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PARTICIPATION OF FOREIGNERS IN ENVIRONMENTAL DECISION-MAKING & THE AARHUS CONVENTION

*Alon Jasper**

What role do foreigners have in national and subnational decisions? Do government and local authorities have a duty to consider their interests? Can foreigners demand information regarding an impending decision? Can they turn to the legal system for remedy? Which foreigners are part of the public involved? These questions are integral to many fields of governance, especially in the EU. They are most apparent in decisions of environmental importance where the impact of a decision, such as building of a dam in the Danube River, is of trans-boundary nature.

To answer the above-mentioned questions in the environmental context, I turn, in this paper, to The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Hereinafter the Aarhus Convention), the prominent international effort for implementation of procedural rights in the environmental context. By analyzing the various compliance mechanisms of the Aarhus Convention I argue that a trend over time of inclusiveness is evident. By focusing on the periodic implementation reports that are submitted by the parties to the convention, this paper gives an insight to the array of approaches countries adopt regarding varying types of foreigners (foreign citizens residing in the country; neighbors; down-streamers and foreign Environmental NGOs) and offers possible explanations to the approaches adopted by different regimes. Moreover, exploration of the convention compliance mechanisms offers insight to the ways the convention bodies' design and the convention framework enables coordinated learning that is inclined toward an inclusive stance regarding foreigners.

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INTRODUCTION

What role do foreigners play in national and subnational decisions? Do government and local authorities have a duty to consider their interests? Can foreigners demand information regarding an impending decision? Can they turn to the legal system for remedy? Which foreigners are considered part of the public involved? Do they have to show a stake in the matter? How can they realize those rights and express their interests? These questions are integral to many fields of governance, especially in the EU. A growing body of literature has recently argued that the interlocking, interdependent nature of our globalized world, with its diverse phenomena, has been accompanied by a normative and legal shift in – or struggle over – the dominant conception of sovereignty: from a property concept, according to which the right to exclude is considered a basic attribute of sovereignty, to an inclusionary-fiduciary concept which is manifested through,¹ *inter alia*, a change in the treatment – both procedurally and substantively – of foreigners.² Metaphorically, this is a change from seeing the world as made up of different mansions (countries) residing near each other to a view of the world as an apartment building where powerlines, water pipes and the staircase are all connected.

The idea that a normative shift has occurred (is occurring?) is being examined today in different domains of governance,³ and is of special interest in the context of the environment where the impact of a decision, such as building a dam on the Danube River, is of a transboundary – and even global – nature.⁴ This paper seeks to contribute to the transboundary-environmental discussion of responsibility toward foreigners by turning to The Convention on Access to

¹ Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L. L. 295, 295 (2013); also, see Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 270 (2015); EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016). For a critical analysis of the fiduciary notion of public law, see Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016).

² For the Global Administrative Law (GAL) outlook, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROB. 15 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L. J. 1492 (2006).

³ On the extraterritorial application of constitutions and the Israeli-Palestinian case, see Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question* 30 B. U. INTER. L. J. 135 (2012); On the question of a "responsibility to protect," see Monica Hakim, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247 (2014); on the prevention and intervention in cases of crimes against humanity, see W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT'L.L. 57 (2008); on transnational family law, see Daphna Hacker, *Divorced Israeli Men's Abuse of Transnational Human Rights Law*, 28 CAN. J. WOMEN & L. 91 (2016); on alien tort litigation in the U.S., see Dorin Lustig, *Three Paradigms of Corporate Responsibility in International Law: The Kiobel Moment*, 12 J. INT'L. CRIM. JUST. 593 (2014); for a discussion of intellectual property, see R. Neethu, *Sovereign trusteeship and multilateral protection of intellectual property rights*, 10 J. INTELL. PROP. L. & PRAC. 89 (2015); for some historical perspectives, see Volume 16(2) of *THEORETICAL INQUIRIES IN LAW* (2015).

⁴ For other work in the environmental context, see, among many, Alan Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 J. ENVI. L. 3 (2005); Jutta Brunnée, *International Environmental Law and Community Interests: Procedural Aspects* (forthcoming in Eyal Benvenisti and Georg Nolte, eds., *Community Obligations in International Law*, 2017).

Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (*hereinafter*: The Aarhus Convention), the most prominent international effort to implement procedural rights in the environmental context. By analyzing the various compliance and implementation mechanisms of the Aarhus Convention, this paper argues that in its context (a) in most regimes foreigners are given room to access information, challenge decisions in courts and, to a lesser degree, take part in decision-making; and (b) over time a cross-national trend of inclusiveness is evident in different regimes, which appears to apply – both in magnitude and in scope – first and foremost to access to information, but also to participation in decision-making and the ability to challenge decisions in courts. Furthermore, by focusing on the periodic implementation reports that are submitted by the parties to the convention, this paper offers an insight into the array of approaches that countries have adopted regarding foreigners and the types of "foreigners" who are taken into consideration. It argues that the parties' reports and the decisions of the Compliance Committee express a more comprehensive and substantive approach to foreigners' participation in comparison to the formal, textual demands of the convention, marking a near-consensus regarding the treatment of foreigners and affirming a normative shift in the commitment of sovereigns to foreigners.⁵

Moreover, the paper's exploration of the convention's compliance mechanisms offers insight into the ways the convention framework enables coordinated learning, and makes it possible to view the convention as an example of experimental regulation carried out between the national and supranational scales.

The paper consists of four parts. In Part I the Aarhus convention is introduced – with a focus on the notion of three pillars of public participation and its bodies and mechanisms. In Part II the place of foreigners in the text and compliance mechanisms of the Aarhus convention is explored. Parts III & IV are dedicated to discussing and explaining the phenomenon observed in Part II.

I. INTRODUCING THE AARHUS CONVENTION

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was signed in the Danish city of Aarhus on 25 June, 1998 by 39 countries from Europe, the Caucasus and Central Asia. It entered into force in October of 2001, and is administered by the United Nations Economic Commission for Europe

⁵ It will nonetheless be emphasized that the input from regulatory regimes is derived from the participating parties' reports and does not necessarily represent the actual treatment of foreigners, although it does represent the way the parties to the convention understand the expectations of them. On the broader question of compliance with treaties, *see* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); for a discussion in the environmental context, *see* Ronald B. Mitchell, *Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 893 (Daniel Bodansky et al., eds., 2007); on different European attitudes to compliance, *see* Gerda Falkner et al., *Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories'*, 46 EUR. J. POL. RESEARCH 395 (2007); and in an Eastern-Europe context, *see* Laszlo Szegedi, *The Eastern Way of Europeanisation in the Light of Environmental Policymaking?*, 2014 ELTE L. J. 117 (2014).

(UNECE).⁶ As of March 2017, there were 47 parties to the Convention including the EU,⁷ 35 parties to the Protocol on Pollutant Release and Transfer Registers (PRTRs),⁸ and 30 parties to the amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs).⁹ The convention is designed to promote protection of the environment through the establishment of procedural rights which enable the public to take part in decisions that have environmental aspects. It imposes upon the parties to the convention an obligation to take necessary steps to ensure the effectiveness of those rights. The underlying principles of this structure – the premise of the convention – can be traced back to article 10 of the Rio Declaration:¹⁰

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

In accordance with these principles, the convention adopts a procedural mindset that presumes that by creating adequate procedures, environmental issues will receive proper treatment. This mindset materializes through the three pillars of procedural rights: access to information; public participation, and access to justice.

A. THE THREE PILLARS OF THE CONVENTION

The first pillar is access to environmental information, grounded in Article 4 of the convention. Article 4(1) states that authorities should supply environmental information (as defined in Article 2(3)) upon request, without demanding that the applicant state his interest in the information, and should provide the information in the form requested (insofar as is reasonable). Articles 4(2)-(6) further detail specifications for withholding or limiting information. Article 5 goes a step further and demands proactive action by the parties to "collect and disseminate"

⁶ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

⁷ Monaco and Lichtenstein signed the convention but did not ratify, accept, approve or access it. *See* United Nation Treaty Collection, Chapter XXVII, 13, available at treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-13&chapter=27&lang=en#1.

⁸ Armenia, Bosnia & Herzegovina, Georgia, Greece, Italy, Montenegro and Tajikistan signed but did not ratify, accept or approve the Protocol. Albania, Israel, Malta and Slovakia did not sign the Protocol but ratified, accepted or approved it. *See* United Nation Treaty Collection, Chapter XXVII, 13.a, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-13-a&chapter=27&clang=en.

⁹ *See* United Nation Treaty Collection, Chapter XXVII, 13.a, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-13-b&chapter=27&clang=en.

¹⁰ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, ¶ 10, U.N. Doc. A/CONF. 151/26 (Vol. 1) (Aug. 12, 1992).

information in a way that assures that "information available to the public is transparent and that environmental information is effectively accessible."¹¹

The second pillar is public participation in decision-making.¹² This pillar is manifested in the convention in three ways: First, the parties must take necessary steps to enable the "public concerned" (including environmental NGOs)¹³ to respond to specific activities, such as permits, that are expected to affect the environment. Article 6 elaborates on this demand. Second, Article 7 demands that parties make appropriate provisions for the public to participate during the preparation of plans and programs relating to the environment.¹⁴ Third, Article 8 calls on the parties to promote effective public participation in executive regulations and other legally binding rules that may have a significant effect on the environment. It is of note that even though this demand is phrased as a nonbinding request (i.e., "shall strive to promote"), Article 8 is interpreted as a specific demand, so the burden of proof lies with the questioned party.¹⁵

The third pillar is access to justice. Article 9(1) demands that the parties ensure that any person who considers his or her request for information (under Article 4) to have been ignored or wrongfully refused has access to a review procedure before an independent and impartial body established by law. Article 9(2) demands that the parties ensure that members of the public concerned "having a sufficient interest" or "maintaining impairment of a right" have access to a review procedure before an independent and impartial body established by law to challenge the legality of a decision or act, subject to the provisions of Article 6 ("[and] other relevant provisions of this Convention."). Articles 9(3)-(5) set forth other mechanisms intended to ensure access to justice. In other words, access to justice is designed to generate adequate procedures – safeguards – to enable access to information and public participation.

B. CONVENTION BODIES

As might be expected of a late-20th century international treaty, the convention sets forth different bodies to achieve its aims. First, as mentioned above, is the governing body of the convention – the Meeting of the Parties (MoP). Over time, the MoP has established other bodies through which it works. Of the multitude of bodies enacted over time, those relevant to this paper are the Compliance Committee; the National Implementation Reports; Task Force on Public Participation in Decision-Making; Task Force on Electronic Participation; and Aarhus Centers.

¹¹ Article 5(2).

¹² For a discussion on different definitions of public participation, see Brigit Peters, *Towards the Europeanization of participation? Reflecting on the functions and beneficiaries of participation in EU environmental law*, 3 (Draft) (2014); F. Rauschmayer, *European Governance of Natural Resources and Participation in a Multi-Level Context: An Editorial* 19 ENVTL. POL'Y. GOV'T. 141, 142 (2009).

