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## So far but no further? Transparency and disclosure in the Aarhus convention

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## **II**

### **State-Led Multilaterally Negotiated Transparency**

Michael Mason

So Far ~~b~~But No Further?

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## So Far ~~b~~But No Further? Transparency and Disclosure in the Aarhus Convention

Michael Mason

Insofar as the transparency turn in global environmental politics includes multilateral agreements, one treaty stands out as seminal—the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (henceforth Aarhus Convention ~~1998~~).<sup>1</sup> The Aarhus Convention, negotiated under the auspices of the United Nations Economic Commission for Europe (UNECE), ~~features~~ contains a striking invocation of human environmental rights. Its article 1 affirms 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,<sup>2</sup> and access to justice.

These Aarhus procedural rights bring corresponding duties ~~on~~ to states. Thus, for citizens<sup>2</sup> access to information, there are information disclosure obligations ~~on~~ for public authorities. Similarly, for citizen rights to access to

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decision-making and justice in environmental matters, the convention sets out associated duties. The effective realization of these procedural rights becomes 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 [2003](#)), adopted at a meeting of the parties to the Aarhus Convention.<sup>2</sup> In force since October 2009, the Kiev Protocol is the first legally binding international instrument facilitating access to pollution registers.

UNECE has lauded “Aarhus environmental rights” for increasing citizen access to environmental information across Europe, and helping to secure more transparent and accountable regulatory processes. As will be shown, the agreement has indeed introduced innovative mechanisms for empowering public participation in national and international decision-making, and affording legal standing 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 that found fertile ground in the 1990s in the context of external democracy promotion within Eastern Europe. Transparency, expressed as information disclosure, was seen as a necessary expression of, and condition for, democratic governance. In this chapter, which revises and updates an earlier article on the Aarhus Convention (Mason 2010), I examine

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the nature and scope of its information disclosure obligations. Combining elements of constructivism and critical political economy, the theoretical concern is with the historical emergence, institutionalization, and effects of the information disclosure norms prescribed by the convention.

The close association of Aarhus transparency with democracy promotion suggests confirmation of the first hypothesis set out chapter 1—that the extensive adoption of transparency in global environmental governance is largely driven by democratization and marketization trends, although this finding does not capture the relationship between the two drivers in this case. In the next section, I argue that the marketization driver ~~was~~ has been more significant in shaping Aarhus information disclosure, because the UNECE’s promotion of political modernization in ~~central~~ Central and ~~eastern~~ Eastern Europe has deferred in practice to market liberal norms of governance dictated by multilateral economic actors.

After setting out this historical context for the adoption of the Aarhus Convention, I then survey the institutionalization of its information rights. Drawing on materials from the treaty secretariat and parties to the convention, as well as relevant nonstate actors (notably public communications to the Aarhus Convention compliance committee), I examine the second hypothesis, presented in chapter 1, that the institutionalization of transparency decenters or qualifies state-led regulation and also opens up political space for new actors. For the Aarhus Convention, these tendencies relate, ~~firstly~~, to the extent to

which state sovereign actors implement and comply with treaty obligations and, secondly, to the governance scope for civil society actors in realizing and validating information disclosure. An analysis of the implementation record of the parties to the convention reveals a mixed picture of compliance with information disclosure obligations, with civil society actors playing a major role in scrutinizing and challenging states over their implementation practice.

Finally, I investigate the normative, procedural, and substantive effects of Aarhus governance by disclosure. The third hypothesis examined in this book is that transparency is more likely to be effective under contexts resonant with the goals and decision processes of both disclosers and recipients. The Aarhus Convention advances disclosure obligations that are general enough to fit divergent political systems and administrative cultures, while and at the same time holding holds enough legal specificity to steer behavior. I identify major normative, procedural, and substantive effects arising from the application of these obligations: I argue that they reflect a structural imbalance in the articulation of Aarhus rights between social welfare and market liberal perspectives, and that the dominance of the latter has eroded the efficacy of the convention's information disclosure obligations. This seems to corroborate the "loss of innocence" thesis posited by Mol in chapter 2, though given that market liberal ideas framed the convention from its inception, Aarhus transparency was never innocent.

## Embracing Transparency

The genealogy of the Aarhus Convention is closely bound up with the widening diplomatic work of UNECE over several decades. ~~While~~ ~~Although~~ ostensibly a forum for pan-European economic integration, 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. During the East–West détente process of the mid- ~~to~~ late 1970s, it was the selection of transboundary air pollution as a negotiation issue for mutual gain that favored UNECE as an institutional setting for environmental rule-making (Wettestad 2000, 95). Following the collapse of communist rule in Eastern Europe, the UNECE co-initiated an “Environment for ~~Europe~~–~~Europe~~” initiative in 1991 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 (Economic Commission for Europe 2000, 25). 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~~ sixteen newly independent Central and Eastern European states 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~~ guidelines and, in the Sofia Ministerial Declaration, 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.

