ACCESS TO ENVIRONMENTAL JUSTICE FOR NGOS: REVIEWING THE EU LEGAL STANDING CRITERIA IN LIGHT OF THE AARHUS CONVENTION

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The human right of access to justice has been conceptualized by the Aarhus Convention in light of international environmental law, creating a right of access to environmental justice and recognizing an important role for non-governmental organizations (NGOs) in the enforcement and protection of this right. Considering that the European Union is a member to the Aarhus Convention, the EU criteria for legal standing should be interpreted in light of the Aarhus Convention. What we see here is a convergence of various fields or 'layers' – international human rights law, international environmental law, European Union Law – in which access to justice is conceptualized and institutionalized. This begs the question on how a potential conflict of converging norms and possibly competing authorities will be addressed, and whether a return to general rules of the law of treaties will be able to provide guidance on this matter. Further, does this situation lead to an enhanced right to access to justice for non-state actors or impede further progress?

1. Access to Justice as an Individual Right under International Law

Given the lack of access to justice provisions in international environmental agreements, access to justice in environmental matters is most likely to be achieved through provisions of human rights and via further integration between human rights and environmental law.[1] The necessity of access to justice as described by Ebbeson:

> 'Access to justice provides a means to enforce environmental laws, correct erroneous administrative acts, decisions and omissions and to push competent authorities to do their job.'[2]

Access to justice has by now a firm basis in international law as an individual right.[3] Access to justice refers to the 'possibility for an individual to bring a claim before a court and have a court adjudicate it'.[4] Within human rights conventions, access to justice is conceptualized as one of the vital rights for human rights protection, protected via the right to seek a judicial remedy before an independent court of law[5] and the right to an effective remedy,[6] also

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[1] C. Redgwell, 'Access to Environmental Justice' in F. Francioni (ed.) *Access to Justice as a Human Right* (2007) 153 at 155; See also J. Ebbesson, 'Public Participation' in: D. Bodanksy, J. Brunnee and E. Hey (eds) *Oxford Handbook of International Environmental Law* (2007) 685 at 701.

[2] J. Ebesson, 'Access to Justice at the National Level' in: M. Pallemaerts (ed.), *Aarhus Convention at Ten* (2011) 245 at 247.

[3] See particularly, F. Francioni, 'The Rights of Access to Justice under Customary International Law' in *Access to Justice as a Human Right,* above n. 2, 1 at 7-8.

[4] Idem at 1.

[5] E.g. Art 8 of the UDHR (1948), Art 6(1) ECHR, Art 25 ACHR.

[6] E.g. art 2(3) ICCPR and Art 13 ECHR.

referred to as fair trial or due process rights. Minimum standards for remedies under international human rights law include effective remedies and that they should provide fair and impartial justice; how these remedies are realized, i.e. via which domestic system of legal remedies this is achieved, is left to the states to decide.

2. Access to environmental justice

Traditionally, individuals were only entitled to file a complaint against States alleging that international obligations have been violated via the mechanisms as established within the human rights systems.[7] The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') is the first international instrument to address procedural human rights in an environmental context and conceptualizing access to justice as access to environmental justice for non-state actors.[8] The Convention stipulates minimum standards for access to justice relating to environmental decision-making by public authorities.[9] In general, they must be fair and equitable, timely, and not prohibitively expensive. They also must provide adequate and effective remedies and be carried out by independent and impartial bodies.[10] Access to justice in this context implies that the public should have access to a court or another independent and impartial review body to ask for review of potential violations of the convention on procedural grounds or on substantive grounds. The Aarhus Convention stipulates a prominent role for individuals or NGOs as members of the public to enforce the Convention in addition to the parties.[11] In international environmental law, NGOs play a crucial role in the implementation and compliance.[12] NGOs play a role via putting pressure on governments to release information and provide the public with information on environmental problems;[13] the Aarhus Convention provides the option for NGOs to enforce the Convention.

[7] M. Macchia, 'Global Administrative Law Compliance: the Aarhus Convention Compliance Review System' (2008) 4 *ERPL/REDP* 1317 at 1336-1337.
[8] (Aarhus, Denmark, 25 June 1998) United Nations, *Treaty Series*, vol. 2161, 447. Today it has 46 parties to the Convention. See for current status of ratifications, http://www.unece.org/env/pp/ratification.html.
[9] Article 3 (5) of the Aarhus Convention.
[10] Article 9 (4) of the Convention.
[11] E.g. Article 2(5) of the Aarhus Convention. See also ACCC in the case of Denmark, ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4 (29 April 2008) para 28: '…members of the public [are provided] with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective'.
[12] M.R. Goldschmidt, 'The Role of Transparency and Public Participation in International Environmental Agreements'(2002) 29 *Environmental Affairs* 343 at 347.
[13] Macchia, above n. 8 at 1334.

