



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

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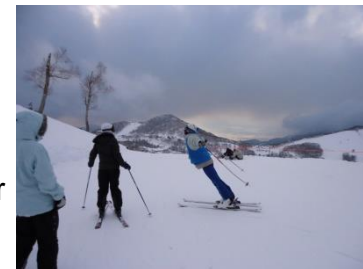
Tokyo Bar Association, Aarhus Network, 13<sup>th</sup> Dec 2017



# 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, Aarhus Convention & national Austrian context
2. **part:** Some current cases
  - a. ACCC/EU versus AT: Nature NGO Aarhus rights
  - b. EU & AT: Aarhus 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, Aarhus 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**

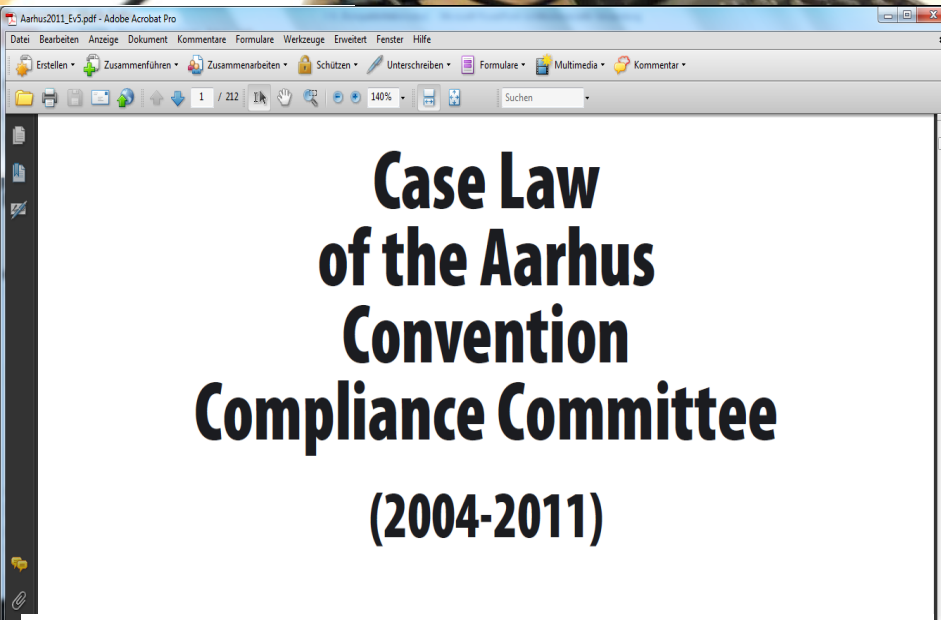




# AARHUS CONVENTION

## Parties to the Aarhus Convention and their dates of ratification

<https://www.unece.org/env/pp/aarhus/ap.html> (20.11.2017)



[http://doku.cac.at/accc2011\\_rel.pdf](http://doku.cac.at/accc2011_rel.pdf)



kyo, 13. Dec. 2017 © Volker Mauerhofer



# Regional & national overview globally

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

Access to	Europe		America		Africa			Asia			Oceania
	EU	Non-EU	North	Latin	West	East	South	West	East	South-East	
Info/ regional	⊗	⊗	⊗	∅	O	∅	O	∅	O	O	-
Dec.mak/ regional	⊗	⊗	O	O	O	O	O	∅	O	O	-
Justice/ regional	⊗	⊗	-	-	-	-	-	∅	-	-	-
Info/ national	⊗	⊗	⊗	∅	O	O	∅	∅	∅	∅	⊗
Dec.mak/ national	⊗	⊗	⊗	∅	O	O	∅	∅	∅	∅	⊗
Justice/ national	⊗	⊗	⊗	∅	O	O	∅	∅	∅	∅	⊗





## Public participation in environmental matters: Compendium, challenges and chances globally

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### ARTICLE INFO

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Civil society  
Public authority  
Regional agreement  
Regulation  
NGO

### ABSTRACT

This paper aims to provide a global and comparative overview of Public Participation in Environmental Matters in the sense of the Aarhus convention. The method applied is an in-depth literature review in particular of research papers, legal documents, policy papers, which was implemented by means of electronic databases (Web of Science, Scopus) as well as by internet research using terms such as public participation, access to information, participation in decision-making and access to justice in combination with continent 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 regionally and nationally within the three pillars, access to information, participation in decision-making and access to justice large differences. While access to information is widely legally 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.