Thus, the pan-European development of environmental information disclosure by UNECE cannot be divorced from its democracy promotion efforts in ~~central~~ Central and ~~eastern~~ Eastern Europe. Indeed, Secretary-General Kofi Annan labeled the Aarhus Convention the most ambitious venture in “environmental democracy” undertaken by the United Nations (Economic Commission for Europe 2000, v). From 1989 onwards, ~~both~~ the European Commission and the United States funded major governmental and nongovernmental capacity-building programs in the former communist



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, given that these states were already adopting new environmental information and participation laws with an explicit human rights component (Jancar-Webster 1998; Stec 2005). 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 on private investment and trade decisions generating significant environmental harm.

However, the substantive commitment to environmental justice in article 1 was soon 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. The UNECE mandate for facilitating European economic development—interpreted in the preamble to the Aarhus Convention as “sustainable development”—deferred in practice to this *market-liberal* model of economic development. Thus, the commission’s commitment to

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information disclosure as supportive of its core commitment to East–West cooperation mirrored Western economic liberalization and privatization objectives for transition countries, which were set as conditionalities for European Union and World Trade Organization (WTO) membership. Within this dominant norm complex of neoliberalism, information disclosure by governmental and private actors is market correcting rather than market forcing: 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 (Tietenberg 1998; Dasgupta et al. 2001).

It is necessary to recognize, therefore, the *historicity of the governance by disclosure* formulated by UNECE for the Aarhus Convention. While Although democratization served as the main driver for the multilateral embrace of environmental information disclosure, there were ideological divisions over the aims and scope of this disclosure from the outset. In the first place, UNECE embraced the transformative potential of governance by disclosure as part of a new social contract between the citizens of the new democracies and their first elected governments. As detailed below in the following, this is evident in the development of convention obligations that embodied far-reaching public entitlements to information access. The causal

assumption that information can empower 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 greater accountability of public authorities. Many parties to the convention, in their implementation reports, support the view that information disclosure is enabling for their citizens (Economic Commission for Europe ~~2008b~~2008c, 21–22).

Secondly, and at variance with the convention commitment to public empowerment, is the deference to market liberal norms that exempt private entities from democratic accountability. In keeping with market liberal notions of regulation, the Aarhus Convention restricts its direct obligations to public authorities. ~~While Although~~ “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), this definition clearly circumscribes its class of duty holders. Privately owned entities ~~only~~ fall within the immediate scope of the convention ~~only~~ insofar as they perform public functions deemed to be environment-related, such as the provision of energy or water services.

The discretion allowed here has invited inconsistencies among parties. The UK ~~Government~~government, for example, has exempted private water and sewage companies from Aarhus obligations by applying a restrictive

definition, ~~while-whereas~~ Ireland has defined public authorities more broadly (Economic Commission for Europe 2011b, 11–12; Ryall 2011, 58–59).

Significantly, when UNECE considers the role of the private sector in the ~~Implementation-implementation Guide-guide~~ to the Aarhus Convention, it is in relation to non-mandatory notions of “corporate citizenship” and stakeholder engagement. Business and industry is one of the “major groups” identified by the Rio Declaration and Agenda 21 at the 1992 UN Conference on Environment and Development (Economic Commission for Europe 2000, 19–20). 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-convention~~, which relates to the public dissemination of information held by private entities.

To summarize, the uptake of Aarhus information disclosure confirms the first hypothesis presented in chapter 1—that *the adoption of transparency in global environmental governance is largely driven by democratization and marketization trends*—although this finding, by itself, does not capture the dynamic tension between the two drivers. ~~While-Although~~ political modernization was particularly important to the uptake of the convention, especially in the new European democracies, its information disclosure provisions were significantly inflected, and compromised, by market liberal norms of governance. The restrictive influence of the marketization driver

becomes more evident as we turn now to the institutionalization of Aarhus information disclosure.

## Institutionalizing Transparency

### The Access-to-Information Pillar

The Aarhus Convention articulates a rights-based framework of governance by disclosure, focusing on the procedural rights of citizens, with access to information supportive of access to decision-making and access to justice in environmental matters. As the first pillar, access to information thus becomes an indispensable prerequisite for the other environmental rights in the convention (Hayward 2005, 178). Aarhus information disclosure combines obligations on convention parties with novel public entitlements. To what extent, then, does it confirm the hypothesis posited in chapter 1 that *the institutionalization of transparency decenters state-led regulation and opens up governance space for new actors?*

In the context of an international treaty, the first part of this hypothesis denotes how shared decision-making rules qualify sovereign state authority. Articles 4 and 5 of the convention cover, respectively, the means by which environmental information is 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” (article 4(2)). 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 that public authorities are actively required to collect and disseminate. The priority accorded to public access to such information 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 Kiev Protocol, 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. In an important distinction, the Kiev Protocol is open to all states, so its governance by disclosure ambit transcends membership of UNECE. The other new legal instrument proposed to parties of the convention is an amendment adopted at the second meeting of the parties in Almaty, Kazakhstan, 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.” This clause is designed to render more precise a reference to genetically modified organisms in article 6(11) of the convention, which was deliberately left vague in recognition of the political conflicts underway at the time in negotiating what became the Cartagena Protocol on Biosafety under the Convention on Biological Diversity (see also Gupta, this [volumebook](#), chapter 6).

