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# Public Participation and Water Resources Management:

## Where Do We Stand in International Law?

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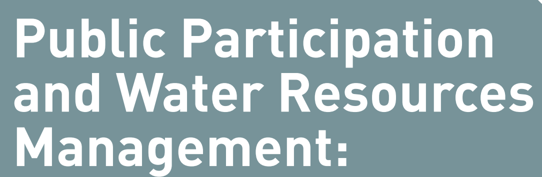


## Where Do We Stand in International Law?

INTERNATIONAL CONFERENCE • GENEVA, 13 DECEMBER 2013

**PROCEEDINGS**

**Edited by**
Mara Tignino
Komlan Sangbana

# TABLE OF CONTENTS / TABLE DES MATIÈRES

List of abreviations / Liste d'abbréviations 7

Préface 9

*Laurence Boisson de Chazournes*
Professeure, Faculté de droit, Université de Genève

Avant-propos 11

*Alice Aureli*
Coordinatrice du Programme sur les aquifères transfrontaliers
UNESCO, France

L'eau, les individus et les communautés locales 12

*Mara Tignino*
Maître-assistante et Coordinatrice de la Plateforme pour le droit international de l'eau douce,
Faculté de droit, Université de Genève, Suisse

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PART 1. LINKAGES BETWEEN PUBLIC PARTICIPATION, THE MANAGEMENT AND PROTECTION OF FRESHWATER 17

NATIONAL APPROACHES 19

Water Regulation and Public Participation in the Indian Context 20

*Philippe Cullet*
Professor, School of Oriental and African Studies (SOAS), University of London, United Kingdom
Senior Visiting Fellow, Centre for Policy Research, Delhi, India

Public Participation and Water Management in Romania 30

*Ana Drapa*
Senior Advisor
Department for Waters, Forests and Fishery,
Ministry of Environment and Climate Change, Romania

**Participation publique dans le cas du Rhône, une relecture en termes d'efficacité sociale, substantielle et procédurale** 38

*Christian Bréthaut*
Chercheur Post-Doc,
Institut des sciences de l'environnement, Université de Genève

*Géraldine Pflieger*
Professeure associée,
Institut des sciences de l'environnement, Université de Genève

REGIONAL APPROACHES 47

**Public Participation in the International Commission for the Protection of the Danube River** 48

*Benedikt Mandl*
Technical Expert for Public Participation and Communication
International Commission for the Protection of the Danube River
at the ICPDR Permanent Secretariat

**Public Participation and the Guarani Aquifer Agreement** 55

*Uzuazo Etemire*
Lecturer in Law University of Port Harcourt Law Faculty, Nigeria

*Francesco Sindico*
Reader in International Environmental Law, University of Strathclyde Law School, Glasgow
Director, Strathclyde Centre for Environmental Law and Governance, United Kingdom

**Public Participation in the Dniester River Basin Management** 62

*Serhiy Vykhryst*
Expert, European ECO-Forum, Ukraine

**État du processus de gestion intégrée des ressources en eau dans le Bassin du Niger : Expériences de l'implication des acteurs non étatiques et de la prévention des conflits entre usagers de ressources** 69

*Robert Y. Dessouassi*
Responsable de l'Observatoire du bassin du Niger, Autorité du Bassin du Niger, Niger

**La participation du public dans le cadre de l'Organisation pour la mise en valeur du fleuve Sénégal** 77

*Komlan Sangbana*
Assistant de recherche et d'enseignement, Plateforme pour le droit international de l'eau douce, Faculté de droit, Université de Genève, Suisse

**Le principe de la participation du public et la Commission mixte internationale** 84

*Mara Tignino*
Maître-assistante et Coordinatrice de la Plateforme pour le droit international de l'eau douce, Faculté de droit, Université de Genève, Suisse

**Transboundary Hydropower Projects on the Mainstream of the Lower Mekong River—the Case of Public Participation and its National Implications for Basin States** 91

*Alistair Rieu-Clarke*
Reader in International Law UNESCO Centre for Water Law, Policy and Science,
University of Dundee, United Kingdom

## Part 2. THE ROLE OF THE PUBLIC IN NON-COMPLIANCE PROCEDURES AND DISPUTE SETTLEMENT MECHANISMS 99


**The Implementation Committee of the Helsinki Water Convention: A New Tool of Public Participation for the Management of Transboundary Water Resources** 100

*Attila Tanzi*
Full Professor of International Law, Department of Legal Studies, University of Bologna, Italy
Chair of the Implementation Committee of the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Switzerland

*Cristina Contartese*
Post-Doctoral Researcher, Faculty of Law, Economics and Finance, University of Luxembourg, Luxembourg

**The Aarhus Convention and Water Resources Management** 110

*Fiona Marshall*
Environmental Affairs Officer, Secretariat of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Switzerland

*Virginie Barre*
Intern, Secretariat of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Switzerland

**Public Participation and Water Resources Management in the Danube Delta: The Bystroe Canal Project and the Espoo Convention** 120

*Felix Zaharia*
Chair of the Implementation Committee of the UNECE Convention on Environmental Impact Assessment in a Transboundary Context, Switzerland. Diplomat with the International Law and Treaties Directorate, Ministry of Foreign Affairs of Romania, Romania

**Justice by any Other Name? The Grievance Mechanisms of Multilateral Development Banks** 129

*Vanessa Richard*
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Center for International and European Studies and Research
Joint Research Unit no.7318
Aix Marseille University, France

**The Role of the Public and the Human Right to Water** 139

*Owen McIntyre*
Senior Lecturer
Faculty of Law, University College Cork, Ireland

**Access to Justice and Public Participation in the Water Sector: A Promising Legal Development** 147

*Yves Lador*
Earthjustice, Permanent Representative to the United Nations, Geneva, Switzerland

# LIST OF ABREVIATIONS / LISTE D'ABBRÉVIATIONS

| | |
|---|---|
| ABN | Autorité du basin du Niger |
| ACHR | American Convention on Human Rights |
| ADB | Asian Development Bank |
| AfDB | African Development Bank |
| ANB | Authority of the Niger Basin |
| CAO | Compliance/Advisor/Ombudsman |
| CIPEL | Commission internationale pour la protection des eaux du Lac Léman |
| COGEFE | Comité Genevois pour l'utilisation du Fonds d'électricité |
| CRMU | Compliance Review and Mediation Unit |
| EBRD | European Bank for Reconstruction and Development |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| EIA | Environmental Impact Assessment |
| EIB | European Investment Bank |
| EU | European Union |
| GAS | Guaraní Aquifer System |
| GIRE | Gestion intégrée des ressources en eau |
| IBRD | International Bank for Reconstruction and Development |
| ICIM | Independent Consultation and Investigation Mechanism |
| ICDPR | International Commission for the Protection of the Danube River |
| ICJ | International Court of Justice |
| IDB | Inter-American Development Bank |
| IFC | International Finance Corporation |
| ILC | International Law Commission |
| ILM | International Legal Materials |
| ILO | International Labour Organization |
| IRM | Independent Review Mechanism |
| IWRM | Integrated Water Resources Managamenent |
| MDBs | Multilateral Development Banks |
| MEAs | Multilateral Environmental Agreements |
| MIGA | Multilateral Investment Gurantee Agency |
| MOP | Meeting of the Parties |
| MRC | Mekong River Commission |
| NA | National Administration |
| NCP | National Contact Point |
| NGOs | Non-Governmental Organizations |
| OECD | Organization for Economic Co-operation and Development |
| OMVS | Organisation pour la mise en valeur du fleuve Sénégal |
| PADD | Plan d'action de développement durable |
| PIM | Participatory Irrigation Management |
| RBMP | River Basin Management Plan |
| RMC | Rhône Méditerranée Corse |
| SDAGE | Schéma Directeur d'Aménagement et de Gestion des Eaux |
| UN | United Nations |
| UNECE | United Nations Economic Commission for Europe |
| UNEP | United Nations Environment Programme |
| WWF | World Widlife Fund |

# PRÉFACE

**Laurence Boisson de Chazournes**
Professeure, Faculté de droit, Université de Genève

La participation du public constitue l'un des principes cardinaux de la gestion et de la protection des ressources en eau. Pendant longtemps les traités sur les cours d'eau internationaux se sont limités à énoncer les droits et les obligations des États riverains. Depuis les années 1990, ces instruments juridiques ont connu des développements significatifs avec l'intégration de nouveaux aspects tels la protection des besoins humains essentiels, l'accès à l'information en matière de qualité des ressources en eau ainsi que le droit de recours à des mécanismes juridictionnels et administratifs[1]. Le droit international de l'environnement au travers d'instruments comme la *Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement* de 1998, a renforcé les droits des individus et des communautés locales dans les régimes régionaux portant sur les ressources en eau transfrontières. En outre, un certain nombre d'instruments de protection internationale des droits de l'homme ont fourni une assise à l'émergence du droit à l'eau et à l'assainissement[2]. Les organes de protection des droits de l'homme, notamment les mécanismes régionaux, contribuent à en développer le contenu[3].

Ces questions relèvent du champ de compétence de nombre de commissions de bassin. La Commission mixte internationale, établie par le Traité sur les eaux limitrophes de 1909, entre le Canada et les États-Unis, en constitue un exemple[4]. De même, en Afrique, l'implication du public dans la gestion des ressources en eau transfrontières est devenue un axe central de la politique de gouvernance de plusieurs cours d'eau internationaux, tels le bassin du Sénégal et celui du Niger. Dans la région européenne, le *Traité sur la protection et le développement*

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1 Voir par exemple les articles 10.2 et 32 de la Convention des Nations Unies sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation du 21 mai 1997. La Convention est entrée en vigueur le 17 août 2014. Voir aussi l'article 16 de la Convention de la Commission économique des Nations Unies pour l'Europe (CEE-ONU) sur la protection et l'utilisation des cours d'eau transfrontières et des lacs internationaux.

2 Voir l'Observation générale n°15 : Le droit à l'eau (art.11-12 du Pacte international relatif aux droits économiques, sociaux et culturels), Novembre 2002, E/C.12/2002/11 ; Résolution de l'Assemblée générale des Nations Unies, 28 juillet 2010, A/RES/64/292 ; Résolution du Conseil des droits de l'homme, 24 septembre 2010. A/HRC/15/L.14.

3 Cour Interaméricaine des Droits de l'Homme (Cour IDH), *Yakye Axa Indigenous Community* c. *Paraguay,* arrêt, 17 juin 2005, Ser. C, no. 125, 85-86, para. 167 ; Cour IDH, *Sawhoyamaxa Indigenous Community* c. *Paraguay,* arrêt, 29 mars 2006, Ser. C, no. 146, 83, para. 164 ; Cour IDH, *Xákmok Kásek. Indigenous Community* c. *Paraguay,* arrêt, 24 août 2010, Ser. C, no. 124, 44-45, para. 195. Voir L. Boisson de Chazournes, « Le droit à l'eau et la satisfaction des besoins humains : notions de justice », in : Alland, D., Chetail, V., de Frouville, O. & Viñuales, J. E. *Unité et diversité du droit international : écrits en l'honneur du professeur Pierre-Marie Dupuy / Unity and Diversity of International Law : Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden : Martinus Nijhoff / Brill, 2014, pp. 967-981.

4 Le principe de la participation du public est affirmé dans les articles IX et XII du Traité sur les eaux limitrophes de 1909. Ainsi, l'article IX du Traité se lit comme suit : « Les Hautes parties contractantes conviennent de plus que toutes les autres questions ou différends qui pourront s›élever entre elles et impliquant des droits, obligations ou intérêts de l›une relativement à l›autre ou aux habitants de l›autre, le long de la frontière commune aux États-Unis et au Canada, seront soumis de temps à autre à la Commission mixte internationale pour faire l›objet d›un examen et d›un rapport, chaque fois que le gouvernement des États-Unis ou celui du Canada exigera que ces questions ou différends lui soient ainsi référés ». En outre, l'article XII du Traité prévoit que : « La Commission a le pouvoir de faire prêter serment aux témoins, et de recevoir quand elle le juge nécessaire des dépositions sous serment dans toute procédure ou toute enquête ou toute affaire qui, en vertu du présent traité, sont placées sous sa juridiction. Il est donné à toutes les parties qui y sont intéressées, la faculté de se faire entendre ».

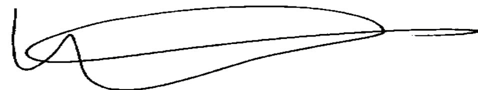
*durable du bassin du Dniester*, conclu en 2012 entre l'Ukraine et la Moldavie, consacre les principes de l'accès à l'information, de la participation du public au processus décisionnel ainsi que du droit à l'eau et à un environnement sain[5].

Le statut des acteurs non-étatiques en matière de gestion des eaux douces internationales a été l'objet d'un projet de recherche de la Plateforme pour le droit international de l'eau douce de la Faculté de droit de l'Université de Genève (www.unige.ch/droit/eau). Mara Tignino, maître-assistante à la Faculté de droit, et Komlan Sangbana, assistant de recherche et d'enseignement, ont mené à bien ce projet de recherche qui a bénéficié d'un soutien financier du Fonds national de la recherche scientifique (FNS). La présente publication est l'un des fruits de ce projet.

Créée en 2009 par des membres du Département de droit international public et organisation internationale de la Faculté de droit de l'Université de Genève, la Plateforme pour le droit international de l'eau douce est un centre d'excellence en matière de recherche et de renforcement des capacités en droit international des ressources en eau. La recherche et l'enseignement ainsi que les activités d'expertise et de conseil comptent parmi les domaines d'action de la Plateforme. Depuis 2012, la Plateforme et l'Institut des Nations Unies pour la Formation et la Recherche (UNITAR), avec l'appui financier de la Direction suisse pour le développement et la coopération (DDC) du Département fédéral des affaires étrangères (DFAE), ont mis en place des cours de formation en ligne en droit international de l'eau permettant à des experts en droit, mais aussi en ingénierie, hydrologie ou géologie d'approfondir leurs connaissances en droit international et en règlement des différends.

Le besoin d'approfondir les thèmes liés au rôle du public dans la gestion des eaux douces et en matière de règlement des différends a été à l'origine de l'organisation de la conférence sur « La participation du public dans la gestion des ressources en eau : où en est le droit international ? » tenue au Palais des Nations le 13 décembre 2013. Cette conférence, organisée en partenariat avec la Commission économique des Nations Unies pour l'Europe (CEE-ONU), a réuni un grand nombre d'experts et de chercheurs. Nous sommes reconnaissants au Programme hydrologique international (PHI) de l'UNESCO de son appui pour la publication des Actes de ce colloque. Je me réjouis que la Plateforme ait pu développer des partenariats avec ces institutions dont l'expertise dans le domaine de la gestion des eaux douces est universellement reconnue.

Avec mes cordiaux messages.



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Professeure à l'Université de Genève

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5 Voir par exemple l'article 4.2 (b) de l'Accord entre la Moldavie et l'Ukraine relatif à la protection et le développement durable du bassin du fleuve Dniester, 29 novembre 2012, http://www.unece.org/fileadmin/DAM/env/water/activities/Dniester/Dniester-treaty-final-EN-29Nov2012_web.pdf

# AVANT-PROPOS

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La présente publication rassemble les Actes de la Conférence « La participation du public et la gestion des ressources en eau : où en est le droit international ? » organisée par la Plateforme pour le droit international de l'eau douce de la Faculté de droit de l'Université de Genève en partenariat avec la Commission économique des Nations Unies pour l'Europe (CEE-ONU), le 13 décembre 2013, au Palais des Nations à Genève. Cette Conférence avait pour objectif d'analyser les contours de la participation du public et des communautés locales en matière de gestion et protection des ressources en eau. L'échange d'informations sur la pratique des organes de bassin de différentes régions du monde (Afrique, Amérique, Asie et Europe) a donné lieu à une compréhension plus systématique des approches existantes en ce domaine.

Cette publication contribue aux objectifs du Programme hydrologique international (PHI) de l'UNESCO. Le PHI est le seul mécanisme intergouvernemental consacré à l'analyse de la gestion des ressources en eau, à l'éducation ainsi qu'au renforcement des capacités. Parmi ses priorités, le Programme vise à améliorer la Gestion Intégrée des Ressources en Eau (GIRE) et à mettre en relief le rôle des sciences naturelles, économiques et sociales dans la gestion et la protection des ressources en eau.

La protection des besoins humains essentiels, la participation du public dans le processus décisionnel ainsi que l'accès à l'information sont des éléments indispensables pour une bonne gouvernance de l'eau. La publication de ces Actes contribuera à renforcer le droit international de l'eau et à une meilleure gouvernance des ressources en eau douce.

# L'EAU, LES INDIVIDUS ET LES COMMUNAUTÉS LOCALES

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# I. INTRODUCTION

L'accès à l'eau et à l'assainissement comptent parmi les défis les plus importants du droit international de l'eau. Les besoins humains font de plus en plus souvent partie des régimes de gestion et protection des ressources en eau transfrontières.[1] Tant la Convention des Nations Unies sur le droit relatif à l'utilisation des cours d'eau internationaux à des fins autres que la navigation de 1997 (ci-après la Convention des Nations Unies de 1997) que le Projet d'Articles sur le droit des aquifères transfrontières contiennent des dispositions qui font référence aux besoins humains.[2] En outre, certains instruments sur des ressources en eau en Afrique incluent le droit à l'eau.[3] La Charte de l'eau du bassin du Niger, par exemple, prévoit que lors de l'adoption des politiques de planification et d'utilisation des ressources en eau, tant de surface que souterraine, les États membres doivent s'efforcer « de garantir aux populations un approvisionnement suffisant et continu en eau d'une qualité appropriée ».[4] En Europe de l'Est, le Traité adopté en 2012 entre la Moldovie et l'Ukraine sur la coopération en matière de protection et développement durable du bassin du fleuve Dniester inclut parmi ses objectifs de coopération le droit humain à un environnement sain et l'accès à l'eau potable.[5]

En complément aux conventions relatives aux ressources en eau, l'accès à l'eau et à l'assainissement est devenu un enjeu majeur des droits de l'homme. En 2010, l'Assemblée générale des Nations Unies et le Conseil des droits de l'homme ont adopté deux résolutions qui reconnaissent le droit humain à l'eau et à l'assainissement. L'Assemblée générale a ainsi reconnu que « le droit à l'eau potable et à l'assainissement est un droit de l'homme, essentiel à la pleine jouissance de la vie et à l'exercice de tous les droits de l'homme ».[6]

La question de l'amélioration de l'accès à l'eau potable et à un assainissement adéquat souligne l'importance de prendre en compte les droits des individus et des communautés locales. L'accès à l'information, la participation du public au processus de prise de décision ainsi que l'accès à la justice[7] sont des facettes des droits des individus et des communautés en matière de gestion et protection des ressources en eau. Elles sont également des critères pour déterminer le respect du droit de l'homme à l'eau et à l'assainissement.[8]

Depuis l'adoption de la Déclaration de Rio sur l'environnement et le développement de 1992 et la Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement de 1998 (ci-après la Convention d'Aarhus), les individus et les communautés locales ont un rôle croissant en matière environnementale. En effet, les projets sur des ressources en eau transfrontières peuvent avoir un impact sur les conditions de vie et la santé des populations riveraines. Ainsi, les individus et les communautés susceptibles d'être affectés demandent de plus en plus souvent à être consultés préalablement à la mise en œuvre d'un projet et exigent la transparence du processus décisionnel.[9] Le droit international

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1 L. Boisson de Chazournes, *Fresh Water in International Law*, Oxford University Press, 2013, p. 147.

2 Article 10.2 de la *Convention des Nations Unies sur le droit relatif à l'utilisation des cours d'eau internationaux à des fins autres que la navigation*, Résolution 51/229 de l'Assemblée générale, 21 mai 1997. La Convention entrera en vigueur le 17 août 2014. Article 5.2 et Article 17.3 du *Projet d'Articles sur le droit des aquifères transfrontières*, *Annuaire de la Commission du droit international*, 2008, Vol. 2 (2), pp.31-86.

3 Voir l'article 4 de la Charte des eaux du fleuve Sénégal, 18 mai 2002, http://www.portail-omvs.org/sites/default/files/fichierspdf/charte_des_eaux_du_fleuve_senegal.pdf; l'article 4 de la Charte de l'eau du bassin du Niger, 30 avril 2008, http://www.abn.ne/attachments/article/39/Charte%20du%20Bassin%20du%20Niger%20version%20finale%20francais_30-04-2008.pdf; Articles 72-77 de la Charte de l'eau du bassin du lac Tchad, avril 2012. Voir les contributions de K. Sangbana, « La participation du public dans le cadre de l'Organisation pour la mise en valeur du fleuve Sénégal » ; R. Dessouassi**,** « État du processus de gestion intégrée des ressources en eau dans le bassin du Niger : expériences de l'implication des acteurs non étatiques et de la prévention des conflits entre usagers de ressources ».

4 Article 11 de la Charte de l'eau du bassin du Niger.

5 Voir la contribution de S. Vykhryst, « Public Participation in the Dniester River Basin Management » ci-après.

6 Résolution 64/292, 28 juillet 2010, par.1

7 Voir la contribution de Y. Lador, « Access to Justice and Public Participation in the Water Sector : A Promising Legal Development » ci-après.

8 À ce propos, le rapporteur spécial sur le droit à l'eau potable et à l'assainissement, Mme Catarina de Albuquerque a conduit une étude sur la relation entre le droit à l'eau et à l'assainissement et la participation des individus et communautés. Un rapport a été présenté en octobre 2014, voir : http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/490/08/PDF/N1449008.pdf?OpenElement

9 M. Tignino, « Les contours du principe de la participation du public et la protection des ressources en eau transfrontières », *Vertigo – La Revue électronique en sciences de l'environnement*, 2010, http://vertigo.revues.org/9750

a développé des règles et mécanismes pour intégrer les individus et les communautés dans le processus décisionnel concernant la gestion des eaux transfrontières.

Dans le cadre de la Commission économique des Nations Unies pour l'Europe (CEE-ONU), la *Convention sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière* de 1991[10] (ci-après la Convention d'Espoo) et la Convention d'Aarhus[11] mettent en place un cadre juridique pour que les communautés riveraines qui partagent une ressource en eau soient consultées et que leur avis soit pris en compte dans le cadre du processus d'évaluation environnementale d'un projet. Même si ces instruments ont été adoptés au niveau européen, l'exigence d'assurer la participation du public fait aussi partie d'instruments au champ d'application plus large.[12] L'exigence d'intégrer les communautés et les individus répond en effet à l'intérêt du public en matière de gestion de l'eau. Le public ne peut pas être exclu du processus décisionnel concernant cette ressource et la jurisprudence des mécanismes juridiques de protection relatifs aux droits de l'homme l'a souligné.[13] Ces derniers ont affirmé le droit à la consultation préalable des populations locales et l'obligation d'assurer l'accès à l'information.

## II. LES INDIVIDUS ET LES COMMUNAUTÉS LOCALES DANS LES INSTRUMENTS DU DROIT DES COURS D'EAU INTERNATIONAUX

La place des individus et des communautés doit se renforcer dans les instruments relatifs aux ressources en eau transfrontières. Les normes relatives à l'accès à l'information sur la qualité des eaux et la consultation avec les communautés riveraines sont encore rares dans ces instruments. Par exemple, la Convention des Nations Unies de 1997 ne prévoit que l'obligation pour un État riverain de veiller à ce que toute personne qui a subi un dommage découlant d'activités liées à un cours d'eau international puisse avoir accès aux procédures juridictionnelles. La Convention de 1997 affirme l'obligation des États riverains d'assurer l'accès à la justice sans discrimination « fondée sur la nationalité, le lieu de résidence ou le lieu où le préjudice a été subi ».[14]

Au niveau régional et au niveau de cours d'eau particuliers, beaucoup d'États ont adopté des accords qui contiennent des dispositions relatives à l'accès à l'information. Les communautés et les individus doivent disposer d'informations sur la qualité des eaux dont elles dépendent. Par exemple, les informations transmises doivent comprendre l'impact des utilisations industrielles d'un cours d'eau sur l'environnement et la santé humaine. L'accès à l'information sur la qualité des ressources en eau est un aspect important de la gouvernance de l'eau. Certaines conventions soulignent la relation entre l'accès à l'information et la prévention de la pollution. C'est le cas de la *Convention sur la protection et l'utilisation des cours d'eau transfrontières et des lacs internationaux* de 1992, adoptée sous l'égide de la Commission économique des Nations Unies pour l'Europe (ci-après la Convention d'Helsinki de 1992) et de la *Convention sur la coopération pour la protection et l'utilisation durable du Danube* de 1994.[15] En outre, l'importance du rôle des acteurs non étatiques a été soulignée en ce qui concerne l'efficacité de la procédure d'examen et de conformité à la *Convention d'Helsinki* de 1992. La Décision établissant le Comité d'application de ladite Convention tient compte du rôle du public dans le cadre des

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10 Voir la contribution de F. Zaharia, « Public participation and water resources management in the Danube Delta. The Bystroe Canal Project and the Espoo Convention » ci-après.

11 Voir la contribution de F. Marshall, « The Aarhus Convention and water resources management » ci-après.

12 Voir la contribution de U. Etemire et F. Sindico, « The Guaraní Aquifer and the Role of Non-State Actors » ci après.

13 Voir : Belo Monte Dam Case, décision de la Cour interaméricaine des droits de l'homme, Mesures conservatoires, MC-382-10, 1 avril 2011; *Centre for Minority Rights Development (Kenya) and Minority Group International (on behalf of Endorois Welfare Council) c. Kenya*, Commission africaine des droits de l'homme et des peuples, 276/03, 25 novembre 2009. Voir la contribution de O. McIntyre, « The Role of the Public and the Human Right to Water » ci après.

14 Article 32 de la Convention.

15 Voir la contribution de B. Mandl « Public Participation in the International Commission for the Protection of the Danube River » ci-après.

discussions relatives aux activités du Comité et impose à ce dernier de tenir compte de leurs observations éventuelles pour établir la version définitive des conclusions et mesures. [16]

En Amérique, le public a été intégré dans le processus de révision de l'Accord sur la qualité de l'eau dans les Grands Lacs entre le Canada et les États-Unis de 1972 et certaines commissions riveraines ont développé des instruments pour renforcer la place du public dans la gestion des ressources en eau transfrontières.[17] A l'instar des instruments portant sur des cours d'eau internationaux en Amérique, l'*Accord sur la coopération pour le développement durable du bassin du fleuve Mékong* de 1995 ne prévoit pas de dispositions expresses en matière de participation du public. Cependant, depuis 2007, le Comité conjoint qui réunit les représentants du Vietnam, du Laos, du Cambodge et de la Thaïlande a adopté une recommandation en vue d'intégrer les organisations non-gouvernementales (ONG) et la société civile au sein des réunions de la Commission du Mékong. Il s'agit d'une étape significative dans le processus d'intégration du public dans la gestion de cette ressource en eau.[18] Le mouvement vers l'inclusion du public dans la gestion des eaux transfrontières est également visible dans les instruments sur les cours d'eau en Afrique. La *Charte des eaux du fleuve Sénégal* de 2002[19] ainsi que le *Protocole sur le développement durable du bassin du Lac Victoria* de 2003 prévoient des règles en matière de participation du public.[20] Le principe de la participation du public dans la gestion des ressources en eau transfrontières doit être appréhendé par une approche holistique comprenant les normes du droit des cours d'eau internationaux, des droits de l'homme et celles du droit international de l'environnement. La lecture intégrée de ces normes peut renforcer la place de l'individu et des communautés dans la gestion des ressources en eau transfrontières et contribuer à l'utilisation durable de ces ressources.

L'inclusion du public est aussi importante lorsque des acteurs comme les banques de développement interviennent dans le financement d'un projet sur des ressources en eau transfrontières.[21] Les populations locales de l'État emprunteur qui réalise le projet et celles de l'État susceptible d'être affecté doivent être consultées. Le manque de consultation préalable peut mettre en danger la légitimité d'un projet et causer une controverse entre les deux États concernés. Le différend sur les *Usines de pâte à papier sur le fleuve Uruguay* entre l'Argentine et l'Uruguay porté devant la Cour internationale de Justice (CIJ) en 2006 en est un exemple.

## III. OBJECTIFS ET RÉSULTATS DU COLLOQUE

Considérant le besoin d'examiner la place du public dans le droit applicable aux ressources en eau, des membres de la Plateforme pour le droit international de l'eau douce de la Faculté de droit de l'Université de Genève *ont* organisé, en partenariat avec le Secrétariat de la *Convention sur la protection et l'utilisation des cours d'eau transfrontières et des lacs internationaux,* une conférence internationale sur le thème « La participation du public et la gestion des ressources en eau : où en est le droit international ? ». Cette conférence a eu lieu au Palais des Nations le 13 décembre 2013.[22] Le thème de la conférence a été abordé à travers des analyses de la pratique conventionnelle et jurisprudentielle ainsi qu'à la lumière des activités des organismes de bassin. L'exploration

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16 Voir la contribution de A. Tanzi, C. Contartese sur « The Implementation Committee of the Helsinki Water Convention a New Tool of Public Participation for the Management of Transboundary Water Resources » ci-après.

17 Dans le cadre du fleuve Uruguay, la Commission administrative du fleuve Uruguay (CARU) a conclu en 2002 avec quinze gouvernements locaux uruguayens et argentins un *Plan de protection environnementale du fleuve Uruguay*. Ce plan se fonde sur une coordination « collecti[ve], participati[ve] et collaborati[ve] »pour protéger le fleuve Uruguay et s'inspire des principes contenus dans la Déclaration de Rio de 1992 tels le développement durable. *Affaire des Usines de pâte à papier sur le fleuve Uruguay*, Mémoire de la République Argentine, 2007, par. 3.153-3.157.

18 Voir la contribution de A. Rieu-Clarke « Transboundary Hydropower Projects on the Mainstream of the Lower Mekong River – The Case of Public Participation and Its National Implications for Basin States » ci-après.

19 Article 13.

20 Articles 3 (l), 4.2 (h), 12.2, 22.

21 Voir la contribution de V. Richard « Justice by any other name? The grievance mechanisms of multilateral development banks » ci-après.

22 L'organisation de la conférence a bénéficié d'un subside du Fonds National de la Recherche Suisse (FNS). La Société académique de Genève a soutenu la publication des Actes de la conférence.

de pratiques nationales a également permis d'observer les interactions entre le droit international et les droits internes dans la mise en oeuvre de la participation du public au plan local.[23]

Quatre enjeux relatifs au principe de la participation du public et la gestion des ressources en eau ressortent des différents débats.

## 1) La nécessité d'une universalisation des règles de la participation du public dans la gestion des ressources en eau douce

Les contours du principe de la participation du public sont peu développés au niveau universel. Or, l'inclusion de ce principe dans les instruments universels favoriserait son universalisation et le développement de standards communs au niveau de chaque bassin considéré.

## 2) La nécessité d'associer la participation du public à la réalisation du droit d'accès à l'eau potable et à l'assainissement

Le droit à l'eau et à l'assainissement contribue à modeler le régime applicable à la participation du public afin de le rendre effectif. Il constitue ainsi un référentiel dans l'appréciation de l'efficacité et de la réception du principe de la participation du public développé auprès des populations concernées, tel que nous pouvons l'observer dans le contexte des bassins du Niger et du Sénégal avec la consécration d'un droit humain à l'eau.

## 3) La nécessité du renforcement de l'inclusion du public dans les mécanismes institutionnels

Les mécanismes institutionnels ouverts au public contribuent à une protection plus efficace des ressources en eau. Le public peut apporter des informations complémentaires relatives à la qualité et aux utilisations des eaux douces par des échanges d'informations au sein de commissions de bassin. Ensuite, la mise à disposition de l'information au profit du public améliore la capacité de la société civile et des populations locales à vérifier la mise en œuvre des conventions de l'eau. Une fois que le public est informé de l'état de la mise en œuvre nationale desdites conventions, les acteurs non étatiques peuvent avoir accès à des procédures judiciaires ou administratives. En cela, les acteurs non étatiques apparaissent comme les garants d'une gestion intégrée de l'eau.

Enfin, le public peut également contribuer au règlement des différends s'il est associé dans le développement de projets économiques dès les premières phases. Cet aspect se reflète dans la pratique des mécanismes de plainte des banques régionales de développement ainsi que du Comité de la Convention d'Aarhus de 1998.

## 4) Coopération entre plusieurs secteurs et à différents niveaux

L'étude de la participation du public et de la gestion des ressources en eau met en relief l'influence réciproque que différents milieux (agricole, industriel, environnemental) exercent sur la gestion de certains bassins. C'est le cas notamment dans le bassin du Rhône.[24] Cette situation révèle également la nécessité d'une meilleure coordination institutionnelle. Au niveau national, le processus de réforme entamé en Inde ou en Roumanie souligne l'interaction entre les niveaux international et national ainsi que la contribution des associations d'usagers à la gestion qualitative et quantitative des ressources en eau.

