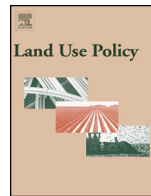




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Judicial perspectives from the European Union for Public Participation in Environmental Matters in East Asia

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ARTICLE INFO

Article history:

Received 15 October 2013

Received in revised form 11 April 2015

Accepted 7 June 2015

Keywords:

Environmental litigation

Citizen

Public service

Regional agreement

Regulation

Binding approach

ABSTRACT

This paper aims to provide judicial perspectives for Public Participation in Environmental Matters in East Asia based on the example of the European Union (EU). This is done both by means of an in-depth literature review which covers research papers, legislative documents and court decisions, and by means of a comparative analysis of court cases. The focus is on the implementation by the EU of the United Nations Economic Commission for Europe (UNECE) Aarhus Convention, which applies and details Principle 10 of the Rio Declaration. The assessment starts by providing an overview of several legislative documents issued by the EU for different policy sectors and briefly describes the contents regarding the implementation of the Aarhus Convention. Based thereon, the case law of the Court of Justice of the European Union is analysed. Seventeen judgements enforcing the Aarhus Convention for the EU level are described and their significance to a regional integration process is outlined. This provides valuable information to a region such as East Asia which plans to enter soon into a stronger regional integration process and which has the clear potential for improvement toward increased Public Participation in Environmental Matters based on the globally applicable Principle 10 of the Rio Declaration.

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1. Introduction

Public Participation in Environmental Matters gained considerable importance during the past two decades. Public involvement in environmental matters was globally promoted at the 1992 United Nations Conference on Environment and Development (UNCED), and in particular through the release of Principle 10 of the Rio Declaration (UN, 1992; Pallemmaerts, 1995).

As reflected in this fundamental Principle 10,¹ Public Participation in Environmental Matters comprises three so-called pillars:

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¹ Principle 10 of the Rio Declaration states as follows: 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective

access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.² The participatory paradigm rests on the idea that an improved public access to information and justice and greater public participation in decision-making in environmental matters enhances the quality, legitimacy and effectiveness of environmental law (Brady, 1998; Pallemmaerts, 2011a).

Principle 10 of the Rio Declaration was applied and detailed at the level of the United Nations Economic Commission for Europe (UNECE) via the Convention on access to information, public participation in decision-making and access to justice in environmental matters, i.e., the Aarhus Convention (UNECE, 1998; Larssen, 2001; Wates, 2005; Dross, 2005; Mauerhofer, 2010). The Aarhus Convention, adopted in 1998 and entered into force in 2001, contains the three pillars of Public Participation in Environmental Matters –

access to judicial and administrative proceedings, including redress and remedy, shall be provided.

² We use here and in the following large letters for the term 'Public Participation' when dealing with the whole participatory system of the three pillars. While small letters are applied when discussing public participation including sole consultation for the second pillar.

access to information, public participation in decision-making, and access to justice – and develops Principle 10 in two manners: on the one hand, the Convention transposes each pillar into a right of the public – i.e., a right to access to information, a right to participation in decision-making, a right to access to justice (Jadot and Larssen, 2005) – and, on the other hand, the Convention significantly details Principle 10 by establishing a veritable participatory system. In turn, the Principle 10 Guidelines (UNEP, 2010) were considerably inspired by the Aarhus Convention's participatory system (Larssen, 2010).

The EU signed the Aarhus Convention in 1998 and ratified it in 2005. The Convention has extensively supported the implementation of Principle 10 in the EU, and has led the EU to issue legislation regarding each pillar of the participatory system.

The first pillar, access to environmental information, was implemented by the EU via the Environmental Information Directive (Larssen, 2005; Maurici and Moules, 2013) and the Regulation establishing the European Pollutant Release and Transfer Register (E-PRTR). The second and third pillars, public participation in environmental decision-making and access to justice in environmental matters, were notably implemented by the EU via the Public Participation Directive, the "Seveso III" Directive, the Strategic Environmental Assessment Directive, the Environmental Liability Directive and the Water Framework Directive (Jendroška, 2011; Pallemarts, 2011a). Besides the general interpretation of the Aarhus Convention through the non-judicial opinions of the Aarhus Convention Compliance Committee (ACCC) based on Article 15 of the Convention and hosted by UNECE in Geneva/Switzerland (for an overview see e.g., Case Law, 2011; Jendroška, 2011), the Court of Justice of the European Union (CJEU) has already interpreted several of these Directives in a binding way in the light of the Aarhus Convention.