The comprehensive scope of Aarhus transparency rights and obligations represents a major international commitment to governance by disclosure, and thus the willingness of convention parties to forego at least some freedom of unilateral movement in this realm. In principle, extensive areas of public decision-making are covered by the access-to-information pillar, although the [following](#) discussion [below](#) of implementation practices

suggests the resistance of at least some parties to a generous interpretation of the Aarhus obligations on information disclosure.

The second facet of institutionalization of Aarhus transparency—new governance entitlements for civil society actors—owes, in the first instance, a semantic debt to another UNECE agreement, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention, 1991). ~~From this agreement, the~~The Aarhus Convention imports the broad notion of the public as “one or more natural or legal persons” ~~from this agreement, and adds to this adding, for emphasis,~~ associations, organizations, or groups in accordance with national legislation or practice.<sup>3</sup> ~~The Aarhus Convention~~It also has a separate formulation of “the public concerned,” encompassing those persons likely to be affected by, or having an interest in, relevant environmental decision-making, including environmental NGOs (article 2(5)). These expansive notions of the public are politically significant, because Aarhus entitlements address persons regardless of nationality, residence, or citizenship (article 3(9)). At least in principle, then, information disclosure (and other Aarhus) obligations on public authorities are extensive and without discrimination.

Public entitlements under the Aarhus Convention also extend to its compliance mechanism, representing a major innovation in judicial oversight (Krämer 2012, 98). Article 15 of the convention expressly allows “appropriate public involvement,” which may include “the option of consideration of



communications from members of the public related to this Convention.”

~~These entitlements were further elaborated and adopted at~~ The first meeting of the parties to the Aarhus Convention in October 2002 in Lucca, Italy ~~further elaborated and adopted these entitlements~~. They now include the right of members of the public to nominate candidates to the compliance committee, as well as the right to submit ~~to this body~~ allegations of non-compliance by any party ~~and~~ thereafter should be entitled to participate in the discussions of the committee ~~(Economic Commission for Europe, 2004a)~~. At the Lucca meeting, the United States (attending as a UNECE member state but not an Aarhus Convention signatory) criticized the novel scope of these public oversight rights as contrary to established multilateral treaty practice. Nevertheless, they are extensively ~~utilized~~ used (as noted ~~below~~ in the following). Similar public oversight rights are also included in the compliance committee mechanism established in April 2010 under the Kiev Protocol. I now turn to the implementation record on Aarhus information disclosure to gauge the role in practice of state commitment and compliance challenges from civil society actors.

## Implementation and Compliance Experience

The Aarhus Convention entered into force on ~~30~~ October 30, 2001. As of ~~April~~ September 2013~~2~~, there were ~~46~~ forty-six parties to the convention, ~~30~~ thirty-two parties to the Kiev Protocol, and ~~27~~ twenty-seven parties to the

**Comment [S5]:** AU: Should we put Economic Commission for Europe (ECE), 2004b, cited here? And is that basically the same as Lucca Declaration. 2004. ECE/MP.PP/2/Add.1, April2. New York: UN Economic and Social Council? Please fix.

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amendment on genetically modified organisms. Decision I/8, adopted at the first meeting conference of the parties, requires parties to the convention to report on their implementation activities before the relevant meeting of the parties. Three reporting cycles had been completed by the fourth meeting of the parties in Chisinau, Republic of Moldova, ~~29 June~~ ~~29~~ ~~1~~ July 1, 2011. For each reporting cycle, the Aarhus Convention secretariat is charged with producing a synthesis report on implementation, but is limited by its mandate and resource constraints in verifying the content of the reports—a common problem associated with the reliance on self-reporting in the implementation of multilateral environmental agreements (Treves et al. 2009).

In generating these reports, the Aarhus Convention secretariat has categorized countries into three regional groupings on the basis of implementation capacity. First, the parties from Eastern Europe, the Caucasus, and Central Asia (EECCA) face common implementation issues because of their shared experience as post-Soviet states transitioning to democratic governance. These parties are credited by the secretariat with having made the 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. The organization 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 (Organization for Security and Co-operation in Europe 2008).