Les individus et les communautés locales sont de plus en plus inclus dans la gouvernance des ressources en eau transfrontières. Ce modèle de gestion peut améliorer la qualité des décisions en matière d'utilisation et de protection des ressources en eau, et des conflits potentiels sur ces ressources peuvent être évités. Le risque d'un différend sur des ressources en eau transfrontières diminue lorsque le public dispose d'un accès aux informations pertinentes et du droit de formuler des observations et de faire des recommandations sur les activités projetées sur ces ressources.

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23 Voir les contributions de P. Cullet « Water Regulation and Public Participation in the Indian Context » et A. Drapa « The Experience of Romania in Public Participation » ci-après.

24 Voir la contribution de C. Bréthaut et G. Pflieger sur la « Participation publique dans le cas du Rhône, une relecture en termes d'efficacité sociale, substantielle et procédurale » ci-après.

# PART 1.

## LINKAGES BETWEEN PUBLIC PARTICIPATION, THE MANAGEMENT AND PROTECTION OF FRESHWATER

# NATIONAL APPROACHES

# WATER REGULATION AND PUBLIC PARTICIPATION IN THE INDIAN CONTEXT

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## ABSTRACT

*Water regulation in India has traditionally been largely weak on public participation. Major changes have taken place in the past couple of decades from different perspectives. On the one hand, the international participatory agenda has been reflected in the adoption of a series of policies and laws emphasising the need for fostering the participation of water users. On the other hand, constitutionally-triggered decentralisation has led to democratically elected bodies of local governance being given broader water-related competencies. There have thus been significant changes in the discourse concerning public participation in the water sector. Yet, a lot more remains to be done to ensure that the change in discourse leads to an effective democratisation of the regulation of water. The two different forms of participation developing in parallel are different in their conceptual origin, the framework put in place for implementation and their results. While everybody agrees that participation in the water sector is necessary, its long-term success will be dependent on being framed in binding legal frameworks that reflect democratic principles.*

## RÉSUMÉ

*Le droit de l'eau en Inde n'a traditionnellement pas donné beaucoup de place à la participation du public. Au cours des deux dernières décennies, différentes innovations dans ce domaine sont devenues visibles. D'une part, l'agenda international pour des politiques participatives se trouve refléter dans des lois et politiques mettant en avant le besoin d'encourager la participation des utilisateurs d'eau. D'autre part, un processus de décentralisation déclenché par des réformes constitutionnelles a permis de donner, à des assemblées locales élues démocratiquement, des pouvoirs nettement plus étendus concernant l'eau. Les deux formes de participation qui se sont développées en parallèle diffèrent conceptuellement, en termes du cadre mis en place pour leur réalisation et de leurs résultats en pratique. Alors que chacun accepte aujourd'hui que la participation du public est nécessaire, son succès à long terme ne pourra être assuré que si ses bases se trouvent dans des instruments juridiques contraignants et basés sur des principes démocratiques.*

**Key words:** Water, public participation, India

**Mots clés :** Eau, participation du public, Inde

# I. INTRODUCTION

Water regulation in India has had a long history. In terms of modern water law, some of the earlier enactments are irrigation acts and rules regulating access to and control over groundwater. Most of the basic structure of current water law was, in fact, set out in judicial pronouncements and legislative enactments dating back at least a hundred years, if not more. This slow and progressive development of water law over time has led to a situation where water regulation is largely based on dated principles that do not reflect many of the advances that have taken place in recent decades, either in the field of human rights or environmental law. As a result, older water law is largely top-down and reflecting the priorities of the government.

If the core of water law in India is still based on old legal instruments or principles, there has been a significant push for change over the past couple of decades. Various new enactments have been adopted in a number of Indian states.[1] One of the major components of these new acts has been the focus on participation of water users. This is seen as a major shift from supply-led (top-down) to demand-led management, within which water users get a say in the management of water. This has been implemented particularly with regard to irrigation and drinking water supply.

There have also been developments in other areas of law that have an influence on the water sector. This is in particular the case of environmental law within which a number of new principles that also apply to water have developed, including mechanisms such as environmental impact assessment that foster some form of participation by project-affected people.[2]

While specific laws are noteworthy, some of the most significant recent developments have taken place at the level of the Constitution. This is, for instance, the case with constitutional amendments adopted in the 1990s that significantly strengthened local democratic governance, within which water has an important place. This is momentous because it confirms that participation cannot be dissociated from decentralisation and democratisation. It also clearly puts democratically-elected local institutions at the centre of the participation framework and confirms that participation is not limited to central/state government-organised participation.[3]

There are thus a number of important legal changes that have taken place over the past couple of decades in the legal framework that directly concern the participation of water users. While the role of the law has been important, some of the most significant changes that have taken place have not been the changes brought in through legislation or strictures of the higher judiciary but rather changes brought through policy development. In fact, one of the key markers of the reforms that have taken place over the past couple of decades in India is that in certain areas, such as drinking water supply, the framework has developed overwhelmingly through policy interventions.[4] This has significant consequences with regard to the kind of participation that is proposed and the mechanisms for enforcing the same.

This contribution examines the framework within which participation in the water sector is conceived in India. It then looks more specifically at two sectors where participation has been particularly emphasised, irrigation and drinking water supply. It concludes by analysing the lessons learnt over the past couple of decades of reforms in a context of ongoing reforms.

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1 Water being a state subject in India, water laws are, in principle, adopted at the state level.

2 See e.g. S. Divan, 'The Contours of EIA in India', in R. Iyer (ed.), *Water and the Laws in India*, New Delhi, Sage, 2009, p.390.

3 See E. Mostert, 'The Challenge of Public Participation', *Water Policy*, vol. 5, 2003, p.179.

4 See e.g. P. Cullet, 'New Policy Framework for Rural Drinking Water Supply—The Swajaldhara Guidelines', *Economic & Political Weekly*, vol. 44/50, 2009, p. 47.

## II. FRAMEWORK FOR WATER REGULATION AND PUBLIC PARTICIPATION IN INDIA

Water law is a relatively old branch of law. As a result, it is a comparatively well-developed field but one where the introduction of new principles has been relatively more difficult than in relatively new areas of law like environmental law. This section introduces the basic water law framework and the way in which participation has progressively been strengthened. It also examines other participatory developments in other parts of the legal framework. Further, it considers the significant influence of policy instruments in recent decades over water policy and law generally and concerning participation specifically.

### A. WATER LAW AND PARTICIPATION

A part of existing water law finds its sources in the nineteenth century. This includes in particular irrigation acts adopted by the colonial power for whom agriculture, hence irrigation, was a central tenet in the economic development of the country. As a result, older legislation is geared towards giving the government the power to mobilise resources for fostering higher yields. These enactments give no particular space to farmers or other water users. In fact, the central issue is control over land. While colonial legislation is a historical remnant, the framework for irrigation legislation did not change much after independence, as confirmed by the 'Bihar Irrigation Act' of 1997 that is still based on a framework that gives the state overwhelming control and does not consider the needs and rights of farmers and water users directly. There are thus still a number of irrigation acts in force that are based on principles that are largely 'anti-participation'.

Another old part of water law are the rules concerning access to groundwater. English rules giving overwhelming control over groundwater to landowners were simply transposed in India. They still apply to date, as there has been no significant change to the basic legal framework concerning groundwater rights yet.[5] These rights are 'participatory' in the sense that they give landowners control over groundwater. However, in a broader sense, they give landowners a monopoly over groundwater while denying everyone else any say in the control, use and management of groundwater. This is particularly 'un-participatory' in a context where around 40% of the population does not own land and where groundwater is the main source of basic and drinking water for the overwhelming majority of the population in rural areas.

The lack of participation in irrigation and groundwater law is noteworthy because it constitutes two of the more developed areas of water law. In a context where there is no framework for water legislation,[6] an analysis of Indian water law must thus look at the main 'sectors' that have been covered in the legal framework. In this context, while participation in water law in general has not changed much over the past few decades, one sector has seen significant reform. Within irrigation regulation, the concept of 'participatory irrigation management' that has existed for a long time[7] has been much strengthened over the past couple of decades and is now enshrined in a number of state legislations.[8] This is taken up separately in the next section.

Beyond water law itself, a lot has happened with regard to participation in the past couple of decades. Firstly, at the constitutional level, two amendments adopted in the early 1990s have paved the way for strengthening local bodies of democratic governance in both urban and rural areas.[9] These constitutional provisions specifically refer to water and thus provide directly for a much more participatory form of water governance at the local level. Implementation of these provisions is uneven in the country, partly because implementation first depends

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5 P. Cullet, 'Groundwater Law in India—Towards a Framework Ensuring Equitable Access and Aquifer Protection', *Journal of Environmental Law*, vol. 26/1, 2014, p.55.

6 Note however two separate initiatives in this regard, the first one, Planning Commission, National Water Framework Bill, 2011, available at: http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_wtr_frame.pdf and the second, the Draft National Water Framework Bill, 2013.

7 See e.g. N. Pant, 'Impact of Irrigation Management Transfer in Maharashtra—An Assessment', *Economic & Political Weekly* A-17, vol. 34/13, 1999.

8 R. Madhav, 'Law and Policy Reforms for Irrigation', in P. Cullet et al. (eds.), *Water Law for the Twenty-first Century: National and International Aspects of Water Law Reforms in India*, Routledge, Abingdon, 2010, p. 205.

9 Constitution of India, art. 243.G and Eleventh Schedule; and art 243.W and Twelfth Schedule.

on state legislation making this constitutional framework a reality in the legal framework.[10] In general, much more can be done with regard to effective control over water by local bodies of governance but participatory principles are now clearly in place.

Secondly, a number of participatory provisions have been introduced in environmental law. Since environmental law applies to water too, this is directly relevant in our context.[11] One of the instruments that specifically reflect the participatory imperative is environmental impact assessment. India has had a formal framework for this since 1994. While it has been subjected to severe criticism over time for being too weak,[12] it provides a starting point for some public participation which is not found anywhere in water law.

## B. BEYOND WATER LAW: OTHER INFLUENCES ON PUBLIC PARTICIPATION

The participatory framework highlighted in the previous section is framed at the level of binding norms, statutes or judicial fiat. While this is what usually interests lawyers, in the context of water, the enquiry must be pushed further because some of the most important developments having taken place over the past two decades have happened through instruments that are usually side-lined because they are not binding. The water sector has been a particularly important laboratory of this new kind of quasi-law making. Two different dimensions of this process can be identified, the national and international one. Interestingly, while there has been little international law influence on the development of water law in India over the past few decades, international policy instruments and international institutions have played an important role in the reforms that have been introduced, thus requiring reading them as a joint process.

While India does not yet have a framework for water legislation,[13] a national water policy has been adopted on three different occasions. The first dates back to 1987, the second to 2002 and the existing policy was adopted at the end of 2012.[14] In principle, a national water policy would have been understood as something paving the way for the adoption of legislation by Parliament. However, what has happened in practice is that the process has remained driven entirely by the executive, providing more flexibility in adaptation to new circumstances but bypassing the various safeguards that the constitutionally established process for the adoption of legislation provides.

From the point of view of public participation the national water policies are very important because they directly refer to participation, something that water laws usually fail to do. The first policy of 1987 emphasised farmers' participation in irrigation,[15] something that has been taken up subsequently in a number of states through the adoption of separate enactments. The second policy of 2002 moved towards a broader understanding of participation, including the 'participation of beneficiaries and other stakeholders' in project planning and private sector participation in the water sector.[16] The latest policy proposes participation as part of good governance and specifically highlights community participation in the management of water projects and services.[17]

There has thus been a steady emphasis on different forms of participation over the past couple of decades. This participation is, on the whole, completely different from the democratic participation proposed in the constitutional amendments devolving control over local water resources to local bodies of governance. Whereas the latter is framed in terms of a permanent framework, the former evolves in tune with the policy orientation of the executive over time, without creating any rights for people. Put differently, there is a major difference between the recognition of the fundamental right to water by the Supreme Court that implies 'participation' by rights holders and the 'participation' envisaged in the national water policy documents that have been increasingly built around the idea that water has an 'economic value' and must be allocated so as to foster its

10 For rural areas, see e.g. Rajasthan Panchayati Raj Act, 1994. For urban areas, see e.g. Rajasthan Municipalities Act, 2009.

11 Environment (Protection) Act 1986, s. 2(a).

12 See e.g. M. Menon & K. Kohli, 'From Impact Assessment to Clearance Manufacture', *Economic & Political Weekly*, vol.44/28, 2009, p.20.

13 Note that in a context where water is a state subject, it would in principle be state legislative assemblies that should adopt a framework for water legislation. Yet none has done so.

14 National Water Policy, 1987, available at www.ielrc.org/content/e8701.pdf; National Water Policy, 2002, available at www.ielrc.org/content/e0210.pdf; and National Water Policy, 2012, available at www.ielrc.org/content/e1207.pdf.

15 National Water Policy, 1987, s. 12.

16 National Water Policy, 2002, s. 6(8) and 13.

17 National Water Policy, 2012, s. 1(3) and 12(3).

'efficient use'.[18] This happens to mirror policy developments at the international level, in particular the Dublin Statement, a non-binding instrument that has been used as the basis for fostering an understanding of water as an economic good since the early 1990s.[19]

The promotion of participation by national water policies over time is thus both interesting and of concern. These policies and various other subsidiary administrative directions of the government constitute a framework for fostering public participation. At the same time, this is done in a context which takes little notice of developments happening elsewhere, such as the recognition of the fundamental right to water by the Supreme Court as early as 1991.[20] Further, this happens in a context where the sectoral development of water law has left major gaps in the legal framework. The most significant is the absence of any legislation providing the framework for translating the fundamental right to water into practice. In other words, the issue that is universally understood as being the most important priority by all branches of government suffers from not having any legislative basis that would make the fundamental human right to water a reality in legislative terms. In this context, while Supreme Court pronouncements carry significantly more weight than policy instruments, the reality that people experience on the ground, in particular in rural areas is that the real 'law' is what the executive implements on a daily basis. This ends up giving policy instruments much more importance than they should in principle have.

The ways in which participation has evolved in the legislative and policy framework over the past couple of decades is well exemplified by the example of participatory irrigation management and drinking water supply that give more concrete shape to the ideas conveyed through national water policies. This is taken up in the next section.

## III. PARTICIPATION IN DIFFERENT SECTORS: THE CASE OF DRINKING WATER AND IRRIGATION

Participation has progressively become entrenched in the water policy discourse over the past couple of decades at the international level as well as in India. Two key areas in the Indian water sector have been deeply influenced by this new vocabulary that finds its source both in evolving domestic and international policy making. The different underlying influences explain in part that 'participation' is understood and implemented in different ways in different contexts, though the overarching term used remains the same.

### A. Participation and Surface Irrigation

As noted above, irrigation law is one of the oldest branches of modern statutory water law in India. It has thus logically been at the centre of calls for reforms for decades. The necessity to bring in change has become progressively more visible as decades of massive investments in surface irrigation schemes have failed to foster the kind of benefits expected in terms of irrigated zones. There had been calls for giving farmers more of a say in the management of irrigation schemes for a long time, which were based on the fact that there were strong historical precedents of local management before the colonial and independent governments started planning larger schemes under their control.

Calls for participation in irrigation management thus existed in India independently from the development at the international level of the model of Participatory Irrigation Management (PIM) that has come to dominate water policy since the 1980s.[21] It is thus striking to find that the model of participation in irrigation management that has been progressively implemented through projects and since the late 1990s through legislation is mostly a direct

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18 *Ibid*., ss. 1(2) & 1(3).

19 Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992.

20 *Subhash Kumar v State of Bihar* AIR 1991 SC 420 (Supreme Court of India, 1991).

21 See e.g. S. Hodgson, *Legislation on Water Users, Organizations—A Comparative Analysis*, FAO Legislative Study 79, Rome, 2003.

application of the international PIM model. This raises questions as to the nature of participation in legal terms because the PIM model is a generic template that has not been tailored to the existing legal framework in India.

The PIM model now enshrined in law through legislation in a number of Indian states providing for the setting-up of water user associations (WUAs) is based partly on the realisation that the planning of massive irrigation schemes without farmer participation was not an appropriate starting point. It is also based on a broader policy shift away from entrusting the government with most developmental responsibilities in favour of a 'demand-led' model where water users are called on to participate.[22] The form of this participation is what matters and is analytically significant. Indeed, two different models coexist in India today.

On the one hand, there are now WUA acts that provide for the participation of farmers in the management of irrigation systems. This should not be confused with participation in policy-making in irrigation or participation in project design. The participation envisaged here is narrower and limited to certain specific tasks concerning the management of existing schemes. This is, for instance, the case in Maharashtra where the two main objects of WUAs are to ensure an equitable distribution of water among its members, to adequately maintain irrigation systems and to ensure efficient, economical and equitable distribution and utilization of water to optimize agricultural production.[23]

On the other hand, state legislation throughout the country has given democratically elected bodies of local governance control over water resources in pursuance of the constitutional mandate giving panchayats control over water at the local level, in particular minor irrigation, water management, watershed development and drinking water.[24]

There are thus two parallel bodies with competence over irrigation at the local level. This is unwelcome and inappropriate. Panchayats have been conceived as part of a comprehensive system of governance that understands the need for regulation of different natural resources, different activities and different uses of a given natural resource in a coordinated manner. In addition, panchayats are democratically elected and include reservation for both women and scheduled castes and scheduled tribes, a very important point to foster better representation of groups traditionally vastly under-represented.[25] In comparison, WUAs foster a type of participation that is narrowly conceived and based on regressive bases. Firstly, WUAs provide participation only for certain specific tasks rather than alongside the whole chain of activities from policy formulation to project management. They also fail to take into account the fact that in rural areas, it is artificial to consider irrigation separately from drinking water or other water uses since the same sources may be used. Secondly, their membership is skewed since it is only landowners that are members.[26] This is inappropriate participation in a context where water sources can often not be clearly distinguished by water use. In addition, apart from one exception,[27] WUA acts do not provide reservation, hence leading in practice to a logical dominance of higher caste males.

On the whole, the WUA framework, which appears at the outset as a welcome break from an over-centralised, government-driven regulatory scheme, is found to be lacking. This is mostly because WUAs were introduced in India alongside the model adopted at the international level without consideration of the existing legal framework and the specific conditions obtaining in Indian states. The limitations in terms of participation are made more evident by the fact that while different regions/states of India traditionally had different irrigation management arrangements, states in various corners of the country have adopted the same WUA model with little adaptation to local conditions. WUA acts also fail to act as a real reform of irrigation law since they only address a single issue within the sector rather than propose a comprehensive reform framework that is badly needed, in particular for laws adopted many decades ago.

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22 See e.g. N. Pant, 'Some Issues in Participatory Irrigation Management', *Economic & Political Weekly*, vol. 48/1, 2008, p.30.

23 Maharashtra Management of Irrigation Systems by Farmers Act 2005, s 4(1), available at www.ielrc.org/content/e0505.pdf.

24 Constitution of India, Eleventh Schedule (art. 243.G), available at http://indiacode.nic.in/coiweb/welcome.html.

25 Constitution of India, art. 243.D, available at http://indiacode.nic.in/coiweb/welcome.html.

26 See e.g. Maharashtra Management of Irrigation Systems by Farmers Act 2005, s. 2.1(w), available at www.ielrc.org/content/e0505.pdf.

27 Chhattisgarh sinchai prabandhan me krishkon ki bhagidari adhiniyam 2006, s. 5, available at http://www.ielrc.org/content/e0605.pdf.

## B. PARTICIPATION AND BASIC WATER SUPPLY

Drinking water is today universally recognised as the key priority in the water sector. India is no exception and, in fact, the Supreme Court of India confirmed the existence of the fundamental right to water as a right linked to the right to life much before international bodies started taking a serious interest in the human right to water. It is thus surprising that there is no legislation setting down the basic principles and parameters governing drinking water supply. As a result, there are still no binding drinking water quality standards, even though reference standards have existed for quite some time.

The absence of legislation notwithstanding, drinking water became politically so important in the decades after independence that by the 1970s the Central Government started taking specific policy initiatives in this area, particularly with regard to rural drinking water supply in the context of the Accelerated Rural Water Supply Programme. There has been no looking back and since then the Central Government has kept giving policy direction in this sector through administrative instruments. In fact, since the mid-1990s, there has been an increasing array of interventions, making it a fast changing policy framework.

The relevance of this changing policy in the context of this chapter is that one of the key principles that has driven change in recent years is participation. As in the case of irrigation, the driving force behind change has been a perceived need to move away from government-led initiatives to water user-led initiatives, the so-called demand-led paradigm. The trigger for policy change was a World Bank pilot project that sought to bring in a completely new policy paradigm in the rural drinking water supply sector. This was based on making users take a more direct role in certain aspects of decision-making, making a financial contribution to the capital costs and taking on the financial and managerial responsibility for the operation and maintenance of the schemes.[28] This pilot project constituted an attempt to completely change the relationship between the government and water users and was centred around a concept of participation that would see local water users having more control over decisions made at the local level in return for their 'participation' in financing and operating the scheme. The pilot project was turned into national policy in the early 2000s through what came to be known as the Swajaldhara Guidelines.[29] Most of the key principles introduced during those years are now enshrined in the new overall policy framework that has been in place since 2009, the National Rural Drinking Water Programme (NRDWP).[30]

The participation envisaged under the Swajaldhara Guidelines was of an atypical nature. It included two dimensions. The first corresponded broadly with the mainstream understanding of participation whereby water users got more say in decisions affecting them directly. The second was in fact not 'participation' but the imposition of a duty to bear part of the costs of building the infrastructure and a duty to operate and maintain it. The capital cost proved to be particularly controversial because only people who contributed would be given access to the water provided by the scheme.[31] This thus excluded ab initio the poorest, who were already the people that had the least access to drinking water in their communities.

While the policy to make water users responsible for operation and maintenance has not been entirely abandoned, the capital cost contribution has been sidelined under the NRDWP because it had proved controversial and impractical in all the communities that could not afford the contribution. In the meantime, the emphasis is now both on participation by water users and private sector participation. Thus, the Strategic Plan 2011-2022 suggests at various points the need to strengthen the involvement of private actors in the delivery of rural drinking water supply.[32] In other words, there has been a shift from fostering public participation in all aspects of drinking water supply to suggesting a mix between public and private sector participation.

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28 World Bank, Staff Appraisal Report—Uttar Pradesh Rural Water Supply and Environmental Sanitation Project (Report No 15516-IN, 1996).

29 Ministry of Rural Development, Guidelines on Swajaldhara 2002, available at www.ielrc.org/content/e0212.pdf.

30 Government of India, Department of Drinking Water Supply, National Rural Drinking Water Programme (2009/2013), available at www.ielrc.org/content/e1308.pdf.

31 See e.g. P. Sampat, '"Swa"-jal-dhara or "Pay"-jal-dhara—Sector Reform and the Right to Drinking Water in Rajasthan and Maharashtra', *Environment & Development Journal*, vol. 3/2, 2007, p. 101, available at http://www.lead-journal.org/content/07101.pdf.

32 Government of India, Department of Drinking Water and Sanitation, *Strategic Plan—2011-2022: Ensuring Drinking Water Security in Rural India*, available at www.ielrc.org/content/e1104.pdf.

# IV. PUBLIC PARTICIPATION IN THE WATER SECTOR IN INDIA – LESSONS LEARNT

India is a fascinating case study of the development of participation in water law and policy. It confirms that participation in the water sector is a much more complex issue than an international level analysis focusing on developments in international environmental law or human rights law indicates.

Firstly, the progressive development of participation has taken place both within water law and in other areas. The different pathways for participation proposed in water laws, the Constitution, environmental law and local laws indicate that there are unresolved tensions as to the nature of participation.

Secondly, participation is to an extent the antithesis of the framework on which many existing water laws are based. The government-centric framework of earlier decades leaves little place for effective participation by water users. In this context, initiatives like the adoption of WUA laws are an attempt to inject a participatory framework in the irrigation sector. However, since these WUA laws are usually not conceived as part of an overall participatory reform of irrigation law, they are unlikely to have broad-ranging impacts.

Thirdly, a large part of participatory frameworks that have been adopted over the past couple of decades are found in administrative instruments. This has the advantage of flexibility, but creates no binding rights and obligations. While the existing legal framework for accountability has not necessarily worked well, this replaces it with a non-system that is at least as problematic.

Fourthly, participation has increasingly been linked both with the participation of water users and private sector actors. The mainstream understanding of participation as bringing in more democratic processes and outcomes is thus no longer the only form that 'participation' takes in the water sector in India. This is unfortunate because it confuses completely different things in the name of bringing together different non-state actors on the same platform.

Fifthly, participation has been influenced equally by domestic and international factors. This is per se unremarkable since law and policy making is often subject to various influences. In this case, it brings up the problem of different participatory frameworks being placed side by side without ensuring that the whole constitutes a coherent framework. Thus, the participatory framework proposed in the WUA model is one that sees participation as detached from existing bodies of democratic governance and linked to specific interest groups, such as landed irrigators. This is largely separate, if not opposed, to the participatory framework envisaged in the Constitution that provides for permanent structures where participation is based on universal participation and the recognition of the need for reservation of disadvantaged groups.

On the whole, developments in India over the past couple of decades concerning participation reflect a dichotomy between two understandings of participation. The first one that is based on the current international water policy consensus that sees water as an economic good and that promotes demand-led water management. This version has permeated all documents adopted by the executive, ranging from national water policies to administrative directions and projects implemented by the government. The second understanding of participation is the one that sees participation as a facet of decentralisation. It also identifies the overbearing power of the central/state governments as a problem that needs to be addressed. The answer given is, however, radically different since it is enshrined in legislation, is based on universal participation, and specifically seeks to address existing inequalities within local communities.

The existence of two different understandings of public participation for something as important and contested as water is hardly surprising. This nevertheless raises questions from a legal perspective. Indeed, in the existing framework that puts the Constitution and fundamental rights at the top of the pyramid, we would expect to find that participation is driven by the fundamental human right to water and by the decentralisation framework provided in the Constitution. In practice, however, the influence of non-binding policy instruments has been such that it is often the case at local levels that the only thing that 'really' matters are the administrative directions of the government. These may not run counter to the legal framework but since, for all practical purposes, they

supersede what are theoretically hierarchically superior norms, the issue calls for further probing. In the context of a fast-evolving law and policy context in the water sector, we will certainly witness a lot more debate on these issues in the coming years. This is in fact what the Planning Commission tried to initiate during the development of the 12th Five Year Plan with the introduction of a new 'paradigm shift',[33] and the drafting of some new laws, including a proposed national water framework act.

## FURTHER READING

Cullet, P., *Water Law, Poverty and Development: Water Law Reforms in India,* Oxford University Press, Oxford, 2009.

Iyer, R. (ed.), *Water and the Laws in India*, Sage, New Delhi, 2009.

33 M. Shah, 'Water: Towards a Paradigm Shift in the Twelfth Plan', *Economic & Political Weekly*, vol. 48/3, 2013, p.40.

# PUBLIC PARTICIPATION AND WATER MANAGEMENT IN ROMANIA

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## ABSTRACT

*This paper presents public participation in Romania related to the issue of water management in general and the participation process in accordance with the provisions of the EU Water Framework Directive in particular. This process was prepared by the authorities having responsibilities in implementing the water management policy, including the EU Water Framework Directive, based on the documents elaborated at the level of the European Commission and the International Commission for Protection of the Danube River and also at national level. The process is not a simple one; it involves considerable human and financial resources. Besides this, the coordination at national and also international level - in this case on the Danube River Basin level - is essential for ensuring the success of involving all stakeholders and implementing the EU Water Framework Directive. The results of the public participation process during the development of the 11 River Basin Management Plans and the 1st National Management Plan for the Romanian portion of the International Danube River Basin District (2400 participants in 70 meetings) have shown that there is an interest from the public and stakeholders side regarding water resources management issues. Lessons learned during the public consultation process should lead to the improvement of the process to the next cycle of the river basin management planning. This can be reflected in the contributions to the documents developed according to regional and national requirements as well as of the EU Water Framework Directive provisions.*

## RÉSUMÉ

*Ce papier présente la participation du public en Roumanie en matière de gestion de l'eau en général, ainsi que la procédure de participation à la lumière des règles de la Directive-cadre sur l'eau en particulier. Cette procédure a été préparée par les autorités ayant des responsabilités dans la mise en œuvre de la politique sur la gestion de l'eau, y compris en ce qui concerne la Directive-cadre. Elle est basée sur les documents élaborés au niveau de la Commission européenne et de la Commission internationale pour la protection du fleuve Danube ainsi qu'au niveau des autorités nationales. En outre, la coordination aux niveaux national et international – dans le cas du bassin du fleuve Danube – est essentielle pour assurer le succès d'une gestion participative, prenant en compte toutes les parties prenantes dans la mise en œuvre de la Directive-cadre. Le public a participé pendant le développement de Plans de gestion et du Premier Plan de gestion national pour la portion roumaine du District hydrographique international du fleuve Danube (2400 participants en 70 réunions). L'élaboration de ces documents et la participation du public a montré l'intérêt du public et des parties prenantes en matière de gestion des ressources en eau. Les leçons acquises pendant le processus de consultation devront mener à une amélioration du processus au cours du prochain cycle en matière de planification de gestion de bassin. Elles vont notamment s'appuyer sur les contributions et les documents développés selon les législations nationale et européenne.*



**Key words**: Public participation, Water Framework Directive, river basin management plan

**Mots clés** *:* Participation du public, Directive cadre sur l'eau, plan de gestion de basin

# I. INTRODUCTION

In recent years, public interest for participating in the decision-making process regarding water management in Romania has grown steadily. An important step in this process is represented by the public participation in development and implementation of the River Basin Management Plans, as requested by the Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy (the 'Water Framework Directive').

Sustainable water management is achieved both through specific technical, institutional and legislative measures and by ensuring collaboration and participation of all parties involved at all levels, acting as a consultative party in the decision-making process.

Romania has a surface area of 238,391 km2 and over 21,500,000 inhabitants and is located almost entirely in the Danube Basin (97.4%), covering approximately 29% out of the entire basin. Romania's water resources are composed of the Danube River (44%), inland surface waters (rivers and lakes) (46%) and groundwater (10%). Romania's hydrographical network has a total length of 78,905 km. Romania is a relatively water-poor country, with access to 1870 m³/inhabitant/year, ranking it 13th in Europe.[1]

Water management organized at the level of the river basin as a whole has a long history in Romania, being done since the year 1958. Actually in Romania, 11 river basins have been designed this way.

Romania has developed an adequate legal framework for furthering public participation in water management issues.

# II. NATIONAL LEGISLATION AND WATER RESOURCES MANAGEMENT

Tools for public consultation and participation, including access to water management information, are broadly settled in Romanian legislation. The legislative framework regarding public information, participation and consultation is ensured through the Water Law and subsequent legislation.

The Water Law no. 107/1996 as subsequently amended includes a special section dedicated to public participation and access to information on water management. Procedures governing the mechanism for access to public information on water management, and on the consultation of water users, riparians and public participation in water management decision-making processes have been approved through Ministerial Orders.[2]

The Water Law as subsequently amended further provides for the establishment of Basin Committees, in order to create mechanisms for consultation at all levels, such as on local authorities, water users on the river basin level, and/or the beneficiaries of water management services. Basin Committees are organized for each of the 11 River Basin Administrations of the National Administration 'Apele Române' (NA 'Apele Române'), and each consists of a maximum of 21 members, including representatives from the central public authority responsible for water, experts in environmental protection and health, mayors of municipalities and towns within the relevant river basin, county prefects, and county council presidents, as well as representatives of the water users within the relevant river basin and relevant non-governmental organizations. The Regulation on the organization and operation of the Basin Committees approved by Government in 2000 was amended in 2012.[3]

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1 National Management Plan for the portion of the International Danube River Basin District, falling within the territory of Romania—Synthesis of the Management Plans (RBMPs) at basin level, vol.I (www.rowater.ro).

2 Order of the Minister of Environment and Water Management No. 1012/2005— Procedures on Public Access Mechanism to Information on Water Management; Order of the Minister of Environment and Water Management No. 1044/2005—Procedures for Consultation with Water Users, the Riparians and the Public in Decision-Making in Water Management.

3 Government Decision no. 270/2012 on the Approval of the Regulation for Organization and Operation of the Basin Committees.

