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Research Articles

Information Disclosure and Environmental Rights: The Aarhus Convention

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Introduction

Access to information is the first "pillar" of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[1] negotiated under the auspices of the United Nations Economic Commission for Europe (UNECE). The Convention is often lauded as a unique international agreement in terms of integrating human rights and environmental protection: Article 1 of the Convention presents the "right of every person of present and future generations to live in an environment adequate to his or her health or well-being" as justification for its recognition, in environmental matters, of rights to information access, public participation and access to justice.[2] These Aarhus procedural rights bring corresponding duties on states. Thus, for citizens' access to information, there are information disclosure obligations on public authorities. Similarly, for citizen rights to access to decision-making and justice in environmental matters, the Convention sets out associated duties. The effective implementation of all the procedural rights is seen as a condition for realizing the substantive right to an adequate level of environmental quality. This claim about the necessary conjoining of procedural and substantive environmental rights is also found in the preamble to the Protocol on Pollutant Release and Transfer Registers (Kiev Protocol), which was adopted at an Extraordinary Meeting of the Parties to the Aarhus Convention.[3] The Kiev Protocol entered into force on 8 October 2009

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1. Aarhus Convention 1999 (adopted 25 June 1998; entered into force 30 October 2001).
2. Aarhus Convention 1999. This right is also stated in the seventh preambular paragraph of the Convention.
3. Kiev Protocol 2003 (adopted 21 May 2003; entered into force 8 October 2009).

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and is presented by UNECE as the first legally binding international instrument allowing access to pollution inventory information.

"Aarhus environmental rights" have been lauded for increasing citizen access to environmental information across Europe, helping to secure more transparent and accountable regulatory processes. Indeed, UNECE presents the Convention as heralding a more responsive relationship between people and governments. As will be shown, the agreement has introduced innovative mechanisms for empowering public participation in national and international decision-making, affording a special status to affected publics and nongovernmental organizations (NGOs). This in part reflects the efforts of environmental NGOs in lobbying UNECE regarding decision-making entitlements for civil society actors—lobbying which found fertile ground in the 1990s in the context of external democracy promotion within Eastern Europe. Transparency, expressed as information access, was deemed to be a necessary expression of, and condition for, democratic governance. However, transparency norms in the Aarhus Convention have been framed mainly by a market liberal understanding in which information disclosure obligations fall directly on public authorities and only indirectly steer private sector institutions and actors. As will be argued here, the construction and implementation of Aarhus rights according to this understanding has weakened the information access rights of citizens and affected publics.

In this article, I examine the nature and scope of the information disclosure obligations under the Aarhus Convention. After outlining the development of environmental information disclosure provisions by UNECE, I briefly set out the relevant provisions of the agreement and characterize its construction of information disclosure rights. The application of these disclosure rights is then examined, drawing mainly on materials from the treaty secretariat and Parties to the Convention, but also referring to the perspectives of relevant nonstate actors. An analysis of the experience so far of applying Aarhus information rights pinpoints inherent (unexamined) inconsistencies in Aarhus informational governance. These include the discretionary authority accorded to Parties, the exclusion of private actors from mandatory duties regarding information disclosure, and the indeterminate coupling of substantive and procedural rights. Analytically, I argue that these inconsistencies reflect a structural imbalance in the articulation of Aarhus environmental rights between social welfare and market liberal perspectives. While the Convention expresses, in Article 1, a socially just commitment to decent environmental conditions for all, the differential obligations placed on public authorities and private actors reveal a more restricted (liberal) understanding of rights. The article highlights various manifestations of this normative mismatch.

Environmental Information Disclosure and UNECE

The drafting of the Aarhus Convention drew on ten years of experience of environmental agreements within UNECE, as part of the "Environment for Eu-

rope" process. While ostensibly a forum for pan-European economic integration,[4] UNECE has developed a body of international environmental law covering transboundary aspects of air pollution, environmental impact assessment, industrial accidents and the protection and use of shared watercourses.[5] During the East-West détente process of the mid-late 1970s, it was the selection of transboundary air pollution cooperation as a negotiation issue for mutual gain that favored UNECE as an institutional setting for environmental rule-making.[6] Following the collapse of communist rule in Eastern Europe, in 1991 UNECE co-initiated the Environment for Europe process to promote pan-European environmental cooperation. Environment for Europe discussions served as the immediate backdrop for the two years of negotiations that produced the Aarhus Convention, and it was at the Fourth Ministerial Conference (in Aarhus, Denmark in June 1998) under this process that the Convention was adopted.