In the second regional grouping—the European Union (EU) countries and Norway—implementation of information-access provisions is more advanced, given prevailing legislation and mature democratic systems. Furthermore, European Community ratification of the Aarhus Convention means that it is 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, with Directive 2003/4/EC on public access to environmental information adopted in January 2003, repealing a 1990 directive on environmental information access (Commission of the European Communities 2008: 4).<sup>4</sup>

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 regional insecurity in 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 (Regional Environmental Reconstruction Programme for South Eastern Europe 2007).

The synthesis reports on implementation produced by the convention secretariat have noted that parties appear to have fewest problems in implementing information disclosure obligations compared to the other two pillars of the convention. For the provisions on access to information upon request (article 4), all submitted national implementation reports show relevant legislation in place. However, for EECCA and SEE Parties, the secretariat has identified recurring implementation obstacles. These include legislative gaps and discrepancies compared to convention clauses, ambiguities over the meaning of “environmental information,” and lack of explanation from public authorities when refusing information requests. 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 right-to-information provisions—is the right of the public in Norway to access information directly from private enterprises, rather than only from public authorities (Economic Commission for Europe 2008b, 2008c, 10–11; 2011b, 16).

The reported experience of parties in implementing the Aarhus obligations on the collection and dissemination of environmental information

(article 5) attests to extensive legal development, though many EECCA and SEE parties point to procedural uncertainties and resource constraints as negatively affecting active information disclosure. ~~In~~ By contrast, most EU countries and Norway have 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 (Economic Commission for Europe ~~2008b~~2008c, 11–13; ~~and~~ 2011b, 15–17).

Nevertheless, 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. By the end of 2011, the compliance committee had ~~only~~ received only one submission from a party to the convention with regard to compliance by another party, but had received ~~63~~ sixty-three communications on compliance from the public.<sup>5</sup> Over half of the public 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. As Table table 4.1 indicates, in the period 2004–2011, there were ~~24~~ twenty-one public communications alleging non-compliance of parties with the information-disclosure provisions of the Aarhus Convention.

[Insert Table 4.1 here]

Table 4.1 shows that public communications to the compliance committee about information disclosure have focused on article 4—the convention provision on access to information. Interestingly, of the twelve cases in which the committee had adopted findings by the end of 2012, ten were rulings of non-compliance. All but two of these cases of non-compliance featured article 4(1)—requiring public authorities to respond effectively to requests for information. Most non-complaint countries were from the EECA regional grouping: under the convention’s soft compliance regime, these countries have been granted extensions and assistance in bringing relevant legislation or practices into compliance: only Ukraine, taking seven years to realign information access provision, induced the compliance committee to raise the prospect of a diplomatic caution from convention parties. Spain has twice been ruled to be non-compliant with convention obligations on access to environmental information, highlighting deficiencies in its domestic transposition of the convention. Compliance discussions at the fifth meeting of the parties in 2011 did not identify any serious shortcomings in the implementation of the information-access pillar of the convention. The parties decided, nonetheless, to create a task force that was charged, among other duties, with identifying capacity-building needs, barriers, and solutions with respect to public access to environmental information (Economic Commission for Europe 2011a, 5–7).

The implementation practice of the Aarhus Convention offers partial support to the second hypothesis, presented in chapter 1, that the institutionalization of transparency decenters state-led regulation and opens up political space for new actors. There is no clear confirmation of the first part of the hypothesis, because the constraints on sovereign authority posed by Aarhus rules on transparency are significantly offset by the discretionary space afforded to parties in interpreting these rules. There are firmer grounds to accept the second part of the hypothesis, as because, under the convention, civil society actors have held states answerable for their compliance with Aarhus obligations, including those pertaining to information disclosure.

## Effects of Transparency

Drawing on transparency scholarship, the first two chapters of this book put forward the hypothesis that transparency is more likely to be effective under contexts resonant with the goals and decision processes of ~~both~~ disclosures and recipients. A directional version of this hypothesis—posited in chapter 1 and addressing the dominance of market liberal ideas in global environmental governance—is that *the adoption of transparency in liberal environmental contexts will have minimal market-restricting effects*. This is not to suggest an absence of “positive” transparency outcomes, but rather that transparency effects will tend to reinforce understandings of public and private authority consistent with market liberalism. In line with the categorization of effects

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~~informing contributions to this~~ elaborated in chapter 1 of this ~~volume~~ book, I distinguish ~~between~~ ~~next~~ among key normative, procedural, and substantive effects of Aarhus governance by disclosure.

### **The Normative Selectivity of Aarhus Rights**

As noted ~~above~~, the Aarhus Convention articulates a rights-based approach to governance by disclosure forged in the crucible of democracy promotion for Central and Eastern Europe. Notwithstanding its embrace of “environmental democracy,” this worldview of political modernization was largely framed by Western European and US models of market liberalism. As evident in Aarhus implementation practice, the normative selectivity of this governance project is most telling regarding the exclusion of private actors from mandatory information disclosure duties.