¹³ Article 2(5): "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

¹⁴ It is important to note that Article 6 & Article 7 form separate demands which consist of procedures of different substance: see THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 119 (2ND ed., 2014).

¹⁵ On the binding/unbinding nature of the verb "shall," see: Joseph Kimble, *The Many Misuses of Shall*, 3 SCRIBES J. LEG. WRITING 61, 62 (1992); BLACK'S LAW DICTIONARY 1407 (6th ed. 2006).

II. PARTICIPATION OF FOREIGNERS THROUGH THE AARHUS LENS

What place does the Aarhus Convention carve out for foreigners to participate in national and local environmental decision making? The question of procedural rights of foreigners is central to different aspects of law, such as private international law, investment law and labor law. It is a subject of particular sensitivity in the context of environmental issues. For example, decisions made in Kelheim, Germany regarding the Danube River will affect farmers in Austria and fishermen in Moldova much more than residents of Berlin, Hannover or Dortmund; a decision regarding the air quality in San Diego, California will impact residents – across the U.S.\Mexico border – of Tijuana, Mexico much sooner than it will affect residents of San Francisco, California. It is therefore expected, at least to some degree, that the interests and desires of foreigners will have some meaning and impact in environmental matters.

The Convention is a product of the Committee of Environmental Policy of the United Nations Economic Commission for Europe (UNECE), which since 1971 has promoted a "European" notion of environmental law. For that reason, the convention is likely to adjust per that notion and define its objects – the public and the public affected – through a broad, interest-bound formulation that transcends political boundaries, particularly regarding the formation of the EU in the same period.¹⁶

The Convention is also linked to a series of statements, treaties and directives that base procedures for decision making in a transboundary context (such as EIAs).¹⁷ Nevertheless, Article 10 of the 1992 Rio statement views participatory rights as given to "concerned citizens, at the relevant level." That is, the statement views the world as an onion composed of different layers of engagement and responsibility, where every person has rights correlating with "his" country's duties'.

Given this background, the paper proceeds to examine the role foreigners have in the working of the Aarhus Convention. This examination addresses different aspects of the convention. First, the Preamble and text of the convention are analyzed as the basic normative text from which different notions of foreign participation can be derived. Second – but most importantly – the paper focuses on the Compliance Committee's decisions and the national implementation reports. These two mechanisms provide an outsider an inside view of the convention over time. The bottom-up implementation reports combined with the top-down compliance reports outline gradual changes in what is expected of the parties to the convention and in the attitudes adopted by them. Third,

¹⁶ For a discussion regarding the European notion of democracy as involving the direct participation of the European public as a basis for its legitimation, see Peters, *supra* note 12, at 4-6.

¹⁷ The most relevant is the ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), adopted in Espoo, Finland on 25 February 1991. See Article 4 paragraph 2 to the convention. Also see Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive); Article 9 of the ECE Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention), adopted in Helsinki on 17 March 1992; ECE Convention on the Protection and Use of the Transboundary Watercourses and International Lakes (Water Convention), adopted in Helsinki on 17 March 1992.

other mechanisms of the convention are explored to better understand the particularities of foreign participation in the context of the convention.

A. PREAMBLE & TEXT

The few references to foreigners in the convention follow the outline sketched in the Rio Declaration where any deviation from citizenship-based rights is only general and vague. On one hand, the preamble to the convention asserts, among other declarations, "that every person has the right to live in an environment adequate to his or her health and well-being," and the duty "to protect and improve the environment for the benefit of present and future generations."¹⁸ In contrast to this inclusive idea of "every person" and "future generations," the following paragraph shifts to a statist, citizenship bound notion of rights and duties:¹⁹

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

As noted, even though the preamble sets forth a vision of an "Environment for Europe,"²⁰ it sets the "rights vs. duties" paradigm in alignment with the citizen-state relationship.²¹ However, Article 2 of the convention, which includes the definitions of the convention's terms, does not bind the terms "public" and "public concerned" to the concept of citizenship. The definition of the public as "natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups," remains open to interpretation.

The most explicit provision in the convention regarding foreigners is Article 3(9), a general provision, which states that all the convention rights will be given²²

without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Hence, not only are the terms "citizenship" and "nationality" not a part of the definition of "public," they are even explicitly forbidden as a basis on which to distinguish and discriminate between different persons.²³

The interpretation of Article 3(9) as representing an inclusive worldview is strengthened by the negotiations and draft preceding the convention. The earlier version of the article (numbered 3(1)(a)) stated "without discriminating on the grounds of citizenship, nationality or domicile or

¹⁸ Preamble to the Aarhus Convention, par. 7.

¹⁹ *Id.* Par. 8.

²⁰ *Id.* Par. 24.

²¹ Aarhus Convention, Article 1.

²² U.N. ECON. COMM'N OF EUR, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 47 (1st ed., 2000).

²³ However, as will be further elaborated, this provision is still open to limiting, excluding interpretation. The Macedonia 2005 implementation report's answer to question 7 is a good example of this kind of approach: "Finally, the Law is based on the principle of non-discrimination. According to the Constitution, citizens are equal in enjoying rights and freedoms, irrespective of sex, race, skin colour, national and social origin, political and religious conviction, property and social status. Citizens are equal before the Constitution and the laws."

any other ground". The Convention Implementation guide, published in 2000, sheds some light regarding the formation of this article:²⁴

Although the public is defined without respect to citizenship and other international instruments have also talked in terms of the "any person" principle in the context of environmental protection, it was considered necessary to expressly address non-discrimination in a forceful way in the Convention. This was in part due to the legacy of authoritarianism in some countries, where discrimination on the basis of citizenship, nationality or domicile was the norm with respect in particular to access to information. During the negotiations the reluctance of some countries to accept a principle of non-discrimination in fact led to a more forceful posture by the majority of countries, which considered this to be non-negotiable. In the end, a quite clear and simple provision emerged. It should be noted, additionally, that this provision is potentially useful to domestic persons in cases of positive discrimination in favor of foreign entities.

Most of the Convention's articles are dedicated to the "public concerned," addressing the public with an interest, stake, or even "adequate interest" in the decision at hand. The question of "interest" highlights the distinct features of the convention's pillars. Access to information is specifically framed so as to forbid parties from demanding that an applicant state or prove an interest when asking for information.²⁵ A similar approach is expressed regarding access to justice that is granted to "any persons" following a denied information request. On the other hand, access to justice following participation in decision making is granted only to "members of the public concerned" with an "adequate interest."²⁶ The question of this adequate interest is not explored in the convention's text, leaving a *prima facie* broad discretion – via an interpretive space – to the parties whether to include or exclude foreigners.

In summary, the convention's text provides ground for the inclusion of foreigners, but only in broad terms and without clear and concrete content: Which provisions are relevant to foreigners? What kind of foreigners are entitled to participate? What constitutes "discrimination" and what constitutes a relevant difference? Are there any positive – "to do" – duties of the parties in this regard? All these questions remained unanswered in the convention's text and were left to the parties – and the convention bodies – to answer in due time.

B. THE COMPLIANCE COMMITTEE

Article 15 of the convention demands that the parties establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the

²⁴ Draft elements for the Convention on Access to Environmental Information and Public Participation in Environmental Decision-making, CEP/AC.3/R.1 (11 April 1996), available at www.unece.org/env/pp/adwg.html. Article 6(4) of the draft which is about access to justice is phrased in a similar manner.

²⁵ Article 4(1)(a) of the Aarhus Convention. There are restrictions to the article, see Article 4(3) & 4(4). The restrictions are highly compatible with excluding foreigners and include reasons such as national security and international relationships.

²⁶ On the difficulties with regard to question of standing, *see*, for example, Karel Relve, *Influence of Article 9 (3) of the Aarhus Convention on Legal Standing in Estonian Administrative Courts*, 16 JURIDICA INT'L 176 (2009).

provisions of this Convention." In 2002, the first MoP adopted decision I/7, thereby forming the convention's Compliance Committee. There are five eventualities whereby this committee convenes: ²⁷(i) on request by the MoP (ii); by a party submission of reservations regarding compliance of another party; (iii) by a party submission of reservations regarding its own compliance; (iv) by referral of the Secretary of the committee; or (v) by communication from members of the public. The committee's mandate enables it to recommend varying steps to the Meeting of the Parties. As of December 2016, the Compliance Committee received 149 communications from members of the public, two submissions by parties regarding other parties, one request from the MoP, one submission from a party regarding its own compliance, and no referrals from the secretary. Out of those 153 cases, the committee prepared 54 reports and the MoP adopted 32 decisions. Of those decisions, four were related to foreigners' rights.

In the case of Ukraine from 2004, the committee found that generally foreign and international ENGOs are to be considered as members of the public even if their center of activity and place of registration is outside the country. ²⁸Moreover, in this specific case the committee acknowledged the ENGO as part of the public concerned, ²⁹and found that Ukraine's disregard (i.e., its failure "to provide for proper notification and participation") of Romanian citizens in a decision regarding the Danube River violated their right to information and even affected their right to participate according to Article 6 of the convention. The committee also noted "that, generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making." In other words, even though Ukraine had a specific obligation towards the Romanian public – which they knew wanted to participate, and had the option of doing so through the Romanian authorities – and the committee found Ukraine to be in noncompliance due to disregarding that obligation, it did not assert any general-strict requirement to involve foreigners in decision making. However, the decision called for "such guidance [...] in particular, in cases where there is no requirement to conduct a transboundary EIA." ³⁰

In another decision, in 2005, Turkmenistan was found to be in noncompliance with Article 3(9) of the convention due to its Act on Public Associations, which set up a regime that had the effect of limiting the participation rights of ENGOs, especially foreign and international. ³¹The decision was followed by legislation in Turkmenistan that lifted most of the obstacles to ENGOs, ³²and by 2014 the MoP acknowledged the progress of the Turkmenistan legislation and found it in compliance with Article 3(9). However, further legal reforms were recommended, all aimed at

²⁷ U.N. ECON. COMM'N OF EUR, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 9 (2nd ed., 2013).

²⁸ CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004-2011) 14 (A. Andruskevych, T. Alge, C. Konrad eds., 2011); Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 26 (hereinafter: The Ukraine Case)

²⁹ *Id.*

³⁰ *Id.* at § 28.

³¹ AARHUS CASE LAW, *supra* 28 at 21; Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 16; THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 65 (2nd ed., 2013).

³² AARHUS CASE LAW, *SUPRA* 28 AT 129.

enabling foreigners and "persons without citizenship" to be included through the concept of "natural persons."³³

The most recent case dealing with foreigners rights' is the 2016 case of the Czech Republic, regarding the construction of a nuclear power plant near the village of Temelín, CZ (60 km. from the German border).³⁴ In that case the committee found that:³⁵

Though the Convention does not expressly address a Party's responsibilities when organizing a public participation procedure in a transboundary context, it nevertheless makes clear that, for all decision-making subject to article 6, the Party must ensure that the public concerned is informed in an adequate, timely and effective manner. The Committee notes that the Czech Ministry of Environment gave clear instructions to the German authorities on how to notify the public in Germany [...] and that these instructions were consistent with the means of notification envisaged for notifying the public in Czechia. Nevertheless, the Committee is not convinced that these instructions were sufficient to ensure effective notification in the transboundary context.