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### Introduction: the global foundations of public participation

Public Participation in Environmental Matters covers the public participation in environmental decision-making procedures as well as the access to environmental information, and to justice. In the particular context of this paper, it stands for the legally binding institutionalisation of rights for individuals and non-governmental organisations. The call for Public Participation in Environmental Matters was prominently expressed for the first time at the global level in Principle 10 of the Rio Declaration on Environment and Development (short 'Rio Declaration') in 1992<sup>1</sup> and further reiterated in Chapter 23 of the Earth Summit Agenda 21 (short

'Agenda 21').<sup>2</sup> Also, the United Nations Convention to Combat Desertification (UNCCD) drew a similar conclusion two years later and emphasised the need for Public Participation in degradation assessment and rehabilitation of land.<sup>3</sup>

Since then, Public Participation in Environmental Matters has been increasingly discussed and implemented worldwide. It culminated since then with the conclusion of the Convention on Access to Information, public participation in Decision-making and Access to Justice in Environmental Matters (the 'Aarhus Convention') in 1998 under the auspices of the United Nations Economic Commission for Europe – UNECE,<sup>4</sup> the so-called Bali Guidelines

<sup>1</sup> <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163>, accessed 29.04.14.

<sup>2</sup> According to Agenda 21 – and therein especially 23.1 and 23.2 – there is a need for "new forms of participation" and the "... need of individuals, groups and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions" (<http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, accessed 29.04.14).

<sup>3</sup> See e.g. Articles 1 (b) i 3 (a), 6 (d), 10 (2) f, 17 (1) f, 18 (2) a, 19 (1) a United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (<http://www.unccd.int/Lists/SiteDocumentLibrary/conventionText/con-ene.pdf>, accessed 29.04.14).

<sup>4</sup> For the text see <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html> (accessed 29.04.14).

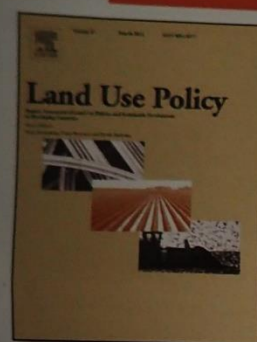
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<sup>1</sup> Principle 10 of the Rio Declaration states as follows "At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous 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 judicial and administrative proceedings, including redress and remedy, shall be provided" (Full

<http://dx.doi.org/10.1016/j.landusepol.2014.12.012>  
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# Land Use Policy

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## Public Participation in Environmental and Land Use Policy in East Asia

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Public participation in environmental matters: Compendium, challenges and chances globally  
Volker Mauerhofer

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## PART 2: SOME CURRENT CASES

- a. ACCC/EU versus AT: Nature NGO Aarhus rights
- b. EU & AT: Aarhus 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