To recall, Aarhus obligations fall directly on convention parties and constituent public authorities, with privately owned entities having Aarhus responsibilities 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



(Economic Commission for Europe 2004b, 4). ~~While-Although~~ the protocol has entered into force, there are few signs within convention practice of a “hardening” of information disclosure duties on private entities. For example, the United Kingdom has resisted claims by NGOs that privatized water companies have “public authority” functions subject to Aarhus Convention duties. In its reviews of implementation practice, the Aarhus Convention secretariat has noted an extensive preference among 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.for~~ example, European energy efficiency requirements for household appliances and vehicles (Economic Commission for Europe ~~2008b~~2008c, 13; 2011b, 15–16). Moreover, at the third of the parties, during negotiations on the 2009–2014 strategic plan for the convention, the European Union vetoed a proposal by Norway to grant public actors the right to access information directly from industry. This proposal had been inspired by community-~~\_~~right-to-know entitlements enshrined in the Norwegian constitution and Environmental Information Act 2003 (Economic Commission for Europe ~~2008a~~2008b, 19; ~~and~~ European ECO Forum 2008).

Excluding private enterprises from mandatory information disclosure duties is of course consistent with a market liberal model of corporate social responsibility in which information disclosure depends on the voluntary consent of the operator (Gunningham 2007; ~~and~~ Garsten and Lindh de

Montoya 2008). Pollution release and transfer registers create indirect obligations on operators. ~~While~~ ~~Although~~ typically structured, as under the Kiev Protocol, to promote free, user-friendly access to standardized pollution- and facility-specific information, they defer to commercial control over the generation of raw data. The right to confidentiality of commercial information is a justifiable basis under the Aarhus Convention for public authorities to refuse requests for environmental information (article 4(4)(d)). This exemption is tempered in principle by a public interest in information disclosure, but this has not been borne out by implementation practice. Of particular relevance here is the tendency of EU institutions to shield corporate actors from Aarhus responsibilities. For example, the European ombudsman censured the European Commission in March 2010 for citing commercial confidentiality as a reason to block NGO access to copies of communications with a German carmaker over proposed reductions in vehicle emissions (European Ombudsman 2010). Similarly, the ~~European~~ ~~Union~~ has diluted a public entitlement, under the ~~access-to-justice~~ pillar of the convention (article 9(3)), to allow access to legal mechanisms for facilitating the direct liability of private parties and public authorities for non-compliance with environmental law (including information disclosure). In Regulation (EC) No. 1367/2006, applying the convention to ~~Community~~ ~~community~~ institutions and bodies, the ~~European~~ ~~Union~~ omits the reference to private parties in its legal codification of this article, thereby blunting its regulatory potential (Ryland 2008, 530–

531). This reinforces a market liberal perspective on regulatory authority, [one](#) in which private operators are shielded from administrative and judicial challenges issuing from civil society actors.

### **Procedural Flexibility: National Discretion and Implementation Gaps**

In several provisions of the Aarhus Convention—including the specification of obligations ~~for~~[by](#) 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 obligations.<sup>6</sup> This discretionary space seems sensible in view of the varying legal systems and governance capacities of parties across the UNECE region. Nonetheless, early commentators on the convention already anticipated difficulties arising from the ambiguity of these phrases, including for the ~~access~~[to](#)~~information~~ pillar (Lee and Abbot 2003, 93). Implementation experience indicates that the discretion allowed to parties regarding Aarhus information provisions has been most problematic for EECCA parties, some of whom have struggled to accommodate the right to information within administrative cultures with an institutional memory of secret and closed ~~decision~~[making](#). As 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” (2005, 14). 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 EECCA parties facing public charges of non-compliance under the convention, most submissions to the convention compliance committee were made by domestic NGOs.

Even for Western European democracies and the European Union, however, it has been claimed that the interpretive discretion allowed to parties by the convention has diluted the force of its obligations. The compliance committee has criticized the excessive time taken by some parties to meet public requests for environmental information; for example, declaring the seven years that Danish authorities took over one information request as “not compatible with the Convention” (Economic Commission for Europe 2012, 1). There are particular concerns that rights to information and participation are sometimes treated more narrowly in implementing legislation than in the letter or spirit of the convention. For example, EU Directive 2003/35/EC—transposing Aarhus public participation provisions to EU Member-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 (Verschuuren 2005, 38–39). This has implications for information access, as-because the public participation provisions of 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-Although~~ the convention recognizes that Aarhus rights have effect regardless of nationality (article 3(9)), state practice has not been to grant decision-making rights to foreign publics. ~~T~~Zwier argues, for example, that the activities of European investment and export credit agencies expose most vividly the implementation gap here, ~~as-because~~ Aarhus rights to information and participation extend in principle to those 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 ~~credit investment and credit decisions~~agency activities affecting their lives and livelihoods (Economic Commission for Europe 2009, 9; Zwier 2007, 228–229).