According to UNECE, the Aarhus Convention was based in part on its experience of implementing previous environmental agreements, including the application of information disclosure provisions.[7] In an effort to codify these various entitlements, in 1995 UNECE produced Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making. The geopolitical context of regime change and independence in former Warsaw Pact countries gave an unprecedented opportunity for the Commission to set a regional governance agenda that, in the creation of new legal instruments, fused democratic entitlements with environmental protection norms. Between 1990 and 1995, 16 newly independent Central and Eastern European states had joined UNECE and, at least symbolically, were keen to embrace democratic values. In October 1995, at the Third Ministerial Conference under the Environment for Europe umbrella, the participating environment ministers endorsed the UNECE Guidelines. They also adopted the Sofia Ministerial Declaration, which called for all countries in the region to ensure that they had an effective legal framework to secure public access to environmental information and public participation in environmental decision-making.[8]

Thus, the ambitious multilateralism of UNECE in regard to the pan-European development of environmental information disclosure cannot be divorced from its democracy promotion efforts in Central and Eastern Europe. Indeed, Secretary-General Kofi Annan introduced the Aarhus Convention as the most ambitious venture in "environmental democracy" undertaken by the UN.[9] From 1989 both the European Commission and the US funded major governmental and nongovernmental capacity-building programs in the former communist

4. The ECE includes 56 countries in the European Union, non-EU Western and Eastern Europe, South-East Europe, the Commonwealth of Independent States and North America.
5. See http://www.unece.org/env/welcome.html, accessed 20 April 2010.
6. Wettestad 2000, 95. These negotiations resulted in the first UNECE environmental treaty—The Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979; entered into force 16 March 1983).
7. Economic Commission for Europe 2000, 25.
8. United Nations Economic Commission for Europe 1995.
9. Economic Commission for Europe 2000, v.

countries, which included the creation in Budapest of a Regional Environmental Center for Central and Eastern Europe. In this context of external democracy promotion, the development of the Aarhus Convention was notable for the active role of transition countries in shaping its provisions, for these states were already adopting new environmental information and participation laws with an explicit human rights component.[10] It is not surprising, therefore, that Article 1 of the Convention champions a substantive environmental right—the equal entitlement of all persons, across generations, to a decent level of environmental quality. This represents a strong conception of *social welfare*, which is compatible, in principle, with socialist and social democratic norms from a range of European political traditions. It implies regulatory constraints (to a greater or lesser degree) on private investment and trade decisions generating significant environmental harm.

However, the substantive commitment to environmental justice in Article 1 has been at odds with the aggressive free market restructuring facilitated for the new democracies by multilateral development banks (e.g. European Bank for Reconstruction and Development) and private investment actors. This means that the UNECE mandate for facilitating European economic development—which in the preamble to the Aarhus Convention is interpreted as "sustainable development"—has deferred in practice to a *market liberal* model of economic development. Thus, the Commission's commitment to information disclosure as supportive of its core commitment to East-West cooperation has mirrored Western economic liberalization and privatization objectives for transition countries, which have been set as conditionalities for European Union and WTO membership. Within this dominant norm complex of neoliberalism, information disclosure by governmental and private actors is market-correcting rather than market-transforming: it is seen as reducing the incidence of environmental externalities by rectifying information deficits and asymmetries. In other words, it is appropriate for states to facilitate information disclosure as a public good to promote market efficiencies, but in the service of, rather than as a challenge to, profit-motivated imperatives for economic growth.[11]

It is necessary to recognize, therefore, the *historicity of the informational governance*[12] formulated by UNECE for the Aarhus Convention. In the first place, the Commission articulated an influential variant of what, at the global scale, Aarti Gupta labels "governance by disclosure"—a growing number of regulatory forms (mandatory and voluntary) animated by assumptions of due process and empowerment through information.[13] For the Aarhus Convention, as will be shown below, the procedural entitlements favoring public information access are legally innovative. The causal assumption that information can empower

10. Jancar-Webster 1998; and Stec 2005.
11. Examples of this perspective include Hamilton 1995; Tietenberg 1998; and Dasgupta et al. 2001.
12. By information governance I mean, following Mol (2008, 80), environmental governance in which information, information technologies and information processes play a central role.
13. Gupta 2008. See also Florini 2007.

members of the public is explicitly made in the ninth and tenth preambular paragraphs of the Convention, where improved access to information—conjoined with public participation—is claimed to enhance public awareness and understanding, the communication to decision-makers of matters of public concerns, and the greater public accountability of public authorities. Many Parties to the Convention, in their implementation reports, support the view that information disclosure is enabling for their citizens.[14] Within the wider research community, there is also empirical support for this claim, though by no means a scholarly consensus.[15]

Second, in keeping with market liberal notions of regulatory action, the Aarhus Convention restricts its direct obligations to public authorities. While "public authority" is understood in an expansive sense as all governmental authorities and natural or legal persons with public administrative functions and other environmental responsibilities, functions and public service providers (Article 2),[16] this definition clearly circumscribes its class of duty holders. Privately owned entities only fall within the immediate scope of the convention insofar as they perform public functions deemed to be environment-related, such as the provision of energy or water services. In terms of public international law, the Convention resonates with those state-based rules which populate the mandatory domain of governance by disclosure, notably treaty obligations on information exchange, notification, consultation and consent.[17] Significantly, when UNECE considers the role of the private sector in the Implementation Guide to the Aarhus Convention, it is in relation to non-mandatory notions of "corporate citizenship" and stakeholder engagement. Business and industry is mentioned as one of the "major groups" already identified by the Rio Declaration and Agenda 21 at the 1992 UN Conference on Environment and Development.[18] The claim that direct environmental information disclosure for private operators can effectively be tackled by voluntary means (e.g. eco-labeling and eco-auditing schemes) is stated explicitly in Article 5(6) of the Convention, which relates to the public dissemination of information held by private entities.