The committee also recommended that the Czech Republic provide the necessary arrangements to ensure that "When conducting transboundary procedures in cooperation with the authorities of affected countries, the competent public authorities [will] make the necessary efforts to ensure that the public concerned in the affected countries."³⁶ An interesting notion that arises from this case is that even though the Czech Republic implemented its commitment to the German public through the German authorities, it was deemed to remain responsible with regard to the concrete means of notification used. This decision can be seen as breaking away from the classic "black box" nature of sovereignty, which ostensibly should have forestalled the Czech Republic from concerning itself much with the "instructions" given to the German authorities and the concrete ways in which the German authorities informed their citizens. In a way, in its decision, the

³³ ECE/MP.PP/2014/2/Add.1, Decision v/9I on Turkmenistan, § 6.

³⁴ A similar case is the Slovakia case in which an Austrian NGO (Global 2000/Friends of the Earth Austria), together with other NGOs claimed that Slovakian authorities restricted the standing of the communicants to challenge decisions with regard to the Mochove Nuclear Power Plant. The committee found Slovakia to be in noncompliance with regard to the opportunity of early public participation, yet did not directly discuss the question of foreign ENGOs or people of other countries. See ECE/MP.PP/2011/11/Add.3.

³⁵ ECE/MP.PP/C.1/2017/3, Findings and recommendations with regard to communication ACCC/C/2012/71 concerning compliance by Czechia, par. 71. The findings and recommendations of the committee will be brought before the MoP only in Sep. 2017.

³⁶ *Id.*, par. 117. It should be noted that another case regarding the Czech Republic dealt with building permits and restrictions on NGOs through the definition of the public concerned. Even though the case did not deal directly with foreigners, the Czechs explicitly mentioned their intention of including foreign entities in their 2013 correspondence with the committee: "[T]he public concerned (including foreign entities) will have the opportunity to take part in proceedings on an environmental authorization and, after this, they will have the right to challenge only that authorization in court. Besides legal persons, including foreign entities, who meet the criteria in question, the definition of 'public concerned' will include those natural persons who may be affected by a project." MINISTRY OF THE ENVIRONMENT OF THE CZECH REPUBLIC, PROGRESS REPORT ON IMPLEMENTING COMMITTEE'S FINDINGS AND RECOMMENDATIONS 2 (Sep. 12, 2013) available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/50TableCz.html>.

committee regarded the German authorities not as a sovereign responsible for its own actions, but as a technical instrument of the Czech Republic in pursuing its responsibility toward foreigners.

On the other hand, in a 2014 case regarding Romania it was alleged that the Romanian authorities, by refusing to provide an English translation of a proposed national "energy strategy," discriminated against foreign members of the public. Yet the committee found that "While article 3, paragraph 9, is intended to prevent not only formal discrimination but also factual discrimination, this provision cannot be interpreted as generally requiring the authorities to provide a translation of the information into any requested language."³⁷

In summary, the Compliance Committee's work highlights two groups of foreigners – people of neighboring countries and foreign ENGOs – who are expected to be able to take part in environmental decision making. Moreover, whereas in 2004-2005 parties to the convention had sought to exclude foreigners while the convention's bodies affirmed a commitment to foreigners, by 2014-2016 it was taken for granted that a party is expected to treat foreigners in much the same way as it treats its citizens, and the question that remained disputed was only the magnitude of the obligation.

C. IMPLEMENTATION REPORTS

Decision I/8 was adopted by the first MoP of 2002 and constructed a mechanism of periodical National Implementation Reports (NIRs) which are submitted by each party prior to every MoP. The NIR is an important communication medium between the convention's parties and is considered central to ensuring compliance and implementation of its requirements. The NIR is comprised of 37 questions of four types: general questions (questions 1-6, and 32-37 regarding the annex to the convention); access to information (questions 7-14); public participation (questions 15-27); and access to justice (questions 28-31). As of March 2017, four cycles of reports have been completed, and in each one at least 31 states have submitted reports, yielding a total of 156 reports.³⁸

In this paper, the implementation reports are used to facilitate a broad, cross-national review of the treatment accorded by different parties to varying types of foreigners. The findings are of two types: quantitative findings, which provide insight into the question whether parties regard foreigners at all, and in what context. The qualitative findings provide insight as to the exclusive/inclusive nature of the treatment. Due to the amount of data in the reports, the method I used to identify relevant answers was a keyword-text-search of the text, facilitated through the online reporting mechanism of the convention.³⁹ Each answer a party gave was coded as one of four types:

³⁷ (Romania ACCC/C/2010/51; ECE/MP.PP/C.1/2014/12, 14 July 2014, para.105.

³⁸ A fifth cycle was due by 15 Mar. 2017. As of the deadline, only 23 reports were available on the convention's website.

³⁹ apps.unece.org/ehlm/pp/NIR. The keywords were chosen after consideration of the convention's text and the compliance reports. A few reports were randomly chosen to be read in full and after 5 initial searches, the final word list was chosen: Foreign, Stateless, External, Alien, International, Non-citizen, Non-national, Resident, Residency, Nationality, Citizenship, Discrimination, Any person, Every person, Natural Person, Legal Person, Everyone, Stakeholder, Transboundary, State, Country. A small number of reports were not

- I. **Explicit reference** – Usually made using the terms "foreigners," "noncitizens" or "stateless." These are direct references to the treatment of foreigners – individuals and legal entities – as subjects of public participation. A typical explicit reference can be found in the Turkmenistan 2011 report: "foreign citizens enjoy the same rights and freedoms as Turkmen citizens."⁴⁰
- II. **Implicit reference** – Usually made using the terms "any person," "every person" and "everyone," these are indirect references that leave clear room for interpretation in favor of inclusion of foreigners.
- III. **Statist reference** – Usually made using the terms "state," "country" and "transboundary". These are references to the ability of states – not persons or other legal entities – to be involved in decision making. For example, the Macedonia 2008 report contained the following extract: "Where a foreign country so requests, [types of documents] shall be made available to the competent authority of foreign country, in accordance with the stipulated procedure."⁴¹
- IV. **No reference** – Inferred when no reference was found or when the text search produced results that were out of context such as "Ministry of Foreign Affairs" or "international forums."

I coded each answer as only one reference type, even when the requirements for multiple reference types were met in the same answer. In order of ranking, explicit references were the "trump," followed by implicit reference and statist reference. So when an answer could be categorized as both explicit and statist, it was coded as explicit. The "single tag" categorization method was chosen to simplify the research, but it is not devoid of reason because of the "scaled" nature of the categories chosen. In other words, an explicit reference to inclusion of foreigners renders an implicit one – made in the same answer – less important. The same can be said of statist references, which were of less importance when paired with references that related directly to natural/legal persons. In the coding process, 156 reports were searched, with a total of 5772 answers. In those answers, 409 references were found in total consisting of 113 explicit references, 282 implicit references and only 14 statist references.

1. General Findings

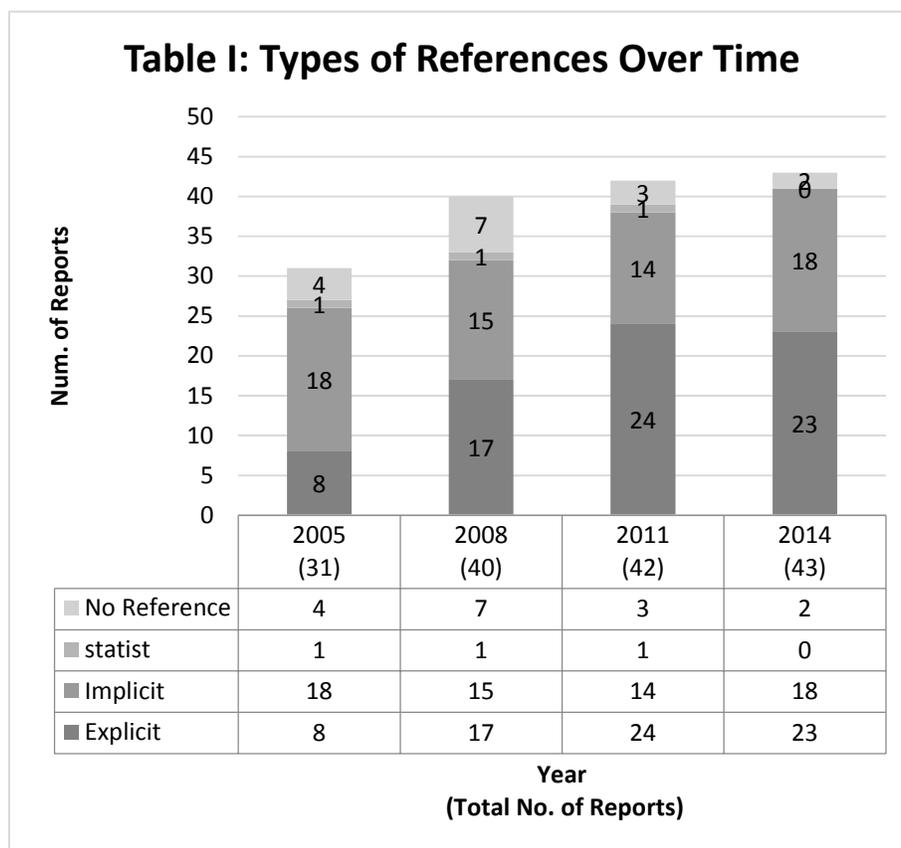
Out of the 44 countries (and the EU) submitting reports, only Slovakia made no reference to foreigners during the research period and only 16 other countries made no explicit reference. In other words, 28 reporting bodies (60%) made at least one explicit reference to foreigners' rights regarding environmental decision making.

available through the online mechanism and were searched through in .pdf and .doc formats. Six reports were found only in a Russian version. I thank Ilya Goldstein for his most valuable help with those reports.

⁴⁰ See *infra*, note 52.

⁴¹ See *infra*, note 56.