Discretion to each party “within the framework of its national legislation” is also expressed in article 9(1) of the Aarhus Convention, concerning 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 (Economic Commission for Europe 2008b~~2008c~~, 18–19; 2011b, 22–24). 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 across the parties. ~~While~~ Although the convention compliance committee has ~~only~~ received only a few public communications regarding article 9(1), there have been, since 2010, a significant number of complaints relating to the wider range of access to justice obligations covered by article 9. Most of these public communications reveal a perception that the discretion afforded to Aarhus parties has allowed them to restrict public access to justice, whether through narrow interpretations of standing (Czech Republic, Armenia), inadequate access to review procedures over alleged contraventions of national environmental law (Austria, European Union), and prohibitively expensive procedures (Denmark, United Kingdom). There are also ongoing concerns about the European Commission's adoption of an unduly restrictive interpretation of article 9 to limit its Aarhus obligations on access to justice in environmental matters (Justice and the Environment 2010; Poncelet 2012). Indeed, the EU General Court ruled in June 2012 that the European Commission was violating the Aarhus Convention in applying narrow grounds for public challenges to administrative acts and omissions contravening relevant environmental law.<sup>7</sup>

### **The Retreat from Substantive Rights**

Implementation reports submitted by parties to the Aarhus Convention secretariat reveal little reflection on the effectiveness of the convention in

protecting or promoting substantive environmental rights. In other words, there has been no systematic scrutiny of a key assumption informing its adoption: that information disclosure by parties to the convention will lead to environmental improvements. The right to an adequate environment contained in article 1 lacks specification in treaty practice; and this indeterminacy reflects more than the procedural thrust of the convention, for it is surely in the interests of the parties to identify substantive benefits promoted by increased transparency, participation, and access to justice in environmental matters. Instead, the indeterminacy reveals, above all, the liberal rights-based paradigm dominating convention design and implementation.

In the first place, it expresses a *liberal political aversion* to prescribe a particular set of life choices by empowering a substantive environmental right. A declaration made by the UK ~~Government~~ government upon adopting the Aarhus Convention expresses this, treating the human right to a healthy environment as no more than an aspiration, and according legal recognition only to the procedural rights created by the convention. Even for those Aarhus parties ~~that~~ who legally recognize this substantive right, there is extensive uncertainty about its connection to convention's procedural rights. In the structuring of their national implementation reports, parties are requested to follow a template provided by the convention secretariat: this includes 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~~thirty-seven implementation reports received by the convention secretariat in the second (2008) round of reporting, ~~13~~thirteen contain no response to this request, and the majority of the rest feature substantive right statements that are cursory and/or 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 society (Azerbaijan, Georgia, Slovenia, Ukraine), especially when that substantive right has national constitutional protection (Belgium, Finland, Germany, Kazakhstan).

Secondly, the absence of substantive environmental standards in the convention is also a *practical obstacle* impinging on its commitment to human rights, ~~as~~because it arguably reduces the scope for public deliberation on the appropriateness of environmental decision-making according to competing social values (Bell 2004, 103–104; Jones 2008). Information disclosure and public participation risk becoming more a means for legitimizing rather than interrogating governance institutions, and for benchmarking public authorities against procedural checklists rather than substantive environmental standards. Advances in information and communications technologies, which allow citizens to ~~utilize~~use complex information in a politically transformative way, may however increase the scope for citizens and civil society groups to explore the conditions needed to realize environmental health and well-being for current and future generations. Article 5(3) of the Aarhus Convention

**Comment [S6]:** AU: Emphasis necessary?

MM: Yes, as preceding paragraph also highlights the key claim ('liberal political aversion')



requires parties to ensure that environmental information progressively becomes available in electronic databases that are publicly accessible, and most parties are now using electronic communications tools (Economic Commission for Europe ~~2008b~~2008c, 12). 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 about specific policy choices (Fung at el. 2007, 39–46). Such moves would complement rather than supplant the general information disclosure provisions of the convention, but by themselves will not thicken its substantive effects.

## Conclusion

Marking a decade since its entry into force, on ~~+~~July 1, 2011, the fourth meeting of the parties to the Aarhus Convention adopted the Chisinau Declaration to reaffirm their commitment to the convention as a touchstone for environmental democracy, promoting public access to information, decision-making, and justice in environmental matters. This optimism as to the transformative potential of Aarhus rights resulted in a decision by the parties to encourage global accession to the convention (Economic Commission for Europe 2011a, 26–27). At least for the access-~~to-~~information pillar, the assumption is that transparency and disclosure are transferable norms of democratic governance. I have argued here, however, that the information rights given force by the convention articulate a selective liberal framing that

**Comment [S7]:** AU: This source not cited in this chapter but I have pulled what I think you mean from another chapter. Please verify in the references.