Information Disclosure Provisions in the Aarhus Convention

The Access to Information Pillar

As already mentioned, Article 1 of the Aarhus Convention establishes access to environmental information as the first of three procedural rights—for all

14. Economic Commission for Europe 2000, 18; and 2008b, 21–22.
15. Compare, for example, the sanguine view of Stephan 2002 with the more skeptical outlook of Fung et al. 2007.
16. Regional economic integration organizations that are Parties to the Convention are also classified as public authorities; thus, ratification of the Convention in February 2005 by the European Community means that it has direct Aarhus obligations.
17. Louka 2006, 120–126.
18. Economic Commission for Europe 2000, 19–20.

persons—in support of the human right to a healthy environment. Articles 4 and 5 cover, respectively, the means by which environmental information can be requested from public authorities and the obligations on Parties to ensure that such authorities actively disseminate environmental information from a variety of sources. Both articles include the provision that obligations are enacted "within the framework of national legislation," which allows Parties significant discretion in disclosing information, including conditions for refusing information requests (e.g. for reasons of national defense and security, commercial confidentiality and personal data protection). However, Parties are obliged to interpret grounds for refusal in a restrictive way "taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."[19] In contrast to the passive (request-based) disclosure obligations on public authorities contained in Article 4, Article 5 covers the forms and categories of environmental information which public authorities are actively required to collect and disseminate. The priority accorded to public access places the onus on these authorities to order and publish relevant environmental information, including national state-of-the-environment reports, legislation and policy documents, environment-related policy information, and information on pollution releases and transfers.

Furthermore, Article 5 provided a legal basis for the Aarhus Parties to develop the Protocol on Pollutant Release and Transfer Registers (PRTRs)—a commitment agreed at the First Meeting of the Parties to the Aarhus Convention in October 2002 at Lucca, Italy. The Protocol was adopted at an Extraordinary Meeting of the Parties seven months later in Kiev.[20] It is presented by UNECE as the first legally binding international instrument on pollution inventories, with the goal of enhancing public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers. Parties are obliged to ensure effective public access to the information contained in national registers, which follow a harmonized reporting scheme that is mandatory, annual, multimedia, facility-specific and pollutant or waste-specific. The Kiev Protocol is open to all states, so its contribution to informational governance transcends the membership of the UNECE.

The only other provision of the Aarhus Convention that has generated a new legal instrument requiring the approval of its Parties is an Amendment adopted at the Second Meeting of the Parties to the Convention, held in Almaty, Kazakhstan, 25–27 May 2005. The Amendment, which is not yet in force, adds a provision to the Convention (Article 6 bis) requiring each Party to "provide for early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms."[21] This clause is de-

19. Aarhus Convention 1999, Article 4(2).
20. Kiev Protocol 2003.
21. United Nations Economic and Social Council 2005, Article 6 bis(1).

signed to render more precise a reference to genetically modified organisms in Article 6(11) of the Convention, which had deliberately been left vague in its drafting in recognition of the political difficulties at that time accompanying the negotiations over what became the Cartagena Protocol on Biosafety.[22] In recognition of the need to have non-conflicting national biosafety frameworks, the Amendment to the Aarhus Convention calls for Aarhus Parties to ratify or accede to the Cartagena Protocol. Nevertheless, by complementing the information disclosure provisions of the latter, the Amendment attests to the fact that Aarhus transparency norms have a wider currency than the Convention.

Information Access as a Human Environmental Right

The Aarhus Convention is drafted in terms of human rights, declaring in its opening article a basic right of every person to a healthy environment. Prior to the Convention, a number of countries had already recognized such a substantive environmental right in their national constitutions: the Aarhus formulation extended this emphatically to international human rights law, as reaffirmed at the First Meeting of the Parties in Lucca:

> We recognise the close relationship between *human rights* and environmental protection. Through its goal of contributing 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, the Convention reflects this link.[23]

Yet the Aarhus Convention is mainly concerned with procedural rights of citizens, with access to information supportive of access to decision-making and access to justice in environmental matters. It therefore expresses a particular blend of human environmental rights, marking procedural entitlements as necessary for the successful exercise of substantive environmental rights. As the first pillar, access to information may be interpreted as an indispensable prerequisite for the other environmental rights in the Convention.[24] Arguably, this implies that the corresponding information disclosure obligations placed on the Convention Parties and public authorities become critical to the successful functioning of the treaty.

The three pillars of the Aarhus Convention mirror the procedural entitlements to information, public participation and justice expressed in Principle 10 of the Rio Declaration.[25] There is also a semantic debt to another UNECE agreement—the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). From this treaty, the Aarhus Convention imports the broad notion of the public as "one or more natural or legal

22. See Gupta 2010 for analysis of political conflicts around transparency in the Cartagena protocol negotiations.
23. Lucca Declaration 2004, para. 6.
24. Hayward 2005, 178.
25. Rio Declaration on Environment and Development (UN Doc. A/CONF.151/26/REV.1).

persons" adding, for emphasis, associations, organizations or groups in accordance with national legislation or practice.[26] The Aarhus Convention also has a separate formulation of "the public concerned," encompassing those persons likely to be affected by, or having an interest in, the relevant environmental decision-making, including environmental NGOs.[27] These expansive notions of public actors are politically significant, because Aarhus entitlements are addressed to persons regardless of nationality, residence or citizenship.[28] At least in principle, then, information disclosure (and other Aarhus) obligations on public authorities are extensive and without discrimination.