As



summarized in Table I, the first reporting cycle of 2005 included 8 reports (25%) containing at least one explicit reference; 18 reports (58%) containing no explicit reference and at least one implicit reference; one report with only a statist reference; and 4 reports that featured no references to foreigners at all. In contrast, the 2014 reporting cycle provided 23 reports (53%) with explicit references; 18 reports (41%) with implicit references; no reports with only a statist reference; and only two reports with no references to foreigners.⁴²

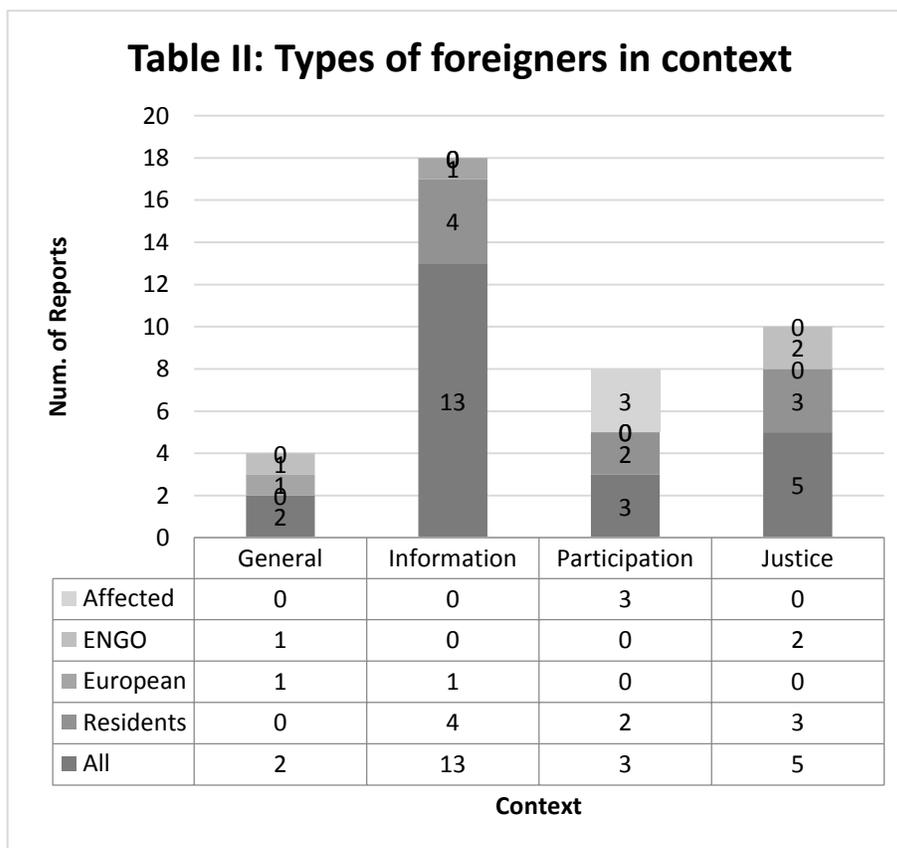
Not only has the number of reports containing references to foreigners increased over the years, and those references have become more explicit, but also the scope of references has broadened. In 2005, only four countries explicitly mentioned foreigners in more than one answer to the questionnaire; in 2014, 11 countries did so. Moreover, the average of answers-with-references per report rose from 2.22 in 2005 to 3.02 in 2014. The most evident shift was in the frequency of explicit references, which rose from a 0.41 ratio (some reports contained more than one explicit reference) to 0.88, hence more than doubling even though many more reports were submitted in the later cycle. In other words – from a quantitative perspective, parties to the convention gave

⁴² Out of the 29 countries that reported in both 2005 and 2014, 8 countries featured a shift from implicit to explicit; 2 a shift from no reference to implicit; and one from statist to implicit. In other words, the trend of inclusiveness is evident even in the set of the 2005 reporting countries.

foreigners much more "room" in their implementation reports that is evident across different measurement methods.

2. Types of Foreigners

What kinds of foreigners are explicitly referenced? The implementation reports reveal 4 types of foreigners: (i) affected foreigners – persons who are placed outside the decision-making country and are likely to be affected by the decision; (ii) European citizens – citizens of the EU or the EEA Agreement; (iii) foreign NGOs; and (iv) foreign residents of the decision making countries. Table III summarize the number of countries that made an explicit reference to foreigners in a specific context (general; information; participation; justice). The 'all' category regarding types of foreigners applies when the explicit reference was made in a general inclusive way.



What Table II immediately makes evident is that most countries – in every context and mainly in the information context – made explicit reference to all kinds of foreigners, without differentiating between them. While some of those references were made in adherence to the convention's wording of antidiscrimination

with regard to nationality and residency,⁴³ others employed very inclusive lists of foreigners.⁴⁴

⁴³ For example, *see* Answer n. 7 of the Denmark, 2008 report: "The Environmental Information Act stipulates that everyone is entitled to the right consequential upon the Act. The Act therefore ensures that there is no discrimination on the grounds of residency, nationality, etc."

Regarding the different types of foreigners, the most prevalent is the residents group: people who reside in the territorial boundaries of the decision-making country. Foreign residents (either foreign citizens or stateless persons), are referenced in a different context, signifying the importance of the territorial paradigm of sovereignty.

The second most prevalent type is affected people. That is – people who live in other countries and are expected to be affected by the decision at hand. Two interesting remarks are due. First – the affected class of foreigners is noted only in the context of participation, echoing the framing of the participation pillar through the wording of "concerned" and "interest." Second, the parties do not distinguish between classes of affected people: there is no special emphasis on shared resources or special relationships such as the "downstream" type of foreigners. This convergence of classes of foreigners is related to the Convention on Environmental Impact Assessment in a Transboundary Context, otherwise known as the Espoo Convention, which also does not distinguish between classes of affected foreigners and had an impact on the Aarhus Convention.⁴⁵

Two other types of foreigners that are explicitly mentioned are ENGOs and European (EU/EEA Agreement) citizens. Reference to those groups is not surprising. As discussed regarding the Compliance Committee, the inclusion of ENGOs lies at the same time at the core of the convention and at the heart of legal disputes regarding standing, particularly of foreign ENGOs. References that detail the status accorded to foreign ENGOs therefore come as no surprise. European citizens are also expected to be referenced, given the broad "European" notion of the convention.

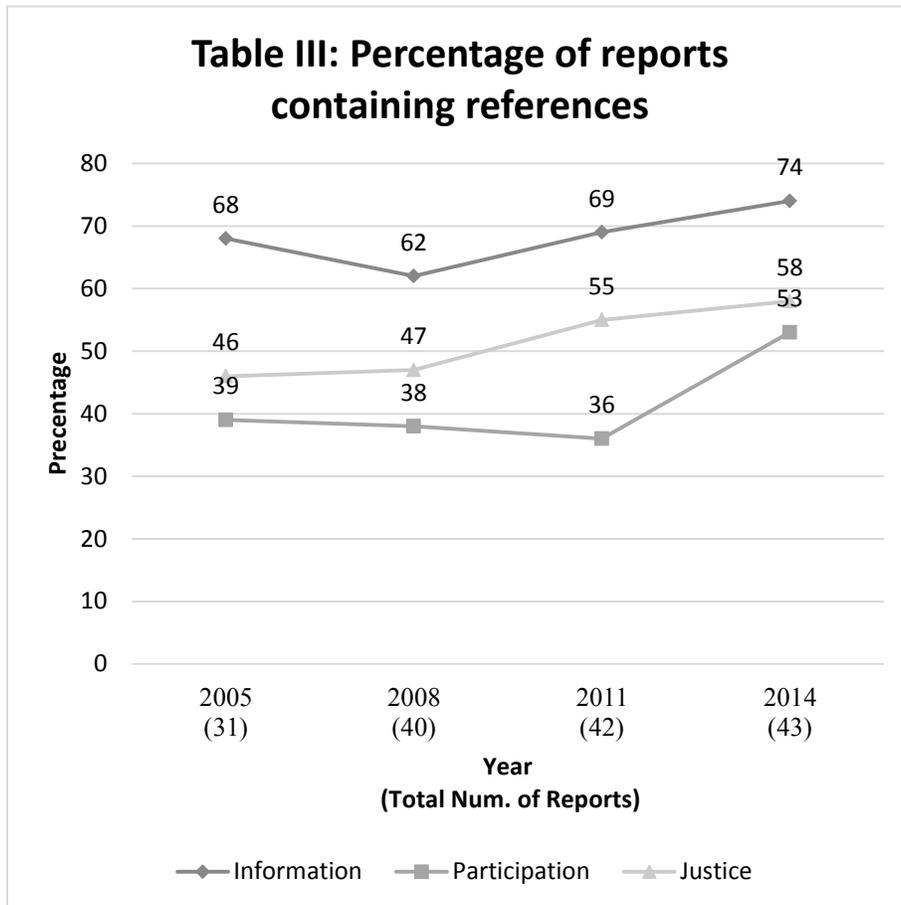
3. *Different Pillars – Different Treatment*

A key observation with regard to Table II is that the parties' reports differentiate between the three pillars of the convention. This theme is further explored in this section. As shown in Table III, there is, over time, a visible change in the context of the references. While the percentage of references (explicit, implicit and statist) in the context of access to information was high and more or less steady throughout the four reporting cycles, a shift in references in the context of

⁴⁴ For example, see Answer n. 7 of the Kyrgyzstan, 2011 report: "Under the Law on Access to Information and the Instructions on Completing Forms, the 'requesting individual' is a citizen of the Kyrgyz Republic or a legal person independent of its form of ownership and type of organisation, or its subsidiaries or representative offices. Foreign citizens and stateless persons, legal persons of foreign states, their subsidiaries and representative offices also enjoy the right of access to information"; Montenegro, 2014, Answer n. 7: "Every domestic and foreign natural or legal person is entitled to access the information without obligation to state the reasons and explain the interest of seeking information."

⁴⁵ For more on this subject, see *infra*, at part II.D.2.

participation in decision making is observable between the first three cycles (that featured references at around 39% of the reports) and the 2014 cycle, which featured a 53% peak in that context. A similar but more gradual rise is observed in the context of access to justice – rising from 45%, through 47% and 55% to the current (2014) 58% record high.



i. Access to information

As can be seen in Table III above, the main context of references to foreigners is access to information. Even in the first reporting cycle of 2005 most of the reports (22 of 31) contained some kind of reference to foreigners in the information context. Although a noticeable drop in the implicit references rate was observed in the second reporting cycle, the occurrences of explicit references almost doubled. The third and fourth reporting cycles included a steady amount of explicit references and a slight rise in implicit references and in the total amount.

As mentioned above, explicit references to foreigners in the context of access to information are made in a broad manner with no demand of affinity to the state or the specific decision. For example, in 2014, Montenegro provided the following text as part of an answer to question #7 (the central question regarding access to information):

Every domestic and foreign natural or legal person is entitled to access the information without obligation to state the reasons and explain the interest of seeking information.

Montenegro's approach is similar to those of other countries such as Croatia, Kazakhstan, Kirgizstan, Norway and Sweden.⁴⁶ On the other hand, Finland and Bulgaria acknowledge the right to information only in the scope of national territory and jurisdiction – with no regard to status of citizenship:⁴⁷

The Constitution (731/1999) guarantees basic rights and liberties to everybody living under Finnish jurisdiction regardless of whether they are Finnish citizens or not. These basic rights include the right to access to information, public participation in decision-making and access to justice in environmental matters.

⁴⁶ Croatia, 2008, answer #11: "The non-discrimination requirement arises from the definition itself which reads as follows: 'A person entitled to receive information is any domestic or foreign physical or legal person requiring access to information.'"

Kazakhstan, 2005, answer #7: "Under the Information Act, individuals and corporate bodies in Kazakhstan have the right of free access to publicly available State information resources. [...] This right applies not only to citizens of Kazakhstan but also to stateless persons and foreigners."

Kirgizstan, 2011, answer #7: "foreign citizens and stateless persons, legal persons of foreign states, their subsidiaries and representative offices also enjoy the right of access to information."