Yes – correct and verified in the references.

limits their application and transformative force. The preoccupation with procedural entitlements fits comfortably with existing liberal expressions of civil and political rights in the domestic law of western UNECE states, even as the bold declaration in the treaty of a universal human right to an environment adequate for health and well-being anticipates a more ambitious conception of social justice. In implementation practice, the de facto bracketing of the Aarhus substantive right dissipates the tension between these two perspectives.

The historicity of Aarhus governance by disclosure is central to understanding the limits to transparency set by this marginalization. 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~~ Western governments. The key driver of Aarhus transparency was democratization, fed by popular demands for openness and inclusivity in decision-making on environmental matters, but one inflected by a deepening marketization of European economies. As noted ~~above~~, this ideological current has affected the treatment in the convention of private entities, which (in contrast with public authorities) are shielded from direct information-disclosure duties concerning environmental information. Other chapters in this ~~volume~~ book indicate that a structured preference for voluntary disclosure from private actors is typical of new transparency regimes in global environmental governance (e.g., Dingwerth and Eichinger, this book, chapter 10, ~~this volume~~; Van Alstine, this

[book](#), chapter ~~1211~~, ~~this volume~~). The reporting requirements placed by the Kiev Protocol on private owners and operators of polluting facilities suggests that it is possible under the convention to go further in promoting corporate accountability for environmental harm, though these remain indirect obligations mediated by treaty parties.

The ~~previousforegoing~~ discussion ~~above~~ of the implementation of Aarhus information rights offers some support to the hypothesis that the institutionalization of transparency decenters state-led regulation and opens up political space for new actors. On the first part of the hypothesis, sovereign powers are indeed steered in favor of transparency by multilateral obligations, although the discretionary space afforded to parties in interpreting rules has diluted the force of Aarhus information disclosure. More confidence accompanies confirmation of the second part of the thesis in the sense that civil society actors have acquired a major governance role, over and above their ~~information~~-access rights, in holding states to account for their compliance with Aarhus obligations. The Aarhus Convention has achieved significant gains in the transparency of public authorities. However, the review of its normative, procedural, and substantive effects confirms the hypothesis that transparency adopted in liberal environmental contexts will tend to have minimal market-restricting effects. A number of factors significantly compromise the transformative potential of Aarhus rules on information disclosure. These include the exclusion of private actors from mandatory

disclosure requirements~~;~~; the low regulatory ambition of parties (evident in their restrictive interpretations of Aarhus rights~~);~~); and the symbolic treatment of the article 1 environmental right, suggesting that Aarhus procedural rights require no substantive outcomes vis-à-vis the activities of public and private actors. The convention has not breached centers of private authority responsible for major environmental harm: it could, and should, go further.

## Notes

1. Aarhus Convention 1998 (adopted ~~25~~June 25, 1998; in force ~~30~~October 30, 2001).
2. Kiev Protocol 2003 (adopted ~~21~~May 21, 2003; in force ~~8~~October 8, 2009).
3. Espoo Convention 1991, ~~Artart~~. 1(x); Aarhus Convention 1998, ~~Artart~~. 2(4).
4. ~~While~~ Although a directive (2003/35/EC) has also been adopted in relation to the public participation pillar of the Aarhus Convention, a proposed directive on access to justice (COM(2003) 624) failed to get sufficient support from member states.

5. See <http://www.unece.org/env/pp/pubcom.htm> for information on all public communications to the Aarhus Convention Compliance Committee.

**Comment [NWK8]:** The URL <http://www.unece.org/env/pp/pubcom.htm> has been redirected to <http://www.unece.org/env/pp/pubcom.html>. Please verify the URL.

MM: Verified

6. For the access-to-information pillar, the ~~term phrase~~ “within the framework of national legislation” appears in ~~Articles articles~~ 4(1) and 5(2). See Economic Commission for Europe (2000, 30–31).

7. Judgment of the General Court of the European Union of 14 June 14, 2012, Case T-338/08, available at: <http://curia.europa.eu/juris/liste.jsf?num=T-338/08>.

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<eref>~~Convention, Aarhus. 1998. *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*. Available at: <http://www.unece.org/env/pp/treatytext.html>, last accessed January 25, 2012.~~</eref>

<jrn>Dasgupta, Susmita, Benoit Laplante, and Nlandu Mamingi. 2001. Pollution and Capital Markets in Developing Countries. *Journal of Environmental Economics and Management* 42 (3): 310–335.</jrn>

<jrn>~~Dingwerth, Klaus, and Margot Eichinger. 2010. *Tamed Transparency: How Information Disclosure Under the Global Reporting Initiative Fails to Empower*. *Global Environmental Politics* 10 (3): 74–96.~~</jrn>

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MM: citation added at p. 159.

