Spring 2010

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Sustainable Development Law & Policy

Volume 10
Issue 2 *Winter 2010: Climate Law Reporter 2010*

Article 16

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*by Winfield J. Wilson**

During the Copenhagen climate change negotiations in December 2009,[1] as the talks concluded tensely for government representatives,[2] coalitions of environmental groups were disappointed because their efforts to play a participatory role had been frustrated.[3] The silencing of the nongovernmental organization ("NGO") perspective runs counter to established international principles of broad participation in multilateral environmental agreements ("MEAs"),[4] and is particularly troubling in light of the global challenge climate change poses to humanity.

At the beginning of the second of two weeks of the negotiations, as pressure mounted for the talks to produce a meaningful and binding treaty, logistics and site-management broke down at the conference center and the UN suspended observer registration, leaving thousands literally standing in the cold.[5] On a broader level, the lockout prompted NGO leaders to invoke international principles on public involvement in MEAs in a letter to political leaders, which cited the 1992 Rio Declaration and the UN Commission on Sustainable Development's Agenda 21 language that "non-governmental organizations play a vital role in the shaping and implementation of participatory democracy."[6] More pointedly, NGOs considered the lockout a Danish violation of the Aarhus Convention,[7] which provides for public participation in MEA decision-making as vital for accountable governance and effective environmental protection.[8]

NGOs could claim a violation of the Aarhus Convention's Articles 6, 7, or 8, on public participation in environmental decision-making.[9] The challenge for NGOs, however, is that only Parties are bound by these articles and can enforce them, and NGOs are not Parties.[10]

While the Convention provides negotiation and arbitration between Parties as enforcement mechanisms, additional measures for compliance have been further outlined in subsequent Convention Decisions made during Meetings of the Parties at Lucca, Italy and Almaty, Kazakhstan.[11] Notably under these Convention Decisions, members of the public including NGOs may submit formal communications to the Compliance Committee and allege a violation, subject to some procedural requirements.[12] Based on the Lucca and Almaty Decisions, NGOs could petition for a compliance action against Denmark for the administrative actions that led to the exclusion of observers at the conference center in Copenhagen. Ultimately, however, compliance rests with the Parties when they decide whether to take action at Meetings of the Parties, although they do take into account the reports from the Compliance Committee.[13] Even though NGOs would not be able to force Denmark to comply with the Convention, such an action could create publicity and ongoing pressure on future hosts of the United Nations Framework Convention on Climate Change ("UNFCCC").

However, invocation of participatory requirements of the Aarhus Convention is also limited in geographic scope, as only some European and Eurasian countries are Parties, and does not include many of the largest nations and greenhouse gas emitters, for example, the United States or China.[14] Notably, the next Conference of the Parties ("COP") of the UNFCCC is in Mexico, also not a party to Aarhus, leaving open the possibility of exclusion of NGOs from that meeting.[15]

The UNFCCC has draft rules of procedure that could serve as the basis for greater public participation, but it has not adopted them, even though it, in effect, operates under them.[16] These draft rules do include provisions on public participation, but are not nearly as inclusive and ambitious as the goals set out in the Aarhus Convention.[17] The draft rules, which allow for observers to attend and participate without any voting privileges,[18] should be adopted by the UNFCCC as a first step to ensuring NGO participation.

In order to be more comprehensive and consistent with the Rio Declaration, Agenda 21, and the Aarhus Convention, the UNFCCC should further create procedures providing the opportunity for meaningful public participation at all climate meetings, regardless of location. At a minimum, the UNFCCC should write and adopt new rules that specifically address the logistics of observer participation at every meeting. Ideally, affirmative rights to petition for public participation, which embrace the principles of MEAs and create a progressive and democratic process, will also be created.[19] The universal problem of climate change impacts every person on the globe and climate negotiations must provide legal protection for public participation to ensure an inclusive and effective solution.

Endnotes: Legal Foundations for NGO Participation in Climate Treaty Negotiations *continued on page 69*

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ENDNOTES: LEGAL FOUNDATIONS FOR NGO PARTICIPATION IN CLIMATE TREATY NEGOTIATIONS *continued from page 56*

[1] United Nations Framework Convention on Climate Change, 1771 U.N.T.S. 107, S. Treaty Doc No. 102-38, U.N. Doc. A/AC.237/18, 31 I.L.M. 849 (1992), *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf [hereinafter UNFCCC]. The talks were formally called the fifteenth Conference of the Parties ("COP 15") of the UNFCCC and COP 15 website is http://unfccc.int/meetings/cop_15/items/5257.php (last visited Mar. 4, 2010).

[2] Andrew C. Revkin & John M. Broder, *A Grudging Accord in Climate Talks*, N.Y. TIMES, Dec. 19, 2009 at A1.