# III. STRUCTURES RESPONSIBLE FOR PUBLIC PARTICIPATION IN WATER MANAGEMENT

The institutions involved in water management at the river basin level, and consequently within the process of public information, consultation and participation in the development and implementation of River Basin Management Plans are the following:

1. The Department of Waters, Forests and Fishery within the Ministry of Environment and Climate Change, acting as 'Competent Authority', is responsible for ensuring the legal framework and monitoring its enforcement, and is also responsible for implementation of the EU Water Framework Directive in relation to the European Commission. The public information and consultation process complies with the provisions of this Directive and ensures that members of the public have both access to information and the possibility to express their opinions.
2. Through its 11 River Basin Administrations, the NA 'Apele Române' has responsibility for implementing both water management policy and the EU Water Framework Directive; initiates activities for development of River Basin Management Plans that are submitted to Basin Committees for consultation; and participates in the process of organizing public consultation.
3. The Basin Committees themselves ensure the participation of various interest groups in decision-making processes, which gives a higher responsibility on their own activities, having the aim of reducing the negative impact of human activity on the whole basin. Basin Committees collaborate with the NA 'Apele Române' in the application of the national strategy and water management policy. The involvement of the beneficiaries in decision-making activity, namely the effective cooperation of the local water management systems with the local government in order to maintain the balance between conservation and sustainable development of water resources were fundamental objectives underlying the establishment of these structures.

For the consultation process related to water issues, it is essential to mobilize all relevant authorities and institutions at regional and national levels, such as environment, health, industry, agriculture, and to have an active involvement of non-governmental organizations.[4]

# IV. IMPLEMENTATION OF THE EU WATER FRAMEWORK DIRECTIVE AND PUBLIC PARTICIPATION

The public is recognized as a key player in achieving the objectives of the Water Framework Directive, if we take into consideration that even from the preamble it is mentioned that: 'The success of this Directive relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users'. Article 14 of the Directive is otherwise entirely

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4 See Water Law no 107/1996 as subsequently amended; Government Decision no. 270/2012 on the approval of the Regulations for Organization and Operation of the Basin Committees; Order of the Minister of Environment and Water Management No. 1012/2005 for the Approval of the Procedures on public Access Mechanism to Information on Water Management; Order of the Minister of Environment and Water Management No. 1044/2005 on Procedures for Consultation with Water Users, the Riparians and the Public in Decision-Making in Water Management.

dedicated to the development of this theme and is based on three core elements: information, consultation and active participation.[5]

The tool for the implementation of the EU Water Framework Directive is represented by the River Basin Management Plan that, based on knowledge of the status of the water, establishes objectives for a period of six years and proposes measures to achieve 'good status' of water, providing a sustainable use for it.

The timetable for public participation in the basin management process is closely linked to the various stages and deadlines set by the Water Framework Directive, in order to achieve good ecological and good chemical status for all waters by 2015.

Romania has committed to developing the River Basin Management Plan in line with the provisions of the Water Framework Directive and according to the European Commission and the International Commission for Protection of the Danube River requirements and deadlines.

Romania is part of the International Danube River Basin District. For the portion of the International Danube River Basin District falling within the territory of Romania, including the coastal waters of the Black Sea, Romania has developed the following components of the National Management Plan:

- At the level of river sub-basins (11 River Basin Management Plans (RBMPs));
- At national level: National Management Plan — Synthesis of the Management Plans (RBMPs) at sub-basins level;
- Contribution to the elaboration of the Danube River Basin District Management Plan;
- Contribution to the elaboration of the Tisa River Sub-Basin Management Plan.

The International Commission for Protection of the Danube River is the coordinating body for implementing the EU Water Framework Directive at the international level. Romania collaborates with the other Danube countries in the development of the Danube River Basin Management Plan.

The public consultation on the development of the river basin management plan was based on the guidelines that have been developed at national level under the Water Framework Directive Common Implementation Strategy (Guidance on Public Participation in relation to the Water Framework Directive and Guidance on planning process) and the Strategy for Public Participation for the Danube River Basin District.

In Romania, public participation in implementing the Water Framework Directive at regional and local level is done through the River Basin Committees. Key milestones in implementation of the Water Framework Directive and of the public participation process in Romania have included debate sessions and information.

According to the International Commission for the Protection of the Danube River (ICPDR) Operational Plan (2005-2010) and in order to ensure public participation in implementation of the Water Framework Directive on the basin-wide level, the Ministry of Environment and Forests and the NA 'Apele Române' organized public debate sessions in 2007, focusing on specific target groups of stakeholders both nationally and at the level of the 11 Basin Administrations. The purpose of these meetings was public consultation during the development of the River Basin Management Planning, and presenting information on:

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5 Article 14 ('Public information and consultation') reads as follows: '1. Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users:(a) a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;(b) an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;(c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers. On request, access shall be given to background documents and information used for the development of the draft river basin management plan. 2. Member States shall allow at least six months to comment in writing on those documents in order to allow active involvement and consultation. 3. Paragraphs 1 and 2 shall apply equally to updated river basin management plans'.

- New EU policy on flood prevention, protection and diminution of the flood effects at the River Basin level;
- Synthesis of the water management issues for all 11 river basins managed by the 11 Water Basin Administrations of the NA 'Apele Române';
- Stage of development of the River Basin Management Plan.

Sharing information among the participants related to the significant water management issues at the national, basin and local level was done through the distribution of brochures and leaflets. The outcomes of these meetings were the comments and proposals made by water users and local authorities related to the significant water management issues identified in the elaboration process of the River Basin Management Plans. Also, at the national level a document on 'Significant water management issues in Romania' was developed and made publicly available on the websites of the Ministry of Environment and Forests (www.mmediu.ro) and the NA 'Apele Române' (www.rowater.ro).

Within the framework of the European Commission-funded projects carried out at the level of the River Basin Administrations in 2007, questionnaires were developed on the involvement of stakeholder representatives in different stages of elaboration of River Basin Management Plans. During the workshops, the EU Water Framework Directive requirements, as well as methods and tools for development of public participation in the process of consultation and decision-making were presented.

The programme of measures is a major chapter of the River Basin Management Plan including all the measures to be taken during the period 2010 – 2027, aiming to achieve the environmental objectives set out. The programme of measures addressed to all main stakeholders, local and regional authorities, environmental agencies, etc. was supposed to be implemented by 2012.

In 2008, 44 public debates were organized at the level of the 11 River Basin Administrations with the purpose of developing the programme of measures. The timetable of these meetings was posted on the River Basin Administrations and NA 'Apele Române' websites. These meetings were organized on the basis of specific activities and in order to target specific groups of stakeholders in accordance with the proposed measures to reduce pollution from agglomeration, industrial and agricultural activities and hydro-morphological alterations. During these meetings, the main stakeholders and water users were informed about the need to implement the basic measures or, if necessary, supplementary measures to reduce water pollution levels.

At this stage of public consultation, 1819 questionnaires were elaborated, with the purpose of collecting opinions and comments from key stakeholders and water users, and brochures were distributed. The questionnaires were posted on the River Basin Administrations and NA 'Apele Române' websites, transmitted via mail or e-mail to the main water users. Some 574 questionnaires were filled-in and received. Based on the comments, observations and proposals received from key stakeholders and general public, the draft RBMPs (hereafter dRBMPs) were updated. Out of a total number of 274 comments and proposals, 217 were taken into consideration in updating the dRBMP.

In November 2008, a seminar was held at the national level to assess hydro-morphological pressures on the Danube River, evaluate their impact and develop a preliminary set of measures to reduce them, with the participation of River Basin Administrations and key stakeholders in order to achieve the environmental objectives required by the EU Water Framework Directive.

In 2008 the project 'Growing up of the NGO's contribution in implementing water management policies and the preservation of nature' with the participation of two River Basin Administrations, Prut and Dobrogea-Litoral, and the World Wildlife Fund (WWF) has contributed to the organization of public debates with small groups of stakeholders, such as representatives of local associations of fishermen and forest workers.

In 2009, after completing the draft River Basin Management Plan at the level of each River Basin Administration, 2-3 meetings were organized with key stakeholders, water and environment authorities, local and county councils representatives, and all those interested actors in the draft River Basin Management Plan debates (hydropower representatives, navigation, farmers, NGO's, etc.). The purpose was to ensure better knowledge of specific issues in water management through a dialogue with all stakeholders involved in using water resource.

From 22nd of December 2008 until the 10th of November 2009, the drafts of all 11 River Basin Management Plans were posted on the websites of the NA 'Apele Române' and the River Basin Administrations and the Ministry of Environment and Forests, in order to ensure public information and consultation.

Information on the dRBMP has been elaborated by each River Basin Administration and disseminated to the stakeholders for additional information in the form of brochures, leaflets and DVDs. Questionnaires on the dRBMP and Programmes of Measures were sent to all interested water users, but the number of questionnaires completed and submitted was rather low.

In addition, NA 'Apele Române' developed on its website an online system which allowed the stakeholders to provide views regarding the draft of the RBMP, submitted for consultation.

In November 2009, the Basin Committees agreed on the 11 River Basin Management Plans and in September 2010, the Strategic Environmental Assessment procedure for the National Management Plan - Synthesis of the 11 River Basin Management Plans in Romania was finalized. An environmental report was presented at the final public debate.

Information about meetings held during the period 2007-2009 was communicated to media through press releases and local newspapers published articles on the issue.

The National Management Plan for the international portion of the Danube River Basin falling within the territory of Romania, was approved in 2011 through a Government Decision and was submitted and reported to the European Commission by the deadline set according to the Water Framework Directive timetable.

The interim report on the progress of the implementation of the programme of measures was submitted to the European Commission on 22 December 2012 (uploaded to the European Water Information System (WISE)), which provided an overview of the implementation of the measures set out in the River Basin Management Plan.

In accordance with the provisions of article 14 of the Water Framework Directive, a timetable and work programme detailing the public participation activities involved in the production ofthe 2nd management plan (covering the period between 2015 and 2021) at national and basin level, were published in December 2012 on the websites of the NA 'Apele Române' and River Basin Administrations.

On 22nd December 2013, the document on 'Significant water management issues' (SWMIs) at national level was finalized and published on the website of the NA 'Apele Române' and the River Basin Administrations for consultation and comment until the 22nd June 2014. This document addresses the provisions of Article 14 para. 1(b) of the Water Framework Directive, providing an updated interim overview on the SWMIs at national level, which needs to be addressed in the 2nd RBM Plan. Furthermore, this paper focuses on the progress and changes since the development of the first SWMIs paper in 2007 and of the 1st Basin Management Plan in 2009.[6]

The SWMIs, both nationally and at the river basin level are similar to those established at the level of the International River Basin District of the Danube within the relevant document prepared by the ICPDR, based on the national contributions of the Danube countries in 2013 (https://www.icpdr.org/main/SWMI-PP).

6 The first paper on the SWMIs from 2007 and the 1st RBM Plan from 2009 outlines the following SWMIs, also identified in the frame of the ICPDR for the Danube River Basin District: – Pollution by organic substances; – Pollution by nutrients; – Pollution by hazardous substances; – Hydromorphologicalalterations

# V. CONCLUSION

Public participation in general, and within the framework of Water Framework Directive implementation in particular, is an important activity for Romania's Department of Waters, Forests and Fishery within the Ministry of Environment and Climate Change and the NA 'Apele Române', involving significant human and financial resources. At the same time, implementation requires good coordination of all parties involved at international, national and basin level.

Appropriate management of the process of public participation in the development of the first River Basin Management Plan was based on specific documents developed by the European Commission and the ICPDR.

Can the public participation process be improved? Obviously yes. The experience gained during the development of the 1st River Basin Management Plans and the 1st National Management Plan has highlighted the following issues:

- More active involvement of the public and stakeholders from the earliest stages of development and cooperation closely with NGOs and local authorities;
- Increasing the number of interested groups in accordance with the specific problems of the basin;
- Using non-technical language when addressing the public;
- Maintaining regular contacts between decision-makers and key stakeholders, NGOs and the public during the entire cycle of defining River Management Plans;
- Providing adequate resources for the promotion process, including the provision of relevant information on water management issues through the media at national, regional and local levels.

Improving the quality of public participation, the exchange of experience and correlation of activities are provided by the Expert Group on Public Participation in the ICPDR. Danube Day held each year on June 29th is a good opportunity to inform and increase public awareness on the need for participation in the development of River Basin Management Plans.

## FURTHER READING

Ministry of Environment and Climate Change - Department for Waters, Forests and Fishery, National Administration 'Apele Române', Document on significant water management issues identified in the River Basins—Synthesis of the documents on river basin level, 22 December 2013, available at www.rowater.ro.

National Management Plan for the portion of the international Danube River Basin District falling within the territory of Romania – Synthesis of the Management Plans (RBMPs) at basin level, Vol I and Annex 12.1 (Outcomes of the questionnaires completed during the public consultation process on assessment of the River Basin Management Plans), available at www.rowater.ro.

# PARTICIPATION PUBLIQUE DANS LE CAS DU RHÔNE, UNE RELECTURE EN TERMES D'EFFICACITÉ SOCIALE, SUBSTANTIELLE ET PROCÉDURALE

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## RÉSUMÉ

*La nécessité d'une participation du public pour la gestion des problématiques environnementales en générale et pour celles liées à l'eau en particulier est aujourd'hui largement reconnue. Cette notion est ainsi au cœur de la déclaration de Rio (article 10), mais également de principes aujourd'hui largement diffusés tel que la Gestion Intégrée de la Ressource en Eau (GIRE). Les mécanismes de participation ont été passablement étudiés depuis plusieurs décennies, et dans ce contexte, notre contribution vise à analyser l'efficacité de ce type de processus. On peut en effet se demander si la participation publique signifie véritablement l'intégration du plus grand nombre aux processus décisionnels ? Si cette participation a un effet sur les actions entreprises ? Si celle-ci est vraiment efficace ? Pour ce faire, nous portons notre attention sur le cas du Rhône, un fleuve européen qui a longtemps été caractérisé par la prééminence de l'activité hydroélectrique et qui connaît depuis quelques années maintenant un regain d'attention auprès du grand public. À travers cette contribution, nous relisons l'efficacité de la participation publique dans le cas du Rhône à travers trois types d'efficacité : efficacité sociale, efficacité substantielle et efficacité procédurale.*

## ABSTRACT

*The need for public participation in the management of environmental issues in general and for those related to water in particular is now widely recognized. Indeed, the concept of public participation is at the heart of the Rio Declaration (Article 10), but also present within principles that are today widely disseminated such as Integrated Water Resource Management (IWRM) for example. Participation mechanisms have been studied for several decades, in this context, our contribution aims to analyse the effectiveness of this type of process. One can indeed ask whether the public participation really means the integration of the majority of people in the decision-making processes, whether the participation process has a concrete effect on the actions taken and whether public participation really work? In our contribution, we focus on the case of the Rhone; a European river that has long been characterized by the predominance of hydroelectric activities and that has recently experienced renewed attention from the general public. Through this contribution, we reread the efficiency of public participation in the case of the Rhone River through three types of effectiveness: social effectiveness, substantial effectiveness and procedural effectiveness.*

**Key words:** public participation, Rhone River, transboundary water management

**Mots clés :** participation publique, Rhône, gouvernance transfrontalière de l'eau

# I. INTRODUCTION

La participation du public dans le champ environnemental a gagné une importance considérable depuis le début des années 1990. Le Principe 10 de la Déclaration adoptée à la conclusion du Sommet de la terre de 1992 stipule, par exemple, que chaque individu doit avoir la possibilité de participer aux processus décisionnels relatifs à l'environnement.[1] En effet, la participation au sein des processus de décision est à ce jour considérée comme un droit démocratique dont chaque citoyen doit pouvoir bénéficier durant la conduite de l'action publique en matière d'environnement. Ce principe est présenté de façon explicite dans plusieurs textes de droit international tels que la Convention sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement de 1998, appelée également Convention d'Aarhus[2].

La problématique de l'eau n'a pas échappé à cet élan participatif. Avec la résurgence du concept de Gestion Intégrée de la Ressource en Eau (GIRE) au début des années 2000[3] , la participation du public s'est imposée comme un prérequis dans les pratiques de gestion de la ressource. Par ailleurs de nombreux travaux ont porté sur l'analyse de la participation. *Delli Priscoli (2004)*[4] souligne que la participation conduit à des négociations à la fois verticales (de la base vers les décideurs ou inversement), mais également transversales entre les services de l'administration publique. *Fischer (1993)*[5] rappelle qu'une implication large des acteurs concernés renforce la qualité et la durabilité des processus de décision. De façon plus modérée, *Biswas (2008)*[6] considère que la participation des acteurs (et la décentralisation des processus de décision au niveau le plus bas) n'est pas forcément capable de promouvoir une intégration des modes de gestion à un niveau institutionnel supérieur.

Dans cette contribution, nous considérons la participation comme un mécanisme où les individus, les groupes et les organisations décident de jouer un rôle actif au sein des processus de décision. Nous nous concentrons ici sur l'implication d'acteurs affectés par une décision plutôt que sur une large participation du public[7]. En particulier, nous portons notre attention sur l'efficacité des processus participatifs dans le cas de la gestion du Rhône. Si l'implication d'un nombre élargi d'acteurs fait plutôt consensus, nous questionnons les conditions d'une telle participation avec l'aide de trois critères d'évaluation : l'efficacité sociale, l'efficacité substantielle et l'efficacité procédurale.

Nous considérons le cas du Rhône comme particulièrement intéressant. Celui-ci se caractérise par la forte fragmentation des acteurs en présence et nous autorise à comparer différentes instances plus ou moins participatives. Avec ce cas, nous posons différentes questions : comment le concept de participation est-il mis en œuvre empiriquement ? Dans quelle mesure l'implication de nombreux acteurs témoigne-t-elle concrètement d'une gestion plus participative du fleuve ? Quelle est l'efficacité de cette participation des acteurs au sein des processus de décision ? La multiplicité des instances de participation contribue-t-elle à l'intégration de la gestion du Rhône ?

Pour répondre à ces différentes questions, nous revenons tout d'abord (1) sur la signification du concept de participation. Nous nous concentrons sur les définitions de ce concept, sur ses différents degrés d'intensité et sur son efficacité variable. En analysant le cas du Rhône, nous portons ensuite (2) notre attention sur les

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1 « La meilleure façon de traiter les questions d'environnement est d'assurer la participation de tous les citoyens concernés, au niveau qui convient. Au niveau national, chaque individu doit avoir dûment accès aux informations relatives à l'environnement que détiennent les autorités publiques, y compris aux informations relatives aux substances et activités dangereuses dans leurs collectivités, et avoir la possibilité de participer aux processus de prise de décision. Les États doivent faciliter et encourager la sensibilisation et la participation du public en mettant les informations à la disposition de celui-ci. Un accès effectif à des actions judiciaires et administratives, notamment des réparations et des recours, doit être assuré. » (Déclaration de Rio, article 10)

2 M.S. Reed, 'Stakeholder participation for environmental management: a literature review', *Biological conservation*, vol. 141 (10), 2008, pp. 2417-2431.

3 Global Water Partnership (2000) Integrated Water Resources Management. TAC Background Papers No. 4, p. 22 (Stockholm: GWP Secretariat).

4 J. D. Priscoli, 'What is public participation in water resources management and why is it important?' *Water International*, vol. 29(2), 2004, pp. 221-227.

5 F. Fischer, 'Citizen participation and the democratization of policy expertise: From theoretical inquiry to practical cases', *Policy sciences*, vol. 26(3), 1993, pp. 165-187.

6 A.K. Biswas, 'Integrated water resources management: is it working?', *Water Resources Development*, vol. 24(1), 2008, pp. 5-22.

7 M.S. Reed, *supra,* n. 2, pp.2417-2431.

caractéristiques de la participation et sur son efficacité. Les enseignements tirés de ce cas, nous conduisent en conclusion (3) à revenir sur la notion même de participation et sur ses différents instruments.

## II. L'IDÉAL PARTICIPATIF ET LA DIVERSITÉ DES DÉMARCHES

La notion de participation recouvre différentes définitions et relève de deux dynamiques allant vers le haut (*bottom up*) et/ou vers le bas (*top down*). La première dynamique se caractérise par une approche démocratique forte considérant que les acteurs concernés doivent être intégrés aux processus décisionnels. Cette implication d'une large base d'acteurs doit garantir l'intégration de différentes considérations[8]. Elle doit également enrichir les modalités de gestion et préciser les objectifs visés grâce à l'intégration des connaissances locales[9] et à l'anticipation de désaccords, de tensions et de conflits potentiels[10]. La seconde dynamique illustre les préoccupations liées à la mise en œuvre et à la sécurisation d'un processus de décision grâce au renforcement de sa légitimité auprès des acteurs concernés[11].

L'implication du public peut se concrétiser selon diverses modalités et des intensités variables. La littérature développe plusieurs typologies caractérisant un processus participatif. Les travaux précurseurs d'*Arnstein (1969)*[12] définissent par exemple une échelle de participation structurée par l'implication croissante des acteurs allant de la *manipulation* à *l'implication active* au sein des processus de décision. Cette conceptualisation a ensuite été complétée par différents auteurs et d'autres typologies. Selon un principe similaire, *Biggs (1989)*[13] propose par exemple de définir les niveaux d'engagement du public par une relation *contractuelle, consultative, collaborative* ou *collégiale*. De façon synthétique et en nous inspirant de ces différents travaux, nous discernons quatre niveaux de participation. Au bas de l'échelle, nous trouvons tout d'abord l'*information* ; cette première étape n'implique pas une participation des acteurs concernés aux processus de décision, mais une certaine transparence à leur égard en ce qui concerne des décisions déjà prises. Nous trouvons ensuite la *consultation* ; l'avis des acteurs concernés est ici demandé sans qu'il ait pour autant une influence sur les processus de décision[14]. Le troisième niveau est la *délibération* avec une prise en compte de l'avis des acteurs concernés et une intégration de celui-ci aux processus décisionnels. Enfin, au sommet de cette échelle vient la *coproduction* ; ici les acteurs concernés participent à l'ensemble du processus décisionnel (de sa conception à sa mise en œuvre).

Ces différents niveaux d'intensité impliquent une forte diversité de formes. Une multitude d'instruments conduit à la plus ou moins forte implication des acteurs concernés avec par exemple des expositions ou forums de discussion permettant la *consultation* ou des ateliers participatifs, des débats publics permettant la *délibération* ou enfin l'intégration réglementée d'acteurs au sein d'instances de décision pour une *coproduction*. Dès lors, la notion de participation recouvre une diversité de méthodes et de procédures impliquant une insertion variable des acteurs au sein de la décision publique.

Dans cette contribution, nous nous concentrons sur la définition et l'utilisation de différents critères d'évaluation de la participation nous conduisant à analyser plus précisément le cas du Rhône et à mieux saisir l'ampleur de la participation au sein des processus décisionnels. Ces critères permettent également de revenir sur les limites inhérentes à la mise en œuvre d'un processus participatif.

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8 T.C. Beierle, 'The quality of stakeholder-based decisions', *Risk analysis*, vol. *22*(4), 2002, pp. 739-749.

9 G. Habron, 'Role of adaptive management for watershed councils', *Environmental Management*, vol. 31(1), 2003, pp. 0029-0041.

10 P. Garin, J. Rinaudo, & J. Ruhlmann, 'Linking expert evaluations with public consultation to design water policy at the watershed level', *Water Science & Technology*, vol. 46(6-7), 2002, pp. 263-271.

11 R.A. Irvin & J. Stansbury, 'Citizen participation in decision making: is it worth the effort?', *Public administration review*, vol. 64(1), 2004, pp. 55-65.

12 S. R. Arnstein, 'A ladder of citizen participation', *Journal of the American Institute of planners*, vol. 35(4), 1969, pp. 216-224.

13 S.D. Biggs, *Resource-poor farmer participation in research: A synthesis of experiences from nine national agricultural research systems*, OFCOR-Comparative Study, 1989.

14 La *consultation* peut toutefois mener à la prise en compte de l'avis des acteurs et peut donc permettre le passage à la *délibération*. C'est dans cette logique que s'inscrivent la *Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement* ou la *Convention d'Espoo sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière.*

Premièrement, il est essentiel de souligner qu'une participation du public n'induit pas *de facto* une efficacité sociale. En effet, il est également nécessaire de considérer le type d'acteurs prenant part au processus et l'égalité du traitement qui leur est réservé. Des inégalités peuvent exister avec des acteurs plus ou moins représentés, plus ou moins influents et écoutés au sein du processus décisionnel. Dès lors, il faut considérer le degré de participation des acteurs au sein des instances : ceux-ci parviennent-ils à faire entendre leurs préoccupations ? La participation se caractérise également par un risque de voir émerger des intérêts individuels et localisés au détriment de l'intérêt collectif. Le risque consiste ici dans l'émergence d'oppositions et de dynamiques « NIMBY » (*Not In My Back Yard*) difficilement contrôlables au sein d'un processus politique *(Fischer 1993)* et décisionnel[15].

Deuxièmement, une forte participation des acteurs ne se traduit pas forcément par une forte efficacité substantielle. L'argument consiste ici à questionner l'impact de la participation sur la décision finale. En d'autres termes, il s'agit de savoir si l'on se situe dans le cas d'une simple *consultation* ou d'une *délibération* (voire d'une *co-production*). Nous questionnons également ce qu'il se passe entre la consultation des acteurs et la prise de décision. Les enseignements découlant du processus participatif sont-ils véritablement pris en compte ? Se reflètent-ils dans les choix opérés au terme du processus de décision ? Enfin, il s'agit de réfléchir aux étapes concernées par la participation et de se demander dans quelle mesure une dimension participative est mise en œuvre de façon homogène durant l'ensemble d'un processus décisionnel.

Troisièmement, la participation peut faire preuve de plus ou moins d'efficacité procédurale. La mise en œuvre d'une participation publique peut s'avérer lourde et chronophage et ralentir de façon considérable la prise de décision. Engager un processus participatif peut également signifier l'ouverture d'une « boîte de pandore » faisant émerger de nombreuses préoccupations dont l'arbitrage peut être long et difficile. Ce critère éclaire la tension existant entre, d'une part, l'efficacité sociale et, d'autre part, l'efficacité procédurale. La question est : comment une participation élargie au plus grand nombre peut-elle être menée de façon aboutie tout en maintenant les délais relatifs à un processus politique et décisionnel ?

Il s'agit maintenant de mobiliser ces trois différents critères d'évaluation de la participation pour l'analyse de la gestion du Rhône. Nous présentons tout d'abord les spécificités du fleuve et de son système de gouvernance. Nous décrivons ensuite les différentes arènes de participation au sein du bassin versant. Chaque arène est analysée à travers les trois critères d'efficacité présentés précédemment. Sur la base de cette analyse, nous caractérisons les processus participatifs du Rhône et soulignons les traits saillants de ce contexte particulier.

## III. PARTICIPATION DANS LE CAS DU RHÔNE : UN CAS PARTICULIER

Dans un contexte européen marqué par des politiques de l'eau fortement tournées vers l'intégration (soit vers la participation, vers la transversalité de l'action publique et vers le bassin versant comme unité de référence), le Rhône fait figure d'exception.

Le fleuve a longtemps été considéré pour ses capacités de production. *Pritchard (2011)*[16] a montré le rôle joué par le fleuve après la deuxième guerre mondiale pour la reconstruction des capacités énergétiques françaises. Le Rhône a dès lors été canalisé de façon massive tant sur le territoire suisse que français et les riverains s'en sont détournés progressivement. Le fleuve est passé d'un hydrosystème naturel à un outil industriel de production permettant la production hydroélectrique, l'irrigation agricole et l'exploitation agricole de nouvelles terres découlant de la canalisation.

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15 Comme l'indique Fischer (1993), le concept « NIMBY » se réfère à une situation où des individus reconnaissent la nécessité d'un projet pouvant s'avérer contrariant ou laisser part à une certaine incertitude mais qui refusent de voir ce projet situé à proximité de leurs intérêts, logements, etc.

16 S. B. Pritchard, *Confluence: the nature of technology and the remaking of the Rhone* (No. 172). Harvard University Press, Harvard, 2011.

Du point de vue des mécanismes de gouvernance, cette évolution a eu des effets considérables[17] avec la présence forte d'opérateurs hydroélectriques privés au bénéfice de contrats de concession pour l'utilisation du Rhône. En pratique, la régulation des débits du fleuve entre Genève et la Méditerranée dépend principalement de deux opérateurs hydroélectriques. L'évolution de ces débits est encadrée par des concessions de droit public, mais également par de nombreux accords et contrats de droit privé optimisant la production d'électricité. Cette structure de gouvernance, dominée, d'une part, par une politique de gestion tournée vers la production et, d'autre part, par la délégation de compétence à des opérateurs privés, se traduit par la faible coopération des acteurs publics à l'échelle transfrontalière. Si de nombreux fleuves européens font l'objet d'une institution de gestion transfrontalière des eaux, le Rhône ne connaît pas de structure similaire. Dans un tel contexte, la participation du public peut être remise en question puisqu'aucune institution ne regroupe, n'organise et ne met en œuvre un tel processus.

## IV. UNE MULTIPLICITÉ D'ARÈNES DE PARTICIPATION

Le Rhône se caractérise par la diversité des formes de participation. L'implication des acteurs concernés est variable et non homogène. Elle résulte d'initiatives fragmentées ne faisant pas l'objet de coordination à l'échelle du bassin versant. Comme le montre le tableau 1, nous identifions différentes instances de participation pour le Rhône. Celles-ci diffèrent dans leur nature et dans les objectifs poursuivis. Nous les regroupons dans trois principales catégories.

**Tableau 1. Multiplicité des arènes et des formes de participation**

| Type d'arènes participatives | Instances de participation | Mécanismes participatifs |
|---|---|---|
| Instances de gouvernance | Commission Internationale pour la Protection des Eaux du Léman (CIPEL) | Information |
| | Agence de l'eau Rhône Méditerranée Corse (RMC) | Coproduction |
| | Plan Rhône | Délibération |
| Instances de gestion opérationnelle du fleuve | Comité Genevois pour l'Utilisation du Fonds d'Electricité (COGEFE) | Coproduction |
| | Commission consultative pour la gestion de l'Arve et du Rhône | Consultation |
| | Plan de gestion des poissons migrateurs (PLAGEPOMI) | Délibération |
| Opération ponctuelle et participation | Chasses sédimentaires du barrage de Verbois | Consultation |

17 C. Bréthaut, G. Pflieger, 'The shifting territorialities of the Rhone River's transboundary governance: a historical analysis of the evolution of the functions, uses and spatiality of river basin governance', *Regional Environmental Change*, 2013.

Tout d'abord, trois instances de participation représentent des *instances de gouvernance*. La Commission Internationale pour la Protection des Eaux du Léman (CIPEL), le Plan Rhône et l'Agence de l'eau Rhône Méditerranée Corse (RMC) visent des objectifs de gestion globale de l'eau sur des tronçons en particulier. Tout d'abord, la CIPEL représente une institution internationale (franco-suisse) visant à superviser la gestion du Léman. Sa mission porte avant tout sur des dimensions de gestion qualitative du lac. L'Agence de l'eau RMC constitue un établissement public du ministère chargé du développement durable. Instaurée dans une logique décentralisée de gestion par bassin, l'Agence met en œuvre le Schéma Directeur d'Aménagement et de Gestion des Eaux (SDAGE) à l'échelle du bassin versant du Rhône français. Sa mission a une portée réglementaire et doit conduire à une gestion cohérente du fleuve sur le territoire français. Enfin, le Plan Rhône a été mis en œuvre suite aux inondations de 2003 sur le Rhône français. C'est un instrument à orientation stratégique visant trois objectifs sur l'ensemble du Rhône français : la réduction des inondations, la réduction de la vulnérabilité et l'amélioration des connaissances du fleuve et de ses enjeux.

La participation des acteurs intervient de façon différente dans ces institutions allant de la simple information jusqu'à la coproduction ; soit l'intégration des acteurs concernés au sein des instances et des processus de décision.

Ensuite, trois instances peuvent être regroupées comme opérant à un niveau de gestion opérationnelle du fleuve. Ces dernières diffèrent des instances de gouvernance puisque leur portée est moins globale et visent la réalisation d'un objectif en particulier. Le COGEFE redistribue le fonds alimenté par le prélèvement d'une taxe sur l'eau turbinée sur le Rhône genevois. La Commission consultative pour la gestion de l'Arve et du Rhône regroupe les acteurs usagers du fleuve (opérateurs hydroélectriques, industries, pêcheurs, etc.) sur le tronçon allant du Léman à la frontière française. Enfin, le PLAGEPOMI vise quant à lui à définir et à assurer un plan de gestion pour les poissons migrateurs à l'échelle du Rhône français. Ici également les mécanismes participatifs diffèrent fortement avec l'inclusion variable d'acteurs concernés et impliqués au sein des processus décisionnels.