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MM: deleted

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Comment [NWK12]: Reference "Economic Commission for Europe (ECE), 2008c" is not cited in the text. Please add an in-text citation or delete the reference.

MM: I confirm this change to 2008a.

<conf>Economic Commission for Europe (ECE). 2008a2008b. *Report of the Third Meeting of the Parties, ECE/MP.PP/2008/2*. New York: United Nations.</conf>

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<bok>Economic Commission for Europe (ECE). 2008c. *Report by the Compliance Committee, ECE/MP.PP/2008/5*. New York: United Nations.</bok>

Comment [NWK13]: Reference "Economic Commission for Europe (ECE), 2008c" is not cited in the text. Please add an in-text citation or delete the reference.

MM: I confirm change to 2008a above.

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**Comment [NWK14]:** Reference "Economic Commission for Europe (ECE), 2009" is not cited in the text. Please add an in-text citation or delete the reference.  
MM: citation added at p. 171.

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MM: deleted.

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**Comment [S16]:** AU: Is this the Fung et al. reference you mean?

MM: yes.

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MM: verified.

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MM: deleted.

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MM: verified.

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**Table 4.1**

Public ~~communications~~ **Communications** to the Aarhus Convention Compliance Committee (2004–2011) citing Information Disclosure Provisions of the Convention (Articles 4 and 5)\*

Party <del>concerned</del> <b>Concern</b> <del>ed</del>	Article <del>s</del> <b>s</b> <del>ited</del> <b>Ci</b> <del>ted</del>	Received <del>(m/d/yr)</del> <b>(m/d/yr)</b>	Status [NC = non-compliance]
Kazakhstan	4(1), 4(2)	<del>07-02-07</del> .2 004	Findings adopted: NC— 4(1) and 4(2)
Ukraine	4(1)	<del>06-05-06</del> .2 004	Findings adopted: NC— 4(1) and 4(2)
Armenia	4(1),	<del>20-09-20</del> .2	Findings adopted: NC—

**Comment [S27]:** ED: Should these be restyled in US date order preference (m.d.yr)?

AU: It would be our preference to restyle dates per US style: month/date/year. OK?—DMC at MIT.

MM: changed to US system.

	4(2)	004	4(1) and 4(2)
Armenia	Articles 4, 5	<del>22</del> -09. <del>22</del> .2 004	Not admissible
Poland	Article 4	<del>04</del> -07. <del>04</del> .2 005	Not admissible
European Commission	4(1), 5(3)	<del>14</del> -08. <del>14</del> .2 007	Findings adopted
Spain	4(8)	<del>13</del> -05. <del>13</del> .2 008	Findings adopted: NC— 4(8)
Denmark	4(1), 5(1)	<del>07</del> -09. <del>07</del> .2 008	No decision
Poland	Article 4	<del>20</del> -10. <del>20</del> .2 008	No decision
Moldova	4(1), 4(4)	<del>03</del> -11. <del>03</del> .2 008	Findings adopted: NC— 4(1) and 4(4)
Spain	Articles 4, 5	<del>10</del> -12. <del>10</del> .2 008	Not admissible
Spain	4(1), 4(2)	<del>02</del> -03. <del>02</del> .2 009	Findings adopted: NC— 4(1) and 4(2)
Belarus	4(1)	<del>14</del> -03. <del>14</del> .2 009	Findings adopted: NC— 4(1)
United Kingdom	4, 5(1)	<del>07</del> -05. <del>07</del> .2 009	Findings adopted
Belarus	4(1)	<del>10</del> -12. <del>10</del> .2 009	Findings adopted: NC— 4(1)
Austria	4(2), 4(7)	<del>13</del> -03. <del>13</del> .2 010	Findings adopted: NC— 4(2) and 4(7)
Romania	4(1), 4(4), 4(6)	<del>02</del> -09. <del>02</del> .2 010	No decision
United Kingdom	Article 4	<del>01</del> -09. <del>01</del> .2 010	Closed (UK judicial review)
United Kingdom	Articles 4, 5	<del>26</del> -11. <del>26</del> .2 010	Findings adopted: NC— 4(1)

European Union	Article 5	<del>15</del> .10. <del>15</del> .2 010	Not admissible
United Kingdom	Article 4	<del>03</del> .12. <del>03</del> .2 010	Suspended (European Court of Justice case)

*\*Note:* References in these public communications to any other ~~Convention~~  
~~convention~~ ~~Articles~~-~~articles~~ are excluded here.