2.1. Access to Environmental Justice at the Level of the European Union

Considering that the European Union (EU) is since 2005 party to the Aarhus Convention,[14] NGOs may - in principle - request the courts of the European Union to review decisions falling within the scope of the Aarhus Convention with regard to compliance by the EU institutions. Therefore, the provisions of the Convention apply similarly to EU institutions as to (member) state institutions. One of the obstacles that NGOs face in enforcing the Aarhus Convention is the lack of legal standing at the level of the European Union. Several cases were initiated at the Aarhus Convention Compliance Committee (ACCC), both against individual member states of the EU as well as against the institutions of the EU. Access to environmental justice is regulated within the EU via the Aarhus Regulation[15] implementing the obligations for EU institutions to provide access to justice. Access to the European Court of Justice (ECJ) is regulated by article 263(4) Treaty on the functioning of the European Union (TFEU)[16] which stipulates that, for an individual in order to challenge the legality of acts of EU Institutions directly at the courts of the European Union, the act must be of direct and individual concern to them. The criterion of individual concern as interpreted most prominently in the *Plaumann* case[17] has been criticized severely for upholding a too restrictive approach[18] to access to the courts of the European Union for natural or legal persons. This approach of the ECJ can be seen as an extreme example of the impairment of rights doctrine.[19] NGOs must prove that a factual or legal situation '[differentiate them] from all other persons and by virtue of these factors distinguishes them individually just as in case of the person addressed.'[20] Considering that environmental NGOs request for review in order to defend values common[21] to all of us,[22] it seems impossible to meet the *Plaumann* criteria. This is further affirmed by the *Greenpeace case* in which the EJC stated that Greenpeace is:

[14] The European Union, one of the main negotiators in the drafting phase of the Convention joined the Aarhus Convention on 18 May 2005; See also J. Jendrośka, 'Public Participation in Environmental Decision-making' in Aarhus at Ten, above n 3, 93 at 94.

[15] Regulation No 1367/2006 (6 sept. 2006) OJ L 264/13 25.9.2006.

[16] Old article 230(4) EC Treaty. The wording has changed slightly with the Lisbon Treaty, whether this had led to substantial changed in approach by the ECJ is doubtful. See e.g. discussion in P. Craig and G de Burca, *EU Law*: Text, Cases and Materials (2012) at 490-512.

[17] *Plaumann & Co v Commission*, Case 25/62 [1963] ECR 95.

[18] See e.g. Justice and Environment, Access to justice in Environmental Matters (2010), available via http://www.justiceandenvironment.org; G. Betlem, 'Being "Directly and Individually concerned" the Schutz-Norm Doctrine and Francovich Liability' in N. Reich and HW Micklitz (eds.) *Public Interest Litigation before European Courts* (1996); T. Crossen and V. Niessen, 'NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door' (2007) 16(3) *Reciel* 332-340.

[19] Justice and Environment, Access to justice in Environmental Matters, above n. 19.

[20] *Plaumann & Co v Commission*, Case 25/62 [1963] ECR 95.

[21] See also Hey, who argued that 'system of public international law ... is still-equipped to address common-interest problems due to its reciprocal nature…' Further, adversarial and inter partes nature of judicial procedures may make in inadequate to consider environmental problems that transcend the interest of individual

> an association formed for the protection of the collective interest of a category of persons cannot be considered for the purposes of [article 230] of the treaty by a measure affecting the general interest of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually.[23]

The NGOs are practically barred from access to justice at the EU Courts. The problematic of this line of jurisprudence in relation to the Aarhus Convention requirements to access to environmental justice was subject to review by the ACCC after an NGO – ClientEarth – had filed a complaint on this matter. ClientEarth's complaint focused on the 'individual concern' requirement for standing before the Court of Justice of the European Union and thereby the lack of access to internal review.[24] The communicant alleged that there was a general failure by the EU to comply with provisions of the Convention on access to justice in environmental matters.[25] The Compliance Committee therefore had to examine whether the jurisprudence was in line with the conventional principles on access to justice in environmental matters.[26] Without deciding on (non) compliance, the Compliance Committee argued that, if the line of jurisprudence as set by the *Plaumann* case was going to be upheld by the European Court of Justice, it would lead to a violation of the Convention regarding access to justice.[27] Further, the Committee argued that the system of preliminary references did not seem to be an adequate complementary element to compensate the lack of standing for review at the ECJ in order to achieve access to justice in environmental matters. The European Union in it various submissions during the procedure before the ACCC clarified and defended the position taken by the EU on this matter.[28] The Commission argued that there was a sufficient system of internal review, and that additionally; there was a system of preliminary references which supplemented the internal review procedures. Further, the European Commission argued that the level of judicial protection offered at the EU was of equivalent protection to the European

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states. E. Hey, 'The Climate Change Regime: An Enviro-Economic Problem and International Law in the Making' (2001) 1 *International Environmental Agreements* 75, at 90-91. See also separate opinion Judge Weeramantry to International Court of Justice case*, the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep. 7.