Enfin, le dernier type d'arène participative intervient lors d'une opération ponctuelle. En juin 2012, le barrage hydroélectrique de Verbois situé sur territoire suisse a procédé à une chasse sédimentaire. Cette opération, sensible à la fois pour l'opérateur du barrage et pour les acteurs situés à l'aval, représente un rare exemple de démarche participative instaurée à l'échelle transfrontalière. Grâce au recours aux mécanismes prévus par la *Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement* (ci-après la Convention d'Arhus) ou la *Convention d'Espoo sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière* (ci-après la Convention d'Espoo), une mise à l'enquête publique a permis d'intégrer les acteurs suisses et français concernés au sein d'un large processus consultatif.

## V. RELECTURE EN TERMES D'EFFICACITÉ SOCIALE, SUBSTANTIELLE ET PROCÉDURALE

Après avoir décrit les différentes instances de participation du Rhône et la nature de ces mécanismes, il s'agit maintenant de mobiliser trois critères d'évaluation de la participation : *efficacité sociale, efficacité substantielle* et *efficacité procédurale*. Le tableau 2 présente une analyse synthétique des différentes instances de participation du Rhône en fonction des trois critères identifiés. Différentes constatations découlent de cette synthèse.

**Tableau 2. Efficacité sociale, substantielle et procédurale de la participation dans le cas du Rhône**

| Instances de participation | Efficacité sociale | Efficacité substantielle | Efficacité procédurale |
|---|---|---|---|
| Commission Internationale pour la Protection des Eaux du Léman (CIPEL) | **Faible** Principalement de l'information | **Faible** Dynamique essentiellement top down | **Faible** Dynamique essentiellement top down |
| Agence de l'eau Rhône Méditerranée Corse (RMC) | **Forte** Coproduction | **Forte** Participation au sein du Conseil d'administration | **Forte** Inclusion des usagers dans l'ensemble des processus de décision |
| Plan Rhône | **Forte** Délibération | **Moyenne** Intégration incomplète au processus de decision | **Moyenne** Intégration incomplète au processus de décision |
| Comité Genevois pour l'Utilisation du Fonds d'Electricité (COGEFE) | **Moyenne** Participation sélective | **Forte** Intégration au Comité de Pilotage | **Forte** Le faible nombre d'acteurs induit une mise en œuvre rapide des décisions |
| Commission consultative pour la gestion de l'Arve et du Rhône | **Moyenne** Participation sélective | **Faible** Principalement de la consultation | **Forte** Le faible nombre d'acteurs induit une mise en œuvre rapide des décisions |
| Plan de gestion des poissons migrateurs (PLAGEPOMI) | **Moyenne** Participation sélective | **Forte** Intégration des partenaires au Comité de Pilotage | **Forte** Objectifs ciblés et définis temporellement |
| Chasses sédimentaires du barrage de Verbois | **Forte** Participation et mise à l'enquête publique grâce aux Conventions d'Espoo et Aarhus | **Moyenne** Large consultation, mais faibles capacités de participation aux processus décisionnels | **Moyenne** Complexité de la démarche participative |

Tout d'abord, l'analyse de l'efficacité sociale montre que la présence d'institutions de gestion à une échelle large telle que le bassin versant semble mieux favoriser la participation. En effet, l'Agence de l'eau RMC ainsi que le Plan Rhône se caractérisent par une efficacité sociale élevée en ce qui concerne les modalités de gestion du Rhône de la frontière suisse à la Méditerranée. Concrètement, la participation se caractérise ici par une implication des acteurs concernés au sein des instances de décision avec des mécanismes participatifs de *délibération* pour le Plan Rhône et de *coproduction* pour l'Agence de l'eau RMC où les représentants des usagers sont intégrés au sein du Comité Directeur. On voit également que la préparation des chasses sédimentaires du barrage de Verbois a fait l'objet d'une forte participation grâce à la mobilisation de Conventions internationales initiant une dynamique participative à l'échelle transfrontalière. Enfin, plusieurs instances se caractérisent par une *participation sélective* où seuls des acteurs en particulier sont invités à participer.

Du point de vue de l'efficacité substantielle, les situations diffèrent passablement. La participation aux processus décisionnels n'est pas toujours garantie et il s'agit souvent avant tout de *consultation* plutôt que de *délibération* ou de *coproduction*. De plus, en réduisant le nombre d'acteurs intervenant au sein du processus, les instances de participation sélectives simplifient les procédures de consultation et permettent une intégration plus facile des acteurs prenant part à l'ensemble du processus.

Enfin, l'efficacité procédurale fait l'objet d'une évaluation mitigée avec des démarches souvent complexes et chronophages. Les arènes sélectives conduisent à une plus forte efficacité procédurale. Néanmoins, comme la littérature l'indique souvent, l'accroissement du nombre de parties consultées et intervenantes au sein du processus participatif complique passablement le déroulement du processus décisionnel. Dans le cas des chasses sédimentaires de Verbois, la mise à l'enquête publique a ainsi débouché sur un délai supplémentaire de deux ans qui n'a pourtant pas fondamentalement modifié les paramètres de réalisation de l'opération.

## VI. UNE PARTICIPATION CERTES, MAIS QUELLE PARTICIPATION ?

L'analyse des mécanismes de participation du Rhône montre le nombre important d'instances mobilisées. Ces dernières fonctionnent souvent de manière indépendante et font l'objet d'une coordination se limitant à l'échelle des frontières nationales. Le fleuve se caractérise pour l'instant en effet par l'inexistence d'instances fédératrices permettant de garantir une participation des riverains à propos de la gestion de l'ensemble du bassin versant du Rhône. Si la *Commission Internationale pour la Protection des Eaux du Léman* (CIPEL) représente une institution de gestion transfrontalière au sein du bassin versant, sa vocation ne porte pour l'instant que sur le Léman et se concentre principalement sur des problématiques liées à la qualité des eaux. Dans ce contexte, la participation transfrontalière se concrétise avant tout lors et dans le cadre d'une opération hydroélectrique où les Conventions de droit international (notamment les Conventions d'Espoo et d'Aarhus) établissent un lien entre deux cadres institutionnels différents et fortement fragmentés.

L'analyse de l'efficacité sociale, substantielle et procédurale montre une situation mitigée où les degrés de participation demeurent variables et où l'implication des acteurs ne concerne pas toujours l'ensemble du processus décisionnel. Le Rhône connaît un nombre important d'instances impliquant des acteurs concernés par des problématiques spécifiques. Néanmoins, cette participation, peu homogène et faiblement coordonnée, semble incapable pour le moment de renforcer l'intégration de la gestion du fleuve à l'échelle de son bassin versant.

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# REGIONAL APPROACHES

# PUBLIC PARTICIPATION IN THE INTERNATIONAL COMMISSION FOR THE PROTECTION OF THE DANUBE RIVER

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## ABSTRACT

The environment of the Danube River Basin (DRB) is highly diverse, but subject to pressures from agriculture, industry and households. The DRB countries address these pressures jointly through the International Commission for the Protection of the Danube River (ICPDR). The ICPDR highly prioritises public participation (PP); this paper introduces the legal frame for its efforts as well as practical consequences.

## RÉSUMÉ

L'environnement du bassin du fleuve Danube est très diversifié, mais il fait l'objet dans son ensemble de pressions de la part de l'agriculture, de l'industrie et des centres urbains. Les États du bassin du fleuve Danube répondent conjointement à ces pressions à travers la Commission internationale de protection du fleuve Danube. Parmi ses priorités, la Commission poursuit la participation du public, dont cette contribution présente le cadre juridique ainsi que les implications pratiques.



**Key words**: Public participation; stakeholder liaisons; Danube River Basin

**Mots clés** : Participation du public ; liens entre les parties prenantes ; bassin du fleuve Danube

The Danube River Basin (DRB) comprises of an area of 801,463 square kilometres, approximately 8 percent of Europe. Extending into the territories of 19 countries, it is the most international river basin in the world. The ICPDR unites the 14 main DRB states and the European Union as contracting parties of the Danube River Protection Convention (DRPC) of 1994.[1] This convention promotes improvement, conservation and sustainable use of the DRB bodies of water and associated resources, including connected ecosystems. The DRPC followed the Bucharest Declaration of 1985[2] and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (hereinafter Helsinki Convention) of 1992.[3]

## I. STRUCTURE OF THE ICPDR

The ICPDR operates primarily by coordinating national efforts at the basin-wide level, rather than by implementing measures directly. This is reflected in the de-centralised structure of the ICPDR: a small Permanent Secretariat with little more than 10 staff members works closely with Expert Groups (EGs) and Task Groups (TGs). This structure ensures that the actions of the ICPDR are firmly anchored within the administration[4] of its contracting parties: Expert Groups are comprised of delegates from contracting parties and observer organisations and typically meet twice a year in locations chosen informally upon invitation from a host country. Expert Groups report and make recommendations to the ICPDR. The ICPDR in turn is comprised of delegations from all the contracting parties.

The ICPDR is the decision-making body and typically meets at two plenary meetings each year. The ICPDR understands that access to information and public participation in decision-making facilitate broader support for its policies and lead to increased efficiency in their implementation.

## II. COORDINATING THE IMPLEMENTATION OF WFD AND EFD IN THE DANUBE RIVER BASIN

The ICPDR coordinates the implementation of the EU Water Framework Directive (WFD)[5] and the EU Floods Directive (EFD)[6] in the DRB. Both of these directives require public consultation,[7] in line with the provisions of the Aarhus Convention.[8]

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1 Convention on Cooperation for the Protection and Sustainable Use of the Danube River, Sofia, 1994.

2 Declaration of the Danube countries to cooperate on questions concerning the water management of the Danube, Bucharest, 1985.

3 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 1992.

4 Note that much of the ICPDR's work is pursued outside of legal provisions, driven by political and personal commitment; this is nourished by the strong involvement of national administration through the EGs, i.e. civil servants from the relevant water administrations of the contracting parties, who often strongly identify with the work of the EGs they are part of.

5 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (WFD).

6 Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (EFD).

7 WFD, art. 14 and EFD arts. 9-10.

8 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 1998.

With regards to the directives, the respective ICPDR management plans primarily target the so-called 'Roof Level'. The roof level deals with broad issues of basin-wide significance and covers rivers with a catchment of more than 4000 square kilometres, lakes of more than 100 square kilometres, transitional and coastal waters as well as certain trans-boundary groundwater bodies. Waters with smaller catchment and surface areas are part of national management plans, which are prepared for each contracting party by the competent authority of the respective country. For the Danube River Basin Management Plan (DRBMP), there is a second level of coordination at the national level and/or for certain sub-basins (Tisza, Sava, Prut and Danube Delta), an internationally coordinated sub-basin level. The third or sub-unit level is comprised of management units within the national territory. The information increases in detail from roof level to sub-unit level.

It is worth noting that not all contracting parties of the ICPDR are also members of the European Union. However, all ICPDR contracting parties — including the non-EU members (currently Bosnia and Herzegovina, Serbia, Montenegro, Moldova and Ukraine) — are committed to compliance with the directives through resolutions of ICPDR plenary meetings and ministerial declarations.[9] For the non-EU member states, this does not create a legal obligation for compliance comparable to that of EU members, but it has positively influenced the role of the ICPDR: it serves as a platform for contracting parties to cooperate within their voluntarily expressed commitment to water management. Thereby, the ICPDR promotes EU environmental legislation in regions which would otherwise be peripheral to it. This includes coordinated actions related to public consultation, e.g. the stakeholder dialogues through meetings and survey for the development of the 1st Danube River Basin Management Plan until 2009.

## III. PRACTICAL APPROACHES TO PUBLIC PARTICIPATION WITHIN THE ICPDR

The ICPDR pursues public participation through two avenues. Firstly, through the involvement of observer organisations: these have a right to actively participate in all expert groups, task groups and plenary meetings of the ICPDR. Although observers do not have formal voting rights, their views are often reflected in decisions, as the ICPDR is mostly a consensus-driven tool for cooperation and votes are rarely taken. Observers are accepted upon approval of the ICPDR. Applications are evaluated according to a defined set of criteria[10] generally leading to the acceptance of organisations with a stake in water management and a presence in more than three DRB countries. As of March 2014, there were 22 organisations recognised as observers, ranging from environmental NGOs to industry representative bodies to international and inter-governmental organisations. The ICPDR strives to have observers that represent the full spectrum of water stakeholders in the DRB, including social, cultural, economic and environmental areas.

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9 Resolution regarding WFD from 16 November 2000: 'The ICPDR Plenary agrees that the ICPDR will be the platform for a basin-wide co-operation for the implementation of the EC WFD in the Danube River Basin.' Note that prior to the endorsement of this resolution, the relevant ministers of the ICPDR contracting parties declared their support for it to the ICPDR President in writing. Coordinating the implementation of the EFD in the DRB directly evolved on the foundation of established ICPDR flood management endeavours and, relating to these endeavours, was formalised only in 2010 through a ministerial declaration: 'We, the Ministers, High Officials and the Member of the European Commission, being responsible for the implementation of the Danube River Protection Convention […] (32) commit ourselves to make all efforts to implement the EU Flood Risk Management Directive throughout the whole Danube River Basin and to develop one single international Flood Risk Management Plan or a set of flood risk management plans, based upon the ICPDR Action Programme for Sustainable Flood Protection and the sub-basin plans, coordinated at the level of the international river basin district by 2015 making full use of the existing synergies with the DRBM Plan'. From: Danube Declaration adopted at the Ministerial Meeting, February 16, 2010.

10 Guidelines for Participants with Consultative Status and for Observers to the ICPDR, ICPDR document number: IC/021.

Secondly, the ICPDR pursues public participation through one Expert Group and one designated staff member at the ICPDR Secretariat who work exclusively on public consultation, communication and outreach. Together with other relevant actors (e.g. other Expert Groups, national administration in lead countries, academia, observers, etc.), they steer and support a range of initiatives outlined in detail in the following paragraphs.

## IV. PUBLIC CONSULTATION IN LINE WITH WFD AND EFD

For the development of the river basin and flood risk management plans required by WFD and EFD, public consultation is done in three stages.[11] Comments from the public are collected first according to a schedule for public consultation; second, on significant water management issues and flood risk maps; and finally, on the draft management plans. Public consultation during each of these stages spans a period of six months, in which the opportunity to provide comments as an organisation or individual is actively promoted through the ICPDR network, utilising established public information tools (website icpdr.org, magazine Danube Watch, etc.) and the Public Participation Expert Group (thereby involving civil servants from all contracting parties dealing with public participation or communication as well as the ICPDR observer organisations).

For the sake of efficiency, public consultations for the two management plans developed in line with the WFD and EFD is synchronised as much as possible on the basin-wide level. This includes for instance a stakeholder workshop for both draft management plans which is currently being conceptualised and is intended to be held in the first half of 2015. All feedback provided by stakeholders through the workshop or by other means will be collected and reported to the ICPDR under the responsibility of the Public Participation Expert Group. The Expert Groups for River Basin Management and Flood Protection will then use this report to review and finalise their respective management plans, which are to be approved by the ICPDR in December 2015.

## V. PUBLIC INFORMATION

Print publications are key elements of the ICPDR's public information efforts. They can be divided into technical documents such as annual monitoring yearbooks, guidance documents or thematic maps on one hand and more general publications such as information brochures, leaflets or the quarterly magazine 'Danube Watch' on the other. 'Danube Watch' in particular has proved useful in engaging a larger community of water professionals primarily from the DRB in developments relevant to the Danube. It is published in an edition of 8500 issues, half of which are disseminated through free subscriptions worldwide, the other half at events such as conferences, study visits or meetings.

11 ICPDR, 2nd Danube River Basin Management Plan and 1st Danube River Basin Flood Risk Management Plan, both currently under preparation; for ongoing public consultation, see ICPDR, 'WFD & EFD: Public Participation Plan', 2012, ICPDR Document Number IC WD 517.

## VI. OUTREACH & ENVIRONMENTAL EDUCATION

Environmental education and public outreach are pursued for example through Danube Day, a river festival organised in all ICPDR countries annually on 29 June. More than 350 partner organisations in the countries manage approximately 1000 individual events ranging from clean-up activities to concerts, exhibitions, art competitions and sport events. Another product to support awareness-raising for water management is the 'Danube Box', a toolkit that helps teachers develop lessons for children between the ages of 10 and 12. 'Danube Box' has been translated into eight languages and has inspired spin-off products for the Black Sea, Saar and Orange River.

## VII. COOPERATING WITH BUSINESSES

In the context of education and outreach, one should note the cooperation of the ICPDR with multi-national corporations. Economic activities often have a significant impact on water resources and a responsible approach to this is desirable. Based on this notion, the ICPDR formed the 'Green Danube Partnership' with the Coca-Cola system (comprising the Coca-Cola Company and Coca-Cola Hellenic Bottling Company) in 2005.[12] This partnership led — among other activities — to the pursuit of joint activities in line with the objectives of the Danube River Protection Convention. This includes, for instance, the development of educational initiatives such as the Danube Box described in more detail above.

The approach was later extended to other businesses through the 'Business Friends of the Danube' network, which aligns the activities, resources and know-how of corporate actors with ICPDR objectives. Most recently, the chemical company Donau Chemie supported analysis work of the 'Joint Danube Survey' (JDS) research expedition. To date, three such surveys with sampling ships travelling along the Danube from Regensburg in Germany to the Danube Delta have been held (2001, 2007 and 2013). Their objective is to collect data that originates from a single sampling source and is therefore readily comparable; and to study parameters not covered by ongoing monitoring regimes, such as radioactive isotopes or rare micro-pollutants. In addition, the JDS ships attract a lot of attention, which is utilised for public events with press conferences in all riparian countries. Complimentary outreach activities include the maintenance of the website danubesurvey.org and the publication of fact sheets and information brochures.

12 ICPDR, Coca-Cola European Union Group & Coca-Cola Hellenic Bottling Company, Memorandum of Understanding for a Partnership to Conserve & Protect the Danube River & Danube River Basin, 2005, online: www.icpdr.org

## VIII. INTER-SECTORAL STAKEHOLDER DIALOGUES

One final aspect of public participation is a stakeholder dialogue process that extends into the responsibilities of several expert groups as it requires inter-sectoral approaches to complex, cross-cutting issues. It was initiated following a request at a ministerial meeting in 2010[13] and relates to inland navigation, climate change adaptation, agriculture and hydropower development. Between 2010 and 2014, this dialogue was conducted with actors from each of these sectors and guidance documents were developed. These include guidelines for sustainable hydropower development;[14] a joint statement and conference series on sustainable navigation[15] as well as a manual with guidance for waterway planning;[16] and a climate change adaptation strategy.[17] The approaches of these documents will also be incorporated in the 2nd Danube River Basin Management Plan.

## IX. CONCLUSION: ICPDR'S UNIQUE COMMITMENT TO PUBLIC PARTICIPATION

The ICPDR's commitment to public participation examined in this paper is unique for a trans-boundary water management mechanism. It will be further reinforced by the upcoming 2nd DRB Management Plan and 1st DRB Flood Risk Management Plan, to be adopted at the end of 2015. The ICPDR's work on public participation is frequently acknowledged in policy conferences, academic research and study visits to the ICPDR Secretariat, indicating that the relevant activities of the ICDPR are considered an illustration of good practice related to public participation in the management of transboundary water resources.

### FURTHER READING

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Wouters, P., *International Law—Facilitating Transboundary Water Cooperation*, Technical Background Papers No. 17, Global Water Partnership, 2013.

13 Danube Declaration adopted at the Ministerial Meeting, February 16, 2010.

14 ICDPR, Sustainable Hydropower Development in the Danube Basin: Guiding Principles, ICPDR, Vienna, 2013.

15 ICDPR, Joint Statement on guiding principles on the development of inland navigation and environmental protection in the Danube River Basin, 2008.

16 ICDPR, Manual on Good Practices in Sustainable Waterway Planning, ICDPR, Vienna, 2010.

17 ICPDR, Strategy on Adaptation to Climate Change, ICPDR, Vienna, 2013.

# PUBLIC PARTICIPATION AND THE GUARANI AQUIFER AGREEMENT

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## ABSTRACT

In 2010 Argentina, Brazil, Paraguay and Uruguay signed the Guarani Aquifer Agreement with the aim of ensuring the effective management of the Guarani Aquifer System (GAS) – a transboundary aquifer shared by the four countries. Activities on, or management of, the GAS is bound to have a wide range of potential effects on the environment in general and on the wellbeing and interests of relevant members of the public in the four countries. In that light, and considering the vital role non-state actors (can) play in natural resource governance, as broadly recognised in the international environmental law arena, this chapter mainly attempts an investigation of the status of public participation in environmental decision-making under the Guarani Aquifer Agreement in consideration of the status of the former under broader international law.

## RÉSUMÉ

En 2010 l'Argentine, le Brésil, le Paraguay et l'Uruguay ont signé l'Accord sur l'aquifère du Guaraní avec l'objectif de garantir une gestion efficace du Système de l'aquifère du Guaraní (GAS), qui est un aquifère transfrontière partagé par les quatre États. Les activités et la gestion autour du GAS ne peuvent avoir qu'une large panoplie de conséquences sur l'environnement ainsi que sur le bien-être et les intérêts des membres du public concernés dans les quatre États. À la lumière de ceci, et en considérant le rôle vital que les acteurs non-étatiques peuvent jouer dans la gouvernance des ressources naturelles, comme il est reconnu dans le domaine du droit international de l'environnement, ce chapitre tâche de mener une recherche sur le statut de la participation du public dans le processus décisionnel en matière d'environnement selon l'Accord sur l'aquifère du Guaraní et le droit international.



**Keywords:** Guarani Aquifer Agreement, public participation, environmental impact assessment

**Mots clés :** Accord sur l'aquifère du Guarani, participation du public, étude d'impact environnemental

# I. INTRODUCTION

Public participation in environmental decision-making has been practiced from prehistoric times;[1] its 'roots run deep in many cultures';[2] and the drive to participate is arguably part of human nature.[3] From these basic – but fundamental – perspectives, one can begin to understand why, as it relates to the environment,

> [a] 'participation explosion' has been occurring throughout the world over the last four [to five] decades', as the idea that 'the governed should engage in their own governance is, quite literally, gaining ground and rapidly expanding in both law and practice.[4]

But has this explosion reached the Guarani Aquifer System (GAS),[5] one of the world's largest transboundary aquifers? This chapter will answer this question by discussing first the status of public participation in environmental decision-making in general international law, followed by a closer look, in consideration of the latter perspective, at the Guarani Aquifer Agreement[6] - the treaty that from 2010 provides the four countries that share the GAS with a legal and institutional framework through which to manage the transboundary aquifer, albeit, admittedly, the agreement is not yet in force.

# II. PUBLIC PARTICIPATION IN INTERNATIONAL LAW

This section focuses on the status in international law of public participation (or consultation) in environmental decision-making processes as it relates to the execution of specific activities.[7]

The concept of 'public participation' has been a part of international environmental law for more than 100 years now.[8] However, international human rights law provided the foundation for generalised rights on public participation in decision-making processes,[9] which has now significantly influenced and grounded the discussion in the environmental law field.[10] Importantly, Article 25 of the (nearly universally ratified) International

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1 See G Pring and SY Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development', in DN Zillman, AR Lucas and G Pring (eds), *Human Rights in National Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resource,* Oxford University Press, Oxford, 2002, 11, 17.

2 *Ibid,* 17-18.

3 See MG Kweit and RW Kweit, *Implementing Citizen Participation in a Bureaucratic Society: A Contingency Approach* (New York: Praeger, 1981) 50.

4 Pring and Noe, *supra*, n. 1, 11.

5 It is estimated that the GAS covers an area of 1.087.879 km2 under the sub surface of Argentina, Brazil, Paraguay and Uruguay. The GAS contains 30,000 km3 of water, which amounts to 100 years of continuing flow of the Paraná River. 92 million people live in territories overlying the GAS. Groundwater extracted from the GAS is mainly used for public water supply. However, irrigation and industrial uses are on the rise. Brazil is the country that has used the GAS the most, with 94% of groundwater exploitation taking place within its territory. Water quality from the GAS is considered to be generally very good and some cities, like Riberão Preto, rely entirely on groundwater from the GAS. For further information and references on the GAS see 8. F. Sindico, 'The Guarani Aquifer System and the Law on Transboundary Aquifers', 13 International Community Law Review (2011), pp. 256-257.

6 The Guarani Aquifer Agreement was signed by Argentina, Brazil, Paraguay and Uruguay in August 2010 and is one of the few agreements worldwide to provide a legal and institutional framework for the management of a transboundary aquifer. As of May 2014 the Agreement was still not in force and it could be said to be dormant. Still, because of the dearth of practice in the specific field of transboundary aquifer law and policy, the Guarani Aquifer Agreement has attracted a lot of attention both from policymakers and scholars. See, amongst others, Sindico (n 5), L. del Castillo Laborde, 'The Guaraní Aquifer Framework Agreement (2010)' in L. Boisson-de-Chazournes, C. Leb and M. Tignino, *International Law And Freshwater: The Multiple Challenges*, Edward Elgar, Cheltenham, 2013, 196-216.

7 Implicitly, access to information and access to justice are embedded parts of public participation in environmental decision-making given that the former are prerequisites for meaningful participation. J Ebbesson, 'Public Participation', in D Bodansky, J Brunnee and E Hey (eds.), *The Oxford Handbook of International Environmental Law,* Oxford University Press, Oxford, 2007, 681, 686.

8 See e.g. the1909 International Boundary Waters Treaty (between US and Canada), available at: http://online.nwf.org/site/DocServer/Boundary_Waters_Treaty_of_1909.pdf?docID=661.

9 C Bruch and M Filbey, 'Emerging Global Norms of Public Involvement', in C Bruch (ed), *The New "Public": The Globalization of Public Participation*, Environmental Law Institute, Washington DC, 2002, 1, 3.

10 See G Händl, 'Human Rights and Perfection of the Environment', in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook,* 2nd edn, Kluwer Law International, The Hague, 2001, 303, 318.

Covenant on Civil and Political Rights,[11] for example, provides that '[e]very citizen shall have the right and the opportunity…: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives' apart from, and further than, the right to vote and be voted for. A similar provision is also contained in several regional human rights treaties like the American Convention on Human Rights (ACHR).[12]

What is more, considering the close connection between human rights and environmental protection, international and regional human rights authorities, including those in the Americas, have in many cases concluded that 'the right of the public to effectively participate in environmental decisions that affect them' is inherently part of various human rights provisions, such as: the right to life, the right to religious and cultural freedom and expression, the right to private and family life, the right to health and the right to a satisfactory environment.[13] However, it has been Principle 10 of the 1992 Rio Declaration on Environment and Development (Rio Declaration)[14] that raised the bar of the environment and human rights interface in international environmental law through the principle of public participation.[15]

In fact, from Principle 10 onwards a plethora of widely supported international/regional environmental treaties and soft law instruments have incorporated its public participation norms;[16] major international financial institutions have incorporated its norms into their programmes;[17] and it has helped to progress many national legislation/practices in environmental democracy.[18] Currently, the most comprehensive treaty implementing Principle 10 is the regional UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention),[19] which has extensive global influence given that its principles are broadly viewed as 'universal in nature'.[20] Partly confirming that position, the Aarhus Convention influenced the provisions of the 2010 UNEP Guidelines for the Development of National Legislation on Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines)[21] and the draft Commentaries to the Bali Guidelines.[22] While both were developed with input from civil society and governments from around the world, only the Bali Guidelines have been adopted by the UNEP Governing Council (made up of fifty-eight Members States from all continents on three-year terms), all for the purpose of ensuring proper implementation of Principle 10.[23]

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11 16 December 1966, 999 UNTS 171.Ratified by all parties to the Guarani Aquifer Agreement.

12 22 November 1969, 1144 UNTS 123, art 23.Ratified by all parties to the Guarani Aquifer Agreement.

13 Eg see *IlmariLansman and Ors v Finland* (1996) ICCPR Comm No 511/1992, para 9.5; *Taskin v Turkey* (2006) 42 EHRR 50, para 118–119; *Maya indigenous community of the Toledo District vBelize*, Case 12.053, Report No 40/04, Inter-Am CHR (2004), para 154-155; and *Social and Economic Rights Action Centre and another v Nigeria* (2001) AHRLR 60, paras 44, 53, and 70-71.

14 (1992) 31 ILM 874.

15 Bruch and Filbey, *supra*, n 9.

16 For a list of such, see Pring and Noe, *supra*, n 1, 37-44, and Bruch and Filbey, *supra*, n 9, 1, 4-5.

17 See Bruch and Filbey, *supra*, n 9, chapters 11, 12 and 14.

18 J Foti, 'Rio+20 in The Rear View: Countries Commit to Improve Environmental Democracy', *WRI Insight,* 2 July 2012, available at: http://insights.wri.org/news/2012/07/rio20-rear-view-countries-commit-improve-environmental-governance.

19 25 June 1998, 2161 UNTS 447.

20 S Stec and S Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide*,: United Nations, New York and Geneva, 2002, 6.

21 UN Doc. UNEP/GCSS.XI/11, Decision SS.XI/5, Part A, 26 February 2010.

22 Available at: http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/Commentary-to-the-guidelines-for-the-development-of-national-legislation.pdf.

23 To ensure proper implementation of the Bali Guidelines, UNEP and UNITAR are executing capacity development projects across a number of regions (Africa, Latin America and the Caribbean, and Middle East and Asia-Pacific as a first step) and countries that have committed themselves to developing or improving their national legislation on Principle 10. See A Juras, 'The Bali Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental matters', a presentation at the First Meeting of Focal points appointed by Governments of the Signatory Countries of the Declaration on the Implementation of Principle 10, held in Santiago de Chile, on 6-7 November 2012, available at: http://www.eclac.cl/rio20/noticias/paginas/8/48588/Alexander_Juras_English.pdf. Similarly, considering the Aarhus Convention and Bali Guidelines, several UNECLAC countries that are signatories to the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development are currently furthering the process of realising a regional convention on Principle 10 norms. For the parties to the Guarani Aquifer Agreement which are signatories to be above mentioned Declaration; see, http://www.unep.org/civil-society/Portals/24105/documents/Principle_10/Programme_workshop_Caribbean_SEPT10_2013.pdf and J Miller, 'Implementation of Principle 10 of the Rio Declaration of the United Nations Conference on Environment and Development', a presentation at the Conference on Sustainable Development in Latin America and the Caribbean, held in Bogota, Colombia, 5-9 March 2013, available at: http://www.eclac.cl/rio20/noticias/paginas/6/48936/2.-Janice_Miller.pdf.

Considering the above developments – the historical and human rights foundations of public participation in environmental decision-making processes, and its widespread acceptance by institutions and implementation in diverse environmental laws – some scholars believe that the Principle 10 norm must be deemed a principle of general or customary international law,[24] while some others believe that is not yet the case.[25] But at least, with the broadening international consensus on the validity of a public right to participate in environmental decision-making processes, it is arguably certain that the norm is a fast emerging rule of general or customary international law.

Besides the above discussion on the international legal status of public participation in environmental decision-making processes generally, it is also important to investigate its status within the specific context of 'environmental impact assessment' (EIA) – a decision-making tool that broadly refers to a procedure for evaluating the likely impact of a proposed major project on the natural and man-made environment.[26] In a transboundary context, the International Court of Justice (ICJ) has held in the Pulp Mills case that an EIA is a requirement of 'general international law' since the practice 'has gained so much acceptance among States'.[27] Although not touched on by the ICJ which simply noted that both Argentine and Uruguay 'agree that consultation of the affected populations should form part of an environmental impact assessment,'[28] Professor Alan Boyle – counsel to Uruguay in the Pulp Mills case later noted that 'there should have been no difficulty persuading the court of the general principle that public consultation is a necessary element of the EIA process'.[29] This position is heavily supported in the literature where public participation is rightly viewed as a natural and fundamental part of any EIA procedure – 'EIA is not EIA without consultation and public participation'.[30] And in corroboration, the first EIA regime – United States' National Environmental Policy Act of 1969,[31] nearly all national EIA systems,[32] the 1991 Convention on Environmental Impact Assessment in a Transboundary Context,[33] the 1987 UNEP Goals and Principles of EIA (adopted by its Governing Council),[34] and EIA procedures of international (financial) institutions[35] etc., all include some form of provision for public participation.