Yet, Aarhus environmental rights straddle uneasily between, on the one hand, their embodiment as procedural entitlements and, on the other, the social welfare aspiration, expressed in Article 1, to provide environmental quality adequate to the human health and well-being of all persons. The UNECE assumption that the former necessarily promotes the latter is asserted rather than substantiated.[29] In the first place, the social welfare aim embodied in Article 1 is short-changed insofar as there is no elaboration of its constituent standards or regulatory significance. Instead, there is in the rest of the treaty a textual "bracketing" of the Aarhus substantive environmental right, which preserves the liberal political axiom that the state should not encroach unnecessarily on the ethical domain of private life-choices and welfare preferences. Similarly, restricting the subjects of Aarhus duties to public authorities means that private corporate entities are shielded from direct obligations under the treaty: this is also consistent with traditional liberal legal protections afforded to markets against governmental interference.

Implementation and Compliance Experience of Aarhus Provisions on Information Disclosure

The Aarhus Convention entered into force on 30 October 2001. As of 8 October 2009, there were 43 Parties to the Convention, 23 Parties to the Kiev Protocol and 24 Parties to the Amendment on genetically modified organisms. Decision I/8, adopted at the First Meeting of the Parties, requires Parties to the Convention to report on their implementation activities before the relevant Meeting of the Parties. There have now been two reporting cycles: by the Second Meeting of the Parties in May 2005, 24 out of 30 Convention Parties had submitted national implementation reports (NIRs), while by the Third Meeting of the Parties in Riga, 11–13 June 2008, 35 out of 41 Parties had submitted NIRs.[30] For each reporting cycle, the Aarhus Convention secretariat is charged with producing a

26. Espoo Convention, Done at Espoo Finland on 25 February 1991, Article 1(x); Aarhus Convention 1999, Article 2(4).
27. Aarhus Convention 1999, Article 2(5).
28. Aarhus Convention 1999, Article 3(9).
29. For example, Economic Commission for Europe 2000, 29.
30. Economic Commission for Europe 2005, 2; 2008b, 3. As of April 2009 four Convention Parties have still to submit their second national implementation reports—Croatia, Lithuania, Luxembourg and Spain.

synthesis report on implementation, but is limited by its mandate and resource constraints in verifying the content of the reports—a constraint characteristic of the implementation norms of multilateral environmental agreements.

There are three regional groupings in implementation capacity categorized by the Aarhus Convention secretariat. First, the Parties from Eastern Europe, the Caucasus and Central Asia (EECCA) are deemed to face common implementation issues on the basis of their shared experience as post-Soviet states moving into democratic governance. These Parties are credited by the secretariat with having made most progress with the access to information pillar in the Convention, in part enabled by significant capacity-building for implementation financed since 1999 by the Organization for Security and Co-operation in Europe (OCSE). OCSE has supported the creation of Aarhus Centers and Public Environmental Information Centers—for awareness-raising, training and communications activities—in Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan and Tajikistan.[31]

In the second regional grouping—the European Union (EU) countries and Norway—implementation of information access provisions are more advanced, given prevailing legislation and more mature democratic systems. Furthermore, European Community ratification of the Aarhus Convention means that it is now binding on Community authorities and on Member States, harmonizing the implementation of the Convention across the European Union. Thus, Regulation (EC) No. 1367/2006 applying the Aarhus Convention to Community institutions and bodies was adopted in September 2006. The European Commission subsequently published Directives designed to align Community legislation with each of the three Aarhus pillars, of which Directive 2003/4/EC on public access to environmental information was adopted in January 2003, repealing a 1990 Directive on environmental information access.[32]

The third regional grouping—South-Eastern Europe (SEE)—covers three Parties (Albania, Bulgaria and The former Yugoslav Republic of Macedonia) deemed by the Aarhus Convention secretariat to share implementation challenges arising from their experience of the regional insecurity of the western Balkans and their participation in Stabilization and Association Agreements with the European Union. Indeed, the European Commission sponsors a Regional Environmental Reconstruction Programme for South Eastern Europe, which supports capacity-building for Aarhus Convention implementation.[33]

The two synthesis reports on implementation, prepared to date by the Aarhus Convention secretariat, indicate that Parties appear to have fewest problems in implementing information disclosure obligations compared to the

31. Economic Commission for Europe 2008b, 6–7; Organization for Security and Co-operation in Europe 2008.
32. Commission of the European Communities 2008: 4. While a Directive (2003/35/EC) has also been adopted in relation to the public participation pillar of the Aarhus Convention, the proposed Directive on access to justice (COM (2003) 624) is still pending within the Community legislative process.
33. Economic Commission for Europe 2005, 5–6; and Regional Environmental Reconstruction Programme for South Eastern Europe 2007.

