including 14 Member States of the EU, Norway and Moldova.

## 2 Highlights from the conference proceedings

The keynote speaker at the opening of the Amsterdam conference was Dr. *Eva Kruzikova*, Director of the Environment and Internal Market Team in the Legal Service of the European Commission, and a former member of the Aarhus Convention Compliance Committee. She discussed the EU's legislative efforts for the implementation of the Convention, focusing in particular on Regulation (EC) No. 1367/2006 on the application of the provisions of the Aarhus Convention to European Community institutions and bodies and the measures taken by the Commission for the implementation of this recent legislation. Mr. *Willem Kakebeeke*, former Director of International Affairs in the Dutch Ministry of Housing, Physical Planning and Environment (VROM) who chaired the UNCECE working group of experts in which the Aarhus Convention was negotiated between 1996 and 1998, recalled the political context of those negotiations and some of the key challenges faced by negotiators at the time and also reflected upon some of the developments since the Convention's entry into force.

Mr. *Ralph Hallo*, former President of the European Environmental Bureau (EEB), one of the NGOs which was particularly active during the negotiating process and has since continued to campaign for full and effective implementation of the Aarhus Convention, addressed the access to information pillar of the Convention and its influence on EU law. But, to begin with, he recalled that EU law also influenced the Aarhus Convention, in particular its provisions on access to environmental information, and discussed how experience with Directive 90/313/EEC strongly influenced the Convention's first pillar and the Aarhus negotiations more generally. In turn, the Convention's first pillar then had a strong impact on the European Commission's proposal for revision of Directive 90/313/EEC, which not only incorporated the improvements introduced by the Convention but went further and proposed new provisions not found in the Convention. Some of these additional improvements ultimately found their way into the new Directive 2003/4/EC. Mr. Hallo also discussed the impact of the Convention on the EU's general access to documents rules which was, however, not as important. Regulation 1049/2001 is on several important points inconsistent with the Aarhus requirements. Most recently, the Commission has issued a proposal for revising the 2001 Regulation, a proposal which promptly attracted criticism for being a step backwards.

The second pillar of the Aarhus Convention, public participation, was discussed by several speakers. Professor *Jerzy Jendroska*, who teaches European law at the University of Opole in Poland and is also a Member of the Aarhus Convention Compliance Committee, examined the provisions of EU law which fall within the ambit of Convention Art. 6 and Art. 7 against the

background of the case-law of the Compliance Committee. He highlighted a number of key legal aspects of the Convention's provisions on early public participation and the proactive notification of and provision of information to the public, in respect of which there are implementation problems in EU Member States, though the specificity of the Community legal order often makes it difficult to determine whether responsibility for these shortcomings can be ascribed to the EU legislation itself or rather lies with national legislative and executive authorities within the Member States.

The question of participatory rights in GMO decision-making was examined by the undersigned, who explained how this question has been a persistent area of tension between the Convention and EU law ever since the late 1990s. When the Aarhus Convention was being negotiated, the European Commission was in the midst of a process of review of the first generation of EU Directives on GMOs and was wary that Aarhus provisions on GMOs might pre-empt this process. As a result, the Convention initially did not include binding provisions on this matter, but, as a compromise, non-binding guidelines were adopted by its 1<sup>st</sup> Meeting of the Parties in 2002. A second round of negotiations took place between 2003 and 2005, as not only NGOs, but also a number of governments of Aarhus Parties outside the EU demanded that the Convention be amended to include public participation requirements for certain regulatory decisions with respect to GMOs. These negotiations were hampered by disagreement within the EU and the lack of a clear EU common position, but eventually the EU's resistance to change was overcome and an amendment adopted by the 2<sup>nd</sup> Meeting of the Parties in May 2005.

In her paper, Dr. *Daniela Obradovic*, a Senior Researcher at the Amsterdam Centre for International Law of the University of Amsterdam, highlighted the disparities between conditions for carrying out European and Member State level consultations with civic groups for the purpose of fulfilling EU environmental impact assessment standards. European law does not adopt a coherent and holistic approach in prescribing the requirements for conducting European and national level consultations on environmental issues with interest groups, as the eligibility criteria to be met by interest groups intending to participate in consultations prescribed by EU legislation significantly differ in regard to the level of environmental decision-making. She called for streamlining the EU requirements for consulting interest groups at the European and national levels on environmental issues and presented recommendations for achieving this goal.

The third pillar of the Convention, Art. 9 on access to justice, remains by far the most controversial. Professor *Jonas Ebbesson*, who teaches environmental law

at the University of Stockholm and is also a Member of the Aarhus Convention Compliance Committee, discussed the implementation of the access to justice requirements of the Convention at the national level and reflected on the question whether, ultimately, wider access to environmental justice would result from the Convention itself or from future developments in EU law, taking into account the pending Commission proposal for a directive on access to justice in environmental matters.

Dr. *Veerle Heyvaert*, a Lecturer in European environmental law at the London School of Economics, for her part analysed the implications of the Aarhus Convention for access to justice at the level of the EU. Her presentation addressed the implementation of the access to justice provisions of the Convention in relation to European Community acts, focusing on the impact of Regulation 1367/2006 on existing rules and restrictions on the contestability of binding acts by private actors. As to the availability of judicial review, the Aarhus Convention and its corresponding EU Regulation are one of the many 'irritants' that have challenged the European Courts' position on non-privileged access to justice over the past 20 years. This irritation now inevitably results in entrenchment rather than reform. Therefore, and until Treaty reforms amend the content of Art. 230(4) EC, it is arguably more productive to look at Regulation 1367/2006 as a building block towards the development of a non-judicial, administrative culture of access to justice. However, Dr. Heyvaert posited that it is in this regard, more than in its inability to "fix" the judicial review deficit, that the Regulation proves very disappointing, as it fails to elaborate any framework or set of standards for internal review to guarantee that the review offered will meet the guarantees of adequacy, effectiveness, and equity that are stipulated in the Aarhus Convention.