[22] Crossen and Niessen, above n. 19.

[23] *Greenpeace Stichting Council v. Commission*, Case-231/95 ECJ 2 April 1998 [1998] ECR I-01651.

[24] ACCC, *communication ACCC/C/2008/32 (part I) concerning compliance by the European Union,* ECE/MP.PP/C.1/2011/4/add.1 (24 August 2011).

[25] Idem, para 3.

[26] Idem, paras 64-66. The cases before the EU Courts that are evaluated were initiated before the Aarhus Convention entered into force for the European Union. The Compliance Committee was therefore not in the position to examine whether the jurisprudence of the EU Courts is in violation with the Aarhus Convention, they can solely establish the approach taken in jurisprudence and to what extent that would result into a violation of the convention when the case law doesn't change once the Convention has entered into force and new cases are dealt with in the same matter.

[27] C*ommunication concerning compliance by the European Union*, above n. 25 at para, 87, 91, 94-95.

[28] The submissions of the European Community and the submissions of the communicant can be accessed via http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html.

Court of Human Rights – relying on the *Bosphorus case*[29] – in order to show the good human rights records of the EU.[30] These critiques of the ACCC do not stand alone. Already in 2002, AG Jacobs argued, in relation to the *UPA case,* that the reasoning of the ECJ in that the possibility for an individual to trigger reference for a preliminary ruling provided full and effective judicial protection for general measures was open to serious objections.[31] Nevertheless, so far, the ECJ has taken every opportunity to uphold the strict interpretation of the individual and direct concern criteria, also after the Aarhus Convention entered into force within the European Union legal order. In the *Lesoochranárske zoskupenie VLK case,* the ECJ argued that the provisions of the Aarhus Convention formed an integral part of the European Union legal order. This implies that the ECJ has the competence to give preliminary rulings concerning the interpretation of the Aarhus Convention, including the competence to define the community obligations and member state obligations under the Aarhus Convention.[32]

2.2. Diverging Interpretations of Treaty Obligations

One can imagine that conflicts of interpretation of obligations deriving from the Aarhus Convention might come up. Both the ACCC and the ECJ have the competence to adopt conclusions of non-compliance and interpret the treaty obligations deriving from the Aarhus Convention. The ECJ has the explicit competence to interpret the TFEU and applicable EU legislation. The ACCC does not have the explicit authority, but in order to examine the issue of compliance by the parties with the Convention it has to justify its finding with a correct interpretation of the Convention and what the legal obligations of the parties are.[33] What we see here is one Committee with an international environmental mandate and a Court of a regional economic integration organization (i.e. EU)[34] reviewing the same performance of the same parties to the convention with regard to similar obligations (often the same).[35] There is of course a chance that this might lead to conflicting interpretation of what is required for access to justice; however it begs the question whether this is a problem. The two parallel systems may come up with incompatible conclusions, or instead might result into 'synergies in compliance control, and further rather than impede the effectiveness of the access to justice

[29] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI
[30] This argument will be further discussed below, p 6-7.
[31] ECJ, Case C-50/00 *P Union de Pequenos Agriculturos v Council* [2002] ECR I – 6677, AG Jacobs para 102.
[32] ECJ, Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR nyr, para 30.
[33] Ebesson (2011), above n. 2 at 251.
[34] This is the definition used by the Aarhus Convention for the European Union (amongst others) to explain that the Convention is open for regional economic integration organizations to become a party.
[35] Ebesson (2011), above n. 2.

in member states'.[36] Some argue that it might result in a positive judicial dialogue which 'would also be in the interest of the Community.'[37]

2.3. In Search for Guidance: General Rules of the Law of Treaties

The European Union as party to the Aarhus Convention is under the obligation to ensure compliance with the Aarhus Convention. The ACCC said in the Belgium case in relation to role of (domestic) courts in complying with international treaty obligations:

> Although the direct applicability of international agreements in some jurisdictions may imply the alteration of established court practice this does not relieve a party form the duty to take the necessary legislative or other measures as provided by article 3(1) of the Convention.[38]