other two pillars of the Convention. For the provisions on access to information upon request (Article 4), all submitted NIRs show relevant legislation in place. However, with regards to EECCA and SEE Parties, some of the implementation obstacles identified by the secretariat in the first synthesis report (2005) recur three years later in the second. These include legislative gaps and discrepancies compared to Convention clauses, ambiguities over the meaning of "environmental information" and the lack of awareness of citizens' information rights. There are also marked variations in the legal grounds upon which information requests may be refused. Different legal approaches to implementing Article 4 are also found in EU countries and Norway, but within a more established culture of openness: the most significant variation—and one that goes beyond Aarhus freedom of information provisions—is the right of the public in Norway to access information directly from private enterprises, rather than only from public authorities.[34] The reported experience of Parties in implementing the Aarhus obligations on the collection and dissemination of environmental information (Article 5) is similar across the two synthesis reports: appropriate laws are in place, but many EECCA and SEE Parties noted procedural uncertainties and resource constraints impacting negatively on active information disclosure. In contrast, most EU countries and Norway reported no major obstacles to the implementation of Aarhus provisions on information collection and dissemination: indeed, the Convention secretariat applauded progress by these Parties in developing electronic tools for information disclosure and in setting up pollutant release and transfer registers consistent with their ratification of the Kiev Protocol.[35]

Nevertheless, recent public communications to the Aarhus Convention Compliance Committee reveal a more mixed picture—at least in terms of alleged breaches of information disclosure obligations of the Convention. It is widely recognized that the Aarhus compliance mechanism is legally innovative compared to other multilateral environmental agreements.[36] Article 15 of the Convention expressly allows for "appropriate public involvement" in a non-confrontational, non-judicial and consultative compliance review mechanism. As agreed at the first Meeting of the Parties (Decision I/7), this has been interpreted to include the right of NGOs to nominate candidates to the Compliance Committee, as well as the right of members of the public (including NGOs) to submit communications regarding compliance by Parties and to take part in Committee discussions with respect to their submission.[37] By the end of 2008, the Compliance Committee had only received one submission from a Party to the Convention with regard to compliance by another Party, but had received 35 communications on compliance from the public.[38] Over half of the public

34. Economic Commission for Europe 2005, 7–9; and 2008b, 10–11.
35. Economic Commission for Europe 2005, 9–11; and 2008b, 11–13.
36. Morgera 2005, 140; and Mason 2006, 296.
37. Economic Commission for Europe 2004a.
38. See http://www.unece.org/env/pp/pubcom.htm for information on public communications to the Aarhus Convention Compliance Committee.

Table 1
Public communications to the Aarhus Convention Compliance Committee (2004–2008) citing Information Disclosure Provisions of the Convention (Articles 4 and 5)*

UNECE reference	*Party concerned*	*Articles cited*	*Received*	*Status*
ACCC/C/2004/01	Kazakhstan	4(1) and 4(2)	07.02.2004	Findings adopted
ACCC/C/2004/03	Ukraine	4(1)	06.05.2004	Findings adopted
ACCC/C/2004/08	Armenia	4(1) and 4(2)	20.09.2004	Findings adopted
ACCC/C/2004/09	Armenia	Articles 4 and 5	22.09.2004	Not admissible
ACCC/C/2005/14	Poland	Article 4	04.07.2005	Not admissible
ACCC/C/2007/21	European Commission	4(1) and 5(3)	14.08.2007	Findings adopted
ACCC/C/2008/24	Spain	4(8)	13.05.2008	Under review
ACCC/C/2008/28	Denmark	4(1) and 5(1)	07.09.2008	Under review
ACCC/C/2008/29	Poland	Article 4	20.10.2008	Under review
ACCC/C/2008/30	Moldova	4(1) and 4(4)	03.11.2008	Under review

*Note: References in these public communications to any other Convention Articles are excluded here.

submissions concern issues of public participation, which has led the Compliance Committee to register concerns about the implementation of the second pillar of the Convention.[39] Yet, as Table 1 below indicates, there have also been ten public communications regarding the compliance of Parties with the information disclosure provisions of the Aarhus Convention and all these submissions (from 2004 to the end of 2008) are allegations of non-compliance.

It can be seen from Table 1 that public communications to the Compliance Committee about information disclosure have focused on Article 4—the Convention provision on access to information. In response to the first round of public submissions in 2004–5, the Committee ruled two communications as inadmissible under the terms of Decision I/7 and found three EECCA Parties—Kazakhstan, Ukraine and Armenia—to be non-compliant with Article 4 obligations on Parties calling for public authorities to respond effectively to requests

39. Economic Commission for Europe 2008c, 16.

for environmental information. The constructive recommendations made by the Committee to the three Parties emphasized necessary legislative and regulatory measures for compliance. By the 2008 Meeting of the Parties in Riga, the Government of Kazakhstan was deemed to be compliant with Article 4 of the Convention, but both Ukraine and Armenia were still judged not to be compliant with Convention provisions on access to information.[40] Public communications to the Compliance Committee in 2008 (Table 1) indicate that charges of non-compliance regarding information disclosure are no longer restricted to EECCA countries. For the complaint against the European Commission, the charge by an Albanian NGO was that the European Investment Bank was not releasing environmental information that it had requested, although the Compliance Committee ruled that the European Community was *not* in a state of non-compliance, as the information had eventually been provided.[41] In the case of Spain, the allegation was that a fee imposed by the Party for environmental information was unreasonable (in breach of Article 4(8)), while in the Danish case, the communicant charged that the public authorities failed to discharge both passive (Article 4) and active (Article 5) information disclosure responsibilities concerning the administration of antibiotics in livestock. Both communications are under consideration by the Compliance Committee, along with allegations of Article 4 non-compliance leveled by NGOs against Poland and Moldova.