We can hence draw at least two important conclusions from the above discussion. First, as confirmed by the ICJ's judgement above, the obligation to undertake an EIA in a transboundary context is part of general international law. This finding is relevant from a practical perspective because, that being the case, countries will be bound by such obligation regardless of the latter being in a treaty or not, or them being parties to a specific treaty. Second, if, as we have argued, the norm embodied in Principle 10 can be considered as an emerging rule of general or customary international law, then it does not seem too far-fetched to argue that also public participation – to be more precise, the obligation to consult the public in the process of environmental decision-making – is, at least, developing into a customary norm of international law. The next section of this chapter will discuss the implications of these findings in the context of the management of the GAS.

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24 See G Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (UN Audiovisual Library of International Law, 2012) 6.

25 See Ebbesson, *supra*, n 7, 685.

26 C Wood, *Environmental Impact Assessment: A Comparative Review*, 2nd ed, Prentice Hall, Harlow, 2002, 1.

27 *Argentina v Uruguay,* Judgment, ICJ Reports 2010, 14, para 205, available at: http://www.icj-cij.org/docket/files/135/15877.pdf.

28 *Ibid,* para 215.

29 A Boyle, 'Pulp Mills Case: A Commentary', 3, available at: http://www.biicl.org/files/5167_pulp_mills_case.pdf. Emphasis added.

30 Wood, *supra*, n. 26, 275. See also Pring and Noe, *supra*, n 1, 38.

31 Wood, *supra*, n. 26, 6 & 281.

32 *Ibid.,* 275.

33 1989 UNTS 310, see arts 2(6) and 3(8) etc.

34 UN Doc. UNEP/GC.14/17, annex III, Principles 7-9.

35 Eg see World Bank, Operational Directive 4.01: Environmental Assessment (1999).

## III. Public Participation in the Guarani Aquifer Agreement

The first question that needs to be asked is whether public participation is even mentioned in the context of the Guarani Aquifer Agreement. Cursory analyses of the provisions that make up the Agreement reveal that this is not the case. However, we have argued in the previous section that public participation can be 'hidden' in EIA provisions, since public participation is integral to, and inherently necessary for an EIA.

The second question then becomes whether the Guarani Aquifer Agreement provides for an EIA to be undertaken. Here the answer is different when one takes a close look at articles 9 and 10 of the Agreement:

> 'Each Party shall inform the other Parties about all the activities and work referenced in the previous Article that are intended to be executed or authorized in their territory, which may have effects on the Guarani Aquifer System beyond their boundaries. The information shall be accompanied with technical data available, including results from an *evaluation of environmental effects*; so that, the Parties receiving the information could evaluate the potential effects of the activities and work.'[36]

and

> 'The Party that considers an activity or work referenced in Article 8, that is intended to be authorized or executed by a second Party, may, in its view, cause significant harm, shall request to the second Party the technical data available, including the *results from an evaluation of environmental effects*.'[37]

It can be argued that articles 9 and 10 combined together provide a strong foundation for an obligation to undertake an EIA when a planned activity may cause significant harm to another GAS State.

There is a third and final question that can help determine whether public participation through an EIA is present in the Guarani Aquifer Agreement. If, as we have argued, the obligation to undertake an EIA in a transboundary context is now part of general international law,[38] are there any provisions within the Guarani Aquifer Agreement that refer directly to international law as a way to fill possible gaps present in the legal and institutional framework provided by the Agreement? This is very relevant from a practical perspective because the Agreement is not yet in force. Commentators may argue that if public participation does not have a customary legal nature, then it would not be applicable to the GAS States in the management of the transboundary aquifer. But this is not the case. In fact, several provisions of the Guarani Aquifer Agreement, starting with the controversial article 2 that refers to national sovereignty,[39] make references to general international law. Article 5, in particular, is relevant for the current discussion:

> 'When the Parties intend to undertake studies, activities or work related to parts of the Guarani Aquifer System that are located in their respective territories, and that may have effects beyond their respective boundaries, they *shall act in agreement with the principles and norms of applicable international law*.' – italics added.

Article 5 can be interpreted as opening the door to public participation within the Guarani Aquifer Agreement by making explicit reference to 'principles and norms of applicable international law'. The latter, when dealing with activities that 'may have effects beyond their respective boundaries', include the obligation to undertake an EIA. In other words, even without articles 9 and 10 of the Guarani Aquifer Agreement, public participation, through EIA, is present in the management framework of the GAS. More importantly, for public participation to be operationalized in the context of activities that could cause significant harm to the transboundary aquifers, States do not have to wait for the Guarani Aquifer Agreement to enter into force, or, more to the case, cannot

36 Art. 9 (italics added).

37 Art. 10.1 (italics added).

38 *Supra*, n. 27.

39 GAA, Art. 2: 'Each Party exercises sovereign territorial control over their respective portions of the Guarani Aquifer System, in accordance with their constitutional and legal arrangements, and *in agreement with the norms of applicable international law*.' (italics added).

excuse themselves on that basis due to the legal nature of the obligation to undertake an EIA (and public participation/consultation) under general international law.

## IV. CONCLUSION

This chapter began by referring to the 'participation explosion' experienced in International Environmental Law. A first look at the Guarani Aquifer Agreement seemed to posit the absence of public participation within the management of this important transboundary aquifer. It appeared as though the explosion had not affected the GAS. But a closer and more detailed analysis of the Agreement, in conjunction with a thorough understanding of the links between public participation and EIA especially, and an accurate appraisal of the international legal nature of the obligation to undertake an EIA in a transboundary context, reveals the opposite. In other words, the GAS States have not been immune to the participation explosion.

## FURTHER READING

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Ebbesson, J.,'Public Participation', in D Bodansky, J Brunnee and E Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford and New York: Oxford University Press, 2007).

Etemire, U.. 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice', *Transnational Environmental Law*, vol. 3/1 , 2014, pp. 149 - 172.

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# PUBLIC PARTICIPATION IN THE DNIESTER RIVER BASIN MANAGEMENT

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## ABSTRACT

*The article is devoted to issues of public participation in transboundary water resources management and the role of non-governmental organizations (NGOs) in it following the experience of stakeholder cooperation on the Dniester river basin.*

## RÉSUMÉ

*Cet article est consacré aux questions de la participation du public dans la gestion des ressources en eau transfrontières et du rôle des organisations non gouvernementales (ONG). On y examine le cas d'étude de la coopération entre les parties prenantes dans le bassin du fleuve Dniester.*

**Key words:** Non-governmental organizations, Dniester River

**Mots clés :** organisations non gouvernementales, fleuve Dniester

Despite the fact that the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes[1] (known as the 'Water Convention') was adopted more than five years before the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[2] (the 'Aarhus Convention'), its provisions, soft-law instruments and practice in the field of public information and participation constitute a solid foundation for the application of public rights in the field of water management. Public involvement in Dniester river basin management has a long history which in many instances drew inspiration from the principles of the Water Convention.

# I. PUBLIC PARTICIPATION UNDER THE EXISTING ARRANGEMENTS FOR BILATERAL COOPERATION ON THE DNIESTER RIVER

The Dniester river (length 1352 km, basin area 72,100 km$^2$, populated with about 8 million people) starts in the Ukrainian Carpathian Mountains, crosses Moldova and returns to Ukraine near the Black Sea.[3] During the Soviet era the Dniester river basin was an internal river basin of the Soviet Union. After the collapse of the USSR, the Republic of Moldova and Ukraine signed the bilateral Agreement on Joint Management and Protection of Cross-Border Waters[4] (hereinafter 'the Agreement') of 1994, the geographical scope of which, *inter alia*, included respective parts of the Dniester river which mark or cross the boundary between the two countries. The Agreement provides for cooperation between the co-riparians via Plenipotentiaries for frontier waters of both countries. In 2007, the Plenipotentiaries adopted a Regulation[5] aimed at ensuring public participation in the activities of this joint body. The Regulation became the first example of formalized rules for dissemination of information and public participation in the activities of joint bodies in the Eastern European, Caucasus and Central Asian subregions of the UNECE.[6]

The Regulation on Stakeholder Participation in the Activities of the Plenipotentiaries[7] provides for the development of a Register of Stakeholders.[8] Stakeholders are defined as any public authority, non-governmental organisation (NGO) and their associations, or legal persons with an interest in transboundary water management.[9] The Register is composed of a Moldovan part and a Ukrainian part.[10] Each Plenipotentiary is responsible for maintaining their respective part of the Register.[11] The Register is accessible on the Internet.[12] Thirty days before their ordinary meeting, the Plenipotentiaries inform stakeholders about all decisions made since the last meeting and about workplans.[13] Twenty days before a meeting or other event, the Plenipotentiaries inform stakeholders about the date, agenda and documents of the upcoming meeting.[14] The Regulation provides for the rights of stakeholders to suggest issues to be discussed by the Plenipotentiaries and to submit written and/or oral comments concerning draft documents, together with suggestions and amendments to the draft

1 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992, online: http://www.unece.org/env/water/text/text.html.

2 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, online: http://www.unece.org/env/pp/treatytext.html.

3 Information available at: http://www.eco-tiras.org/.

4 Agreement Between the Government of the Republic of Moldova and the Government of Ukraine on the Joint Management and Protection of the Cross-Border Waters, online: http://dniester.org/wp-content/uploads/2009/06/10agreement-moldova-ukraine-1994-engl.doc.

5 Plenipotentiaries of the Republic of Moldova and Ukraine for Frontier Waters, 'Regulation on Stakeholder Participation in the Activities of the Institution of Plenipotentiaries', 2007, online: http://dniester.org/wp-content/uploads/2009/06/11regulation-on-stakeholder-participation-in-the-activities.doc.

6 UNECE, *Guide to Implementing the Water Convention*, United Nations, Geneva, 2013, p. 96.

7 'Regulation on Stakeholder Participation', *supra*, n. 5.

8 *Ibid*., art. 4(1).

9 *Ibid*., art. 2.

10 *Ibid*., art. 4(1).

11 *Ibid*..

12 *Ibid*., art. 4(4).

13 *Ibid*., art. 5(1).

14 *Ibid*, art. 5(2).

texts.[15] Draft documents and invitations to submit comments are to be published on the Internet.[16] Comments made by stakeholders are to be taken into account when making the final decision.[17] In December 2007, the Plenipotentiaries also agreed to maintain a joint website for the Dniester river basin (www.dniester.org).[18]

In December 2008 the Dniester River Basin Council was established in Ukraine.[19] The Council consists of 45 members[20] representing public authorities, local self-governments, water users, scientific institutions and NGOs.[21] Its role is primarily advisory, facilitative and coordinating. Members of the Council are elected for a term of three years and may be re-elected.[22] The mission of the Council is to establish an effective organisational mechanism for the development and implementation of the Dniester River Basin Management Plan.[23] The tasks and objectives of the Council also, *inter alia*, include: facilitation of integrated water resource management in the Dniester river basin,[24] review and assessment of quantitative and qualitative status of water resources,[25] development of the strategy and the Long-term Target River Basin Program for the Development of Water Resources and recommendations on mechanisms for their implementation, assisting local authorities in strengthening the role of the public[26] as well as ensuring accommodation of interests and coordination of action between stakeholders in the Dniester river basin.[27] Members of the Council have the right to request information on its activity and suggest issues to be discussed by the Council.[28] Aside from the voting members, the Council is authorised to invite competent qualified persons with an advisory vote.[29] The Council may, as appropriate, establish temporary working groups involving competent experts who are not members of the Council.[30] Sessions of the Council are open to the public unless decided otherwise.[31]

## II. PUBLIC PARTICIPATION IN THE DEVELOPMENT OF THE DNIESTER RIVER BASIN TREATY

The Agreement provides solid grounds for cooperation between the co-riparians—Moldova and Ukraine. However, for a number of reasons it is not sufficient to provide for sustainable management of the Dniester River basin: neither the geographical and sectoral scope of the Agreement nor its institutional arrangements are river basin specific, thus falling short in reaching a number of recognised principles of international water law, including the integrated water resource management principle and the ecosystem approach. For example, the Agreement covers only those Dniester river areas which cross national boundaries, amounting to about 225 km out of its total length of 1,352 km; the joint body to implement the Agreement—the Plenipotentiaries of Moldova and Ukraine for frontier waters—tends to *de facto* centralize management in one agency; the Agreement mostly regulates water use, while there is a clear need to take due account of other sectors like natural, biological and landscape resources, including the integrated management and protection of the Black Sea.[32]

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15 *Ibid*, art. 6 and 7.
16 *Ibid*, art. 7(1).
17 *Ibid*, art. 7(3).
18 *Guide to Implementing the Water Convention, supra*, n. 6, p. 96.
19 Information available at: http://dniester.org/materials/bassejnovyj-sovet-dnestra-ukraina/
20 *Rules of Procedure of the Dniester River Basin Council*, art. 1, online: http://dniester.org/materials/bassejnovyj-sovet-dnestra-ukraina/.
21 *Regulation on the Dniester River Basin Council*, art. 3(1), online: http://dniester.org/materials/bassejnovyj-sovet-dnestra-ukraina/.
22 *Ibid*., art. 2.
23 *Ibid*., art. 1(3).
24 *Ibid*., art. 2(2).
25 *Ibid*., art. 2(3).
26 *Ibid*., art. 2(17).
27 *Ibid*., art. 1(2).
28 *Ibid*, art. 3(8).
29 *Rules of Procedure of the Dniester River Basin Council*, *supra*, n. 20, art. 1.
30 *Ibid*., art. 10.
31 *Regulation on the Dniester River Basin Council*, *supra*, n. 21, art. 3(7).
32 UNECE/OSCE/UNEP Transboundary Cooperation and Sustainable Management in the Dniester River Basin: Phase III—Implementation of the Action Programme (Dniester-III) project, *Dniester Without Borders*, Executive Summary, Kyiv, 2013, p. 8, online: http://dniester.org/wp-content/uploads/2009/06/Dniester-resume-Engl.pdf.

The above concerns have brought about initiatives either to amend the Agreement so as to expand its scope to the entirety of specific river basins, including that of the Dniester River, or to develop a separate Dniester River Basin Treaty. This issue was raised for the first time by the Moldovan environmental NGO 'Biotica' and subsequently supported by a decision of the Moldovan Parliament.[33] In 1999 the International Conference on environmental problems of the Dniester river basin considered the first draft of such a treaty (in the form of a draft Dniester Convention).[34] The Conference had wide NGO participation. In 2002, during the 5th OSCE Forum in Prague, the Eco-TIRAS International Environmental Association of River Keepers[35] reiterated the need for a Dniester River Basin Treaty and in 2003, during the 5th Ministerial Conference 'Environment for Europe'[36] in Kyiv, it organised a round table discussion on the matter.[37]

The mentioned initiatives attracted the attention of a number of IGOs. In 2004-2006, the OSCE, working in conjunction with the UNECE, implemented the so-called 'Dniester-I' Project,[38] which delivered a number of important outputs, laying the foundation for the future 'Dniester Process'. Among those outputs was the 2005 Transboundary Diagnostic Study for the Dniester River Basin.[39] Chapter 7 of the Diagnostic Study is devoted to the issues of public participation. The Diagnostic Study is supplemented by the Legal Conclusion on 'Status and Options for Enhancing the International Legal Framework of Transboundary Cooperation on the Protection and Sustainable Management of the Dniester River Basin'.[40] The Legal Conclusion suggested two options for the way forward: (a) the development of a bilateral Dniester River Basin Treaty or (b) the development of Dniester river-specific supplementary Protocol(s) to the existing Agreement.

In 2005, the Ministers of Environment of Moldova and Ukraine and the Heads of the National Water Management Agencies of the two countries signed the Protocol of Intentions on Cooperation in the Field of Environmental Rehabilitation of the Dniester River Basin.[41] The signatories, *inter alia*, declared their intention to promote the implementation of recommendations of the Transboundary Diagnostic Study, their support for the development of National Action Plans for Environmental Rehabilitation of the Dniester River Basin and their intention to support close cooperation with the public, including NGOs, in addressing issues of environmental rehabilitation of the Dniester river basin.[42]

With the aim of implementing the 2005 Protocol of Intentions and on the basis of the 2005 Transboundary Diagnostic Study for the Dniester River Basin, the Republic of Moldova and Ukraine then signed the 2006 Action Programme to Improve Transboundary Water Management of the Dniester River Basin for the period of 2007-2010,[43] carving the pathway for the development of the Dniester River Basin Treaty (hereinafter 'the Treaty'). The first draft of the Treaty was elaborated in 2006 by a consultant. Consultations on its text, primarily on the expert level, were held during 2006-2010 under the auspices of the Plenipotentiaries of Moldova and Ukraine for frontier waters. NGOs took active part in all rounds of consultations. They were allowed to be present basically at all meetings. In addition, in 2006-2007 public hearings of the draft Treaty were organised both in Ukraine and in Moldova. Public commentaries were taken into account during numerous revisions of the draft text of the Treaty.

In 2011 the Government of Moldova initiated official negotiations with Ukraine on the draft Treaty. The Treaty was initialled in Chisinau, Moldova on 26 July 2012 and signed on 29 November 2012 in Rome, Italy at the Sixth session of the Meeting of the Parties to the UNECE Water Convention.[44]

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33 *Ibid*.

34 *Ibid*.

35 Eco-TIRAS International Environmental Association of River Keepers was created by environmental NGOs of the Dniester River basin in both Moldova and Ukraine to help and advise authorities and to help the local population manage the river in a sustainable way, using an Integrated River Basin Management Approach. At present it unites 38 NGO members. Information is available at: http://www.eco-tiras.org/index.php/mission-mainmenu-27.

36 Online: http://www.unece.org/env/efe/Kiev/proceedings/html/proceedings.html.

37 *Dniester Without Borders*, *supra*, n. 32, p. 8.

38 Online: http://dniester.org/materials/dnestr1/.

39 Online: http://dniester.org/wp-content/uploads/2009/06/17final_report_eng.pdf.

40 Online: http://dniester.org/wp-content/uploads/2009/06/16analysis-of-the-agreement-by-vinogradov-engl.doc.

41 Online: http://dniester.org/wp-content/uploads/2009/06/13protocol-on-intentions-to-cooperate-ukr-moldova-2005.doc.

42 *Ibid*.

43 Online: http://dniester.org/wp-content/uploads/2009/06/14action-programme.doc (accessed April 2014).

44 See Sixth session of the Meeting of the Parties to the Water Convention, 28 - 30 November 2012, online: http://www.unece.org/env/water/mop6/dniester.html (accessed April 2014).

# III. PUBLIC PARTICIPATION UNDER THE DNIESTER RIVER BASIN TREATY

The objective of the Treaty is to establish legal and institutional foundations for cooperation towards achieving rational and environmentally sound use and protection of water and other natural resources and ecosystems of the Dniester river basin in the interests of the population and sustainable development of the Contracting Parties.[45] The principles of cooperation include: the equitable and reasonable utilisation principle, the precautionary principle, the polluter pays principle, the inter-generational sustainability principle, the integrated water resource management principle and the ecosystem approach. The Contracting Parties undertook to ensure the human right to a decent environment and access to clean drinking water. The Contracting Parties assumed that no use of water resources of the Dniester river basin enjoys inherent priority over other uses. In the event of a conflict between uses it shall be resolved with reference to all relevant geographic, hydrographic, hydrologic, climatic, environmental and demographic factors together, as well as the social and economic needs of the states of the Contracting Parties, with special regard being given to the requirements of vital human needs and the needs of ecosystems in ample water supply.[46]

In order to achieve the objectives of the Treaty, the Contracting Parties established the Commission on Sustainable Use and Protection of the Dniester River Basin (hereinafter 'the Commission')[47] and agreed, *inter alia*, to inform the public on the status of water and other natural resources and ecosystems of the Dniester river basin and on measures taken or planned to prevent, control or reduce any transboundary impact, as well as to involve the public in resolving matters to which the Treaty relates.[48] They also expressed commitment to encourage cooperation in the use and protection of water and other natural resources and ecosystems of the Dniester river basin between public authorities and local self-governance bodies, institutions, undertakings and non-governmental organizations.[49] The Contracting Parties agreed to carry out environmental impact assessment in a transboundary context on the grounds of and in accordance with the procedure established by provisions of the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 ('Espoo Convention')[50], which, in its turn implies requirements of proper public participation.[51]

Additionally, issues of public participation are addressed in Article 21 of the Treaty. Paragraph 1 of this Article establishes that

> each Contracting Party shall, in accordance with the national legislation of its state, ensure public access to information on the status of the Dniester river basin and public participation in decision-making related to protection and sustainable development of the Dniester river basin, as well as to projects likely to have significant impact on the status of water and other natural resources and ecosystems. Such access includes informing the public and providing information on its request.

The main elements of public participation in decision-making are enshrined in Article 21(2), which states that public participation in decision-making related to protection and sustainable development of the Dniester river basin shall imply informing the public concerned in an adequate, timely and effective manner of proposed activity at the earliest stage of the decision-making procedure, providing opportunities to submit comments, information, analysis or opinions on the proposed activity and ensuring due account of the outcome of public participation in the relevant decision-making process.[52]

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45 Treaty between the Government of the Republic of Moldova and the Cabinet of Ministers of Ukraine on Cooperation in the Field of Protection and Sustainable Development of the Dniester River Basin, 2012, art. 1, online: http://www.unece.org/fileadmin/DAM/env/water/activities/Dniester/Dniester-treaty-final-EN-29Nov2012_web.pdf.

46 *Ibid.*, art. 4.

47 *Ibid.*, art. 6(4).

48 *Ibid.*, art. 5(h).

49 *Ibid.*, art. 5(i).

50 Dniester Basin Treaty, *supra,* n. 45, art. 17.

51 Convention on Environmental Impact Assessment in a Transboundary Context, 1991, online: http://www.unece.org/env/eia/about/eia_text.html.

52 *Ibid.*, art. 21(2).

The Treaty emphasises that the Contracting Parties shall facilitate public participation in activities related to implementation of the Treaty, including activities of the Commission.[53] To that end, Article 26 establishes that the Commission shall consist of representatives of competent central executive authorities of the Contracting Parties, but specifies that representatives of regional authorities, scientific institutions and organizations, as well as relevant non-governmental organizations may be included; and Article 27(m) foresees that in order to achieve the objectives of the Treaty, the Commission shall inform the public on the status of water and other natural resources and ecosystems of the Dniester River basin, and on activities aimed at achieving the objective of the Treaty, including by posting on its web site reports on its activities and on the ecological status of the Dniester River basin.[54]

Article 26(7) of the Treaty provides that the Commission shall adopt rules of procedure regulating its operation and shall establish working bodies and enlist the services of experts.[55] Moreover, Article 27(r) foresees that the Commission shall determine modalities and conditions for participation of representatives of other interested states, international and non-governmental organizations in the work of the Commission as observers.[56] Bearing in mind that pursuant to Article 29(3) of the Treaty, the Regulations to the Agreement shall be applicable *mutatis mutandis* to the Treaty,[57] it could be established that the Commission is likely to follow the approach of the Plenipotentiaries and the pattern of their respective Regulation on Stakeholder Participation in the Activities of the Plenipotentiaries of 2007.

The public, in particular through NGOs, has played an important role in strengthening cooperation between the Republic of Moldova and Ukraine in the Dniester river basin. They have been actively involved in the activities of the Plenipotentiaries of Moldova and Ukraine for frontier waters, initiated the development of the Dniester River Basin Treaty and took active part in its evolution, and have expressed commitment to be involved in the activities of the Commission and facilitate the objectives of the Treaty. Existing modalities and those yet to be formed (namely, the Commission) joint bodies provide good opportunities for public participation.

## FURTHER READING


Action Programme to Improve Transboundary Water Management of the Dniester River Basin for the period of 2007-2010, online: http://dniester.org/wp-content/uploads/2009/06/14action-programme.doc

Agreement between the Government of the Republic of Moldova and the Government of Ukraine on Joint Management and Protection of Frontier Waters, 1994, online: http://dniester.org/wp-content/uploads/2009/06/10agreement-moldova-ukraine-1994-engl.doc

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53 *Ibid*., art. 21(3).

54 *Ibid*., art.27(m).

55 *Ibid*., art.26(7).

56 *Ibid*., art.27(r).

57 *Ibid*., art.29(3).

# ÉTAT DU PROCESSUS DE GESTION INTÉGRÉE DES RESSOURCES EN EAU DANS LE BASSIN DU NIGER : EXPÉRIENCES DE L'IMPLICATION DES ACTEURS NON ÉTATIQUES ET DE LA PRÉVENTION DES CONFLITS ENTRE USAGERS DE RESSOURCES

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## RÉSUMÉ

*La création de l'Autorité du Bassin du Niger (ABN) s'inscrit dans la longue tradition de gestion partagée du fleuve Niger qui trouve ses racines au début des années 1950. Elle est et demeure un cadre de dialogue et d'orientation pour une gestion concertée des ressources du bassin pour les neuf États drainés par le fleuve Niger et ses affluents. Son ouverture aux entités non étatiques a amorcé une nouvelle dynamique dans la gestion et la protection du bassin Niger. Cette ouverture s'inscrit, en effet, dans le processus « vision partagée » initié par les États membres de l'ABN, qui a pour objectif de mettre en place un cadre réglementaire et institutionnel favorisant la coopération non seulement entre les États, mais aussi entre les États et tous les autres acteurs de la société civile du bassin pour une gestion efficiente du fleuve Niger.*

## ABSTRACT

*The establishment of the Authority of the Niger Basin (ANB) finds its roots in the tradition of shared management of the Niger River starting at the beginning of the 1950s. The ANB provides a framework both for dialogue among and shared management of basin resources by the nine States crossed by the Niger River and its tributaries. Its recent opening to non-state actors has initiated a new dynamic in the management and protection of the Niger basin. This opening is inscribed in the 'Shared Vision' process started by ANB member states with the objective of putting in place a regulatory and institutional framework that seeks, via cooperation not only between States but also between the States and the basin's other civil society actors, efficient management of the Niger River.*



**Mots clés :** Autorité du Bassin du Niger, gestion intégrée des ressources en eau, Afrique

**Key words:** Authority of the Niger Basin; integrated management of water resources; Africa

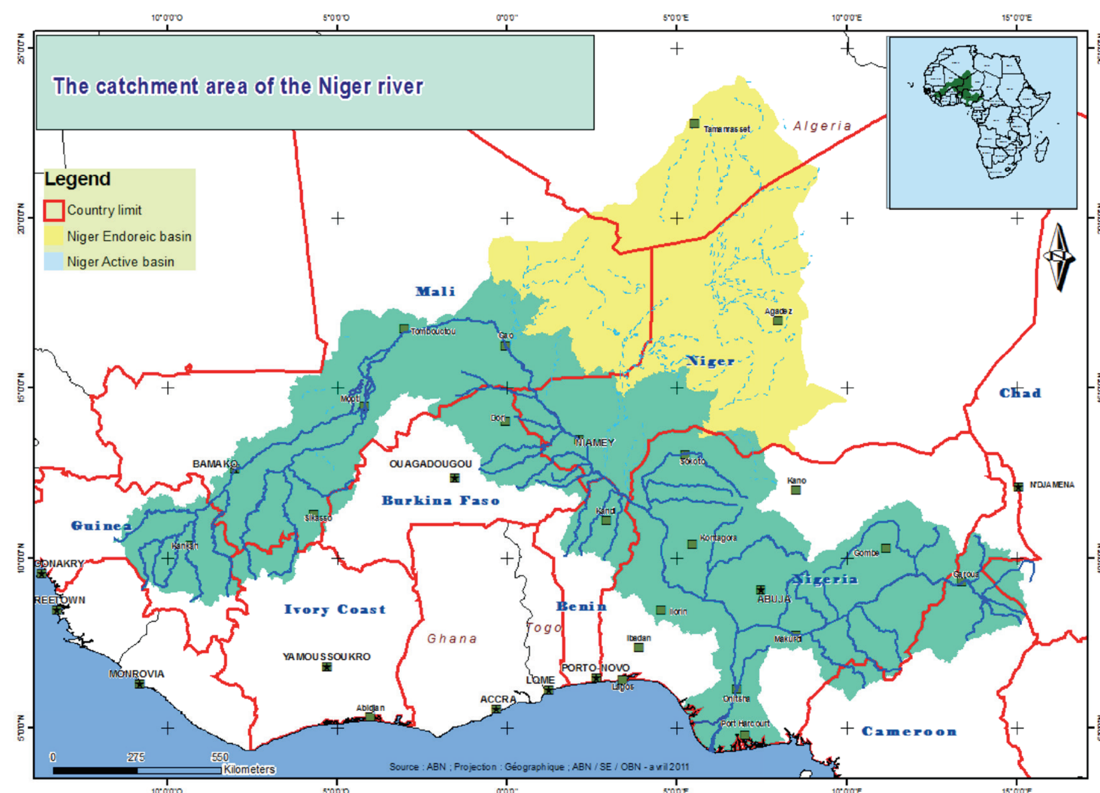
# I. APERÇU DU BASSIN DU NIGER

Le fleuve Niger, long de 4200 km, draine un bassin dont la superficie théorique est de 2.100. 000 Km² avec une partie active de 1.500.000 Km² répartie sur les 9 pays fondateurs de l'Autorité du Bassin du Niger (ABN). Avec cette longueur, le fleuve Niger est le 3e d'Afrique et le 9e du monde.

Les neuf (9) États ayant en partage le bassin du fleuve Niger, à savoir le Bénin, le Burkina Faso, le Cameroun, la Côte d'Ivoire, la Guinée, le Mali, le Niger, le Nigeria et le Tchad, ont créé la Commission du fleuve Niger en novembre 1964 qui fut transformée en Autorité du Bassin du Niger (ABN) en novembre 1980. La mission de l'ABN est de promouvoir la coopération entre les pays membres et d'assurer un développement intégré du bassin du Niger dans tous les domaines par la mise en valeur de ses ressources notamment dans les domaines de l'énergie, de l'hydraulique, de l'agriculture, de l'élevage, de la pêche et la pisciculture, de la sylviculture et l'exploitation forestière, des transports et communications, et de l'industrie.

L'article 4 de la Convention révisée portant création de l'ABN de 1987 assigne à l'ABN, les cinq objectifs majeurs suivants :

1. Harmoniser et coordonner les politiques nationales de mise en valeur des ressources du bassin ;
2. Planifier le développement du bassin en élaborant un plan de développement intégré du bassin ;
3. Concevoir, réaliser, exploiter et entretenir les ouvrages et des projets communs ;
4. Assurer le contrôle et la réglementation de toute forme de navigation sur le fleuve, ses affluents et sous-affluents conformément à « l'Acte de Niamey » et,
5. Participer à la formulation des demandes d'assistance et à la mobilisation des financements des études et travaux nécessaires à la mise en valeur des ressources du bassin.




**Source : Autorité du bassin du Niger**

Le bassin du Niger dispose d'un énorme potentiel de développement qui se fragilise du fait des effets conjugués du changement climatique et de l'action de l'homme, qui se manifestent par la baisse des précipitations et la réduction des écoulements avec apparition de phénomènes environnementaux, qui, dans certains cas, prennent l'allure d'une menace à l'existence humaine dans le bassin du Niger. Il s'agit, entre autres, de la dégradation des terres et des eaux (érosions, ensablement, pollutions d'origines diverses), la prolifération des plantes aquatiques envahissantes (par exemple la jacinthe) et la perte de la biodiversité.

Les fortes pressions démographiques, sociales, économiques et environnementales et l'impact du changement climatique sur les ressources naturelles du bassin du Niger posent de nombreux défis aux États membres de l'ABN. Parmi ces défis, l'on peut mentionner, entre autres : (i) la réduction de la pauvreté et l'amélioration des conditions de vie des populations, (ii) la sécurité alimentaire, (iii) la préservation des ressources naturelles et la protection de l'environnement, (iv) l'utilisation durable et équitable des ressources en eau pour tous les usagers, (v) le partage des bénéfices mutuels et (vi) le développement socio-économique et l'intégration régionale.

## II. LE PROCESSUS DE GESTION INTÉGRÉE DES RESSOURCES EN EAU DANS LE BASSIN DU NIGER

Pour relever les défis du développement durable, les États membres de l'ABN, reconnaissant la communauté d'intérêts qui les lie dans l'exercice de leurs droits et de leurs obligations dans la gestion des ressources en eau du bassin, ont décidé en février 2002, de conduire un processus de mise en place d'une véritable politique de gestion intégrée des ressources en eau pour un développement durable du bassin du Niger[1]. Ce processus de renforcement de la coopération encore appelé « Vision partagée », avait pour objectifs de : (i) renforcer le cadre juridique et institutionnel existant en vue de le rendre propice au dialogue et à la concertation pour l'action coopérative entre les États membres de l'ABN ; (ii) développer les ressources en eau de manière durable et équitable afin de promouvoir la prospérité, la sécurité et la paix dans le bassin du Niger et (iii) élaborer sur une base participative et consensuelle, et mettre en œuvre à l'échelle du bassin, un cadre stratégique de développement intégré : le Plan d'Action de Développement Durable (PADD) du Bassin du Niger.