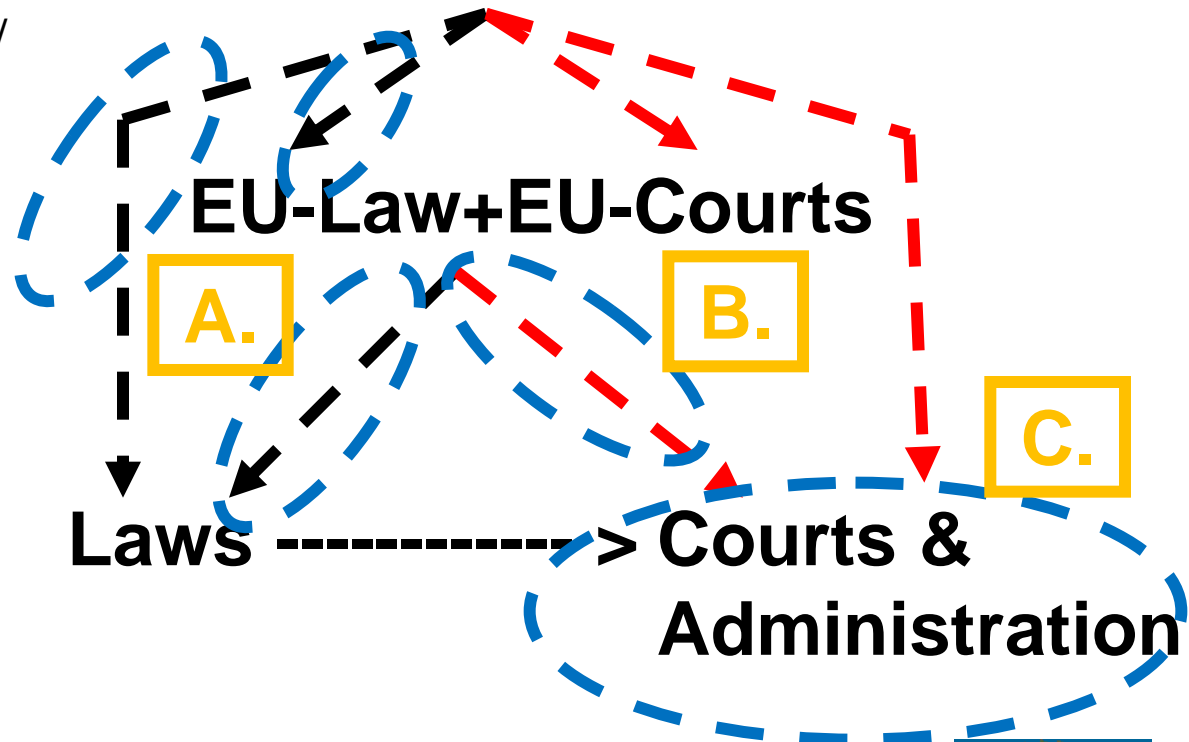
### EU

e.g. Acts transposing the Aarhus  
Convention, Conservation  
Directives by the EU

### National (central/federal)

## Acts+implementation organs

### Agreements + „Tribunals“



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



2012-12: Findings of ACCC/C/2010/48 → Non-compliance of Austria with **Art. 9/3** Aarhus Convention concerning „Access to Justice“ for NGOs

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

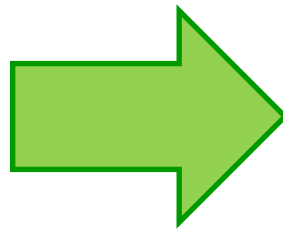
(2016-11: **C-243/15**: judgement of Court of Justice of EU in preliminary ruling procedure against state neighbouring Austria: *Environmental NGO have „Access to Justice“ in conservation procedures of EU-Habitat-Directive based on Art. 47 der EU Fundamental Rights-Charta together with **Art. 9/2 and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