The Incompleteness of Aarhus Information Rights

It is arguably still too early in the lifetime of the Aarhus Convention to offer a definitive assessment of its contribution to the information disclosure policies and practices of its contracting Parties. Nevertheless, there is now sufficient implementation experience to pinpoint problematic areas in realizing Aarhus rights and obligations regarding access to environmental information. I now highlight three such areas: 1) the discretion accorded to Parties in interpreting Aarhus rights; 2) the exclusion of private entities from mandatory disclosure duties; and 3) the indeterminate coupling of procedural and substantive rights.

The Discretion Allowed to Parties in Interpreting Aarhus Rights

At several instances in the Aarhus Convention—including the specification of obligations for Parties for each of the three pillars—there are references to prescribed action "within the framework of/in accordance with national legislation." The Convention secretariat has interpreted this to mean that Parties are allowed "flexibility" in deciding how to implement selected Aarhus obliga-

40. Economic Commission for Europe 2008a, 12; and 2008c, 8–9. All three Parties were judged still not to be in compliance with access to justice (Article 9) provisions of the Convention.
41. Economic Commission for Europe 2009.

tions.[42] This discretionary allowance seems sensible in view of the varying legal systems and governance capacities of the various Parties across the UNECE region, but some early commentators on the Convention already anticipated difficulties arising from the ambiguity of these phrases, including for the access to information pillar.[43] Implementation experience indicates that the discretion allowed to Parties on Aarhus information provisions has been most problematic for EECCA Parties, some of whom have struggled to accommodate freedom of information within administrative cultures with an institutional memory of secret and closed decision-making. As Stephen Stec notes, "access to information, the right to disseminate information, and the control of information are still contentious issues in many countries with a common legacy of strict information control."[44] Of course, part of the administrative challenge facing public authorities in EECCA (and SEE) countries is to respect the political legitimacy of civil society actors as Aarhus rights-holders. For the five EECCA Parties facing public charges of non-compliance under the Convention, each submission to the Convention Compliance Committee was made by a domestic NGO.

Even for western European democracies and EU, though, it has been claimed that the interpretive discretion allowed to Parties by the Convention has diluted the force of its obligations. In particular, there are concerns that rights to information and participation have sometimes been treated more narrowly in implementing legislation than the letter or spirit of the Convention. For example, EU Directive 2003/35/EC—transposing Aarhus public participation provisions to EU Member States—restricts the right to participate in environmental decision-making to those affected by or with an interest in the decision, rather than to any member of the public (as set out in the Aarhus Convention).[45] This has implications for information access, as the public participation provisions created by the Convention have corresponding information disclosure entitlements. Aarhus-enabled public rights to information and participation seem to be most at risk of truncation for decision-making with transboundary environmental effects. While the Convention recognizes that Aarhus rights have effect regardless of nationality (Article 3(9)), this principle of non-discrimination runs against state practice not to grant decision-making rights to foreign publics. Zwier argues that the activities of European export credit agencies expose most vividly the implementation gap here, as Aarhus Convention rights to access information and decision-making extend in principle to people abroad affected by the environmental effects of projects financed by such agencies. Yet in practice, these foreign publics typically have no access to information on export credit agency activities impacting on their lives and live-

42. Economic Commission for Europe 2000, 30–31. For the access to information pillar, the term "within the framework of national legislation" appears in Articles 4(1) and 5(2).
43. Lee and Abbot 2003, 93.
44. Stec 2005, 14.
45. Verschuuren 2005, 38–39.

lihoods.[46] It is noteworthy also that, while the Compliance Committee did not uphold the public communication of an Albanian NGO[47] alleging that the European Community (through the European Investment Bank) had been in breach of information disclosure provisions, it did judge that the Bank had interpreted too narrowly what constitutes "environmental information" in relation to financing agreements.[48]

Discretion to each Party "within the framework of its national legislation" is also expressed in Article 9(1) of the Aarhus Convention, concerning the access to justice for those persons who consider that their requests for information under Article 4 were not effectively met. Self-reporting by Parties on their implementation of Article 9(1) reveals a wide range of administrative and/or judicial proceedings and bodies for review of appeals related to requests for information.[49] The routing of appeals through divergent legal vehicles justifies the flexibility of implementation allowed by the Convention, although this makes it difficult to assess the equality of treatment of applicants between the Parties. So far the Aarhus Convention Compliance Committee has not recorded a significant number of grievances over Article 9(1). Public communications have alleged non-compliance with Article 9(1) by three Parties—Kazakhstan, Belgium and Denmark. Of these, Kazakhstan was initially found by the Compliance Committee to be in breach of this access to justice article (by denying appeal standing to an NGO), but subsequently found to be in compliance following the introduction of a new Environmental Code.[50] The charge by an NGO that Belgium did not provide sufficient standing for environmental NGOs for appealing information refusals (and other aspects of the Aarhus justice pillar) was deemed not to be valid as it related to cases before the Convention had entered into force in Belgium.[51] Finally, the alleged non-compliance of Denmark with Article 9(1) is currently under review by the Compliance Committee. This case is noteworthy as the communicant charges the Danish authorities with having no independent and impartial review body to address the relevant information disclosure appeal.[52]

The Exclusion of Private Entities from Mandatory Information Disclosure Duties

As already noted, Aarhus obligations fall directly on Convention Parties and constituent public authorities, with privately owned entities having Aarhus re-