La volonté politique ainsi exprimée par les Chefs d'État et de Gouvernement de faire de l'ABN, un véritable outil de coopération et de développement, a favorisé une réelle coopération entre les États membres pour la gestion durable et équitable des ressources en eau du bassin du Niger.

Le processus de négociation relative à la « Vision partagée » a duré six ans et a impliqué plusieurs acteurs tels les États membres, les partenaires techniques et financiers et la société civile ; il a abouti aux principaux résultats suivants :

1. l'adoption, en avril 2004, de la « Déclaration de Paris » par les Chefs d'État et de Gouvernement définissant les Principes de gestion et de bonne gouvernance pour un développement durable du bassin du Niger ;

2. l'adoption, en avril 2004, d'un Cadre de Coopération des Partenaires de l'Autorité du Bassin du Niger pour soutenir la « Déclaration de Paris » ;

3. l'adoption, en mai 2005, de trois (3) domaines prioritaires d'action : (i) Développement des infrastructures socio-économiques; (ii) Préservation des Ecosystèmes du bassin et (iii) Renforcement des capacités et participation des acteurs ;

4. l'adoption d'un Plan d'Action pour le Développement Durable (PADD) du bassin par le Conseil des Ministres de l'ABN tenu le 27 juillet 2007 à Niamey ;

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1 Voir Décision n°5 du 7ème Sommet des Chefs d'État et de Gouvernement de l'ABN (2002).

5. l'adoption du Programme d'Investissement (2008 - 2027) associé au PADD par les Chefs d'État et de Gouvernement de l'ABN en avril 2008. Ce Programme d'Investissement comportait 639 actions ou projets pour un montant global estimé à 5.6 milliards d'euros ou 8,3 milliards $US ou 3645 milliards de francs CFA. Il a été révisé en 2012 et comporte désormais 729 actions ou projets pour un montant global estimé à 9,34 milliards $US ou 4126 milliards de francs CFA ;

6. l'adoption de la *Charte de l'Eau du Bassin du Niger* par les Chefs d'État et de Gouvernement de l'ABN en avril 2008. Cette Charte a pour objectif de favoriser une coopération fondée sur la solidarité et la réciprocité pour une utilisation durable, équitable et coordonnée de la ressource en eau du bassin du Niger. Elle est entrée en vigueur le 19 juillet 2010, soit deux ans après son adoption ;

7. l'organisation des Usagers des ressources naturelles du bassin en 9 coordinations nationales et une coordination régionale en vue de leur implication effective dans le processus de planification du développement du bassin.

Pour aider efficacement aux prises de décisions des instances supérieures relativement à la planification des aménagements et à la gestion des événements hydro-climatiques extrêmes dans le bassin, des modèles d'allocation et de gestion de l'eau et de prévisions hydrologiques ont été développés. Ces modèles permettent entre autres : (i) d'optimiser la gestion des ressources en eau ; (ii) d'analyser les impacts hydrauliques des aménagements projetés ; (iii) de coordonner la gestion des barrages ; et (iv) d'alerter les populations en cas de situation d'urgence.

Le processus relatif à l'adoption de la Vision partagée a permis, entre autres, de mettre en place un cadre réglementaire et institutionnel favorisant la coopération non seulement entre les États, mais aussi entre les États et tous les autres acteurs de la société civile du bassin.

En effet, la « Déclaration de Paris » et la Charte de l'Eau du bassin du Niger édictent des règles relatives à la répartition équitable et raisonnable des ressources en eau entre les États membres d'une part et entre les différents usages d'autre part. La consultation entre les États membres dans la planification des projets susceptibles d'avoir des effets négatifs significatifs sur la ressource en eau, ainsi que la prévention et la résolution des conflits liés à l'utilisation de la ressource sont également prises en compte dans ces deux instruments.

Des institutions de gestion de l'eau sont prévues par la Charte de l'eau pour mener ou encadrer les consultations et les négociations nécessaires à la planification consensuelle du développement du bassin. Il s'agit notamment : (i) du Comité Technique Permanent chargé du suivi de la gestion rationnelle des eaux du bassin du Niger, (ii) du Groupe Consultatif Régional chargé d'établir le consensus autour de la conception et la mise en œuvre des aménagements structurants dans le bassin, (iii) du Panel d'Experts chargé de donner des avis et conseils sur des questions techniques spécifiques relatives au développement d'infrastructures dans le bassin et (iv) des Commissions de Sous-bassin au nombre de huit (8), chargées de proposer les modalités d'utilisation des ressources en eau au niveau de chaque sous-bassin hydrographique.

En dehors de la Structure Focale Nationale, il existe, dans chaque État membre de l'ABN, une Coordination Nationale des Usagers (CNU). En effet, de janvier 2005 à 2014, différentes étapes ont été franchies et plusieurs décisions ont été prises en vue d'une implication effective des acteurs de la Société civile dans le processus de la vision partagée. Les neuf Coordinations Nationales et la Coordination Régionale des Usagers (CNU - CRU) des ressources naturelles du bassin, ainsi installées, servent d'interface entre les acteurs et usagers et les autres parties prenantes au développement et à la préservation des ressources du bassin.

# III. ÉTAT DU PROCESSUS DE L'IMPLICATION DES ACTEURS NON ÉTATIQUES DANS LA GESTION INTÉGRÉE DES RESSOURCES EN EAU DANS LE BASSIN DU NIGER

L'initiative d'impliquer les acteurs de la société civile dans le processus de gestion intégrée des ressources en eau dans le bassin du Niger remonte à janvier 2005 à Bamako (Mali), lors de l'atelier régional organisé par l'ABN pour la validation de la synthèse régionale des études multisectorielles nationales à travers une déclaration solennelle dite «Déclaration de Bamako des Acteurs de la Société Civile ». De cette date à 2014, plusieurs étapes ont été franchies et plusieurs décisions ont été prises par les Instances supérieures de l'Autorité du Bassin du Niger. Les actes posés sont :

1. La réalisation d'une étude d'identification et de caractérisation d'acteurs usagers des ressources du bassin dans les sept secteurs ci-après: agriculture et élevage, pêche et navigation, eau potable et assainissement, protection des écosystèmes, barrages, tourisme, mines, industrie et artisanat ;
2. L'organisation du 1er Forum Régional des Acteurs Usagers des Ressources du bassin (FOREAU) en février 2006 à Fada-Ngourma (Burkina Faso) ; les participants à ce forum ont recommandé par consensus :
   - l'implication des organisations d'usagers dans la mise en œuvre des projets et programmes majeurs en cours au sein de l'ABN ;
   - la participation effective des acteurs de la société civile aux instances de l'ABN et dans la mise en œuvre du processus de la « Vision Partagée » ;
   - l'élaboration et la mise en œuvre d'un plan de communication à l'égard des populations et des acteurs actifs dans le bassin pour une participation efficace au processus de développement durable du bassin du Niger.
3. Grâce à l'adoption de la Résolution n°2 relative à l'implication de la société civile au processus d'élaboration de la « Vision Partagée », la 25e Session ordinaire du Conseil des Ministres de l'ABN, tenue en septembre 2006 à Niamey, a reconnu la société civile comme partie prenante au développement durable du bassin et a demandé l'identification et la mise en œuvre des mécanismes de sa participation.

   Dès lors, les acteurs usagers des ressources du bassin ont été associés à toutes les rencontres techniques (études et ateliers de validation) et aux réunions des instances de décisions de l'ABN (Comité Technique des Experts, Conseil des Ministres et Sommets des Chefs d'État), avec droit à la parole.
4. Par les résolutions N°4 et 5 de la Session extraordinaire du Conseil des Ministres de l'ABN tenue en juillet 2007 à Niamey, les États membres de l'ABN ont, une fois de plus, confirmé leur volonté d'impliquer les acteurs et les usagers du bassin en instituant les mécanismes de leur participation tant au niveau national que régional, et l'organisation tous les quatre ans du Forum Régional des acteurs et usagers des ressources du bassin (FOREAU).

   Ainsi, neuf Coordinations Nationales et une Coordination Régionale des Usagers (CNU – CRU) des ressources naturelles du bassin ont été installées. Elles servent d'interface entre les acteurs et les autres parties prenantes au développement et à la préservation du bassin. Cependant, la plupart des coordinations nationales ont connu, pendant les deux premières années (2007-2008), des difficultés de fonctionnement liées au manque de moyens matériels et financiers nécessaires pour mener efficacement leurs activités sur le terrain.
5. En 2009, avec l'appui financier de la Coopération Technique Allemande (GIZ), de l'Agence Canadienne de Développement International (ACDI) et de l'Union Européenne (UE), un Programme de renforcement de capacités a été élaboré en vue d'une meilleure participation de la société civile au processus de développement durable du bassin. Son montant est estimé à 2,6 milliards de FCFA soit 3,96 millions d'euros. Ce programme a connu un début d'exécution depuis 2010 avec un appui aux CNU et à la CRU en termes de dotation en matériel informatique et mobilier, de formations et de voyages d'études.

6. Le 2e Forum régional des acteurs-usagers des ressources du bassin du Niger en février 2012, à Sélingué (Mali) a été organisé, soit 6 ans après le 1er FOREAU. Cette 2e édition du FOREAU a mobilisé près de 200 participants (usagers, élus locaux, structures étatiques et partenaires techniques et financiers).

7. Par sa Résolution N°10, la 32e session ordinaire du Conseil des Ministres de l'ABN, tenue le 29 novembre 2013 à Yaoundé (Cameroun), a adopté le Protocole d'Entente relatif à l'opérationnalisation des CNU/CRU. Ce Protocole d'Entente régit les rapports entre l'ABN (États et le Secrétariat Exécutif) et les CNU/CRU, fondés sur un partenariat durable pour la mise en œuvre efficace du Plan d'Action de Développement Durable (PADD), du Programme d'Investissement et de la Charte de l'eau et ses annexes.

Le Protocole d'Entente vise les objectifs spécifiques suivants: i) créer les conditions d'un partenariat durable entre les CNU/CRU et leurs partenaires (États et Secrétariat Exécutif de l'Autorité du Bassin du Niger, Partenaires Techniques et Financiers (PTF), Organisations internationales et organisations non-gouvernementales), ii) renforcer les capacités des Coordinations Nationales et de la Coordination Régionale des Usagers pour leur permettre d'exécuter leurs missions statutaires.

# IV. ÉTAT DE LA PRÉVENTION ET GESTION DES CONFLITS LIÉS AUX UTILISATION DES RESSOURCES NATURELLES DANS LE BASSIN DU NIGER

L'esprit de coopération et de solidarité qui a caractérisé la création de l'Autorité du Bassin du Niger en 1980 reste vivant et s'est renforcé ces dernières années avec le processus d'élaboration de la « Vision partagée » du bassin du Niger. Grâce au régime de gestion concertée et coordonnée mis en place, le bassin du Niger n'a guère connu de conflits liés à l'utilisation de ses ressources naturelles entre les États membres.

Cependant, à une échelle locale, dans certaines portions nationales du bassin, des conflits parfois sanglants entre les usagers - agriculteurs, pêcheurs, éleveurs et autres exploitants - sont survenus.

Face à cette situation, l'ABN, avec l'appui de la Fondation Friedrich Ebert, a organisé en juin 2006 à Bamako, une conférence régionale sur la prévention et la gestion des conflits liés à l'usage des ressources naturelles dans le bassin du Niger. Cette conférence a vu la participation des représentants des États membres, des partenaires techniques et financiers, des organisations régionales, des Associations et ONG ainsi que celle des collectivités territoriales, des Associations d'usagers et des médias. Les participants ont, entre autres, recommandé : (i) l'adoption des mécanismes de prévention et de gestion des conflits en privilégiant la concertation, la négociation, la conciliation et la médiation et (ii) l'élaboration d'un cadre juridique, institutionnel et réglementaire régional basé sur la gestion concertée des ressources du bassin du Niger en prenant en compte les besoins réels des populations (cette proposition s'est concrétisée dans l'adoption de la Charte de l'Eau en 2008).

La Charte de l'Eau du bassin du Niger a été élaborée et adoptée par les neuf États du bassin par les neuf États membres de l'ABN. Elle a été ratifiée par huit des neuf États : le 9e État connaissant une situation de guerre; elle est entrée en vigueur le 19 juillet 2010 avec le dépôt des instruments de ratification à l'Union Africaine et aux Nations Unies. La Charte prévoit, au titre des principes généraux, que l'utilisation de l'eau du bassin prenne en compte un certain nombre de principes portant notamment sur la participation et l'utilisation équitable et raisonnable des ressources en eau du bassin[2], l'utilisation non dommageable des ressources en eau[3], les principes de précaution[4] et de prévention[5] et enfin, les principes « pollueur-payeur »[6] et « préleveur-payeur »[7].

2 Article 4 : Participation et utilisation équitable et raisonnable.
3 Article 5 : Utilisation non dommageable.
4 Article 6 : Précaution.
5 Article 7 : Prévention.
6 Article 8 : Pollueur-Payeur.
7 Article 9 : Préleveur-Payeur.

En son Article 29, la Charte dispose qu'en cas de différend entre deux ou plusieurs États quant à l'interprétation ou à l'application de la Charte, les États recherchent d'abord une solution à travers les bons offices de l'ABN, la médiation ou la conciliation ou par toute autre méthode pacifique de règlement des différends. Quant à l'Article 30, il dispose que « si aucune solution n'intervenait au terme des procédures de bons offices, de médiation et de conciliation, le différend sera soumis au Comité Technique Permanent qui fera des propositions de règlement au Conseil des Ministres et au Sommet des Chefs d'États et de Gouvernement dans un délai de 6 mois à compter de la date de sa saisine par le Secrétariat ».

Par ailleurs, à défaut de solution satisfaisante à ce stade, les parties au différend saisissent la Commission de conciliation de l'Union Africaine dans un premier temps avant toute saisine de la Cour internationale de Justice. Enfin, les États membres de l'ABN ont convenu d'associer étroitement les *Autorités coutumières et traditionnelles* à la gestion et au règlement des conflits environnementaux au niveau local.[8]

## V. CONCLUSION

Le processus relatif à la gestion intégrée des ressources en eau (GIRE) dans le bassin du Niger a permis de renforcer le cadre réglementaire, juridique et institutionnel, de développer des outils techniques pour une gestion concertée des ressources en eau du bassin et d'adopter un programme d'investissement commun sur 20 ans (2008-2027) en cours d'exécution avec la participation de tous les acteurs concernés.

La volonté politique des États membres de l'ABN de coopérer pour une gestion intégrée, concertée, paisible et durable des ressources en eau du fleuve Niger s'est renforcée à travers le processus participatif de la « Vision partagée » avec l'implication effective des acteurs de la société civile.

Ce processus de « Vision partagée » se fonde sur la participation de l'ensemble des neuf États drainés par le fleuve Niger et ses affluents, des acteurs de la société civile et des partenaires techniques et financiers pour le développement du bassin du fleuve Niger dont le statut de « cours d'eau international » et « ressource partagée» a été appréhendé.

Cependant, il reste deux défis majeurs : la mobilisation du financement nécessaire à la mise en œuvre des actions planifiées et l'opérationnalisation des mécanismes de soutien aux populations en vue de répondre à leurs besoins d'informations, de technologies pour une meilleure connaissance du milieu et pour une utilisation rationnelle et durable des ressources naturelles, qui se fragilisent dans le contexte actuel du changement climatique et de l'explosion démographique.

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8 Article 216 du Protocole de l'Environnement, Annexe 1 de la Charte de l'Eau.

# LA PARTICIPATION DU PUBLIC DANS LE CADRE DE L'ORGANISATION POUR LA MISE EN VALEUR DU FLEUVE SÉNÉGAL

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## RÉSUMÉ

*Longtemps absent du régime juridique au fleuve Sénégal, la participation du public fut érigée comme une modalité fondamentale dans la gestion et la mise en valeur du fleuve par la Charte des eaux du fleuve Sénégal adoptée le 28 mai 2002. En cela, elle s'inscrit dans le paradigme actuellement dominant de la gestion intégrée des ressources en eau. La mise en œuvre de cette approche participative témoigne par ailleurs d'une volonté affichée de l'organisme de ne plus seulement apparaître comme un organisme de gestion et de protection d'un cours d'eau international, mais également comme un organisme de développement au profit des populations installées dans le bassin du fleuve. Toutefois en dépit de cette volonté affichée, l'approche participative telle qu'élaborée pour le moment a une portée essentiellement consultative.*

## ABSTRACT

*Having been so long absent from the legal framework of the Senegal River, public participation was erected as a fundamental modality in the management and development of the watercourse by the Charter of the Senegal River, adopted on 28 May 2002. In this respect, it falls within the currently dominant paradigm of integrated water resources management. The implementation of this participatory approach also reflects a willingness of the organization to appear not only as organization of management of an international watercourse but also as a development agency in favor of the river basin communities. Thus, it reflects the refocusing of the organization on the needs of local populations. However, despite this willingness, the participatory approach as developed yet has essentially a consultative scope.*

**Mots clés :** Participation du public, Organisation pour la mise en valeur du fleuve Sénégal, fleuve Sénégal

**Key words:** Public participation, Organisation for the Development of the Senegal River, Senegal River

# I. INTRODUCTION

Depuis l'adoption de la Déclaration de Rio sur l'environnement et le développement et l'Agenda 21 de 1992, la participation du public a acquis un rôle de plus en plus important en matière de gouvernance environnementale. Elle fournit un modèle de gestion des eaux douces transfrontières dont les contours sont affinés par les différents instruments et mécanismes internationaux tels que ceux élaborés dans le cadre de l'Organisation pour la mise en valeur du fleuve Sénégal (OMVS). Reconnu comme un cadre coopératif de référence, l'OMVS a été chargée le 11 mars 1972 de la gestion solidaire et raisonnable du fleuve Sénégal. Long de 1800 km, le fleuve Sénégal a un bassin qui couvre une superficie de 337, 500 km$^2$ que se partagent les quatre (4) États que sont la Guinée, le Mali, la République Mauritanie et la République du Sénégal et dans lequel vivent environ 3,500 000 habitants. Afin d'atteindre les objectifs qui lui ont été assignés par les États riverains, l'OMVS a été dotée dans un premier temps d'un cadre juridique novateur composé de quatre instruments principaux dits accords de première génération. Outre la Convention portant création de l'OMVS signée le 11 mars 1972, le régime du fleuve a été défini dans la Convention relative au statut juridique du fleuve Sénégal. Par cette convention (signée également le 11 mars 1972), le fleuve Sénégal, y compris ses affluents, est déclaré « cours d'eau international » (art. 1). La « propriété commune et indivisible » des États riverains sur les ouvrages réalisés à l'échelle du bassin est consacrée par la Convention relative au statut juridique des ouvrages communs (1978). La Convention de 1982 relative aux modalités de financement prévoit quant à elle le régime de financement desdits ouvrages communs. L'adoption de la Charte des eaux du fleuve Sénégal en 2002 vient compléter ce régime singulier de première génération en matière de gestion des ressources en eau transfrontières.[1]

Les accords de première génération furent élaborés au départ dans un contexte où primait une vision purement étatiste de la gestion du cours d'eau partagé. Les projets d'aménagements étaient définis en fonction des besoins que les États considéraient comme légitimes dans le cadre de leur politique de développement économique. Il en résulta une faible participation des populations dans les projets de première génération de l'OMVS. L'impact négatif de ces projets sur l'environnement et les populations[2] va conduire à l'amorce d'un recentrage des activités de l'OMVS afin de mieux prendre en compte les intérêts de ces populations. Ce recentrage se caractérise par le développement et le renforcement de la participation des populations à la gestion de la ressource partagée.

# II. L'INCLUSION DU PUBLIC DANS LE CADRE JURIDIQUE DE L'OMVS

La participation du public dans le cadre de l'OMVS trouve sa première affirmation dans la Charte des eaux du fleuve Sénégal adoptée le 28 mai 2002. L'adoption de cette dernière s'inscrit dans le paradigme actuellement dominant du processus de gestion intégrée des ressources en eau. Cette dernière qui s'entend d'un processus recommandant la gestion coordonnée des eaux afin d'en maximiser les profits tout en préservant les écosystèmes vitaux,[3] fait de l'implication de tous les acteurs concernés et intéressés une composante essentielle à sa mise en œuvre. La Charte des eaux du bassin traduit par conséquent la nouvelle optique dans laquelle la gestion

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1 Sur le régime juridique du fleuve Sénégal, voir notamment A. Samboly Ba, M.M. Mbengue, « Le régime juridique du fleuve Sénégal : aspects du droit des cours d'eau dans un contexte régional », *African Yearbook of International Law*, vol. 12, 2006, pp. 309-347.

2 Sur les externalités des grands ouvrages de l'OMVS, voir notamment E. Boinet, *Hydropolitique du fleuve Sénégal. Limites et perspectives d'un modèle de coopération*, L'Harmattan, Paris, 2013, pp. 55-61 ; El Hadji Malick Ndiaye, « Le fleuve Sénégal et les barrages de l'OMVS : quels enseignements pour la mise en œuvre du NEPAD ? », *Vertigo – La revue électronique en sciences de l'environnement*, vol. 4, n°3, décembre 2003, disponible en ligne : http://vertigo.revues.org/3883.

3 Le concept de Gestion intégrée des ressources en eau (GIRE) est apparu officiellement lors de la Conférence internationale sur l'eau et le développement de Dublin (1992) qui en a posé les quatre principes principaux : i) l'eau douce est une ressource limitée et vulnérable qui est indispensable pour la vie, le développement et l'environnement ; ii) le développement et la gestion des ressources en eau doivent être basés sur l'approche participative impliquant les utilisateurs et les décideurs, à tous les niveaux ; iii) les femmes jouent un rôle primordial et stratégique dans l'approvisionnement, la gestion et la préservation de l'eau ; iv) l'eau a une valeur économique dans toutes ses différentes utilisations et doit être reconnue comme un bien économique.

des ressources en eau du fleuve Sénégal est envisagée : celle d'une gestion concertée et solidaire reposant sur l'implication de tous les acteurs du bassin.[4]

La Charte appréhende notamment la participation du public à travers ses composantes « implication du public dans le processus décisionnel » et « accès à l'information »[5]. En effet, tout en mettant en avant les principes de répartition et d'utilisation juste et équitable et en définissant les règles de protection de l'environnement, la Charte érige l'implication du public dans le processus décisionnel comme une modalité fondamentale dans la gestion et la mise en valeur du fleuve. Dès son préambule, il est dit :

> « Considérant que le partage des ressources en eau entre les usages, leur gestion et leur mise en valeur devront s'effectuer en tenant compte de l'objectif de développement durable, en y associant les différents acteurs : usagers, gestionnaires, décideurs, aménageurs et experts concernés, dans une approche globale et intégrée ».

À cet égard l'article 2 précise que l'un des objectifs de la Charte est de « définir le cadre et les modalités de participation des utilisateurs de l'eau dans la prise des décisions de gestion des ressources en eau du fleuve Sénégal ». Cependant malgré cette affirmation, seul l'article 23 de la Charte prévoit une modalité de participation au processus décisionnel en disposant que :

> « Le statut d'observateur auprès de la Commission permanente des eaux pourra être accordé par le Conseil des ministres sur proposition du Haut-Commissaire à certaines entités des États membres. Elles participeront de manière effective aux travaux de la Commission permanente des eaux. Le statut d'observateur peut être accordé aux : représentants des usagers ; représentants des collectivités ; représentants des organisations non gouvernementales ; représentants des Comités de gestion décentralisée ».

Le cadre ainsi défini par l'article 2 pour la participation du public au processus décisionnel est limité à la participation à un organe consultatif, en l'occurrence la Commission permanente des eaux (CPE) et à la participation de certaines entités en qualité d'observateurs (usagers d'eau et organisations non gouvernementales).

L'inclusion du public dans le cadre juridique est également opérée dans le cadre de la Charte à travers la prescription de l'accès à l'information pour le public.[6] L'article 13 de la Charte fait en effet obligation aux États riverains de veiller « à ce que les informations relatives à l'état des eaux du Fleuve, aux mesures prévues ou prises pour assurer la régularité du débit du Fleuve, ainsi qu'à la qualité des eaux soient accessibles au public. Les États et le Haut-Commissariat doivent veiller parallèlement à l'éducation des populations riveraines en encourageant des programmes de sensibilisation pour une utilisation écologiquement rationnelle des eaux du Fleuve ». Aussi en dépit de la consécration de l'approche participative dans la Charte, sa matérialisation demeure contrastée au vu du contenu limitatif et très général des dispositions de la Charte.

En 2003, la Déclaration relative au cadre d'orientation stratégique pour l'OMVS adopté à Nouakchott par la Conférence des Chefs d'États et de gouvernement dite conférence de refondation vient impulser une dynamique nouvelle à cette approche participative. En effet, cette Déclaration élargit le cadre d'intervention de l'OMVS dans le cadre d'une vision globale de développement du bassin du fleuve Sénégal intégrant, pour la première fois, les différents objectifs sectoriels. Le but poursuivi est celui de la maîtrise de la planification du développement du bassin de manière à garantir la croissance économique, le progrès social et la préservation de l'environnement. Parmi les principes devant régir pour le long terme ce cadre d'intervention figure « La structuration et le renforcement de la gestion concertée impliquant, de manière interactive, tous les acteurs du bassin, gage de sa légitimité ». À l'aune de ce principe, la participation du public apparaît désormais comme un facteur légitimant

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4 Sur une analyse détaillée de la Charte des eaux du fleuve Sénégal, voir M.M. Mbengue, « The Senegal River legal regime and its contribution to the development of the law of international watercourses in Africa », in L. Boisson de Chazournes, C. Leb, M. Tignino, *International Law and Freshwater. The Multiples Challenges*, Edward Elgar, Cheltenham, 2013, pp. 230-236.

5 L'accès à l'information, l'implication des populations dans le processus décisionnel et l'accès à la justice sont considérés comme les éléments constitutifs de la participation du public. Voir le Principe 10 de la Déclaration sur l'environnement et le développement, Rio de Janeiro juin 1992, disponible : http://www.un.org/french/events/rio92/rio-fp.htm; Agenda 21, Chapitre 18. 9 (c), disponible : http://www.un.org/esa/sustdev/documents/agenda21/french/action8.htm.

6 L'accès à l'information fait partie des trois aspects de la participation du public avec la participation du public au processus décisionnel et l'accès à la justice tels que dégagés par le principe 10 de la Déclaration de Rio sur l'environnement et le développement (1992).

les actions de l'OMVS. Par cette affirmation, l'OMVS transcende ses missions initiales de gestion du fleuve pour se muer en un organisme de développement au profit des populations installées dans le bassin du fleuve. La dynamique participative ainsi lancée se traduit par la mise en place d'une diversité de plateforme de participation.

# III. UNE INSTITUTIONALISATION PROTÉIFORME DE LA PARTICIPATION

## A. INSTITUTIONNALISATION À L'ÉCHELLE RÉGIONALE

La matérialisation de la participation du public s'opère tout d'abord au travers de son institutionnalisation à l'échelle régionale. Par échelle régionale, il faut entendre des organes ayant compétence sur l'ensemble du bassin versant et ses affluents.

Premièrement cette institutionnalisation se manifeste par l'octroi du statut d'observateur à certaines entités représentatives du public auprès de la Commission permanente des eaux. La CPE est un organe consultatif du Conseil des ministres prévu dans la Convention portant création de l'OMVS[7]. Selon l'article 20 de cette Convention, la CPE est en charge de définir les principes et les modalités de la répartition des eaux du fleuve Sénégal entre les États et les secteurs d'utilisation (agriculture, industrie, alimentation en eau potable et les transports). Constituée essentiellement à l'origine de représentants des États membres de l'OMVS[8], son ouverture à certaines associations d'usagers et aux ONG par la Charte constitue une avancée certaine.

Cette participation est toutefois encadrée tant au niveau de la procédure de sélection de ces entités que dans les modalités de participation dans la pratique. Sur la procédure de sélection, « le statut d'observateur » est accordé par le Conseil des ministres sur proposition du Haut-Commissaire (art. 23 de la Charte). En outre, les entités doivent avoir un intérêt à participer (par exemple si un point à l'ordre du jour les concerne directement); ensuite elles sont identifiées et proposées par les autorités publiques au Haut-Commissaire.[9] La conséquence immédiate est que l'octroi du statut d'observateur est ponctuel. Sur les modalités de participation, le statut d'observateur ne confère qu'un droit de parole. Les observateurs ont pour rôle d'apporter des éléments d'éclairage sur les sujets les concernant.

L'institutionnalisation au niveau régional s'est manifestée également par la mise en place de Comités de bassin en 2009 par le Conseil des ministres de l'OMVS qui est l'organe de conception et de contrôle de l'Organisation en charge de l'élaboration de la politique générale d›aménagement du bassin du fleuve Sénégal pour la mise en valeur de ses ressources. Ce Comité inspiré notamment de l'expérience française[10] est constitué essentiellement d'acteurs publics et privés du bassin. Parmi les acteurs privés, on retrouve notamment les sociétés d'eau et d'électricité, les organisations agricoles, les opérateurs de transport, les organisations non-gouvernementales, les associations d'usagers et la communauté scientifique.[11] Son rôle est entre autres de proposer à l'adresse du Conseil des ministres des avis sur les grands axes de la politique d'aménagement du bassin.

## B. INSTITUTIONNALISATION À L'ÉCHELLE DES ÉTATS MEMBRES DE L'OMVS

Dans un deuxième temps, on observe une institutionnalisation de la participation à l'échelle des États membres de l'OMVS. La participation du public est organisée à ce niveau dans le cadre des Cellules nationales de l'OMVS dans chaque État membre. Ces Cellules coordonnent l'ensemble des activités dans le pays et doivent par

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7 Voir l'article 7 de la Convention portant création de l'OMVS (1972).

8 Art. 20.3 de la Convention portant création de l'OMVS (1972).

9 Éléments recueillis au cours des entretiens avec les experts de L'OMVS, 17-21 novembre 2012.

10 Les Comités de bassin existent depuis la loi sur l'eau de 1964.

11 F. Bedredine, G. Fabre, « Exemple de gestion concertée et solidaire d'un bassin fluvial partagé (Guinée, Mali, Mauritanie, Sénégal) », Document présenté à la conférence donnée à l'Assemblée générale mondiale du RIOB à Dakar (Sénégal) en janvier 2010, p. 10, disponible en ligne : http://www.riob.org/spip.php?page=mot-pays&id_mot=85&lang=fr.

conséquent favoriser le dialogue entre les services techniques nationaux, les instances de l'OMVS telles que le Haut-Commissariat et les différents programmes et projets.[12] Ces Cellules abritent notamment des Comités nationaux de coordination (CNC) et des Comités locaux de coordination (CLC) qui assurent la coordination des activités de l'OMVS et servent de relais au niveau national et au niveau local.[13] En raison de sa zone de compétence géographique, les CLC[14] sont considérés comme la plateforme de participation par excellence des populations locales. En pratique ces comités servent de cadre de consultation entre l'OMVS et les populations locales. Ainsi l'article 5 de l'arrêté portant création des CLC au Sénégal dispose que les CLC constituent le cadre de concertation approprié pour la circulation de l'information et la sensibilisation des acteurs de terrain sur les Projets de l'OMVS notamment leur approche, leur objectif et les conditions de leur mise en œuvre. L'arrêté portant création de la cellule au Mali dispose en son article 2 parmi les fonctions fondamentales des CLC : 1) celui d'assister la Cellule nationale OMVS dans la préparation, la coordination et le suivi de l'exécution des projets de l'OMVS ; 2) Celui d'informer, sensibiliser et organiser les populations autour de l'ensemble des projets de l'OMVS. Des formulations similaires sont prévues dans les textes réglementaires de la Mauritanie et la Guinée. En ce concerne la composition de ces comités, force est de constater qu'elle n'est pas uniforme.[15] Mais en règle générale, le choix des acteurs porte sur les entités qui sont directement concernées par le développement local dans le Bassin. Ainsi, ils regroupent les collectivités locales, les associations et coopératives professionnelles, les représentants d'organisations non-gouvernementales locales.[16] Le mécanisme décrit a été notamment usité dans le cadre de l'élaboration du Schéma-directeur d'aménagement et de gestion des eaux du fleuve Sénégal.[17]

Enfin, la création des Associations d'usagers (Adu) vient compléter cette structure nationale dans le sens de l'effectivité de l'approche participative à l'échelle locale.[18] Il s'agit d'associations créées autour des corporations spécifiques telles que les éleveurs, agriculteurs et pêcheurs.[19] L'OMVS s'appuie sur ces structures pour la mise en œuvre de ces projets à l'échelle locale. Elles peuvent se voir confier la gestion des unités de production et de distribution d'eau potable ou la gestion d'un axe hydraulique.[20]

## IV. CONCLUSION

Le virage participatif dans le cadre de l'OMVS s'est traduit par un renforcement normatif et institutionnel de cette participation. Il s'inscrit largement dans la politique de gestion intégrée des ressources en eau à l'échelle des bassins versants. L'objectif poursuivi est celui d'une part de développer des programmes en adéquation avec les besoins de populations riveraines et celui d'autre part, d'assurer l'efficacité des mesures planifiées à long terme. Dans cette perspective, ce virage met un accent particulier sur l'implication du public dans le processus décisionnel. Toutefois, l'approche participative telle qu'élaborée a pour le moment une portée essentiellement consultative en raison de la nature et des fonctions des organes ouverts au public. Pour parvenir

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12 M. Sow, B. Touré, *État des lieux du cadre juridique et institutionnel dans la région d'intervention en Mauritanie*, OMVS et Assistance Technique du Cofinancement du Royaume des Pays-Bas auprès du Projet des ressources en eau et de l'environnement du bassin du fleuve Sénégal (GEF/BFS), septembre 2008, p. 10.