Norway, 2005-2014, answer #7: "These rights apply to any person who wishes to obtain information from a public authority, regardless of their nationality, domicile or citizenship, or in the case of a legal person who is seeking information, regardless of where the registered seat of an undertaking is located."

Sweden, 2008-2014, answer #7: "The constitution guarantees every citizen freedom of information. Foreign citizens are equated with Swedes (chapter 2, article 22, second paragraph, point 1 of the Instrument of Government and chapter 14, article 5, second paragraph, of the Freedom of the Press Act)."

⁴⁷ Finland, 2005 & 2014, answer #7: "Hence, the right to access to information, public participation in decision-making, and access to justice is possessed by every person within Finnish jurisdiction without any connection to nationality."

Bulgaria, 2005-2008, answer #19: "[...] Article 26, para. 1, of the Constitution states that: 'The citizens of the Republic of Bulgaria, wherever they are, have all rights and obligations referred to in this Constitution. (2) The foreigners who are residents in Republic of Bulgaria have all rights and obligations referred to in this Constitution with the exception of those rights and obligations for which the Constitution and the Law require Bulgarian citizenship.'"

"According to the Access to Public Information Act (art. 4, para. 1), 'Any citizen of the Republic of Bulgaria is entitled to access to public information subject to the conditions and the procedure set forth in this act, unless another act provides for a special procedure to seek, receive and impart such information; (2) Foreign citizens and individuals with no citizenship shall enjoy the right under paragraph 1 in the Republic of Bulgaria; [and] (3) Legal entities shall also enjoy the right under paragraph 1.'"

Bulgaria, 2011-2014, answer #19: "[e]very citizen of the Republic of Bulgaria is entitled to access to public information on the terms and conditions set out in this Act, unless another law provides for a special procedure to seek, receive and disseminate such information. (2) Foreign nationals and stateless persons in Bulgaria shall enjoy rights under par. 1."

An explicit yet reserved reference to foreigners is found in the Serbian reports, recognizing Serbia's duty to refrain from discrimination with the exception "of the rights granted exclusively to the citizens of the Republic of Serbia."⁴⁸ Serbia's reports do not mention whether those "exclusive" rights are political rights with an inherent connection to citizenship or the exception applies, or could apply, to other rights.

Over time, several countries have changed their reported treatment of foreigners. In 2005, Lithuania referenced foreigners in an implicit, minor way:⁴⁹

The applicant is one or more natural persons or legal persons or companies without legal personality. It is intended to introduce the term "the public" (replacing the "applicant") in the new wording of Government Resolution No. 1175 which will be identical to the definition found in the Convention.

In contrast, in 2011 Lithuania referenced foreigners in an explicit way that clarified which foreigners – those who are residents of Lithuania or EEA Agreement citizens – have the right to access information:⁵⁰

Applicant means a citizen of the Republic of Lithuania, a citizen of a country that has signed the European Economic Area Agreement, a foreign national having a residence permit in the Republic of Lithuania or a group of these persons, a legal entity of the Republic of Lithuania, legal entities or other organizations registered in a country that has signed the European Economic Area Agreement or representative offices and branches thereof established in the Republic of Lithuania.

The most drastic change was observed in Turkmenistan's reports. As reviewed above, the Compliance Committee found in 2005 that Turkmenistan is in a state of noncompliance with Article 3(9) of the convention because its national law deprived noncitizens of access to information.⁵¹ Following that decision, Turkmenistan changed its laws and accordingly its 2008 and 2011 reports laid emphasis on its treatment of foreigners:⁵²

Under the Constitution and the legal system of Turkmenistan, citizens, and also foreign nationals, enjoy the right to have access to and to receive information, including environmental information. [...] foreign citizens enjoy the same rights and freedoms as Turkmen citizens, including access to information, in particular information on the environment. [...] The procedure for consideration of communications from citizens [...] foreign nationals and stateless persons have the same right to submit applications as Turkmen citizens.

⁴⁸ Serbia, 2011-2014, answer no. 7.

⁴⁹ Lithuania, 2005, answer no. 7.

⁵⁰ Lithuania, 2011, answer no. 7.

⁵¹ See *supra* 31.

⁵² Turkmenistan, 2008-2011, answer no. 7. Turkmenistan did not submit a report in 2014 for reasons unknown.

ii. Public Participation

Foreigners were also mentioned in the context of public participation. In the 2005 reporting cycle, 13 reports contained references to foreigners in the context of public participation, of which only two were explicit. The amount and rate of references gradually rose, with the 2014 cycle reaching the 50% mark for the first time, consisting of 17 implicit, 6 explicit and 4 statist references.

Some reports feature a broad, highly universalistic and inclusive approach to public participation of foreigners, requiring no unique affinity to the state or specific environmental decision. For example, the 2011 and 2014 Italian reports contained the following passage:⁵³

To be an Italian citizen is not a requisite in order to participate to [in] the consultations, so the principle of non-discrimination is guaranteed.

The Italian approach is similar to that of other countries such as Azerbaijan, Czech Republic and Romania.⁵⁴ A different prevalent approach, however, is to limit participation rights on territorial grounds and not based on citizenship, so that foreigners who reside or work in a given territory are allowed to participate, but residents of other countries remain excluded.⁵⁵

⁵³ Italy, 2011-2014, answer no. 19.

⁵⁴ Azerbaijan, 2011, answer no. 15: "Citizens, stateless persons and foreigners have the right: to address state authorities and organizations about environmental protection; to advance proposals regarding public state environmental reviews [...] to participate in making decisions that have an effect on public health and the environment [...] Citizens and public associations also have the right to submit proposals to state and local self-government authorities (article 7 of the Environmental Security Act)."

Romania, 2011-2014, answer no. 19: "Art. 9 (1) and (3) of the GD 564/2006 stipulates that the public authority shall take into account the outcome of the public participation and shall inform the public accordingly. [...] any natural person without discrimination as to citizenship, nationality and domicile and in case of the legal persons, without discrimination as to where it has its registered seat or effective centre of its activities."

Czech Republic, 2014, answer no. 15: "General public including foreigners have a right of full participation in the EIA process: they have an opportunity to express their opinion either in the form of written comments or orally during public discussion."

Czech Republic, 2014, answer no. 16: "[T]he public concerned, which will be explicitly defined in accordance with the definition in the EIA Directive so that it includes not only domestic and foreign NGOs but also individuals who may be affected by the proposed intent, will be allowed to enter the procedure on the issue of an environmental permit and subsequently to challenge such permit at a court."

Czech Republic, 2014, answer no. 19: "In the Czech law, the requirement of the Convention is transposed into Act No. 100/2001 Coll., on Environmental Impact Assessment, in the regulation of the SEA process (transposition of Directive 2001/42/EC) [...] General public including foreigners have a right to participate in the SEA process."

In its 2005-2008 reports, Poland featured a similar approach: "It can be exercised regardless of age, citizenship, domicile, registered office and any legal or actual interest in the matter." See Poland, 2005-2008, answer no. 15. But its 2011-2014 reports changed to an implicit approach (with similar legal consequences): "[E]veryone has the right to submit comments and motions in the proceedings requiring public participation." See Poland, 2011-2014, answer no. 15.

⁵⁵ See Bulgaria, 2011-2014, answer no. 19.

A third approach to participation of foreigners is the statist approach. Some countries reported consultation with countries in accordance with the Espoo Convention,⁵⁶ while others mentioned it as a way to enable public participation of the public in affected states.⁵⁷

iii. Access to Justice

In the context of access to justice, the 50% mark was reached in 2011 with 16 implicit and 7 explicit references. The 60% mark was reached in 2014 with 17 implicit and 9 explicit references. Some countries restrict access to justice on territorial grounds or enable only foreign ENGOs to access the courts,⁵⁸ while others report no formal restriction.⁵⁹

⁵⁶ Macedonia, 2008, answer no. 15: "Where a foreign country so requests, items 2, 3, 4 and 5 shall be made available to the competent authority of foreign country, in accordance with the stipulated procedure."

Lithuania, 2011, answer no. 15: "When the economic activity proposed to be carried out within the territory of the Republic of Lithuania is likely to have a significant adverse effect for a foreign state, which is a party to the 1991 UN Convention on Environmental Impact Assessment in a Transboundary Context, or when this foreign state requires to perform environmental impact assessment, the public shall participate in the process of environmental impact assessment in compliance with this Convention, the Law of the Republic of Lithuania on Environmental Impact Assessment of the Proposed Economic Activity, treaties to which the Republic of Lithuania and the respective foreign states are parties, and other laws and regulations."

Lithuania, 2014, answer no. 15: "The drafter of the EIA documents shall submit to the competent authority a report and a reasoned assessment of proposals from the public concerned. Where a proposed economic activity is subject to transboundary EIA procedures under the Espoo Convention, the drafter of the EIA documents also submits a reasoned assessment of proposals from a European Union member state and/or foreign state likely to feel the adverse effect on the environment."

⁵⁷ Montenegro, 2011-2014, answer no. 19: "If implementation of a plan or a programme may have a negative impact on the environment of another country, or if another country whose environment may be significantly endangered requests so, the competent state administration authority responsible for environmental protection shall submit, in the shortest period and not later than the date its own public is informed, information about the plan or the programme to the other country for consideration within the procedure of participation of stakeholders and organisations and public."

⁵⁸ Tajikistan, 2005, answer no. 28: "Similar provisions can be found in the Radiation Safety Act, article 26 of which states that citizens, foreign citizens and stateless persons residing within the territory have the right to radiation safety."

Tajikistan, 2014, answer no. 28: "Similar rules are noted in the Law of the Republic of Tajikistan 'On Radiation Safety' (from August 1, 2003 number 42). Article 26 noted that the citizens of the Republic of Tajikistan, foreign citizens and stateless persons residing in the territory of the Republic of Tajikistan have the right to radiation safety."

Germany specifically makes references to foreign ENGOs and not to foreign citizens or states. *See* Germany, 2008-2014, answer no. 28: "domestic and foreign associations that are recognized pursuant to Section 3 UmwRG may, without needing to claim that their own rights have been violated, seek remedy under the Code of Administrative Court Procedure if the following conditions apply: the association must demonstrate that: (1) the contested decision by the public agency violates statutory provisions that protect the environment and could be of importance for the decision; (2) its remit of promoting the aims of environmental protection, as defined in its statutes, is affected by the decision; (3) it was entitled to participate in a procedure under Section 1 (1) of the Environmental Appeals Act and stated its opinion in that matter in accordance with the applicable statutory provisions or, contrary to the applicable statutory provisions, was not given an opportunity to state its opinion. [...] There is a special arrangement, in

D. FRAMING OF PARTICIPATION THROUGH THE CONVENTION'S MECHANISMS

One key feature of the Aarhus Convention is the variety and multitude of bodies whose work is dedicated to constant information gathering and processing: topical taskforces, the Aarhus Centres, which are oriented toward capacity-building, the periodical implementation reports and public-induced procedures of the compliance reports all demonstrate different aspects of the effort to gauge achievement. As demonstrated above, the Aarhus Convention adopted a strong antidiscrimination clause out of which, over time, an explicit commitment to foreigners has emerged. In the same period, other mechanisms of the convention have filled the concept of foreigners' participation with content and context.