46. Zwier 2007, 228–229.
47. See the documents regarding this case, reference number ACCC/C/2007/21, *at:* http://www.unece.org/env/pp/compliance/Compliance%20Committee/21TableEC.htm, accessed 20 April 2010.
48. European Commission for Europe 2009, 6–7.
49. Economic Commission for Europe 2008b, 18–19.
50. Decision III/6c, ECE/MP.PP/2008/2/Add.1
51. Economic Commission for Europe 2008c, 9.
52. See the documents regarding this case, reference number ACCC/C/2008/28, at: http://www

sponsibilities only insofar as they perform public functions deemed to be environment-related. Convention provisions on information disclosure addressing the environmental impact of private operators (Article 5(6)) and products (Article 5(8)) are framed in a non-mandatory, aspirational fashion. To be sure, the obligation on Parties to establish pollutant release and transfer registers (Article 5(9)), as developed in the Kiev Protocol, is regarded as an important Convention mechanism for increasing corporate accountability.[53] While the Protocol has now entered into force, there are few signs within Convention practice of a "hardening" of information disclosure duties on private entities. In its 2008 review of implementation practice, the Aarhus Convention secretariat noted an extensive preference amongst Parties for voluntary eco-labeling and environmental auditing by the private sector, with mandatory disclosure of product information generally limited to specific sectors (e.g. European energy efficiency requirements for household appliances and vehicles).[54] Moreover, at the Third Meeting of the Parties in June 2008, in deliberations over the 2009–2014 strategic plan for the Convention, the European Union vetoed a proposal by Norway to afford the public the right to access information directly from industry—a proposal inspired by community-right-to-know entitlements enshrined in the Norwegian constitution and Environmental Information Act 2003.[55]

Excluding private enterprises from mandatory information disclosure duties is of course consistent with a market liberal model of corporate social responsibility in which any information disclosure depends on the voluntary consent of the operator.[56] According to a recent international survey, the well-established right to commercial confidentiality established by this model routinely disables access to information on pollutants from industrial facilities.[57] The right to confidentiality of commercial information is also a justified legal basis for public authorities to refuse requests for environmental information under the Aarhus Convention (Article 4(4)(d)). This exemption is tempered in principle by a public interest in information disclosure, but the great variation in its legal framing by Parties risks an inequality in implementation practice. At least in one case, there is also evidence that the discretion given to Convention Parties in assigning private sector responsibilities has significantly eroded an Aarhus mechanism of corporate accountability. Under the access to justice pillar of the Convention, members of the public "have access to administrative or judicial procedures to challenge acts and omission by *private persons* and public authorities which contravene provisions of (. . .) national law relating to the en-

.unece.org/env/pp/compliance/Compliance%20Committee/28TableDenmark.htm, accessed 20 April 2010.

53. Economic Commission for Europe 2004b, 4; and Morgera 2005, 144.
54. Economic Commission for Europe 2008b, 13.
55. Economic Commission for Europe 2008a, 19; and European ECO Forum 2008.
56. See, for example, Gunningham 2007; and Garsten and Lindh de Montoya 2008.
57. Foti et al. 2008, 78.

vironment."[58] Thus, some Convention Parties—including Hungary, Latvia, and Sweden—have legal mechanisms for facilitating the direct liability of private operators for non-compliance with environmental law (including information disclosure). However, in Regulation (EC) No. 1367/2006 applying the Aarhus Convention to Community institutions and bodies, the European Union omits the reference to private parties in its legal codification of this article. For the European Commission, this omission merely reflects the fact that Community institutions or bodies are necessarily public authorities, but as this includes them acting in a legislative capacity, the exclusion is questionable.[59] It reinforces a market liberal perspective on regulatory authority in which private operators are shielded from administrative and judicial challenges issuing from civil society actors.

The Indeterminate Coupling of Procedural and Substantive Rights

The influence of a liberal rights-based paradigm also accounts for the indeterminate coupling of Aarhus procedural rights with the substantive right referred to in Article 1 and the seventh preambular paragraph of the Convention. In the first place, this reflects a *liberal political aversion* to prescribe any conception of a good life for individuals who are deemed to exercise freely chosen life-choices.[60] A Declaration made by the UK Government upon signing and ratifying the Aarhus Convention reflects this, treating the human right to a healthy environment as no more than an aspiration, and according legal recognition only to the rights of access to information, public participation in decision-making and access to justice in environmental matters.[61] Even for those Aarhus Parties that recognize legally this substantive right, there is extensive uncertainty about its connection with the Convention platform of procedural rights. In the structuring of their national implementation reports, Parties are requested to follow a template provided by the Convention secretariat: this includes, at Section XXXII, the request to report on how their implementation of the Aarhus Convention contributes to the protection of the right to live in an environment adequate to human health and well-being. Of the 37 implementation reports received by the Convention secretariat in the second (2008) round of reporting, 13 contain no response to this request and the majority of the rest feature substantive right statements that are cursory and vague. Interestingly, the recurring claim in those reports that construct a more significant response is that Aarhus procedural rights contribute to fulfilling the substantive right by empowering civil

58. Aarhus Convention 1999, Article 9(3). Emphasis added.
59. Commission of the European Communities 2008, 28; and Ryland 2008, 530–531.
60. Anderson 1996, 10–12; and Wissenburg 1998, 16–17.
61. Aarhus Convention 1999, Declarations and Reservations. The UK position arguably also reflects a political reluctance to institutionalize an open-ended environmental right, although the ideological effect is the same.