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

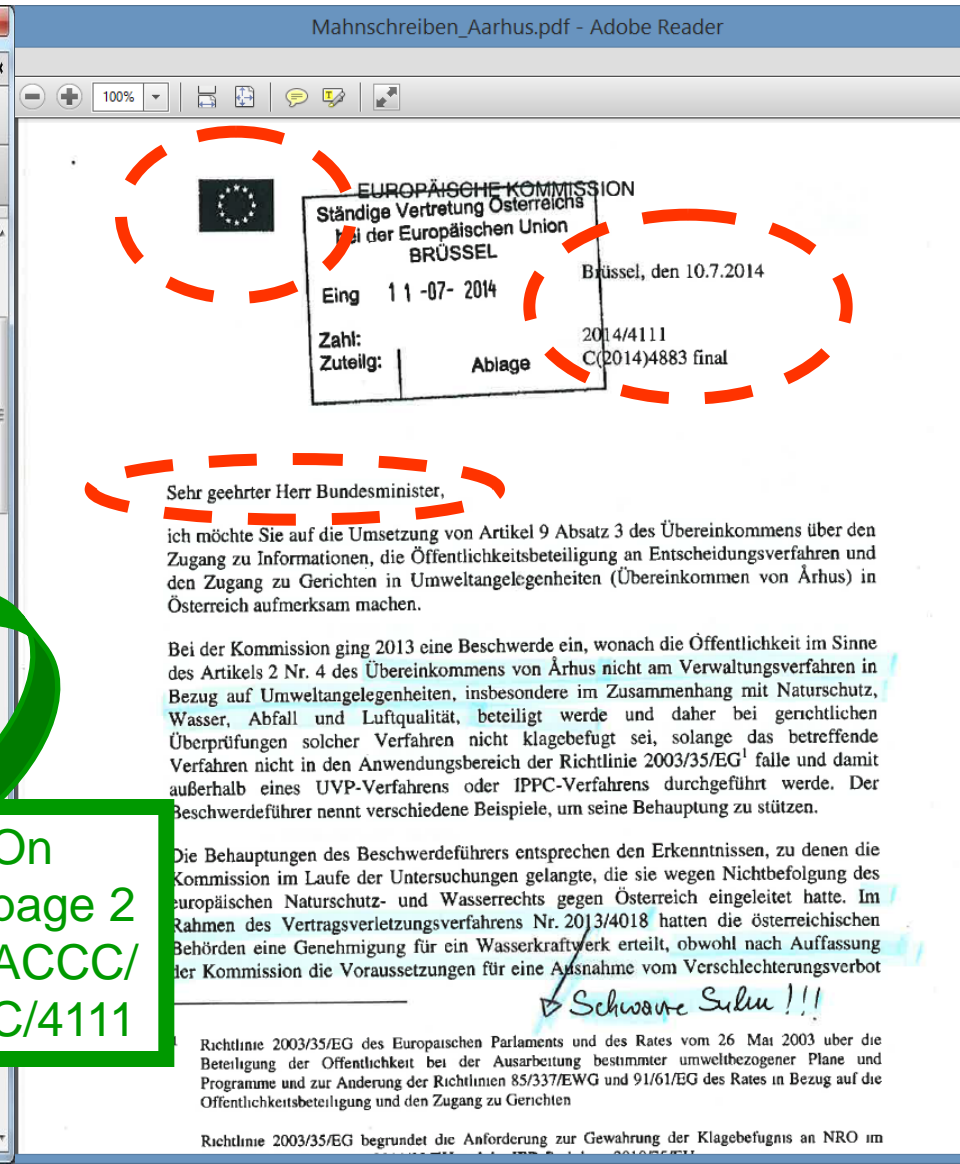
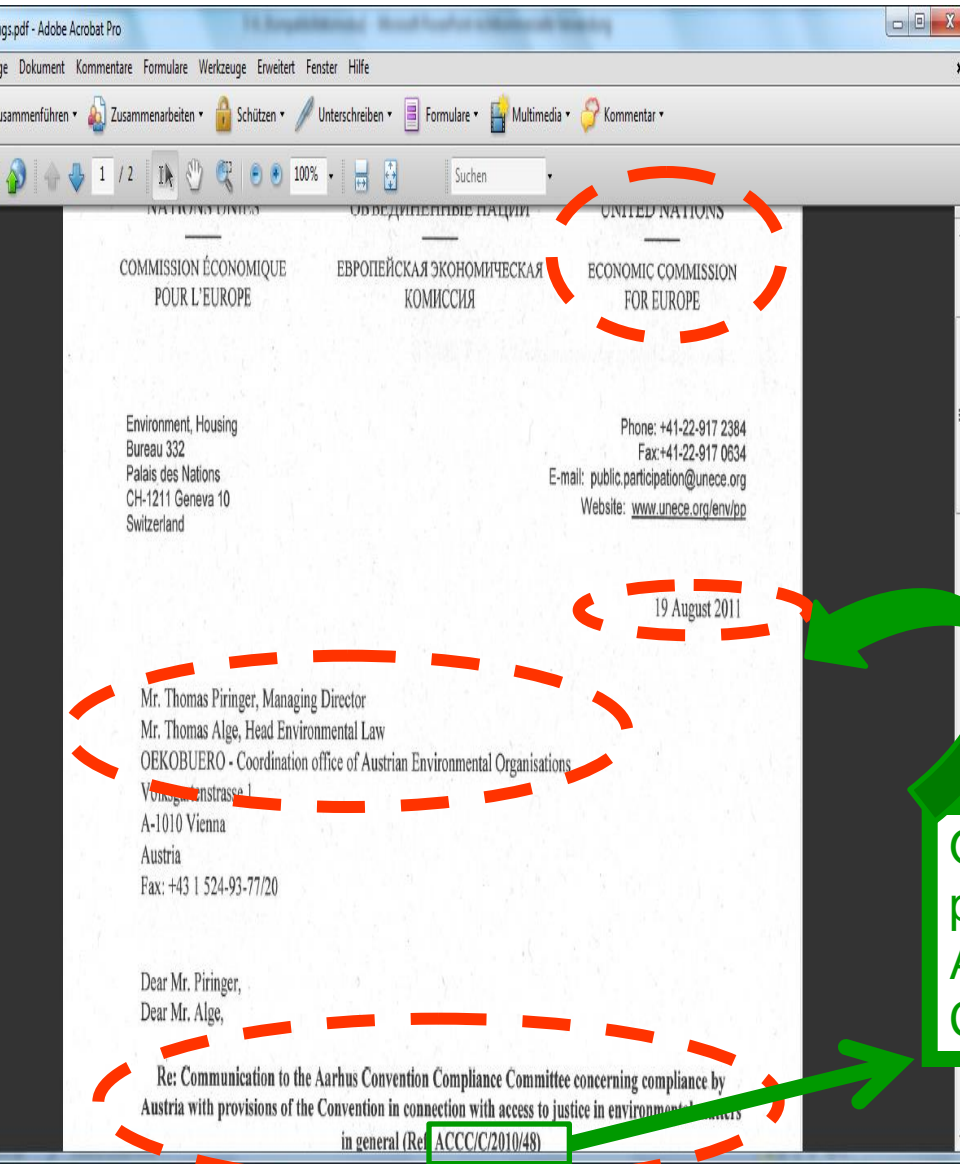