1. Taskforce on Public Participation in Decision Making

The taskforce was established in 2010 by the MoP with the goal of improving the implementation of the Convention's provisions on public participation, including through sharing expertise and good practices, developing recommendations, strengthening civil society and building capacity for public authorities and other stakeholders. In 2014, the taskforce published the "Maastricht recommendations on promoting effective public participation in decision-making in

particular for foreign environmental associations, under which the satisfaction of the precondition specified in point 3 is presumed by statute."

UK, 2014, answer no. 28: "The UK treats any member of the public equally, regardless of nationality, citizenship and domicile. Any legal person has equal access to the courts. However, as set out in the consultation paper *Transforming Legal Aid: delivering a more credible and efficient system*, we believe that limited public funds for civil legal aid should be targeted at those who have a strong connection to the UK. The government has therefore proposed that applicants for civil legal aid should in future have to satisfy a residence test." It is interesting to note that the UK's stance has changed from being more inclusive in prior reports to its current somewhat exclusive posture. See UK, 2008-2011, answer no. 28: "treat any member of the public equally, regardless of nationality, citizenship and domicile. Any legal person has equal access to the courts." In similar fashion, the recent French report put much more emphasis on the importance of "legal interest." See France 2005-2011, answer no. 28: "French law is non-discriminatory (access to information, public inquiries, right to a remedy), and under the practice of the Council of State, non-resident aliens can bring proceedings in French courts"; and France, 2014, answer no. 28: "In French law, any natural person or legal entity substantiating a legal interest may obtain access to justice. This also covers participation and access to information."

⁵⁹ Croatia, 2014, answer no. 28: "Any person (citizen and other natural and legal person, their groups, associations and organisations) who considers that his request for information pertaining to environmental protection matters has been neglected [...] has the right to defend his rights before a court of law."

Romania, 2005, answer no. 28: "Romanian Constitution, article 21 (1) stipulates that any person can bring a case before a court of law in order to protect his/her rights, freedoms and legitimate interests."

Romania, 2005, answer no. 28: "[T]he applicant for environmental information may be any natural or legal person requesting environmental information, regardless of its citizenship, nationality or domicile, and in case of the legal persons, regardless of the place where they are registered or where the effective center of their activities is."

Montenegro, 2011-2014, answer no. 28: "Foreign citizens shall be relieved from paying costs when stipulated so by international agreement, and if such agreement is not in place, based on the condition of reciprocity."

Serbia, 2011-2014, answer no. 28: "[A]ny physical or legal, local or foreign person who considers that their rights have been violated by an act, action or failure to act of an administrative authority may file a complaint with the Protector of Citizens."

environmental matters," which contained a section titled "Participation of the public from other countries," listing the steps parties are encouraged to take in order to facilitate participation of foreigners – both those residing in the country and those who reside in other countries.⁶⁰ In accordance with the trend observed in the implementation reports, the document does not distinguish between foreign neighbors, down-streamers or those who share a resource.

The need to develop the scope and meaning of foreigners' participation was addressed by different speakers at the workshop meetings and in various contexts.⁶¹ For example, at the third meeting of the taskforce a representative of the Polish government presented the "practical experience" of transboundary public participation.⁶² Also, at its first meeting, three local NGOs' representatives argued for the importance of foreigners' participation. Mr. I Trombitsky, a representative for the Eco-Trias NGO of Moldova, argued that "Foreign colleagues' involvement and ECOs colleagues' solidarity in a letters campaign is the important tool to reach success," and that in countries "having a Plan of Cooperation with the EU provisions of such plan as well as EU environmental legislation can be used as an argument."⁶³ Similarly, Mr. Michael Ewing, a representative of the Environmental Pillar NGO of Ireland, argued that "a person doesn't have to be a citizen to be a member of the public,"⁶⁴ and Ms. T. Malkova, representative of the Green

⁶⁰ See comments on earlier drafts of the documents submitted by the European Commission, Armenia, Denmark, Germany, Austria, European Bank for Reconstruction and Development, Friends of the Irish Environment (NGO), Greenpeace (NGO), Struan Simpson (individual comment), Brigitte Artmann (individual comment) www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppppdm/ppdm-recs.html.

⁶¹ On the need to translate documents for minorities and foreigners, see Catalina Radalescu, The challenges of article 6 to effective public participation, presented in the Joint Meeting on public participation in environmental decision-making, focus on strategic environmental assessment, 29-30, Oct. 2012. Geneva, Switzerland. www.unece.org/fileadmin/DAM/env/pp/ppdm/Presentations/Centre_for_Legal_Resources_-_final_01.pdf. (representing the Center for Legal Resources, Romania); Elizabeth Smith, Stakeholder Identification: Voice and Agency, presented at the fifth meeting of the Task Force, 23-24 Feb. 2015, Geneva, Switzerland.

www.unece.org/fileadmin/DAM/env/pp/ppdm/5th_PPDM/Presentations/Elizabeth_smith.pdf. (Representative for European Bank for Reconstruction and Development, arguing for the importance of translation for minority and migrant groups); Jan Haverkamp - Priorities for implementation of the Aarhus Convention in the Nuclear Sector, presented in the Fourth meeting of the Task Force on Public Participation in Decision-making, 12-13, Mar. 2013, Luxembourg. www.unece.org/fileadmin/DAM/env/pp/ppdm/4th_PPDM/Jan_Haverkamp_Greenpeace.pdf (Representative for Greenpeace International, arguing both for the importance of standing of NGOs and transboundary notification of persons from other countries)

⁶² Piotr Otawski, Practical experiences of organizing public participation in SEA in transboundary contexts, presented in the Second meeting of the Task Force on Public Participation in Decision-making, 6-8, June 2012. Geneva, Switzerland.

⁶³ I. Trombitsky, Public participation in decision-making from a parliamentary perspective, presented in First meeting of the Task Force on Public Participation in Decision-making, 25-26, Oct. 2010. Geneva, Switzerland. www.unece.org/fileadmin/DAM/env/pp/ppdm/pres_trombitsky.ppt.

⁶⁴ Mr. M. Ewing, Public participation in environmental decision-making: Making Space for a Sustainable Future, presented in First meeting of the Task Force on Public Participation in Decision-making, 25-26, Oct. 2010. Geneva, Switzerland. www.unece.org/fileadmin/DAM/env/pp/ppdm/pres_ewing_ppdm.ppt.

Dossier NGO of Ukraine, emphasized the "importance of communication links between international – national – local (with a high role of task forces and international experts)."⁶⁵

2. *The Aarhus & Espoo Conventions*

An interesting feature of the Aarhus Convention's framework is its openness to other environmental endeavors, particularly to the Espoo Convention (the Convention on Environmental Impact Assessment in a Transboundary Context). This openness seems to be mutual and to have manifested in a series of procedures: from the Espoo Meeting of Parties' decision to identify synergies in 2004; through the Meeting of signatories to the SEA Protocol in 2005, the Aarhus workshop on public participation in strategic decision-making in 2007, and the 2011 workshop for the Mediterranean sea area; to the Maastricht Recommendations, the Espoo-Aarhus cooperation and mutual influence is clear and strong at all levels of activity. As both conventions operate in an "open" manner, a dual effect has emerged: the Espoo Convention has become more public-oriented (as opposed to official authorities-oriented) because of the Aarhus Convention,⁶⁶ while the Aarhus Convention has become more transboundary-oriented and its bodies more aware of the needs and wants of persons residing in "other countries."

3. *Aarhus Centres*

The Aarhus Centres are locally based and focused, but at the same time part of a wide international network of experts and stakeholders. As such, they are vital to raising awareness of the environmental impact of foreign – transboundary – decisions on communities, facilitating participation in those decisions, and generating good practice (or at least the impression of a positive experience) of foreigners' participation.⁶⁷ As active access points to an international network, the Aarhus Centres are reported to have been instrumental in enabling public participation in transboundary EIAs.⁶⁸ In one case, the Aarhus Centres in Chisinau (the capital of Moldova) and Bender (of the disputed territory of Transnistria) were instrumental in providing a platform for confidence building on both sides of the Dniester River.⁶⁹ In another case, the

⁶⁵ Ms. T. Malkova, Innovative approaches for involving the public, presented in First meeting of the Task Force on Public Participation in Decision-making, 25-26, Oct. 2010. Geneva, Switzerland. www.unece.org/fileadmin/DAM/env/pp/ppdm/pres_malkova.ppt.

⁶⁶ The United Nations Economic Commission for Europe (ECE) Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was adopted in Kyiv in May 2003 and is the central product of the mutual effects of the two conventions. *See*: UNECE, Resource Manual: to Support Application of the UNECE Protocol on Strategic Environmental Assessment 89 (2012); UNECE, Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context (2006); Mr. N. Bonvoisin, Public participation under the Espoo Convention and SEA Protocol, presented in First meeting of the Task Force on Public Participation in Decision-making, 25-26, Oct. 2010. Geneva, Switzerland. www.unece.org/fileadmin/DAM/env/pp/ppdm/pres_espoo_sea.ppt.

⁶⁷ OSCE, AARHUS CENTRES GUIDELINES 44 (2009).

⁶⁸ UNECE, FIRST REVIEW OF IMPLEMENTATION OF THE PROTOCOL ON STRATEGIC ENVIRONMENTAL ASSESSMENT (2010-2012) 7 (2015).

⁶⁹ ENVSEC, TRANSFORMING RISKS INTO COOPERATION 24 (2014).

Aarhus Centres were crucial in raising public awareness of environmental issues of the joint management of the Timok River basin by Serbia and Bulgaria.⁷⁰

The recent 2015 South-Eastern Europe regional roundtable identified transboundary water management as a major challenge for public participation and noted "a network of Aarhus Centres in neighboring countries" as one of the most promising approaches to tackling the issue.⁷¹

4. *Task Force on Electronic Information Tools*

Although not directly related, the adoption of electronic tools to request information, disseminate it, and directly participate in decision making processes has an important role in making foreign participation feasible. Within the scope of the Aarhus Convention, electronic participation is rooted in Article 5 paragraph 3, which demands that the parties gradually make environmental information available in an electronic form.⁷² The taskforce operated from 2002 to 2010, seeking to promote not only informational use of electronic tools but also electronic participation. The task force has set forth recommendations for the effective use of electronic tools and compiled a compendium of "good practice approaches" based on different parties' experience.⁷³

E. SUMMARY OF FINDINGS: MODELS OF PARTICIPATION AND TYPES OF FOREIGNERS

Over time, all but one of the reporting bodies mentioned foreigners in at least one report, and 28 did so in an explicit manner. There seems to be a near-consensus that foreigners have a right to take part in environmental decision making. However, as demonstrated above, foreigners' participation varies greatly by the types of foreigners and the specific manifestation of the participation. Four types of foreigners were referenced: (i) foreigners, including stateless persons, residing in the territory of the decision-making country; (ii) persons residing in neighboring or downstream countries who are expected to be affected by the impending decision; (iii) foreign and international ENGOs who enjoy a special status when the question of interest in the decision at hand is considered; and (iv) "European" citizens. Yet most references, especially in the information context, were made to "foreigners" in general. The variation in the references to those different types is relevant not only to different regimes but also to the different pillars of the convention. Thus, three models of participation are observed: an exclusionary, citizenship-based participation model where the sovereign is only accountable toward its own citizens; an inclusive, global, universal participation model where the sovereign is accountable toward every person

⁷⁰ Id., at 31. Also, the centre in Qurghontepa raised awareness of transboundary pollution. See OSCE, AARHUS CENTRES: FOCUS CENTRAL ASIA 4 (2009).