society (Azerbaijan, Georgia, Slovenia, Ukraine), especially when that substantive right has national constitutional protection (Belgium, Finland, Germany, Kazakhstan).[62]

Second, the absence of substantive environmental standards in the Convention is also a *practical obstacle* impinging on its commitment to human rights, as it arguably reduces the scope for public deliberation on the appropriateness of environmental decision-making according to competing social values.[63] Information disclosure and public participation become more a means for legitimizing rather than interrogating governance institutions and for benchmarking public authorities against procedural check-lists rather than substantive environmental standards. Advances in information and communications technologies, which allow citizens to utilize complex information in a politically transformative way, may however increase the scope for citizens to explore the conditions needed to realize environmental health and well-being for current and future generations. Article 5(3) of the Aarhus Convention requires Parties to ensure that environmental information progressively becomes available in electronic databases that are publicly accessible, and a majority of Parties are now reportedly using electronic communications tools.[64] Thus, it is becoming more feasible for these Parties to advance "targeted transparency" in which the holders of Aarhus rights are able to make reasoned judgments on specific policy choices.[65] Such moves would complement rather than supplant the general information disclosure provisions of the Convention, and are in keeping with its aspirations to environmental democracy.

Conclusion

Aarhus environmental rights have been lauded for increasing citizen access to environmental information, and thus helping to secure more transparent and accountable regulatory processes. The widespread adoption of the Aarhus Convention is a testament to the successful diffusion of environmental protection and democratic governance norms by UNECE. Parties to the Convention have generally embraced the access to information pillar as a significant political resource for citizens. I have argued here, however, that the information rights given force by the Convention are rendered inconsistent in practice by three properties: 1) the discretion accorded to Convention Parties in interpreting Aarhus rights; 2) the exclusion of private entities from mandatory information disclosure duties; and 3) the indeterminate coupling of procedural and substantive rights. These constituent properties generate a structural imbalance in the

62. These findings are from the author's survey of 37 national implementation reports submitted by end of 2008.
63. Bell 2004, 103–104; and Jones 2008.
64. Economic Commission for Europe 2008b, 12.
65. "Targeted transparency" means transparency measures tailored to the decision requirements of users and decision-makers: see Fung et al. 2007, 39–46.

articulation of Aarhus rights via a normative mismatch between the procedural and substantive elements. The preoccupation in the Convention with procedural entitlements fits comfortably with existing liberal expressions of civil and political rights in international and the domestic law of most UNECE states, even as the bold declaration in the treaty of a universal human right to an environment adequate for health and well-being encapsulates a more far-reaching conception of social justice. In implementation practice, the tension between these two perspectives is dissipated by the de facto marginalization of the Aarhus substantive right.

The historicity of Aarhus informational governance is central to understanding the bracketing of its substantive environmental right. This is characterized, above all, by a geopolitical context featuring the spread of market liberalism and representative democracy to Eastern Europe, as well as the embrace of neo-liberalism by leading Western governments. Indeed, as Paul Langley observed at the start of the century, the rise of transparency as an organizing principle in global environmental governance is closely associated with the partial privatization of that governance, evident in the growth of voluntary forms of information disclosure (e.g. environmental auditing and management systems).[66] As noted above, this ideological current has affected the treatment in the Aarhus Convention of private entities, which (in contrast with public authorities) are shielded from direct information disclosure duties concerning environmental information. The other articles in this special issue indicate that a structured preference for voluntary disclosure from private actors is typical of new transparency regimes in global environmental governance.[67] While the motives for the move to transparency vary across different sectors and regions[68]—in the case of the Aarhus Convention, the rationale was democratic capacity-building for environmental governance—the routine disclosure of environmental information by private corporations is rarely prescribed. Yet in the Aarhus Convention, this sits uneasily with the substantive right to an environment adequate for human health and well-being, as Aarhus information disclosure (and other) rights are thereby cut off from the private constellations of power they must breach to be effective.

At the same time, even the mandatory disclosure duties on state-centered actors in the Aarhus Convention are tempered by the discretion accorded to Parties in implementing Aarhus obligations. Here the constraining normative context is a global governance realm in which there is no overarching political authority, such that multilateral cooperation must operate on the basis of the consent of states (and state-centered organizations) to rules that constrain their sovereign authority. The architects of the Aarhus Convention judged the discretionary space allowed to Parties in interpreting Aarhus obligations to be neces-

66. Langley 2001.
67. See in particular Dingwerth and Eichinger 2010; and Haufler 2010.
68. On this, see also Auld and Gulbrandsen 2010; and Florini 2010.

sary for their effective uptake across diverse national governance systems and political cultures. In practice, as noted above, this seems to have diluted the force of Aarhus information (and participation) rights, particularly for decision-making with transboundary environmental effects, as foreign publics suffer from a lack of specification of their Aarhus entitlements. Once again, the emancipatory intent of the Aarhus substantive right suffers, also because the discretion afforded to Convention Parties includes the scope to interpret how to square Aarhus procedural obligations with the realization of substantive environmental justice. Given the potentially far-reaching ramifications of the Aarhus human right to ecologically adequate conditions of life, it is not surprising that few Parties have made more than a symbolic commitment to meeting it.

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