13 Instaurés dans le cadre du Programme d'Atténuation et de suivi des impacts sur l'environnement (PASIE), les CNC et les CLC ont été créés initialement pour servir d'interface avec les populations et identifier les personnes ou groupes à indemniser suite aux préjudices causés par les ouvrages de première génération de l'OMVS. Voir M. Sow et B. Touré, État des lieux du cadre juridique et institutionnel dans la région d'intervention en Mauritanie, OMVS et Assistance Technique du Cofinancement du Royaume des Pays-Bas auprès du Projet de gestion des ressources en eau et de l'environnement du bassin du fleuve Sénégal (GEF/BFS), septembre 2008, p. 6.

14 On compte à ce jour 28 CLC au total sur l'ensemble du bassin du Sénégal répartis comme suit au : Mali (10), Sénégal (7) Mauritanie (7), Guinée (4). Information recueillie sur le site de l'OMVS : http://www.portail-omvs.org/participation-du-public/comites/comite-coordination-clc-cnc (consulté en avril 2014).

15 F. Bedredine, G. Fabre, *op. cit.* , p. 8.

16 *Idem*.

17 Le SDAGE est un document programmatique qui oriente la mobilisation des ressources et les impacts sur le milieu. Il doit offrir la capacité aux décideurs de conduire des politiques multisectorielles de façon équilibrée et équitable entre les États, Rapport de phase 1 : État des lieux et diagnostic, Rapport de l'OMVS, 2003, p. 15.

18 *Ibid*., p. 9.

19 *Idem*.

20 *Idem*.

à une participation effective, il serait indiqué dans un premier temps d'étendre l'accès du public à d'autres organes et groupes de travail de l'OMVS notamment ceux en charge de la conceptualisation et du suivi des politiques d'aménagement du bassin. Dans un deuxième temps, le développement de mécanismes favorisant l'implication croissante des populations locales pourrait s'avérer utile pour assurer une solide assise aux projets de développement et de protection du bassin qui sont développés. Dans ce sens, la mise en place des Adu constitue une avancée remarquable qu'il conviendra de renforcer à travers une meilleure formalisation desdites structures. Enfin complément souhaitable, l'aménagement d'un accès à la justice pour les populations serait de nature à garantir une gouvernance transparente et responsable des ressources en eau du bassin.

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# LE PRINCIPE DE LA PARTICIPATION DU PUBLIC ET LA COMMISSION MIXTE INTERNATIONALE

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## RÉSUMÉ

*Le principe de la participation du public se nourrit d'obligations provenant de plusieurs domaines du droit international, notamment le droit international de l'environnement et les droits de l'homme. Le régime sur les eaux partagées établi entre les États-Unis et le Canada donne une place particulière aux individus et communautés locales. Déjà dans le Traité relatif aux eaux limitrophes et aux questions originant le long de la frontière entre le Canada et les États-Unis de 1909, la possibilité de convoquer des audiences publiques était prévue. Depuis la Déclaration de Stockholm sur l'environnement humain de 1972 et ensuite la Déclaration de Rio sur l'environnement et le développement durable de 1992, le lien entre la participation du public et la protection de l'environnement est de plus en plus reconnu. L'Accord sur la qualité de l'eau dans les Grands Lacs de 1972, amendé en 1978, 1983, 1987 et 2012, a élargi les domaines de compétence de la Commission mixte internationale aux questions environnementales et a donné une place importante au public dans le processus de prise de décision en matière d'environnement afin de préserver l'écosystème des Grands Lacs*

## ABSTRACT

*The principle of public participation is nourished by obligations from different areas of international law, such as international environmental law and human rights law. The regime on the shared waters between the United States and Canada gives a privileged place to individuals and local communities. The Treaty relating to boundary waters, and questions arising between the United States and Canada of 1909 already contained the possibility of calling public meetings. Since the 1972 Stockholm Declaration on the human environment and later the 1992 Rio Declaration on the environment and sustainable development, the relationship between public participation and environmental protection has been increasingly recognized. The Agreement on Great Lakes Water Quality of 1972, amended in 1978, 1983, 1987 and 2012, expanded the sectors of competence of the International Joint Commission to environmental issues and provides the public with a significant role in the decision-making process in environmental matters in order to protect the ecosystem of the Great Lakes.*

**Keywords**: International Joint Commission, Great Lakes, ecosystem

**Mots clés** : Commission mixte internationale, Grands Lacs, écosystème

# I. INTRODUCTION

Le principe de la participation du public est un élément à prendre en compte dans la gouvernance des ressources en eau. L'accès à l'information, la participation du public au processus de prise de décision et l'accès à la justice qui le caractérisent donnent la possibilité aux individus et aux communautés locales de contribuer à des décisions qui peuvent affecter leurs conditions de vie.[1] La participation du public peut concourir à limiter l'impact d'activités qui pourraient avoir des conséquences sur l'environnement ou la santé humaine. En outre, ce principe renforce la « démocratie populaire » en matière environnementale. Dans le processus de prise de décision en matière environnementale, les autorités publiques doivent suivre certains principes reconnus au niveau international. Le droit à la participation fait partie de ces principes.[2]

Le principe de la participation du public est un élément commun à plusieurs domaines du droit international, notamment le droit international de l'environnement et les droits de l'homme.[3] Le public a une place particulière dans le contexte de l'obligation de conduire une étude d'impact[4] ainsi que dans le régime de protection des droits des peuples autochtones.[5] Dans le droit international de l'eau, ce principe doit se lire dans le contexte particulier de chaque régime juridique applicable à des ressources en eau. Chaque instrument peut contenir des dispositions particulières en matière d'accès à l'information, de consultations avec le public ou d'accès à la justice. Un exemple intéressant à ce sujet est celui de la place du public au sein de la Commission mixte internationale établie entre le Canada et les États-Unis.

# II. LA COMMISSION MIXTE INTERNATIONALE : UN MÉCANISME INSTITUTIONNEL PARTICULIER

Les Grands Lacs et le fleuve Saint Laurent comptent parmi les plus grands écosystèmes d'eau douce au monde. Le Canada et les États-Unis coopèrent pour assurer la bonne gestion et la protection de ces ressources. La Commission mixte internationale, mise en place par le *Traité relatif aux eaux limitrophes et aux questions originant le long de la frontière entre le Canada et les États-Unis*[6] de 1909 (ci-après Traité sur les eaux limitrophes de 1909), contribue à la réalisation de cette tâche. La Commission constitue un mécanisme particulier de coopération institutionnelle. Elle est composée de six commissaires dont trois représentant les États-Unis et trois représentant le Canada.[7]

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1 Le principe 10 de la Déclaration de Rio de 1992 sur l'environnement et le développement décrit les trois piliers du droit à la participation du public: « La meilleure façon de traiter les questions d'environnement est d'assurer la participation de tous les citoyens concernés, au niveau qui convient. Au niveau national, chaque individu doit avoir dûment accès aux informations relatives à l'environnement que détiennent les autorités publiques, y compris aux informations relatives aux substances et activités dangereuses dans leurs collectivités, et avoir la possibilité de participer aux processus de prise de décision. Les États doivent faciliter et encourager la sensibilisation et la participation du public en mettant les informations à la disposition de celui-ci. Un accès effectif à des actions judiciaires et administratives, notamment des réparations et des recours, doit être assuré ».

2 L.A. Duvic-Paoli, «The Status of the Right to Public Participation in International Environmental Law : An Analysis of the Jurisprudence », *Yearbook of International Environmental Law*, Vol. 23, No.1, 2012, pp.80-105.

3 M. Tignino, « Le principe de la participation du public et la protection des ressources en eau transfrontières », *Vertigo – La revue électronique en sciences de l'environnement*, hors-série, juin 2010, http://vertigo.revues.org/9750.

4 Voir l'Affaire des Usines de pâte à papier (Argentine/Uruguay), arrêt, 20 avril 2010, C.I.J. Recueil 2010, par. 215-219.

5 Cour inter-américaine des droits de l'homme, Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and reparations, décision, 27 juin 2012, par.159, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf ; Voir aussi Cour inter-américaine des droits de l'homme, Case of Saramaka v. Suriname, décision 28 novembre 2007, par. 133, http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

6 Traité disponible sur le site: http://www.ijc.org/rel/agree/fwater.html.

7 Article 7 du Traité sur les eaux limitrophes de 1909.

La Commission exerce des pouvoirs réglementaires et d'enquête sur la base du Traité sur les eaux limitrophes de 1909. Elle octroie les autorisations pour les projets d'usage, de détournement et d'obstruction. Elle définit également les conditions auxquelles de tels projets doivent être soumis.[8] Tout projet d'utilisation ne doit par exemple pas modifier le débit ou le niveau des eaux de l'autre partie de la frontière. L'autorisation préalable aux projets sur des ressources en eau transfrontières octroyée par une institution conjointe est prévue par certains instruments du droit international de l'eau. Parmi ces instruments, l'on peut citer le *Traité du Rio de la Plata et sa façade maritime* de 1973 et le *Statut du fleuve Uruguay* de 1975.[9] Cette règle consacre l'idée que les ressources en eau partagées constituent une communauté d'intérêts et de droits entre les États riverains et que leurs utilisations ne lèsent pas les intérêts et les droits sur ces ressources.

Les projets d'utilisation des eaux limitrophes sont exécutés sous l'autorité d'un des deux États après l'approbation de la Commission mixte internationale. Le Traité de 1909 définit les eaux limitrophes comme « les eaux de terre ferme à terre ferme des lacs, fleuves et rivières et des voies d'eau qui les relient — ou les parties de ces eaux — que longe la frontière internationale entre les États-Unis et le Dominion du Canada ».[10] Lors de l'approbation, la Commission doit s'inspirer des règles relatives aux priorités d'utilisation. Les usages à des fins domestiques et hygiéniques ont la priorité, suivis des usages pour la navigation, pour la production énergétique et pour l'irrigation.[11] En outre, lorsqu'elles sont utilisées par une Partie, les eaux ne doivent pas être polluées au détriment de l'autre Partie.[12]

Lorsque l'un de deux États riverains demande à la Commission d'approuver la construction d'un barrage ou d'un autre ouvrage sur un cours d'eau ou un lac, les populations riveraines sont consultées par la convocation d'audiences publiques.[13] La Commission tient aussi une audience publique tous les trois ans pour discuter des progrès réalisés dans le cadre de l'*Accord relatif à la qualité de l'eau dans les Grands Lacs* adopté en 1972 et modifié en 2012.[14] Elle sollicite aussi les commentaires de la population sur les rapports biennaux concernant l'*Accord sur la qualité de l'air* de 1991 entre les États-Unis et le Canada.

La pollution transfrontière entre les États-Unis et le Canada est un problème de longue date entre ces deux pays. Le premier cas remonte au début du XXe siècle et concerne la pollution de l'air. Le problème concernait une zone géographiquement limitée à la frontière entre l'État de Washington et la Colombie Britannique. Les habitants américains de cette zone frontalière se plaignaient de la contamination de l'air due à l'émission de fumées d'anhydride sulfureux par une fonderie de zinc et de plomb située à Trail, en Colombie Britannique. Selon eux, les substances rejetées dans l'atmosphère par la fonderie avaient endommagé les terres agricoles. Les deux Parties décidèrent de soumettre cette question à la Commission mixte internationale. En effet, comme il est indiqué dans l'article IX du Traité de 1909, la Commission mixte internationale a une compétence étendue qui inclut « toute question » ou « différend » qui peut s'élever entre le Canada et les États-Unis « le long de la frontière commune».

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8 Les usages des ressources en eau, les projets relatifs à des obstructions et détournements « soit temporaires ou permanents des eaux limitrophes, d'un côté ou de l'autre de la frontière, influençant le débit ou le niveau naturels des eaux limitrophes de l'autre côté de la frontière, ne pourront être effectués si ce n'est par l'autorité des États-Unis ou du Dominion canadien dans les limites de leurs territoires respectifs et avec l'approbation » de la Commission mixte internationale. Article III (1) du Traité de 1909.

9 Articles 17-22 du Traité du Rio de la Plata et sa façade maritime de 1973 ; Articles 7-13 du Statut du fleuve Uruguay de 1975. Voir aussi l'article 4 de la Convention relative au statut du fleuve Sénégal de 1972 ainsi que l'article 10 de la Charte des eaux du fleuve Sénégal ; Article 5 de l'Accord relatif à la coopération pour le développement durable du Mékong de 1995.

10 Article préliminaire du Traité sur les eaux limitrophes de 1909.

11 Article 8 du Traité sur les eaux limitrophes de 1909.

12 L'article IV du Traité sur les eaux limitrophes de 1909 prévoit que : « Il est de plus convenu que les eaux définies au présent traité comme eaux limitrophes non plus que celles qui coupent la frontière ne seront d'aucun côté contaminées au préjudice des biens ou de la santé de l'autre côté ».

13 Article 12.3 du Traité sur les eaux limitrophes de 1909.

14 Selon l'article 5 de l'Accord relatif à la qualité de l'eau dans les Grands Lacs : « Reconnaissant l'importance des commentaires et conseils du grand public, les Parties tiennent, de concert avec la Commission, un Forum public sur les Grands Lacs dans l'année de l'entrée en vigueur du présent accord, et tous les trois ans par la suite ».

**Carte disponible sur le site de la Commission mixte internationale : http://www.ijc.org/fr_/Great_Lakes_Basin**

En 1932, la Commission mena une enquête et adopta un rapport sur les dommages causés aux biens situés dans l'État de Washington. Des experts furent nommés par la fonderie pour présenter des études à la Commission et indiquer que des travaux avaient été effectués pour réduire les émanations de sulfure.[15] Dans son rapport, la Commission recommanda que tout individu ayant subi un dommage[16] causé par les opérations de la fonderie puisse réclamer une indemnisation.[17] La Commission fixa le montant de l'indemnité à 350,000 dollars américains, correspondant aux intérêts américains lésés par la pollution atmosphérique.

Le rapport adopté par la Commission mixte internationale n'arrêta pas les plaintes américaines qui se multiplièrent au cours des années 1930. Les Parties décidèrent ainsi de signer un compromis pour soumettre le différend à un tribunal arbitral qui rendit une sentence intérimaire en 1938 et la sentence finale en 1941.[18]

## III. L'ACCORD RELATIF À LA QUALITÉ DE L'EAU DANS LES GRANDS LACS

Depuis 1972 et la Conférence des Nations Unies sur l'environnement humain de Stockholm, les préoccupations environnementales font partie des accords relatifs aux ressources en eau transfrontières. Des exemples en sont le *Traité du Rio de la Plata et sa façade maritime* de 1973 et le *Statut du fleuve Uruguay* de 1975.[19] En Amérique du Nord, l'*Accord sur la qualité de l'eau dans les Grands Lacs* a été signé entre le Canada et les États-Unis en 1972.[20] L'Accord a été par la suite modifié en 1978, 1983 et 1987. La dernière modification de l'Accord a été faite

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15 Sur ce point le rapport de la Commission indique que : « The Commission further recommends that the Governments of the United States and Canada appoint scientists from the two countries to study and report upon the effect of the works erected and contemplated by the company as aforesaid, on the fumes drifting from said smelter into the United States, and also to report from time to time to their respective governments in regard to such further or other works or actions, if any, as such scientists may deem necessary on the part of the company to reduce the amount and concentration of such fumes to the extent hereinbefore provided for ». Ibid., pp. 369-370.

16 Selon la Commission mixte internationale, le terme « dommage » inclut tout dommage que le Canada et les États-Unis « may deem appreciable, and […] shall not include occasional damage that may be caused by SO2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions. Provided, however, that any damage in the State of Washington howsoever caused by said fumes on and after January 1, 1932, shall be the subject of indemnity by the company to any interests so damaged ». Dommages causés aux biens dans l'État de Washington par les émanations de la fonderie de la compagnie Consolidated Mining and Smelting Company of Canada à Trail, Colombie Britannique, Rapport et recommandations de la Commission mixte internationale établie par le Traité conclu entre les États-Unis d'Amérique et le Canada le 11 janvier 1909, signé à Toronto le 28 février 1931, *Recueil des sentences arbitrales*, vol. XXIX, p. 370.

17 Selon la Commission « Upon complaint of any person claiming to have suffered damage by the operations of the company after the first day of January, 1932, it is recommended by the Commission that in the event of any such claim not being adjusted by the company within a reasonable time, the Governments of the United States and Canada shall determine the amount of such damage, if any, and the amount so fixed shall be paid by the company forthwith ». Dommages causés aux biens dans l'Etat de Washington par les émanations de la fonderie de la compagnie Consolidated Mining and Smelting Company à Trail, Colombie britannique, Rapport et recommandations de la Commission mixte internationale établie par le Traité conclu entre les Etats-Unis d'Amérique et le Canada le 11 janvier 1909, signé à Toronto le 28 février 1931, *Recueil des sentences arbitrales*, vol. XXIX, pp. 369-370.

18 Cas de la Fonderie de Trail (États-Unis/Canada), sentences des 16 avril 1938 et 11 mars 1941, Nations Unies, *Recueil des sentences arbitrales*, vol. III, pp. 1905-1982.

19 Articles 40-43 du Traité du Rio de la Plata et sa façade maritime de 1973 et articles 47-52 du Traité du Rio de la Plata.

20 Pour une analyse, voir : R. B. Bilder, « Controlling Great Lakes Pollution : A Study in United States-Canadian Environmental Cooperation », *Michigan Law Review*, vol. 70, 1971-1972, pp. 501-506.

en 2012 et résulte d'un processus de consultation publique. Des liens étroits entre la protection de la santé, la qualité de l'eau et l'environnement sont affirmés dans l'Accord.[21] Une approche écosystémique[22] est prônée pour la poursuite des objectifs relatifs à la protection de la qualité de l'eau. De plus, les principes du droit international de l'environnement tels les principes de prévention, de précaution, et du pollueur-payeur sont reconnus dans l'Accord.[23]

Les activités de la Commission mixte internationale liées à la protection de l'environnement sont nombreuses. Ainsi, elle est chargée de l'analyse et la diffusion des données et renseignements fournis par les deux États, mais aussi par les provinces, « les gouvernements tribaux, les Premières nations, les Métis, les gouvernements municipaux, les organismes de gestion des bassins versants, d'autres organismes publics locaux et le grand public ».[24] Une panoplie d'acteurs peut ainsi contribuer à fournir les informations relatives à la qualité de l'eau.

Le public exerce plusieurs fonctions aux termes de l'Accord sur la qualité de l'eau dans les Grands Lacs. Cet Accord donne une définition large du public, qui inclut « les personnes et les organisations, telles que les groupes d'intérêt public, les chercheurs et les établissements de recherche, ainsi que les entreprises et autres entités non gouvernementales ».[25] La Commission mixte internationale a la responsabilité d'informer le public de façon claire, régulière et transparente.[26] En outre, elle doit intégrer les avis et les recommandations du public dans le processus décisionnel et lui donner l'opportunité de participer à des réunions organisées pour la réalisation des objectifs de l'Accord.[27]

## IV. CONCLUSION

Le régime juridique applicable aux ressources en eau partagées entre les États-Unis et le Canada donne une place considérable au principe de la participation du public tant sur le fond qu'au niveau procédural. Ces deux aspects sont étroitement liés. La procédure relative à l'autorisation des ouvrages projetés montre cette relation étroite. En premier lieu, l'État qui projette une activité doit en notifier l'autre État qui risque d'être affecté ainsi que la Commission mixte internationale. La Commission procède à la publication de la demande d'autorisation et convoque une audience publique pour les communautés locales qui risquent d'être affectées par le projet.[28] Le public potentiellement affecté est informé des effets potentiels et doit pouvoir exprimer son avis sur l'activité proposée. Selon l'article 16 des Règles de procédure adoptées par la Commission, « toute personne intéressée » dispose de trente jours pour exprimer son avis sur une demande de projet soumise à la Commission.[29] Au terme

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21 Ainsi le préambule de l'Accord de 2012 reconnait l'« importance capitale des Grands Lacs pour le bien-être social et économique des deux pays, l'étroite relation entre la qualité de l'eau des Grands Lacs et l'environnement et la santé humaine, ainsi que la nécessité de gérer les risques pour la santé humaine liés à la dégradation de l'environnement ».

22 L'ecosystème est défini comme « l'aménagement prenant en compte l'interaction des éléments de l'air, du sol, de l'eau et des organismes vivants, y compris les êtres humains ». Article 2.4 (f).

23 Voir les articles 2.4 (h), (i) et (j).

24 Article 7.1 (a).

25 Article 1 (f) de l'Accord.

26 Article 2.4 (a). Selon l'Accord il est nécessaire de « fixer des objectifs clairs, informer régulièrement le grand public des progrès accomplis et évaluer de façon transparente l'efficacité des efforts entrepris pour atteindre les objectifs du présent accord ».

27 Article 2.4 (k) de l'Accord.

28 Selon l'article 15 des Règles de procédure, la Commission mixte internationale doit « aussitôt que possible après la réception de la demande, faire paraître un avis dans la Gazette du Canada et dans le Federal Register, sur le site Web de la Commission et dans deux journaux, un dans chaque pays, diffusés dans les localités ou à proximité des localités qui, de l'avis de la Commission, seront vraisemblablement touchées par l'usage, l'obstruction ou le détournement proposés. Sous réserve du paragraphe (3) du présent article, cet avis doit mentionner que la demande a été reçue, indiquer la nature et l'emplacement de l'usage, de l'obstruction ou du détournement proposés, faire état du délai accordé à tout intéressé pour présenter une réponse à la Commission, et préciser que la Commission tiendra à ce sujet une ou plusieurs audiences au cours desquelles tous les intéressés pourront se faire entendre ». Les règles de procédure de la Commission mixte internationale sont disponibles à cette adresse http://www.ijc.org/rel/agree/rules_f.htm

29 Selon l'article 16 des Règles de procédure : « Sauf s'il en est disposé autrement en vertu de l'article 19, un gouvernement ainsi que toute personne intéressée, à l'exclusion du demandeur, peut présenter une réponse à la Commission dans les trente jours suivant le dépôt de la demande. La réponse doit énoncer, à l'encontre ou à l'appui de la totalité ou d'une partie de la demande, des faits et des arguments qui se rapportent à l'objet de cette dernière. Si la réponse réclame une approbation conditionnelle, elle devrait énoncer la ou les conditions souhaitées. Elle devrait en outre indiquer une adresse où peuvent être signifiés les documents ».

de ces étapes, la Commission doit décider si elle autorise ou non le projet concerné.[30] Ainsi, tant du point de vue procédural que sur le fond, la Commission joue un rôle clé en permettant d'assurer que les deux Parties aient « des droits égaux et similaires pour l'usage des eaux » et qu'aucun usage ne puisse entraver ou restreindre une autre utilisation.[31] En outre, elle s'assure également que le public puisse participer au processus décisionnel et donner son avis sur des projets qui pourraient avoir des effets négatifs sur l'environnement.

Le Traité des eaux de 1909 ainsi que l'Accord de 1972 soulignent la place de l'individu dans la gestion des ressources en eau partagées. Plusieurs acteurs participent à leur protection, tels les communautés autochtones et les acteurs privés. Déjà au début du XXème siècle, le Traité sur les eaux limitrophes donnait un rôle aux acteurs non-étatiques. Depuis les années 1970, la Commission mixte internationale a élargi ses domaines de compétence en incluant la protection de l'environnement et a renforcé les droits des individus par la tenue de consultations publiques.

La Commission mixte internationale représente un cas emblématique de la participation du public en matière de gestion et de protection des ressources en eau partagées. Depuis ses débuts, elle a exercé des fonctions étendues, comprenant la prévention et le règlement des différends. En outre, le public participe de plusieurs manières : en ayant accès aux informations relayées par la Commission et en donnant son avis lors de la procédure d'autorisation des projets qui risquent d'affecter les eaux partagées.

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30 Voir les articles III et IV du Traité de 1909.

31 Selon l'article VIII : « La Commission mixte internationale devra entendre et juger tous les cas comportant l'usage ou l'obstruction ou le détournement des eaux à l'égard desquelles l'approbation de cette Commission est nécessaire aux termes des articles III et IV de ce traité, et en jugeant ces cas la Commission sera régie par les règles et principes qui suivent et qui sont adoptés par les Hautes parties contractantes pour cette fin: Les Hautes parties contractantes auront, chacune de son côté de la frontière, des droits égaux et similaires pour l'usage des eaux ci-dessus définies comme eaux limitrophes. L'ordre de préséance suivant devra être observé parmi les divers usages des eaux ci-après énumérés, et il ne sera permis aucun usage qui tend substantiellement à entraver ou restreindre tout autre usage auquel il est donné une préférence dans cet ordre de préséance:(1) Usages pour des fins domestiques et hygiéniques;(2) Usages pour la navigation, y compris le service des canaux pour les besoins de la navigation;(3) Usages pour des fins de force motrice et d'irrigation. Les dispositions ci-dessus ne s'appliquent pas ni ne portent atteinte à aucun des usages existants d'eaux limitrophes de l'un et l'autre côté de la frontière ».

# TRANSBOUNDARY HYDROPOWER PROJECTS ON THE MAINSTREAM OF THE LOWER MEKONG RIVER—THE CASE OF PUBLIC PARTICIPATION AND ITS NATIONAL IMPLICATIONS FOR BASIN STATES

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## ABSTRACT

*The Xayaburi Hydropower Scheme was the first project that fell under the purview of the prior notification and consultation procedures of the 1995 Mekong Agreement. Pursuant to these requirements, a concerted effort was made by the lower Mekong States (Cambodia, Laos, Thailand and Viet Nam) to discuss any potential downstream impacts of the project. One aspect of the process, which was not explicitly provided for in the agreement or the procedures, was the participation of non-state actors in the discussion of the potential downstream impacts. Ultimately, the Xayaburi consultation process provided invaluable insights into some of the strengths and weaknesses of the Mekong treaty regime concerning non-state actor involvement in decision-making processes for transboundary hydropower projects.*

## RÉSUMÉ

*Le projet hydroélectrique Xayaburi a été le premier projet qui est tombé sous le champ d'application des Procédures de notification et consultation préalable de l'Accord du Mékong de 1995. Sur la base de ces exigences, un effort concerté a été entrepris par les États du bas Mékong (Cambodge, Laos, Thaïlande et Vietnam) pour discuter des impacts en aval du projet. Un aspect de la procédure, qui n'est prévu expressément ni dans l'Accord ni dans les Procédures, concerne la participation des acteurs non-étatiques dans la discussion des impacts potentiels du projet en aval. Au final, la procédure de consultation relative au projet Xayaburi a fourni des perspectives précieuses sur les atouts et les faiblesses du régime conventionnel sur le Mékong en ce qui concerne la participation des acteurs non-étatiques dans les projets transfrontières relatifs aux installations hydroélectriques.*

**Keywords:** Mekong; notification and consultation; public participation

**Mots clés :** Mékong, notification et consultation, participation du public

# I. INTRODUCTION

The Mekong River, one of the largest in the world, remains free-flowing for a significant part of its lower stretch.[1] Since the 1960s if not before, numerous proposals to build dams on the mainstream of the Mekong have been mooted.[2] In the upper part of the river, China already has four dams in operation, and a further four are at various stages of development.[3] Moreover, hydropower projects are a common feature on the tributaries of the lower Mekong,[4] but until recently no developments had been initiated on the mainstream. However, there are currently 12 potential dam sites proposed for the mainstream of the lower Mekong; ten of which are in Laos and two in Cambodia.[5] The potential economic, social, environmental and political impacts of these hydropower developments in the Mekong region are significant. The Mekong Basin is home to around 65 million people, about two thirds of whom live in rural areas and are heavily reliant on the river and associated ecosystem services to sustain their livelihoods.[6] The Mekong ecosystem is also rich in in biodiversity, with recent studies classifying it as the second most biodiverse region in the world.[7] As hydropower project plans move forward, it will be critical to ensure that all stakeholder interests are reconciled in an equitable, legitimate and transparent manner. This begs the question whether the existing legal arrangements that govern the Mekong River are fit for that purpose. By focusing in particular on the manner in which public participation is incorporated into the legal framework that governs the Lower Mekong basin, namely the 1995 Mekong Agreement, this paper aims to examine the latter question.[8] Challenges in implementing the Mekong Agreement will be highlighted through an analysis of the procedures for prior notification and consultation, and their application within the case of the Xayaburi Hydropower Project.[9] It is therefore important to note at the outset that this short paper will not examine the numerous other stakeholder processes that are taking place under the auspices of the Mekong River Commission.[10]

# II. THE MEKONG AGREEMENT AND PUBLIC PARTICIPATION

There is no explicit reference to public participation in the 1995 Mekong Agreement. However, the Agreement does oblige its parties

> [t]o cooperate in all fields of sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin including, but not limited to irrigation, hydropower, navigation, flood control, fisheries, timber floating, recreation and tourism, in a manner to optimise the multiple-use and mutual benefits of all riparians and to minimise the harmful effects that might result from natural occurrences and man-made activities.[11]

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1 International Centre for Environmental Management, *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream—Final Report*, ICEM, Victoria, 2010, online: http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-Main-Final-Report.pdf.

2 P. Hirsch et al., *National Interests and Transboundary Water Governance in the Mekong* (May 2006), online: http://sydney.edu.au/mekong/documents/mekwatgov_mainreport.pdf, p. 313.

3 See 'China Dam Plan Raise Mekong Fears', *Financial Times* (31 March 2010), online: http://www.ft.com/cms/s/0/c96bfb14-3ce3-11df-bbcf-00144feabdc0.html.

4 A. Rieu-Clarke, G. Gooch, 'Governing the Tributaries of the Mekong: the Contribution of International Law and Institutions to Enhancing Equitable Cooperation over the Sesan', *Pacific McGeorge Global Business and Development Law Journal*, vol. 22, 2010, p. 193.

5 Mekong Secretariat, *Mekong Mainstream Run-of-River Hydropower* (December 1994), online; http://www.internatioanlrivers.org/files/attached-files/mekong_secretariat_mainstream_dams_report_1994.

6 G. Ziv et al., 'Trading-off Fish Biodiversity, Food Security, and Hydropower in the Mekong River Basin', *Proceedings of the National Academy of Sciences of the United States of America*, vol. 109, 2012, p. 5609.

7 *Ibid.*, at 1.

8 Agreement on the Cooperation for the Sustainable Development of the Mekong Basin, 5 April 1995, 2069 *UNTS* 3 (entered into force 5 April 1995).

9 For further analysis see A. Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy', *Asian Journal of International Law*, 2014, pp.1-33.

10 See for example, *Consultations*, online: http://www.mrcmekong.org/news-and-events/consultations/.

11 Mekong Agreement, *supra*, n. 8, art. 1.

With such an ambitious and wide-ranging set of objectives it might be argued that, while not explicitly stated, public participation is instrumental to the effective implementation of the Mekong Agreement. Such an interpretation is however confounded by a study of the key substantive, procedural and institutional provisions of the Agreement.

The substantive norms of the Mekong Agreement set out general rights and obligations *amongst the State parties*, all situated on the Mekong River. Key substantive obligations include the requirements to: utilise the waters of the Mekong River System in a reasonable and equitable manner (Article 5); protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources of the Basin (Article 3); and make every effort to avoid, minimise, and mitigate harmful effects that might occur to the environment from the development and use of the Mekong River Basin water resources or discharges of wastes and return flows (Article 7).