[3] *See* Posting of Kevin Grandia, NGO Shutdown at Copenhagen Climate Talks, http://tcktcktck.org/stories/campaign-stories/ngo-shutdown-copenhagen-climate-talks (last visited Mar. 4, 2010) (offering the perspective of the tcktcktck initiative, the Copenhagen-focused campaign of the global coalition 350.org, and reprinting a letter from the director of the Climate Action Network ("CAN") to the Prime Minister of Denmark and the Executive Secretary of the UNFCCC).

[4] *See, e.g.*, Convention on Biological Diversity, art. 23, §5, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818, *available at* http://www.cbd.int/convention/convention.shtml ("Any other body or agency, whether governmental or non-governmental, qualified in fields relating to conservation and sustainable use of biological diversity, which has informed the Secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties, may be admitted unless at least one third of the Parties present object."); United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, art. 4, June 17, 1994, 33 I.L.M. 1328, *available at* http://www.unccd.int/convention/text/convention.php; Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. XI, §7, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, *available at* http://www.cites.org/eng/disc/text.shtml#texttop.

[5] *See* Sunita Narain, *Copenhagen: Excluding People and Voices for an Unfair Deal*, OUTREACH, Dec. 17, 2009, at 1-2, *available at* http://www.stakeholderforum.org/fileadmin/files/Outreach_issues_2009/091217-outreach-color.pdf (describing, from a personal account, the inability to gain access to enter the building to even register). In response to more disruptive demonstrations, some groups were entirely excluded for their actions at the conference center, as noted in the CAN letter.

[6] *Id.* (referring to the United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992), *available at* http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&Article ID =1163): Agenda 21: Programme of Action for Sustainable Development, ch. 27, U.N. GAOR, 46th Sess., Agenda Item 21, U.N. Doc. A/Conf.151/26 (1992), *available at* http://www.un.org/esa/dsd/agenda21/res_agenda 21_27.shtml.

[7] *See Outrage over lockout*, ECO: NGO NEWSLETTER, Dec. 18, 2009, at 4.

[8] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, arts. 6-7, June 25, 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517, *available at* http://www.unece.org/env/pp/documents/cep43e.pdf [hereinafter Aarhus Convention]. *See also* U.N. Econ. & Soc. Council, Econ. Comm'n of Eur., *Decision II/4: Promoting the Application of the Principles of the Aarhus Convention in International Forums*, ECE/MP.PP/2005/2/Add.5, (June 20, 2005), *available at* http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf [hereinafter Almaty Agreement] (adopting the Almaty Guidelines for compliance with the Aarhus Convention, contained in the annex of the Decision).

[9] Aarhus Convention, *supra* note 8, at arts. 6-8. Article 6 addresses public participation in decisions on specific activities, Article 7 addresses public participation concerning plans, programs, and policies related to the environment, and Article 8 addresses public participation during the preparation of executive regulations and/or multilateral treaty negotiations.

[10] *See* Aarhus Convention, *supra* note 8, at arts. 15, 16 (stating the provisions of the Convention on compliance and dispute settlement).

[11] U.N. Econ. & Soc. Council, Econ. Comm'n of Eur., *Decision I/7: Review of Compliance*, ECE/MP.PP/2/Add.8, (Apr. 4, 2004), *available at* http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf [hereinafter Lucca Decision]. Almaty Agreement, *supra* note 8.

[12] Lucca Decision, *supra* note 12, at §18.

[13] *Id.*, at §37.

[14] Aarhus Convention, *supra* note 8, at art. 17.

[15] The UNFCCC schedule lists the location as "to be determined," though the meeting is widely expected to be held in Cancun, Mexico, http://unfccc.int/meetings/unfccc_calendar/items/2655.php (last visited Feb. 10, 2010).

[16] UNFCCC, Adoption of the Rules of Procedure, FCCC/CP/1996/2 (May 22, 1996), *available at* http://unfccc.int/resource/docs/cop2/02.pdf (taking note of UNFCCC Article 7.3 that "the Conference of the Parties shall, at its first session, adopt its own rules of procedure as well as those of the subsidiary bodies established by the Convention ..." but merely "inviting" the Parties to adopt the Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies which begin on page 2).

[17] *See id.* § V (stating that observers may attend and participate, provided: they notify the Secretariat, have qualifications related to the matters being discussed, gain permission from the Secretariat, and their presence is not objected to by one third or more of the Parties).

[18] *Id.*

[19] *See generally* Svitlana Kravchenko, *The Myth of Public Participation in a World of Poverty*, 23 TUL. ENVTL. L.J. 33 (2009) (addressing the deficiencies of environmental decision making when public participation and transparent democratic processes are not present).