# ACCC/C/2010/48

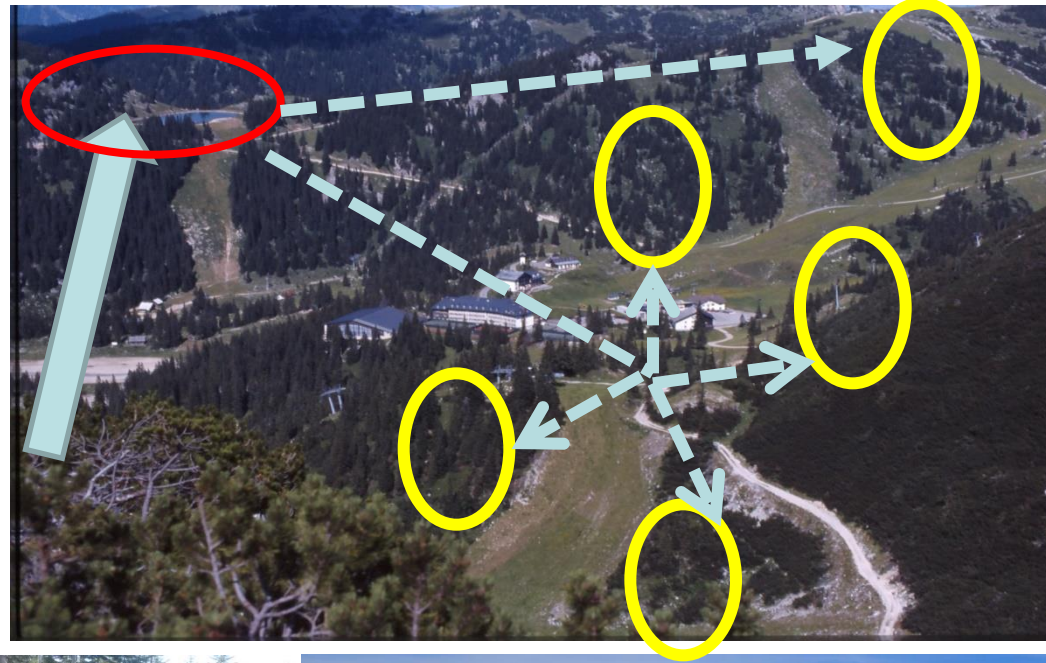


# EU (2014/4111)





## B. EU & AT: Aarhus rights from WFD (C-664/15)?



# Chronology: C-664/15

- 2012: Conservation permit for water extraction from river for ski lift
- 2013: Procedure based on Water Act (Environmental-NGO applies for legal standing **based on Art. 6/3 Habitats-Directive** & Art. 9/3 Aarhus-Convention)
- 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 Aarhus-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=HOOpbnjEyQP0>

[http://systemchange-not-climatechange.at/wp-content/uploads/2016/06/Dritte\\_Pi ste-Wien-Uebe rlagerung-1024x546.png](http://systemchange-not-climatechange.at/wp-content/uploads/2016/06/Dritte_Pi ste-Wien-Uebe rlagerung-1024x546.png)



Arhus Network,  
Tokyo, 13. Dec.  
2017 © Volker  
Mauerhofer

# 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 emmissions.
- **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<sub>2</sub>-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 Parliament) of the Austrian Green Party (in Austria/EU)
- Available: ~60.000 €/year <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)
  - Reclaim 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

# 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



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- UNU-IAS for financial support of that workshop
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  - Marlen Krause for a careful proof-read and
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# Thank you for your attention!



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