Public Participation in Environmental Matters: introduction, three cases, funding

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Some background on me

• >20 years post-doctorate working experience in ~55 countries on six continents
• ISDRS Board Member and Auditor
• Austrian Man & Biosphere Committee Member
• (Managing Guest)Editor for edited volumes with Elsevier and Springer (two ongoing)
• Former positions e.g.: Senior Research Fellow & Visiting Professor/UNU Japan; IPBES Coordinating Lead Author; attorney-at-law
Outline of today’s presentation

1. part: Introduction: Principle X, Arhus Convention & national Austrian context

2. part: Some current cases
   a. ACCC/EU versus AT: Nature NGO Arhus rights
   b. EU & AT: Arhus rights from Water Framework Directive (WFD)?
   c. Airport Vienna: third runway permit?

3. part: Financing of NGOs & Civil Society Initiatives: example Civil Society Initiatives Fonds/Austria
PART 1: Introduction: Principle X, Arhus Convention & national Austrian context
Timeline

• **1992** Rio/UN Conference on Environment and Development: **Principle X Rio Declaration**
  - *access to information*
  - *opportunity to participate in decision-making processes*
  - *effective access to judicial and administrative proceedings, including redress and remedy*

• **1998**: UN Economic Commission for Europe: **Aarhus Convention** (+ Compliance Committee!)
  - 2001: rights concretised & in force for (meanwhile) 47 parties
  - 2005: ratified also by EU (→ Court of Justice of EU!!) + Austria

• **2003/2004**: EU/Austria → **Implementation in especially Environmental impact assessment**
**Regional & national overview globally**

Access to pillar: ⊗ widely; Ø essentially; O basically; – almost not addressed

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(Mauerhofer 2016)
Public participation in environmental matters: Compendium, challenges and chances globally

Volker Mauerhofer

**Abstract**

This paper aims to provide a global and comparative overview of public participation in environmental matters in the sense of the action convention. The method applied is an in-depth literature review in particular of research papers, legal documents, policy papers, which was supplemented by means of electronic database (Web of Science, Scopus) as well as internet research using terms as public participation, access to information, participation in decision making and access to justice in combination with country names. The results were then analysed according to the five continents. They were then divided as well as discussed regarding general aspects, access to information, access to decision-making and access to justice. The results for the five continents show especially within and regionally within the three pillars, access to information, participation in decision-making and access to justice do large differences while access to information is widely established within all regions on all continents, access to justice is the one sector of the three mentioned in Principle 10 of the Rio Declaration which has obtained the least reflection in legislation and implementation so far.

Introduction: the global foundations of public participation

Public Participation in Environmental Matters covers the public participation in environmental decision-making processes as well as the access to environmental information, and to justice. In the particular context of this paper, it stands for the legally binding rule that individuals have rights for individual and non-governed institutional organisations. The call for Public Participation in Environmental Matters was prominently expressed for the first time at the environmental level in Principle 10 of the Rio Declaration on Environment and Development (short ‘Rio Declaration’) in 1992 and further restated in Chapter 23 of the Earth Summit Agenda 21 (short Agenda 21).

According to Principle 10, citizens have the right to access information, public participation in decision making and access to justice in matters concerning the environment.

Since then, Public Participation in Environmental Matters has been increasingly discussed and implemented worldwide. It is mentioned explicitly in the Constitution of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the `Arabian Convention’ in 1998 under the auspices of the United Nations Economic Commission for Europe – UNECE, the so-called Bali Guidelines of the United Nations Convention to Combat Desertification (UNCCD) draw a similar conclusion two years later and emphasized the need for Public Participation in desertification assessment and rehabilitation in land.

Agenda 21.

Also, the United Nations Convention to Combat Desertification (UNCCD) drew a similar conclusion two years later and emphasized the need for Public Participation in desertification assessment and rehabilitation in land.