⁷¹ Regional Roundtable, Strengthening public participation in transboundary water management, exploring the synergies of Espoo, Helsinki and Aarhus Conventions, Tirana, Albania, 25-26 March 2015, Outcome Document.

⁷² The preamble to the convention also contains the following phrasing: "Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication."

⁷³ *Recommendations on the more effective use of electronic information tools to provide public access to environmental information*, ECE/MP.PP/2005/2/Add.4 DECISION II/3. Collection of innovative and good practice approaches in the use of electronic tools to implement the Aarhus Convention, E-tools workshop November 25-26, 2010, www.unece.org/fileadmin/DAM/env/pp/workshops/SEE-EITWorkshop2010/Presentations/ecollection_Tingas.pdf.

(natural or legal) that wishes to participate; and a hybrid model that is based on dual normative grounds: territorial sovereignty and responsibility toward those who are affected by its decision.

The first model is citizenship-based participation, which is incompatible with the nondiscriminatory requirements of Article 3(9) of the convention. Nevertheless, some reports reflect this exclusionary concept. In 2011, the only country whose reports contain no reference to foreigners – Slovakia – reported that "Article 3 paragraph 9 is guaranteed for the Slovak citizens by the Slovak Republic Constitution,"⁷⁴ i.e., guaranteeing nondiscrimination to Slovak citizens only. A more moderate approach can be found in Ukraine's and Turkmenistan's early reports and actions. Another manifestation of this model is in references to collaboration with and notification of other sovereigns (countries), reflecting the old "black box" conception of sovereignty. As reviewed above, these references were sparse, and usually accompanied by a reference to the public itself. As evident from the recent Czech Republic case, the black-box approach is thoroughly rejected by the Compliance Committee.

The second model, which is the most prevalent, is based on a concept of sovereignty whereby a country has a responsibility toward its citizens, toward those who are in its territory, and toward those who are affected by its actions. Under this model, a state requires foreigners (including stateless persons) residing in its territory or who will be affected by a decision of a transboundary nature to be considered part of the "public concerned." It seems that most regimes understand their obligations per the convention to include some kind of procedural commitment to various foreigners who are expected to be affected by a decision (residents, neighbors, and downstreamers).⁷⁵ This is especially true with regard to active participation in decision-making. Even though the Ukraine case opened some room for broad foreign participation and some reports are inclined towards that notion, the dominant point of view seems to be that foreigners can participate only when they are directly concerned by the decision at hand, i.e., directly affected by it. An interesting aspect of this model is the growing practice of making information widely available to the public and allowing the public concerned to identify itself.⁷⁶ This practice is strongly connected to two common trends: the translation of documents to the regional *lingua Franca* (mainly English and Russian), local minorities' languages and neighboring/downstream countries' languages, which is encouraged by the convention's bodies;⁷⁷ and the ever-growing use

⁷⁴ Slovakia, 2011, answer no. 7.

⁷⁵ In this regard, it is interesting to note that hardly any report explicitly mentioned corporations as subjects of participatory rights. One possible explanation could be the protection corporations already enjoy under international investment law, see RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 142-144 (2008).

⁷⁶ UNECE, FIRST REVIEW OF IMPLEMENTATION OF THE PROTOCOL ON STRATEGIC ENVIRONMENTAL ASSESSMENT (2010-2012) 7 (2015).

⁷⁷ But not necessarily mandated by the convention, as evident in the Romania Case. For reports of a right to translation, see Azerbaijan, 2008, answer #11: "The inquirer is entitled to demand a response to a written inquiry in one of the following forms or existing other forms: [...] To have the documents translated"; Finland, 2008-2014, answer #3: "Chapter 5 of the Act also includes provisions on parties engaging with the administrative authorities that do not know Finnish or Swedish, the official languages of Finnish authorities in accordance with the Language Act. In such cases, the authorities' duties are carried out through provision of translation and interpretation"; and answer #28: "Legal assistance in accordance with the Legal Aid Act (257/2002), Section 1, includes provision of legal advice, the necessary measures and representation before a court of law and any other authority and the waiver of certain expenses for the

of electronic means to disseminate information and enable participation, of special importance to people who reside at a distance from the place where the decisions are actually made and where the information is situated, which is true of many down-streamers.

The third global and universal model makes no differentiation between citizens and foreigners and views the "public" as any natural or legal person that wishes to participate in decision making. This approach is most prevalent with regard to access to information, but is apparent in the context of the other pillars as well.⁷⁸ This model is manifested not only in explicit references to foreigners, but also in implicit ones that grant participatory rights to "everyone" or "any natural or legal person" without constraints or reservations. It is notable that a strong supporter (and probably a driving force) of this model in the context of access to information is the EU, which since 2008 has repeatedly reported that even indirect discrimination against non-nationals is forbidden in the EU based on Article 18 of the TFUE.⁷⁹ Moreover, the inclusion of ENGOs in the definition of the "public concerned" and the commitment of the convention's bodies – as in the Turkmenistan Case – that foreign and international ENGOs are not to be discriminated against broadens the boundaries of this regime and opens a backdoor for global-foreign participation. It

consideration of the matter. Granting legal aid relieves the recipient, in part or in full, from liability for the fees and reimbursements for an attorney, the fees and reimbursements arising from interpretation and translation services and handling charges, document charges and the reimbursement of miscellaneous expenses in the authority in charge of the main matter, and corresponding charges collected by other authorities"; also see Kirgizstan, 2011, answer #7 (on the right of minorities to use their own languages); Montenegro, 2011, answer #7 (on the right not to be discriminated against due to language); Moldova, 2008-2014, answer #7 (on the right to receive translated information subject to payment); Serbia, 2014, answer #28 (on the right not to be discriminated against due to language, and the right to receive information in the language requested – if the information in question exists in that language); Tajikistan, 2014, answer #3 (on the right not to be discriminated against due to language).

For reports of the practice of translation, see: Croatia, 2014, answer #1: "The 3rd National Report on the Implementation of the Convention [...] In accordance with the recommendation of the Aarhus Convention Secretariat, the final version of the Report was shortened and translated into English"; The Czech Republic, 2011, answer #11: "The Ministry of the Environment also supports translation of Czech legal regulations and the relevant administrative decisions into English so as to facilitate access of the global public to information on the instruments of environmental protection in the Czech Republic "; The EU, 2014, answer #28: "member States provisions on access to justice for environmental matters were incorporated into the site at the beginning of 2014, and will be translated into the official languages of the EU, thereby contributing to the effectiveness of this provision"; also see Kazakhstan, 2014, answer #37 (on the need to publish in Russian); Montenegro, 2014, answer #11 (on the practice of publishing "state of the environment" reports in English and Romanian); Turkmenistan, 2011, answer #11 (on information published in Turkmen, Russian and English).

⁷⁸ The secondary nature of the access to justice right results from the fact that foreigners' access is dependent on the primary right at hand: in access to information cases, access to justice is broadly applied, while challenging the denial of participation is possible only when a direct interest is involved.

⁷⁹ European Union, 2008-2014, answer no. 7; THE EUROPEAN UNION AARHUS CENTRE, THE AARHUS CONVENTION: IMPLEMENTATION AND COMPLIANCE IN EU LAW 14, 41 (2014) ("Access to environmental information, as opposed to non-environmental information, in the Aarhus Convention and Regulation 1367/2006 is organized as a fundamental right, it is provided to any natural or legal person in the world"); Martin Hedemann-Robinson, EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice – Part 2, 23 EUROPEAN ENERGY & ENVIRONMENTAL L. REV. 151 (2014)

seems that even though most regimes have adopted a model of participation constrained by territorial effect, there is room for global participation through ENGOs.⁸⁰

III. EXPLAINING THE PHENOMENON

The following part of the paper will offer a few competing explanations of the phenomenon observed in the previous part – the growing role accorded to foreigners in public participation.

A. THE ENVIRONMENT

The Aarhus Convention deals with public participation in decision making in the context of the environment. Can a contextual analysis offer the best explanation for the growing focus on foreigners' role? To a certain degree, it seems that this approach could explain the frequent and inclusive references to foreigners. The Rio Declaration offers a glimpse into the way "the environment" is thought of in the international community, as an entity whose constraints are not aligned with national boundaries and political definitions. This perception of the environment makes foreigners' participation a necessity, an inevitable outcome of forging legal order in an environmental context.⁸¹ However, the environmental context fails to explain both the variety of participation models and the gradual change. The contextual analysis is essential to understanding what makes the phenomenon possible, and is helpful in outlining some of its features, yet it is hardly sufficient on its own.

B. PRIVATE ENTITIES: ENGOS AND CORPORATIONS

If contextual analysis is not sufficient, what about rational choice? Could the preferences of different participants explain the phenomenon? Who is poised to gain from the convention and from its inclusion of foreigners? The aim of the convention is to empower private entities by paving their road to participation in public decision making. Who benefits from empowering not only local entities but also foreign ones? The answer is ENGOS and corporations.

ENGOS have a significant role in the convention.⁸² They are specifically listed as part of the public concerned, are considered a vital part of its implementation process and, in contrast to other environmental conventions,⁸³ are a driving force for the work of the Compliance Committee. There is no doubt that ENGOS both benefited from the more inclusive treatment of

⁸⁰ Yet the ability to narrow the definition with "meeting any requirements under national law" can be used to de-facto exclude foreigners, as exemplified in the case of Ukraine.

⁸¹ See Daniel Bodansky, Jutta Brunnée and Ellen Hey, *International Environmental Law: Mapping the Field*, OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 6 (Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., 2007). For an analysis of a similar claim in the Federal context, see Henry N. Butler & Jonathan R Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23 (1996); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).

⁸² Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, 2-4 (2007).

⁸³ See Kravchenko, *Id* at p. 10-34; Brunnée, *supra*, note. 4, noting that "with respect to compliance, the 'international community' in the climate change regime remains primarily one of states."

foreigners and promoted it. For these reasons, ENGOs' involvement can explain some of the gradual changes that have occurred, for it was largely promoted by ENGOs on both the international establishment level and the national-local level. Yet, as with contextual analysis, this explanation is only partial. ENGOs' involvement cannot explain the antidiscrimination requirement regarding natural persons. It does not explain why countries refer to stateless persons, non-nationals and foreigners alongside legal persons and specifically ENGOs.