This line of argumentation follows general principles of international law on treaty interpretation, as described by the Committee review of compliance with the Convention is an exercise governed by international law.[39] According to Article 27 of the 1969 Vienna Convention on the Law of Treaties, a state may not invoke its internal (i.e. domestic) law as justification for failure to perform a treaty. As argued by the Committee, all the branches of government should make an effort to bring about compliance with an international agreement. When it is the legislation as a primary means for bringing about compliance, laws might need to be amended or new laws adopted to achieve it. Additionally, the judiciary branch 'might have to carefully analyze its standards in the context of a Party's international obligation, and apply them accordingly.'[40] The European Union in its submission also referred to this matter by stating that provisions of secondary Community must, as far as possible, be interpreted and applied in a manner that is consistent with those agreements, however:

> (…) an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system. Thus, the powers conferred on the Court of Justice by the EC Treaty may be modified pursuant only to the procedure provided for to that effect by the Community legal order.[41]

The question is therefore whether the EU – as argued in the submission before ACCC – can only revoke the *Plaumann* criteria by treaty provision amendments or whether the ECJ will instead reinterpret Aticle 263(4) TFEU in light of the criticism raised in order to comply with

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[36] Idem, at 252.
[37] A. Tanzi & C. Pitea 'Interplay between EU law and International Law Procedures in Controlling Compliance' 367 at 381 in *Aarhus Convention at Ten*, above n. 2.
[38] ACCC, *communication ACCC/2005/11 concerning Belgium* ECE/MP.PP/C1/2006/4/Add 2 (28 July 2006) para 43.
[39] Idem, para 41.
[40] Idem, para 42.
[41] Submission of the European Commission on behalf of the European Community, to be accessed via http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html.

the obligations arising from the Aarhus Convention. And if this was not enough, the story will soon get even more complicated, and another layer will be added.

2.4.Adding to the Complexity, a Third Layer on its Way

The European Union is in the process of acceding to the European Convention on Human Rights (ECHR).[42] This implies that the European Court of Human Rights (ECtHR) has the competence to assess the compliance of EU institutions with Article 6 of the ECHR (right to fair trial) and related Article 2(3) of the ECHR (the right to an effective remedy). The European Union in their submission has relied upon the presumption of equivalent protection in order to exemplify the level of protection for access to justice at the EU:

> Insofar as access to justice is a fundamental right, it may be useful to note that the European Court of Human Rights has acknowledged that the protection of fundamental rights by Community law, as regards both the substantive guarantees offered and the mechanisms controlling their observance, can be considered to be "equivalent" to that of the Convention system.[43]

However, an interesting case was decided by the ECtHR explaining that the presumption of equivalence protection depends on the facts of the case whether it can be applied to EU access to justice protection. In *Michaud*,[44] the ECtHR ruled that, considering that the French Supreme Court had not requested a preliminary ruling to the ECJ, nor had the ECJ any opportunity to examine the question, a presumption of equivalent protection could not be upheld.[45] In other words, time needs to tell how the access to justice obligations in relation to acts or omissions by EU institutions will be interpreted by the ECtHR and how the Court will situate itself in the judicial dialogue taking place between the ACCC and the ECJ.

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[42] See for current status, http://hub.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention see also the draft agreement on Accession of the European Union to the European Convention on Human Rights, which addresses the relation between the European Court of Human Rights vis-à-vis the European Court of Justice in contentious cases, similar matters.

[43] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, § 155, ECHR 2005-VI, para 155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.

[44] *Michaud v. France*, Application no 12323/11 (6.12.2012) ECtHR, (6 March 2013), see particularly para 115.

[45] Additionally the Court argued that directives in general offer wider room for manoeuvre by states. Idem, see also European Law Blog, 'On the Rocky Road to Accession: Final Draft of EU's Accession Agreement to ECHR Approved (April 12, 2013), available at http://europeanlawblog.eu.

3. Concluding remarks

This short editorial tried to identify the key problematic issues with regard to access to environmental justice in the EU Courts for NGOs and sketch the context in which the judicial and normative interaction is taking place on the concept of access to justice. The question remains whether and to what extent further interaction will take place between the various bodies, each of them given a different mandate, different legal systems, (slightly) different conceptualization of the concept of access to justice but, at the same time, dealing with similar issues. It will be interesting to see whether and to what extent common interest litigation by NGOs will be further conceptualized and institutionalized within the various legal systems and fields of law in light of the right to access to justice. The system in itself has potential to contribute positively to the enforcement and further development of access to (environmental) justice.