Earlier than the Aarhus Convention, the Convention on Environmental Impact Assessment in a Transboundary Context was adopted in 1991 in Espoo, Finland and entered into force on 10 September 1997, the "Espoo (EIA) Convention" (Knox, 2002; Albrecht, 2008; Dereg, 2009). Having currently 47 parties,³ it provides to all natural and legal persons ("the public") the right to be informed about, to participate in relevant environmental impact assessment procedures and to submit comments, all regarding proposed activities that are likely to cause significant adverse transboundary environmental impact. The Espoo Convention thus mainly touches upon the first two pillars of Public Participation, but with transboundary reciprocity among its Parties. The EU as Party implements the Espoo Convention in Article 7 of its EIA Directive, while the CJEU has not yet delivered any judgement on that Article.

The East Asian region strives for more regional integration especially through ASEAN,⁴ but it has been shown that in comparison with other parts of Asia and globally with regard to Public Participation in Environmental Matters, considerable efforts are still need to be made (Kobayashi, 2012; Mauerhofer, this issue).

Although broad differences exist in socio-cultural, economic and environmental terms, the regional example of Europe can provide significant guidance to the regionally integrated East Asia in implementing Principle 10, in particular in view of applying the Principle 10 Guidelines.

Consequently, the case law of the CJEU regarding the legislative EU-acts implementing the Aarhus Convention can provide useful insights for the East Asian region concerning the implementation of Principle 10 of the Rio Declaration via the Principle 10 Guidelines.

This paper consists of the following three sections. First, the legislative transposition of the Aarhus Convention by the EU is briefly described. The next section examines key aspects derived from the case law of the CJEU regarding the legislative EU-acts implementing the Aarhus Convention. The last part contains conclusions and outlines perspectives for the East Asian Region based upon the said case law.

2. Legislation at the EU level

2.1. General

International conventions considerably influence the legislation at the EU level which afterwards significantly effects the legislation at the national level through legal transposition and direct effect of EU law (Mauerhofer, 2008a). The EU signed the Aarhus Convention on 25 June 1998 and ratified the Convention on 17 February 2005.⁵ The Convention has considerable legal effects on the EU and has led the EU to issue several specific legal acts (Pallemarts, 2011a; Maurici and Moules, 2013; Cent et al., 2014). In the following, we describe the specific legal acts which were released or amended in contribution to the implementation of the Aarhus Convention, in order to provide a broader overview of the EU's legislative activities.

2.2. Specific legal acts

The specific legal acts whereby the EU aims at implementing the Aarhus Convention differ considerably in their respective objectives, scope and provision of rights from one or all of the three pillars of the Aarhus Convention. A very detailed description or comparison of their contents lies outside the scope of this paper. These legal acts can be divided into two categories: legal acts imposing Aarhus Convention-related obligations on EU Institutions and bodies, and legal acts imposing Aarhus Convention-related obligations on Member States.

Regarding the first type of legal act, the EU has adopted legislation applying the Aarhus Convention's participatory system to EU-internal procedures, via the Regulation 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.⁶ This Regulation, in force as of 28 June 2007, obliges the EU to apply the provisions of the Aarhus Convention to its own institutions and bodies, albeit not without difficulty, especially regarding the access to justice pillar (Pallemarts, 2011b). It shows certain discrepancies, especially with the existing EU law and the extent of the rights of citizens (ECOSPHERE, 2006).

Apart from the Directives addressing the topics discussed in separate subchapters below, the EU is in the process of completing the implementation, by its Member States, of the third pillar of the Aarhus Convention's participatory system; access to justice in environmental matters (Jadot and Larssen, 2005; Ebbesson, 2011).⁷

⁵ Approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ L 124, 17.5.2005, p. 1)

⁶ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 (OJ L 264, 25.9.2006, p.13). A Regulation of the EU is directly applied while the legal acts described in the following subchapters are mainly take the form of directives, which have to be transposed by Member States within certain deadlines.

⁷ An initial proposal aiming at completing the implementation of the third pillar of the Aarhus Convention in EU Member States (Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters, 24 October 2003, COM (2003) 624 final) was withdrawn by the Commission due to insufficient support by the Member States (see OJ 2014/C 153/03), but a new proposal is currently prepared by the Commission and backed up by different studies (see <http://ec.europa.eu/environment/aarhus/studies.htm>) as well as a public

³ See <http://www.unece.org/env/eia/eia.html> (accessed 14.09.14).

⁴ The Association of Southeast Asian Nations comprises ten member states: Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Laos, Myanmar and Cambodia.

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