Unlike ENGOs, corporations are accorded only a minor role in the convention, both in the phrasing of its text and in the following texts produced by its bodies. Nevertheless, as in the case of any public/private division of power, they should be accounted for. On one hand, corporations may enjoy the benefits of implementation of the convention, and the strong emphasis on the rights of the public concerned. In many cases, corporations may be expected to be the main foreign beneficiaries of global access to information and access to justice when large industrial plans are to be considered, especially in countries where drastic regulatory changes and nationalization are feasible options. On the other hand, corporations' involvement in decision making is not dependent on environmental treaties or legislation. Common doctrines of property law, investment law, administrative law and other doctrines that are grounded in national and international law create considerable tools for information requests, active participation and access to justice. Moreover, the lack of clear corporate fingerprints in the work of the convention's bodies makes this explanation less plausible. In other words, it's quite possible that corporations make use of the regulatory changes that the convention has brought about, but to view them as a driving force behind them is not convincing.

C. EUROPEAN POLITICS

Some regard the Aarhus Convention as an attempt by Western countries to impose their standards upon post-Soviet regimes, while masking this coercion with an international convention that, in fact, has little or no effect on Western regimes.⁸⁴ This narrative has several things working in its favor in general and in the context of foreigners' participation particularly.

First, in the negotiations regarding Article 3(9) (on nondiscrimination) the need for strong, direct language of nondiscrimination (rather than soft "any person" phrasing) was asserted due to the fear that post-Soviet authoritative regimes would not interpret the requirements in the right "spirit." This stance was advanced by the Netherlands' and Hungary's delegations.⁸⁵

Second, the convention's bodies invest considerably in implementation efforts and research of implementation in the post-Soviet parties and the Balkans.⁸⁶ The Compliance Committee issued its inclusive decisions, for example, with regard to post-Soviet regimes – Turkmenistan, Ukraine

⁸⁴ Most post-Soviet states are parties to the convention except for Russia and Uzbekistan.

⁸⁵ Paragraph 14 to UNCE, *Report on the eighth session of the Aarhus Convention*, CEP/AC.3/16 (Dec. 17 1997), available at www.unece.org/env/pp/adwg.html; see *supra*, note 24.

⁸⁶ UNECE TASK FORCE ON ACCESS TO JUSTICE, *ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS: AVAILABLE REMEDIES, TIMELINESS AND COSTS IN THE EECCA COUNTRIES* (2012). For a more general discussion of compliance in East Europe, see Szegedi, *supra* n. 5.

and the Czech Republic.⁸⁷ The Aarhus Centres provide another example of this kind of effort.⁸⁸ With 59 of them in 14 countries, these Centres are a driving force of public participation that is focused solely on the post-Soviet and Balkan states.⁸⁹

Nonetheless, this explanation is not without its difficulties. Even though the negotiations towards the convention show traces of forceful standard-setting, the implementation efforts are focused on Southern/Eastern countries, and the compliance process has been (more) forceful toward the same parties, the picture in its entirety is not dichotomous. Since 2011, the MoP has adopted compliance-decisions regarding the UK, EU, Germany, Austria and Spain that dealt with NGO standing, access to justice and access to information.⁹⁰ Furthermore, some of the same countries started reporting on implementation only in 2008, after the legislation of necessary amendments was completed.⁹¹ Different implementation reports show that most countries, be they from the West, East, North or South, were required to make considerable legislative and regulatory efforts in order to comply with the convention as a whole, and to include foreigners and ensure their participatory rights in particular.

Another rational-choice explanation is the role of the governing European-bureaucratic elites. It can be argued that the convention's initiation, agenda and following inclusion of foreigners are all driven by "Eurocratic" incentives: that the central role of ENGOs, the inclusion of foreigners and broad participatory rights are regulatory mechanisms that enhance and empower supranational institutions by decentralizing national decision making and subordinating breaches of conduct to (Eurocratic) convention bodies. Per this argument, the driving force is not EU states' interests but elitist preferences instead. This explanation also seems to be partial, at best. It cannot account for the reforms required in EU legislation, the Compliance Committee's findings of the EU in noncompliance,⁹² or the 'democratizing destabilization' of participatory rights and the experimental nature of the convention.⁹³

⁸⁷ All of the committee decisions that were adopted by the MoP until 2011 were made with regard to post-Soviet and post-communist countries: Albania, Armenia, Kazakhstan, Lithuania, Turkmenistan and Ukraine.

⁸⁸ For example, the Austrian Development Cooperation funded a roundtable of participants from Albania, Bosnia and Herzegovina, Montenegro and Serbia "to provide the framework for stronger activities of the Aarhus Centres in the region in promoting public awareness and participatory decision-making on environment and security issues related to transboundary water management, and to strengthen their regional network." See OSCE & ENVSEC Regional Roundtable, "Strengthening public participation in trans-boundary water management - Exploring the synergies of the Espoo, Helsinki and Aarhus Conventions," Report, 1 (25-26 March 2015, Tirana, Albania).

⁸⁹ 15 Centres operate in both Kazakhstan and Armenia, 7 in Tajikistan, 4 in Serbia, 3 in Albania, Montenegro and Bosnia & Herzegovina, 2 in Moldova and Kyrgyzstan, and 1 in Ukraine, Belarus, Georgia, Azerbaijan and Turkmenistan. See INFOGRAPHIC: AARHUS CENTRES www.osce.org/secretariat/161651 (last visited Aug. 14, 2015).

⁹⁰ ECE/MP.PP/2014/2/Add.1, Decisions V/9b, V/9g, V/9h, V/9k, V/9n; also, regarding compliance and implementation in the UK, see Benjamin Christman, *The Poor Have No Lawyers: Scotland's Non-Compliance with the Access to Environmental Justice 'Pillar' of the Aarhus Convention*, 4 KING'S INNS STUDENT L. REV. 105 (2014).

⁹¹ Austria, Croatia, Germany, Sweden & the UK.

⁹² For thorough discussions of the tensions between The Aarhus Convention and the EU, see THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND

D. THE CONVENTION'S DESIGN (EXPERIMENTAL REGULATION)

The explanations provided above are missing one key element: How? How was a change facilitated in different countries over a short period? One possibility is that the convention's design paved the road for the different players to achieve gradual change. This kind of explanation can find theoretical ground in Experimental Governance\Regulation (XR). XR is a "recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts." It is an institutional and process-focused model of governance that is composed of four key components: (I) broad framework goals and metrics for gauging achievement are provisionally established by some combination of "central" and "local" units; (II) local units have broad discretion to pursue goals; (III) local units regularly report on performance and participate in peer review to compare results of different local units; and (IV) the goals and decision making procedures are themselves periodically revised in response to the review process.⁹⁴

The Aarhus Convention can easily be described as using an XR framework.⁹⁵ The convention's bodies function as organizational centers, while the parties to the convention function as local units who have broad discretion to pursue the three pillars of the convention, but are obligated to periodical reporting cycles including peer comparison of the results which are then processed into new goals, means and structure. This process is supplemented by private parties' participation, both in producing the reports and through a compliance mechanism which also enables direct peer review and central oversight over the local units. One key feature of the Aarhus Convention is the variety of bodies whose work is dedicated to constant information gathering and processing: topical taskforces, the Aarhus Centres, which are oriented towards capacity-building, the periodical implementation reports and public-induced procedures of the compliance reports all demonstrate different aspects of the effort to gauge achievement. As demonstrated above, different bodies and mechanisms were instrumental in facilitating the normative processes of shaping and reshaping foreigners' participation. Therefore, from an XR perspective on the mechanism of the Aarhus Convention, the phenomenon observed in this paper can be explained as the product of a learning process taking place on both the international (the convention's bodies) and the national (parties to the convention) levels of governance.

EU ENVIRONMENTAL LAW (Marc Pallemarts ed., 2011); Marc Pallemarts, *Environmental Human Rights: Is the EU a Leader, a Follower, or a Laggard?*, 15 OR. REV. INT'L L. 7 (2013).

⁹³ Charles F. Sabel & Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimental Governance in the EU," 14 EURO. L. J. 312 (2008); Marianne Dellinger, *Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 309, 313-4 (2012).

⁹⁴ Sabel & Zeitlin, at 4.

⁹⁵ For a description of the convention as innovative and groundbreaking, see Kravchenko, *supra* note. 83; Cesare Pitea, *The Non-Compliance Procedure of the Aarhus Convention: Between Environmental & Human Rights Control Mechanisms*, 16 ITALIAN YEARBOOK INT'L L. 85 (2006); Fionna J Cumming, *The Role of NGOs in Multi-lateral Environmental Agreement Compliance*, 17 N.Z. J. ENVTL. L. 41, 61 (2013).

IV. INTEGRATING THE NARRATIVES

It is possible, of course, that all of the options elaborated above explain different parts or angles of the phenomenon. I suggest a combined explanation: The environmental context framed the options of inclusion/exclusion; European politics, the Eurocratic agenda and ENGOS' involvement drove the convention in the inclusionary direction; the alignment of multinational corporate interests with this inclusion helped mitigate opposition; and, finally, the reconception of sovereignty enabled the crystallization of the designated order in places that were less affected by the direct interests of nations and organizations, and is used as a justification for the entire process. All the while, these different vectors operated through the convention's design – which was inclined toward inclusion and openness by its very essence.

This paper opened with the question, "What role do foreigners have in national and subnational decisions?" The answer – at least with regard to the Aarhus Convention – seems to be that they have a growing role that amounts to a protected right: They can demand information; they can comment on decisions and expect to be heard, and they can turn to the legal system for some remedy. They can do so on more occasions and in more countries and they have a better infrastructure to do so than ever before.

Furthermore, this change seems to have been facilitated by an elaborated experimental governance structure of the convention which enabled stakeholders to push for an inclusive policy and to gather the necessary data to support, realign and readjust the policy to accommodate varying legal regimes, cultural biases and economic interests. It is an ongoing process, and the dynamics which were detailed in this paper may change. For example, in footnote n. 58 of this paper we can find the following answer of the UK to question no. 28 in the 2014 reporting cycle:

The UK treats any member of the public equally, regardless of nationality, citizenship and domicile. Any legal person has equal access to the courts. However, as set out in the consultation paper Transforming Legal Aid: delivering a more credible and efficient system, we believe that limited public funds for civil legal aid should be targeted at those who have a strong connection to the UK. The government has therefore proposed that applicants for civil legal aid should in future have to satisfy a residence test.

This answer was given two years before the Brexit referendum. It signifies a shift from a more inclusive stance in prior reports to the current some-what exclusive position.⁹⁶ At the time the research was conducted, this answer was almost singular.⁹⁷ The time elapsed since then has placed a question mark on its singularity. Are the times changing regarding foreigners' participation in environmental matters? Only time will tell.

⁹⁶ See UK, 2008-2011, answer no. 28: "treat any member of the public equally, regardless of nationality, citizenship and domicile. Any legal person has equal access to the courts." In similar fashion, the recent French report put much more emphasis on the importance of "legal interest."

⁹⁷ But see France 2005-2011, answer no. 28: "French law is non-discriminatory (access to information, public inquiries, right to a remedy), and under the practice of the Council of State, non-resident aliens can bring proceedings in French courts"; and France, 2014, answer no. 28: "In French law, any natural person or legal entity substantiating a legal interest may obtain access to justice. This also covers participation and access to information."