Reading and understanding the principles and the implications of the specific public participation in environmental matters would, at least, require a basic level of understanding of the legal and technical terms involved. The purpose of this paper is to provide an overview of the legal, institutional and practical aspects of public participation in environmental matters.

Supporting legal documents.

A number of legal instruments and guidelines have contributed to the legal regulation of public participation in environmental matters. These include, among others, the United Nations General Assembly Resolution 1976 (XV), which contains a declaration that the UN is committed to the principle of participation in environmental decision-making.

The United Nations Economic Commission for Europe (UNECE) has also adopted a number of guidelines on public participation in environmental decision-making, including the “Guidelines for the Assessment of the Impact of Environmental Projects” (1993) and the “Guidelines for the Assessment of the Impact of Environmental Projects” (1995). These guidelines provide a framework for the assessment of the impact of environmental projects, and are intended to assist decision-makers in making informed decisions.

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PART 2: SOME CURRENT CASES

a. ACCC/EU versus AT: Nature NGO Arhus rights
b. EU & AT: Arhus rights from Water Framework Directive (WFD)?
c. Airport Vienna: third runway permit?
Overview on the three cases in the transnational legal context

**Geo-political scale**

- **International**
  - e.g. UNECE Aarhus Konvention/ACCC
- **EU**
  - e.g. Acts transposing the Arhus Convention, Conservation Directives by the EU
- **National**
  - (central/federal)

**Acts+implementation organs**

- **Agreements + „Tribunals“**
- **EU-Law+EU-Courts**
- **Laws**
- **Courts & Administration**

A. 
B. 
C.
A. Chronology: ACCC/EU versus AT: Conservation NGO rights


2014-07: Infringement procedure Nr. 2014/4111 startet by EU-Commission against Austria due to NGO-complaint (conservation, water, air, waste & Art. 9/3 Arhus Conv.

(2016-11: C-243/15: judgement of Court of Justice of EU in preliminary ruling procedure against state neighbouring Austria: Environmental NGO have„Access to Justice“ in conservation procedures of EU-Habitat-Directive based on Art. 47 der EU Fundamental Rights-Charta together with Art. 9/2 and 9/4 & Art. 6/1/b Arhus Convention

STATUS: EU-Commission perhaps still awaits C-664/15 (B.)

But in Vienna: Draft for conservation law revision 2016 sent for negotiations to Viennese legislative body (C-243/15!)
Sehr geehrter Herr Bundesminister,


Zweifellos brauchen wir eine gewissenhafte, stetige Einsicht in die Tatsachen.
B. EU & AT: Arhus rights from WFD (C-664/15)?
Chronology: C-664/15

2012: Conservation permit for water extraction from river for ski lift


2013-11: Permit based on Water Act granted (WFD); standing denied

2014: NGO-remedy by provincial administrative court rejected due to „water related objections not raised already during procedures“

2015: NGO-remedy to Supreme Administrative Court: standing based on WFD & Art. 9/3 Arhus-Convention & legal interest expressed

2015-11: Supreme Administrative Court asked CJEU for preliminary ruling

2017-10: Advocat General at CJEU recommended to follow the arguments of NGO → no foreclosure if arguments are not brought forward in administrative procedures
C. Airport Vienna: third runway permit?

https://www.youtube.com/watch?v=HOpbnjEyQP0


Chronology third runway

2007/03 Application according to EIA- Environmental-Impact-Assessment Act forwarded in order to get aviation permit granted.
2012/07 Aviation permit granted by provincial authority acting as EIA-authority.
2017/2 Federal Administrative Court rejects the application to build the third runway in the frame of neighbours‘ remedy
2017/6 Constitutional Court annulled the judgement of the Federal Administrative Court due to a remedy of the Applicant
Federal Administrative Court
Reasoning

• Reasons for the construction: additional need for flight connections and thereby an improvement of the business location as well as enhanced supply with traffic infrastructure + additional jobs.

• But: in federal & provincial constitutions specific primacy is stated for „comprehensive environmental protection“, in particular climate protection. Also Article 37 EU Charta on Fundamental Rights states a high level of environmental protection.