Professor *Attila Tanzi* of the University of Bologna considered the interplay between Community law and international law procedures in controlling compliance with the Aarhus Convention. Following its approval by the EC, the Aarhus Convention has become an integral part of the Community legal order, rendering its implementation at the domestic level justiciable by the European Court of Justice. This speaker explored some selected issues arising from this situation and its relation to the compliance regime established under the Convention, making the case that the direct applicability of the Convention as a piece of Community law is significant for the purpose of enhancing compliance with it. Moreover his presentation discussed the issue of the responsibility of the EC, also for the conduct of its Member States, vis-à-vis the Compliance Committee of the Convention. Finally, Professor Tanzi examined the legal basis and policy aspects of the possibility of promoting a positive "*jurispruden-*

tial" interaction between the Committee and the ECJ in the interpretation of the Convention.

The presentation by Dr. *Stephen Stec*, Head of the Environmental Law Programme of the Regional Environmental Center for Central and Eastern Europe (REC), focused on the relationship between EU Enlargement, Neighbourhood Policy and environmental democracy. Only some of the current candidate countries and of the countries of the Western Balkans, which have or will have a Stabilisation and Association Agreement with the EU, are parties to the Aarhus Convention. To the extent that the EU relationship promotes the adjustment of national legislation to the portion of the *acquis* influenced by Aarhus, they effectively spread Aarhus principles to these countries. However, the task of adjusting legislation for purposes of accession is a daunting one. Historically the early accession process has given priority to investment-heavy directives. The relative position of the Aarhus-related directives was analyzed, and a comparison of the EU Neighbourhood Policy as a security instrument to the EU Enlargement Policy as a means of spreading environmental democracy was made. All European EU neighbours (Armenia, Belarus, Georgia, Moldova, Ukraine) are parties to the Aarhus Convention, but the EU Neighbourhood Policy is not aimed particularly at future membership. Rather, it has as a main goal the extension of European values as a means of increasing the security of the EU on its borders. Assisting in adjusting legislation is a part of this process.

National implementation of the Aarhus Convention in selected EU Member States was discussed by a panel of experts chaired by Professor *Richard Macrory* of University College London. The panellists included Mr. *Francesco La Camera*, Scientific Director of the Osservatorio Regionale Siciliano per l'Ambiente (ORSA) in Palermo, Dr. *Michel Delnoy*, a member of the Liège Bar and Associate Professor at the Université de Liège-HEC, Mr. *Phon van den Biesen*, a member of the Amsterdam Bar, Dr. *Martin Führ*, Professor of public law at the University of Applied Sciences in Darmstadt, and Ms. *Mara Silina*, Coordinator, Public Participation Campaign, European Environmental Bureau (EEB). Ms. Silina summarised the results of a recent survey of Aarhus implementation in EU Member States published by the EEB. Professor Macrory explained that, while in relation to access to environmental justice, UK Courts have for many decades adopted a very liberal approach to standing in public law cases, the most serious obstacle to access to jus-

tice is that when it comes to costs, the judiciary have long followed the same approach in both private and public law cases – the so-called 'costs in the cause rule'. This means that the legal costs of the winning party are paid by the other side, and acts as a significant deterrent to bringing an action, particularly on new or untested pieces of law. Mr. La Camera argued that the main obstacles to the effectiveness of the Aarhus Convention are in the vision of the neoclassical economy, as prevailing in European democracies, with the continuous research of economic growth as means and end of all human activities. Mr van den Biesen drew the conference's attention to some regressive tendencies with respect to access to environmental justice in the Netherlands, while Professors Führ and Delnoy both discussed some specific issues of the Convention's implementation in their respective countries, Germany and Belgium.

In his concluding remarks, Mr. *Jeremy Wates*, Secretary to the Convention, an official of the Environment, Housing and Land Management Division of UNECE, reflected on the future of the Aarhus Convention. Two weeks before the Amsterdam conference, at the 3<sup>rd</sup> Meeting of the Parties held in Riga, Latvia, the Parties attempted to answer this question by adopting a strategic plan setting out their main priorities up to the fifth meeting of the Parties. Mr Wates discussed the key points of the strategic plan, and concluded that while the progress achieved to date gives some grounds for satisfaction, there is no room for complacency if the full vision and mission of the strategic plan are to be realised. The issues that lie at the core of the Convention, and in particular the way in which the Convention seeks to ensure the accountability of government, will remain topical for the foreseeable future.

This short summary of the proceedings can obviously not do justice to all the presentations made and fruitful discussions held at the conference. This account is not intended to be comprehensive, but only to give readers a first impression of the full range and scope of issues debated. Full proceedings of the conference, with the speakers' papers and a number of additional contributions by invited authors, will be published next year (in the form of a volume edited by the undersigned) by Europa Law Publishing in Groningen, the Netherlands. For further details of this forthcoming publication, readers are referred to the publisher's website ([www.europalawpublishing.com](http://www.europalawpublishing.com)).

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

#### **The Environmental Law Division of the Öko-Institut:**

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.*

*Since 2005 elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

### Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

### elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

### elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

### Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

### Elni Website: elni.org

On the elni website [www.elni.org](http://www.elni.org) one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.