• Through climate change are to be expected: heavy health damages + additional death causalities due to heat + heavy negative effects on the Austrian economy & agro-economy + significant increase of greenhouse gas emissions.

• In total the public interest prevails on no further significant increase of greenhouse gases. Also the maintenance of valuable agricultural land for the food supply of future generations is urgently needed.

(own translation)
Constitutional Court – reasoning

• Violation of the right on equality (repeated misconceiving of the rule of law/„despotism“)
• Inclusion of the „comprehensive environmental protection“ into the interpretation & valuation of the public interests administered by the Aviation Act is indeed demanded; but no absolute primacy of environmental interests;
• Wrongful diagnosis concerning the increase of CO$_2$-Emissions
• Despotic use of not directly applicable legal sources/of norms not applicable for emissions from aviation for the appraisal of emissions diagnosed
• Rough misconceiving of the rule of law through added inclusion of „climate protection“ and „soil use“ into the weighting of interests

(own translation)
Own final comments

- **Constitutional Court:** uses in the interpretation, which public interest are administered by the Aviation Act, mainly an old judgement from 1970 of the Supreme Administrative Court.

- **Constitutional Court:** does not use a new judgement from 1991 where in the – 1984 newly introduced – constitutional „comprehensive environmental protection“ has been given absolute primacy in a similar Aviation Act case.

- **Federal Administrative Court:** could ask for a preliminary ruling at CJEU if deemed necessary.
PART 3: Financing of NGOs & Civil Society Initiatives: example Civil Society Initiatives Fonds/Austria
Civil Society Initiatives Fonds/Austria

- Since 2001 administered by Green-Alternative Association for the Support of Civil Society Initiatives (from Oct 2017: only finishes ongoing support)
- Financed by certain share from salaries of MEPs (Members of Parliaments) of the Austrian Green Party (in Austria/EU)
- Available: ~60,000 €/year [http://www.buergerinitiativen.at/](http://www.buergerinitiativen.at/)
- Supported: Civil Society Initiatives & NGO court procedures
- Procurement criteria:
  - Issues of country-wide importance
  - Chances of success
- Conclusion of a support contract:
  - Transparency (annual reports online)
  - Reclalm by the Fonds e.g. in case of win
Extension of a quarry
*(project of ~51 ha subject to an EIA) Civil Society Association „Livable Strasshof“, 1.100 signatures*

1. Instance
- Attorney fees (statement) € 388,00
- Public negotiation € 2.090,00
- Cost of medical expertise on air pollution substance & noise: € 2.040,00

2. Instance
- Attorney fee: Remedy € 2.570,00
- Additional attorney pleading € 360,00
- Statement € 840,00
- Statement € 360,00
- Cost of conservation & forestry expertise € 4.020,00
- Statement to public expertise (2nd instance) € 1.440,00
- Further statements € 1.080,00

Total: € 15.188,00

- Complaint to the Supreme Administrative Court raised, but not co-funded.
- Also not co-funded: action of trespass & media-law based admin.penalty proc..
- **Co-funded by Fonds:** in total € 8.880,00

Source: Presentation of M. Meyer, Green Parliament Club, EIA-Meeting Linz, 03/2009

(own translation)
Example: construction & use of two river hydro-power dams

Gössendorf und Kalsdorf

Subject to EIA according to national EIA-Act

- **Three NGO’s (incl. WWF Austria)**
- **Attorney fees:**
  - Remedy € 1,440,00
  - Complaint (S.Admin Court) € 3,220,00
- **Total costs:** € 4,660,00
- **Costs of 8 expertises used during first instance procedures have not been handed in with the Fonds for co-funding.**
- **Co-funding by Fonds at that stage: € 1,540,00**

Source:
Presentation of M. Meyer, Green Parliament Club, EIA-Meeting Linz, 03/2009

(own translation)
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Any questions?