The Mekong Agreement also sets out an institutional framework that has been designed with the intention to support the implementation and development of the agreement. The so-called Mekong River Commission (MRC) is comprised of three permanent bodies, the Council, the Joint Committee and the Secretariat (Article 12). Decision-making power rests primarily with the Council, which is made up of representatives of *each State* at the Ministerial or Cabinet level. The Joint Committee, comprised of one member of *each State* at no less than Head of Department level supports the implementation of Council decisions. The Secretariat is tasked with technical and administrative assistance to the Council and Joint Committee.

A number of procedural rules also feature in the Mekong Agreement. Procedural requirements include the obligation to notify the Joint Committee of intra-basin uses and inter-basin diversions on the tributaries of the Mekong, and intra-basin uses on the mainstream of the Mekong during the wet season.[12] 'Notification' is defined in the Agreement as the provision of information concerning the proposed use to the Joint Committee.[13] Additionally, the Mekong Agreement requires States to consult with a view to reaching agreement on inter-basin diversions on the mainstream of the Mekong during the wet season, and intra-basin use during the dry season.[14] 'Consultation' is described in the Agreement as not only providing data and information, but also discussing and evaluating the impact of such proposed uses within the Joint Committee. Additionally, the Agreement stipulates that any inter-basin diversion during the dry season must be agreed upon.[15] A 'proposed use' is defined in the Agreement as being, 'any proposal for a definite use of the waters of the Mekong River system by any riparian, excluding domestic and minor uses of water not having a significant impact on mainstream flows'.[16] A threshold for notification and consultation, i.e. 'a use having a significant impact on the *mainstream flows*' (emphasis added) is therefore established within the Agreement.[17]

Finally, the Mekong Agreement includes general dispute settlement provisions, which oblige States to firstly seek to resolve 'differences or disputes' through the Joint Committee and Council; and secondly, where necessary and by mutual agreement, 'request assistance of mediation through an entity or party mutually agreed upon'.[18]

This overview of the key provisions of the Mekong Agreement demonstrates that the instrument was designed to define relationships between the States and no explicit reference to non-State actors can be found in the original text. However, as the following section will demonstrate, the role of public participation, particularly within the procedural aspects of notification and consultation, has become increasingly recognised as an important feature in the implementation of the Mekong Agreement.

12 *Ibid*., art. 5.
13 *Ibid*., chap. II.
14 *Ibid*., art. 5.
15 *Ibid*.
16 *Ibid*., chap. II.
17 A. Rieu-Clarke, G. Gooch, *supra*, n. 4, p. 193; B. L. Bearden, 'Following the Proper Channels: Tributaries in the Mekong Legal Regime', *Water Policy*, vol. 14/6, 2012, pp. 991-1014.
18 Mekong Agreement, *supra*, n. 8, arts. 34-45.

## III. PROCEDURES FOR NOTIFICATION AND CONSULTATION AND THE XAYABURI HYDROPOWER PROJECT

The Lao Government signed a Memorandum of Understanding (MoU) with a Thai energy company (Ch. Karnchang Public Company Limited) on 4 May 2007, to conduct a survey and study the development of the Xayaburi Hydropower Porject on the mainstream of the Mekong in Laos.[19] The Xayaburi Project is primarily designed for hydropower generation, with eight turbine-generator units producing a collective total of 1,285 megawatts. It is envisaged that over 95 percent of this planned power generation will be exported to Thailand. The main components of the project include: the Dam itself (820 m long and 32.6 m high), the spillway for excess river flow, sluices for the bypassing of suspended sediment, navigation locks, and fish bypass facilities.[20] It is envisaged by the developers that the construction of the Dam will take around eight years and three months, and cost around US$3.5 billion.[21]

An Environmental Impact Assessment (EIA) and Social Impact Assessment (SIA) for the Xayaburi Project—confined to areas around the dam site in Laos—were conducted by TEAM Consulting Engineering and Management Company Limited, a Thai consultancy firm, between September 2007 and April 2008. Then on 20 September 2010 the Lao National Mekong Committee submitted prior consultation documents on the Xayaburi Dam to the MRC Secretariat. After some checks and clarifications, the documents were forwarded to MRC Joint Committee members on 22 October 2010. In addition to the key provisions of the Mekong Agreement as described above, the parties relied upon soft law instruments—the Procedures and Guidelines on Notification, Prior Consultation and Agreement—which had been developed by the Joint Committee between 2003 and 2005.[22] However, there is no explicit mention of public participation within these procedures and guidelines.

Pursuant to the procedures and guidelines, several groups were established to support the prior consultation process. A MRC Prior Consultation Joint Committee Working Group, comprised of up to four representatives from each country, was set up to oversee the entire process. In addition, the MRC Secretariat established a Task Group which was a cooperative mechanism amongst MRC divisions, programmes, and projects (Integrated Water Resources Management, Planning, Information Knowledge Management, Fisheries, Environment, Sustainable Hydropower, and Navigation).[23] Two expert groups on Fisheries and Sediments populated by international and regional experts further supported the Task Group.[24]

At the first meeting of the Working Group on 26 October 2010 it was agreed that the prior consultation process should include a series of stakeholder consultations. Given that stakeholder consultation was not explicitly included in the original procedures and guidelines, this was an important concession that may well set a precedent for future consultations of transboundary hydropower projects within the MRC. During January and February stakeholder consultations took place in Cambodia (10 and 28 February), Thailand (22 January, 10 and 12 February), and Viet Nam (14 January and 22 February).[25] The Lao Government felt that it was not necessary to conduct stakeholder meetings in Laos during the prior consultation process as it had previously organized public consultations at the district and provincial level during the development of the EIA and SIA in 2007 and

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19 Ch. Karnchang Public Company Limited, 'Feasibility Study Xayaburi Hydroelectric Power Project Lao, PDR—Final Report' (2008), online: http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/xayaboury-dam-feasibility-study.pdf, p. 1.

20 Mekong River Commission Secretariat, *Prior Consultation Project Review Report—Stakeholder Consultations Related to the Proposed Xayaburi Dam Project* (24 March 2011), online: http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xaiyaburi-24-3-11.pdf, p. 10.

21 *Ibid*., p. 11.

22 Mekong River Commission, 'Procedures for Notification, Prior Consultation and Agreement' (November 2003), online: http://www.mrcmekong.org/assets/Publications/policies/Procedures-Notification-Prior-Consultation-Agreement.pdf; Mekong River Commission, 'Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement' (31 August 2005), online: http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf.

23 *Ibid*., p. 3.

24 *Ibid*., p. 3.

25 See Mekong River Commission Secretariat, *supra*, n 20.Project Review Report—Stakeholder Consultations Related to the Proposed Xayaburi Dam Project' (24 March 2011), online: MRC <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/2011-03-24-Report-on-Stakeholder-Consultation-on-Xayaburi.pdf>, p. 2.

2008, and had organised additional public consultation meetings with identified Project-Affected Persons in April 2009 and August 2010.[26]

In Cambodia, Thailand and Viet Nam the public consultations took place at two levels: amongst communities living downstream of the Xayabury Project that might be potentially affected, and amongst a wider range of stakeholders at the national level. Participants in the various workshops identified additional concerns about the impact of the dams, and requested detailed studies regarding the impact on agricultural productivity, information other social impacts, and assessment of cumulative impacts; suggested the participation of other stakeholders in the feasibility, planning, construction and operation phases of the dam project; and sought more information on the design and proven feasibility of technical features such as fish ladders, sand flushing outlets and navigation locks.[27]

The prior consultation process was then concluded in a somewhat unsatisfactory manner. Laos claimed that there was no reason to go beyond the six-month period set out in the Procedures for Prior Notification, Consultation and Agreement.[28] In contrast, and in line with the concerns of stakeholders downstream of the project, Cambodia, Thailand and Viet Nam called for an extension to the consultation period. Cambodia argued that the six month period was not enough to *inter alia* conduct 'comprehensive consultation both for national and regional levels', and 'national public consultation meetings'.[29]

Following the unsatisfactory conclusion to the prior consultation period, Laos employed the services of Pöyry Energy AG, an international engineering and consulting group, on 5 May 2011, to assess *inter alia* whether the Xayaburi Project had complied with the MRC's relevant design guidelines, the comments submitted by the MRC countries during the prior consultation process and the concerns contained in the MRC Secretariat's *Prior Consultation Review* report, which included the concerns expressed during the stakeholder consultations. Pöyry concluded that,

> The prior consultation process does not give [sic] right to any member countries to suspend the project. As its name suggests, the prior consultation process gives [sic] right to member countries to comment on the project. In case of the Xayaburi HPP, the decision whether or not to proceed with the project rests solely with the Government of Laos.[30]

The report further suggested that, subject to a number of investigations and alterations, in the opinion of the consulting company, Laos was in compliance with its commitments under the Mekong Agreement.[31]

Since then, Laos has maintained its position and proceeded with the construction of the Xayabury Hydropower project, which according to recent reports is 23 percent complete and on track to be finalised in 2019.[32] However, stakeholder activities related to the project did not end with the conclusion of the prior consultation process.

Firstly, in 2012 an international coalition of 14 civil society organisations raised a complaint against Pöyry before the National Contact Point for the OECD Guidelines for Multinational Enterprises (NCP).[33] The compliant claims that Pöyry failed to conduct appropriate due diligence in advising the Lao Government to go ahead with the project, and requested that Pöyry 'engage in dialogue with stakeholders'.[34] The NCP concluded that companies have a responsibility to conduct due diligence to avoid being linked to adverse social and environmental impacts

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26 Ch. Karnchang Public Company Limited, *Social Impact Assessment—Xayaburi Hydroelectric Power Project* (August 2010), online: http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-SIA-August-2010.pdf; and Ch. Karnchang Public Company Limited, *Environmental Impact Assessment—Xayaburi Hydroelectric Power Project* (August 2010), online: http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-EIA-August-2010.pdf.

27 *Supra*, n. 25, at 12-4.

28 Mekong River Commission, *Xayaburi Hydropower Project Prior Consultation Process*, online: http://www.mrcmekong.org/news-and-events/consultations/xayaburi-hydropower-project-prior-consultation-process

29 Ch. Karnchang Public Company Limited, *Social Impact Assessment—Xayaburi Hydroelectric Power Project* (August 2010), online: http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-SIA-August-2010.pdf, p. 2.

30 *Pöyry Energy AG, 'Government of Lao PDR Xayaburi Hydroelectric Power Plant Run-of-River Plant* (August 2011), online: http://www.internationalrivers.org/files/attached-files/poyry_xayaburi_compliance_report.pdf.

31 *Ibid.,* p. 52.

32 'Xayaburi dam in Laos "23% complete"', *Bangkok Post* (3 April 2013), online: http://www.bangkokpost.com/breakingnews/403291/xayaburi-dam-almost-a-quarter-complete.

33 Siemenpuu et al vs Poyry Group, (11 June 2012), online: http://oecdwatch.org/cases/Case_259.

34 *Ibid*.

caused by their clients, but that Pöyry had not acted in breach of the guidelines in this particular case.[35] It was however stressed by members of the NCP that, 'companies should assess the risks of similar major projects more carefully and give more consideration to stakeholders' views'.[36] While the outcome of this case is disputed,[37] it provides a clear demonstration of a further avenue through which stakeholders might hold States and their advisers to account for failing to duly take into account stakeholder opinions—even where explicit provisions are absent from basin-specific treaty arrangements.

Secondly, in August 2012 a lawsuit was filed in the Administrative Court of Thailand on behalf of communities along the Mekong River that might be affected by the Xayaburi Project.[38] The lawsuit questioned the legality of the power purchase agreement between the Electricity Generating Authority of Thailand (EGAT) and the Xayaburi Power Company. However, the Thai Administrative Court ultimately denied jurisdiction to the complainants, largely on the basis that the power purchase agreement in itself had no impact on the community.

## IV. CONCLUSION

The experience of the Xayaburi consultation process demonstrates that despite no clear legal mandate within the 1995 Mekong Agreement, public participation has been, although not perfect, a central feature of the prior consultation process. While this constitutes an important element in the effective implementation of the Mekong Agreement, significant questions remain. It might be asked whether the stakeholder process carried out in the case of the Xayaburi project were sufficient both in range and depth. It might also be questioned whether consultation with potentially affected stakeholders in Cambodia, Thailand and Viet Nam should have taken place early in the process, possibly at the same time that the EIA and SIA were conducted in 2007 and 2008. Certainly, the subsequent disputes raised before the Finnish OECD NCP and the Thai Administrative Court put in question the efficacy of the stakeholder processes. Providing a more deliberate process for stakeholder consultation within the confines of the MRC would certainly help avoid such costly additional complaints. It might even be argued that such a requirement is part and parcel of the due diligence obligations upon watercourse States—as well as the obligations placed upon private companies responsible for the implementation of transboundary hydropower projects.[39] With the progress of further plans, such as the Don Sahong Hydropower Project in Laos gaining significant pace,[40] clarity over the scope and depth of stakeholder consultation both within the Mekong Agreement, and under international law in general, is greatly needed.

### FURTHER READING


Mekong River Commission, *Xayaburi Hydropower Project Prior Consultation Process*, online: http://www.mrcmekong.org/news-and-events/consultations/xayaburi-hydropower-project-prior-consultation-process

Rieu-Clarke, A., 'Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy', *Asian Journal of International Law*, 2014, pp. 1-33.

Rieu-Clarke, A., R. Moynihan, M. Björn-Oliver, *UN Watercourses Convention User's Guide,* online: http://www.unwatercoursesconvention.org/news/launch-of-the-un-watercourses-convention-online-users-guide/


35 *Ibid*.

36 *Statement of the Ministry of Employment and the Economy: Pöyry Oyj complied with OECD guidelines in Laos dam project* (16 June 2014), online: http://valtioneuvosto.fi/ajankohtaista/tiedotteet/tiedote/sv.jsp?toid=2213&c=0&moid=2217&oid=388947.

37 *Environmental rights as human rights in the Lower Mekong Basin* (2 August 2013), online: http://www.earthrights.org/blog/environmental-rights-human-rights-lower-mekong-basin.

38 *Xayaburi dam court decision prompts community consultation*, (19 March 2013), online: http://www.earthrights.org/blog/xayaburi-dam-court-decision-prompts-community-consultation.

39 Public participation might be seen as part and parcel of the due diligence requirement, or 'duty to take appropriate measures', contained in Article 7 of the *Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, 31 *ILM* 700 (in force in August 2014), or Article 2(1) of the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992, 31 *ILM* 1312 (1992) (entered into force 6 October 1996).

40 'Mekong: Laos confirms Don Sahong dam plans', *The Interpreter*, (14 March 2014), online: http://www.lowyinterpreter.org/post/2014/03/14/Mekong-Laos-confirms-Don-Sahong-dam-plans.aspx?COLLCC=2657878000&.

# PART 2.

## THE ROLE OF THE PUBLIC IN NON-COMPLIANCE PROCEDURES AND DISPUTE SETTLEMENT MECHANISMS

# THE IMPLEMENTATION COMMITTEE OF THE HELSINKI WATER CONVENTION: A NEW TOOL OF PUBLIC PARTICIPATION FOR THE MANAGEMENT OF TRANSBOUNDARY WATER RESOURCES

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* The present contribution reflects the common opinion of the authors. Nevertheless, Sections 2 and 6 should be attributed to Attila Tanzi, while Sections 3, 4, and 5 to Cristina Contartese. The views expressed in this contribution are the sole responsibility of the authors. Usual disclaimers apply.

## ABSTRACT

*Under the UNECE Water Convention and the Decision on support to implementation and compliance, non-state actors are not expressly assigned with a specific role. Nevertheless, even in the absence of formal recognition, the public can still exert significant influence on implementation and compliance review procedures. The present paper stresses that the public can enhance such procedures in several ways. By providing information to the Implementation Committee, the public can potentially impact on both the Committee initiative and its decision-making, while through the right of access to information on the Committee's activities, it can participate in the monitoring of implementation and compliance with the UNECE Water Convention. In the future, this aspect could further be enhanced through a reporting mechanism if adopted.*

## RÉSUMÉ

*La Convention de la CEE-ONU sur les cours d'eau et la Décision sur le soutien à l'application et au respect de la Convention n'attribuent pas un rôle spécifique aux acteurs non-étatiques. Toutefois, même en l'absence d'une reconnaissance formelle, le public peut encore exercer une influence significative sur les procédures pour l'application et le respect de la Convention. Cet article met l'accent sur le fait que le public peut améliorer de telles procédures de différentes manières. Grâce aux informations fournies au Comité d'application, le public peut affecter l'initiative du Comité aussi bien que sa prise de décisions, tandis que, grâce au droit d'accès aux informations sur les activités du Comité, il peut participer au suivi de l'application et du respect de la Convention. Dans le futur, cet aspect pourrait de plus en plus être amélioré grâce à la présentation des rapports étatiques dans le cas où un tel mécanisme serait adopté.*

**Key words:** Implementation Committee; UNECE Water Convention; public participation

**Mots clés:** Comité de mise en œuvre; Convention de la CEE-ONU sur les cours d'eau; participation du public

# I. INTRODUCTION

Non-state actors have been playing for a number of decades an increasingly significant role in the making, assessment and enforcement of international legal rules.[1] This holds true all the more for international environmental law, of which water law is gradually becoming an integral part. Since water conventions are mainly conceived as legal frameworks for dispute prevention and management, the public participation provisions and practice relating thereto may well be considered as an important component enhancing implementation of and compliance with international water law.[2]

Under the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes[3] (hereafter 'UNECE Water Convention', 'Helsinki Water Convention'), Decision VI/1 and the Draft decision on support to implementation and compliance (these latter two governing the procedure and functioning mechanisms of its Implementation Committee[4]), non-state actors are not expressly assigned a specific role. Nevertheless, even in the absence of formal recognition, the public can still exert significant influence on implementation and compliance review procedures.[5]

The purpose of the present article is to assess whether the Implementation Committee of the UNECE Water Convention provides a new tool capable of increasing opportunities for public participation in the management of water resources under the UNECE Water Convention.

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1 See, amongst the others, A. Clapham, *Human Rights and Non-State Actors*, Cheltenham, Edward Elgar, 2013; J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law*, Routledge, Abingdon, 2011; B. Reinalda (ed.), *The Ashgate Research Companion to Non-State Actors*, Ashgate, Farnham, 2011; A. Bianchi (ed.), *Non-state Actors and International Law*, Ashgate, Farnham, 2009; P.-M. Dupuy, L. Vierucci (eds.), *The Role of Civil Society in Contemporary International Law*, Edward Elgar, Cheltenham-Northampton, 2008, pp. 135-152; T. Treves, M. Frigessi di Rattalma, A. Tanzi, A. Fodella, C. Pitea, C. Ragni (eds.), *Civil Society, International Tribunals and Compliance Bodies*, TMC Asser Press, The Hague, 2004.

2 See, amongst the others, L. De Stefano, G. Schmidt, 'Public Participation and Water Management in the European Union: Experiences and Lessons Learned', in B. Cosens (ed.), *The Columbia River Treaty Revisisted: Transboundary River Governance in the Face of Uncertainty*, Oregon State University Press, Corvalis OR, 2012, pp. 383-397; J. Razzaque, 'Public Participation in Water Governance', in J.W. Dellapenna, J. Gupta (eds.), *The Evolution of the Law and Politics of Water*, Springer, Dordrecht, 2009, pp. 353-371; A.D. Ryabtsev, 'On Public Participation in Water Resources Management', in P. Wouters, V. Dukhovny, A. Allan (eds.), *Implementing Integrated Water Resources Management in Central Asia*, Springer, Dordrecht, 2007, pp. 89-94; J. Adshead, 'Public Participation, the Aarhus Convention and the Water Framework Directive', *The Journal of Water Law*, vol. 17/5, 2006, pp. 185-192; E. Louka, 'A Practicable Articulation of a Right to Water: Public Participation in Integrated Water Resource Management of the EU', *Annuaire international des droits de l'homme*, vol. 1, 2006, pp. 569-584; K.M. Krchnak, 'Improving Water Governance Through Increased Public Access to Information and Participation', *Sustainable Development Law and Policy*, vol. 5/1, 2005, pp. 34-39; L. Jansky, J.I. Uitto (eds.), *Enhancing Participation and Governance in Water Resources Management: Conventional Approaches and Information Technology*, United Nations University Press, Tokyo, 2005; C. Bruch et al. (eds.), *Public Participation in the Governance of International Freshwater Resources*, United Nations University Press, Paris, 2005; M.M. Mbengue, M. Tignino, 'Transparency, Public Participation, and Amicus Curiae in Water Disputes', in E.B. Weiss, L. Boisson de Chazournes, N. Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005, pp. 367-405; A. Tanzi, C. Pitea, 'Emerging Trends in the Role of Non-State Actors in International Water Disputes', in The International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of International Water Disputes*, Kluwer Law International, The Hague, 2003, pp. 259-297; E. Hey, 'Non-State Actors and International Water Disputes: A Search for the Nexus Between the Local and the Global', in *ibid.*, pp. 299-318.

3 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, *ILM*, vol. 31, 1992, p. 1312.

4 Decision VI/1, Support to implementation and compliance, UN Doc. ECE/MP.WAT/37/Add.2; Draft decision on support to implementation and compliance, UN Doc. ECE/MP.WAT/2012/L.4, 14 September 2012. As for the formal adoption of such draft decision, during its Second Meeting (see UN Doc. ECE/MP.WAT/IC/2013/4, par. 17, 13 January 2014), the Implementation Committee discussed the possibility of developing a proposal (based on Decision VI/1, its annex I, the rules of procedure of the Meeting of the Parties, and the core rules of procedure), to be submitted for adoption by the Meeting of the Parties. However, considering that such a proposal should take into account experiences in the application of such an instrument, it decided to review this matter at a later stage.

5 On this point, see C. Pitea, 'The Legal Status of NGOs in Environmental Non-Compliance Procedures: An Assessment of Law and Practice', in P.-M. Dupuy, L. Vierucci, *NGOs in International Law: Efficiency in Flexibility?*, Edward Elgar Publishing, 2008, pp. 181-203, who states that '[r]ecognition of a formal role for NGOs in compliance mechanisms would give legal certainty to their rights and powers in such procedures. However, lack of recognition of such a formal status does not necessarily imply denial of any role for NGOs on the matter under consideration' (p. 188).

## II. THE IMPLEMENTATION COMMITTEE OF THE UNECE WATER CONVENTION: AN OVERVIEW

The Implementation Committee of the Helsinki Water Convention[6] is the most recently established body of this kind within the UNECE framework.[7] No specific compliance control mechanism is provided for under the Helsinki Water Convention, leaving the Meeting of the Parties ('MOP') as the only institutional form of control. Besides, under art. 17.2(f), the very same MOP is also in charge of '[c]onsider[ing] and undertak[ing] any additional action that may be required for the achievement of the purposes of this Convention'. It was on the legal basis of such a provision that, only at its Fifth Meeting in 2009, the MOP assigned the task of preparing a mechanism to support implementation and compliance to the Legal Board[8] based on the 'Geneva Strategy and framework for monitoring compliance with agreements on transboundary waters'.[9] The final result of this preparatory work was the establishment of the Implementation Committee at the Sixth Session of the Meeting of the Parties to the Convention, which took place in Rome on 28-30 November 2012.[10]

Generally, non-compliance mechanisms are non-judicial, non-confrontational and consultative procedures established under MEAs to facilitate implementation and ensure compliance by States Parties.[11] As emphasized by one of the present authors, '[a]ltough it is not impossible for some of the non-compliance mechanisms to develop in the medium and long run into classical judicial or quasi-judicial dispute settlement procedures, one can make the case that, generally considered, they are a genus on their own, which can hardly be forced into the traditional categories of dispute settlement... All in all, non-compliance procedures may be considered to be 'located within a wider category of non-confrontational avoidance procedures' and defined as administrative procedures within institutional regimes usually created by MEAs'.[12] The Implementation Committee of the Helsinki Water Convention is no exception, having been envisaged as 'simple, non-confrontational, non-adversarial, transparent, supportive and cooperative in nature, building on the distinctive collaborative spirit of the Convention',[13] empowered 'to facilitate, promote and safeguard the implementation and application of and compliance with the [UNECE Water Convention]'.[14]

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6 See J.G. Lammers, 'The Helsinki Water Convention: A New Implementation Mechanism and Committee', *Environmental Policy and Law*, vol. 44/1-2, 2014, pp. 117-124; A. Tanzi, C. Contartese, 'Dispute prevention, Dispute Settlement and Implementation Facilitation in International Water Law: the Added Value of the Establishment of an Implementation Mechanism under the Water Convention', in A. Tanzi, O. McIntyre, A. Kolliopoulos, A. Rieu-Clarke (eds.), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes: Its Contribution to International Water Cooperation*, Brill The Hague (forthcoming); A. Tanzi, *The 1992 UNECE Water Convention and the 1997 UN Convention on International Watercourses: An Analysis of Their Harmonized Contribution to International Water Law*, UNECE (forthcoming).

7 Within the UNECE framework, compliance-review mechanisms have been established under the following Conventions: the 1979 Long-Range Transboundary Air Pollution Convention and its Protocols; the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context and its 2003 Protocol on Strategic Environmental Assessment; the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters and its 2003 Protocol on Pollutant Release and Transfer Registers; and the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. For an analysis of non-compliance mechanisms, see T. Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, T.M.C. Asser Press, The Hague, 2009.

8 The Fifth Session took place in Geneva, on 10-12 November 2009 (UN Doc. ECE/MP.WAT/29, 15 June 2010).

9 See UN Doc. ECE/MP.WAT/2000/5/Annex I.

10 UN Doc. ECE/MP.WAT/37, 23 July 2013.

11 See M. Fitzmaurice, 'Environmental Compliance Control', in *Max Planck Encyclopedia of Public International Law*.

12 A. Tanzi, C. Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward', in T. Treves et al. (eds), *Non-Compliance Procedures and Mechanisms*, *supra*, n. 7, p. 578, 580.

13 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, para. 2.

14 *Ibid*., para. 1.

## III. THE COMPOSITION OF THE IMPLEMENTATION COMMITTEE

Bodies of the kind under consideration can be composed of either State representatives or by individuals serving in their personal capacity.[15] As to the impact of NGOs in the composition of similar bodies, one may note that the Compliance Committee of the Aarhus Convention[16] provides a relevant example, insofar as two out of the five candidates nominated by NGOs were elected as members of the Committee at the First Meeting of the Parties, despite the initial opposition of some governmental delegations.[17] The role of civil society is also important in its current composition.[18] As has been already stressed, '[p]articipation in the committee by either NGOs or independent persons with an NGO background can prove very important in ensuring continuity in the representation of public interests in the workings of the committee, especially in relation to its monitoring function'.[19]

As for the Implementation Committee of the Helsinki Water Convention, such a body is composed of nine members, who 'serve in their personal capacity and objectively, in the best interest of the Convention',[20] and are 'persons with experience and recognized expertise in the fields related to the Convention, including legal and/or scientific and technical expertise'.[21] Most importantly for the purpose of the present analysis, it is to be noted that the role of NGOs is expressly recognized in proposing candidates to State Parties, who ultimately decide on nominations.[22] The current composition of the Implementation Committee consists mainly of expert members coming from governments and academia. It appears that the contribution of NGOs in the composition of this body is less significant than in others of this kind, such as the Compliance Committee of the Protocol on Water and Health and in particular the Aarhus Convention. While this appears to be mostly due to the inter-State dimension of the scope of the Water Convention, as opposed to the primarily domestic one of the two former instruments, NGO participation in the workings of this body may significantly depend on the degree of importance that they will attach to it and to the consequent requests for participation under observer status.

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15 A. Tanzi, C. Pitea, 'Emerging Trends in the role of Non-State Actors', *supra,* n. 2, pp. 274-275, explain that '[t]he first option is more common and reflects the concept of [Compliance review procedures] committees as collective mediation bodies, [while] [t]he second option […] renders the committee similar to a conciliation organ, especially when the committee is also vested with the power to make specific recommendations to the parties'.

16 Under para. 4 of the Aarhus Convention, Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, 'candidates…shall be nominated by Parties, Signatories and non-governmental organizations falling within the scope of article 10, paragraph 5 of the Convention and promoting environmental protection'.

17 A. Tanzi, C. Pitea, 'Emerging Trends in the Role of Non-State Actors', *supra,* n. 2, p. 275.

18 See the Compliance Committee composition on the UNECE web site, available at http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/aarhuscc-members.html.

19 A. Tanzi, C. Pitea, 'Emerging Trends in the Role of Non-State Actors', *supra,* n. 2, p. 275. See also S. Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements', *Colo. J. Int'l Envtl. L. & Pol.y*, vol. 18/1, 2007, pp. 12-16.

20 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, para. 3.

21 *Ibid.,* para. 4. On the Core rules of procedure of the Implementation Committee, see UN Doc. ECE/MP.WAT/2012/L.4, Appendix II, para. 1-30.

22 Para. 5 (UN Doc. ECE/MP.WAT/2012/L.4, Appendix I) reads as follows: 'The members shall be elected by the Meeting of the Parties to the Convention from among candidates nominated by the Parties. To that end, Parties may take into consideration any proposal for candidates made by Signatories or *by non-governmental organizations (NGOs) qualified or having an interest in the fields to which the Convention relates*' (emphasis added).

# IV. THE IMPLEMENTATION COMMITTEE'S FUNCTIONS

The Implementation Committee of the Helsinki Water Convention is vested with a relatively wide spectrum of tasks geared towards supporting the implementation of and compliance with the Convention.[23] Such tasks translate into different procedures, ranging from advisory functions to assessment procedures triggered by Parties or by the Committee motu proprio. As will be illustrated below, it is under this latter procedure that the public has the most relevant role, especially as an essential source of information necessary for the work of the Committee to be set in motion.

Under the so-called 'advisory procedure', which 'is aimed at facilitating implementation and application of the Convention through the provision of advice not to be regarded as alleging non-compliance',[24] the Committee performs several tasks. Namely, it can make suggestions or recommendations to Parties regarding their domestic regulatory regimes, assist them in preparing transboundary water cooperation agreements, facilitate technical and financial assistance, or request that Parties develop an action plan, as well as inviting them to submit progress reports thereto.[25] It lies with Parties alone, acting individually or jointly, to trigger the advisory procedure regarding their efforts and difficulties in implementing or applying the Convention.[26]

This last point brings us to the issue of the subjects entitled to set the Implementation Committee in motion. Like in most compliance mechanisms under MEAs,[27] it is primarily for the States Parties to the Water Convention to trigger the Committee's procedures,[28] without prejudice to the possibility that the Committee may take its own initiative.[29] A Party may bring an issue of compliance before the Committee when it concludes that, despite its efforts, it finds itself unable to comply with the Convention ('self-trigger') or finds itself actually or potentially affected by another Party's difficulties in implementing and/or complying with the Convention ('Party-to-Party trigger'). Unlike other UNECE compliance bodies, such as those under the Aarhus Convention or the Protocol on Water and Health, the Implementation Committee of the Helsinki Water Convention does not provide for a procedure that may be triggered by 'communications from the public'.[30] This should not necessarily be considered as retrogressive on the part of the Water Convention, since such a difference appears to derive from the transboundary scope of application of the latter, in contrast to the above instruments of a primarily domestic scope.

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23 Under para. 15 (UN Doc. ECE/MP.WAT/2012/L.4, Appendix I), the Committee shall: '(a) Consider any request for advice relating to specific issues concerning difficulties in implementation or application made in accordance with section V below; (b) Consider any submission relating to specific issues concerning difficulties in implementation and compliance made in accordance with section VI below; (c) Consider undertaking a Committee initiative in accordance with section VII below; (d) Examine, at the request of the Meeting of the Parties, specific issues of implementation of and compliance with the Convention; (e) Take measures, including recommendations, as appropriate, pursuant to section XI; (f) Carry out any other functions that may be assigned to it by the Meeting of the Parties, including examination of general issues of implementation and compliance that may be of interest to all Parties, and report to the Meeting of the Parties accordingly'.

24 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, para. 18.

25 *Ibid*., para. 22.

26 *Ibid*., paras. 19-20.

27 For an overview on the triggering mechanisms of the non-compliance procedures under MEAs, see F. Romanin Jacur, 'Triggering Non-Compliance Procedures', in T. Treves *et al*., *Non-Compliance Procedures and Mechanisms, supra,* n. 7, pp. 373-387.

28 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, paras. 24-27.

29 *Ibid*., paras. 28-29.

30 On the role of non-state actors under the Aarhus Convention and the Protocol on Water and Health, see amongst others, A. Tanzi, L. Iapichino, 'The Added Value of the UNECE Protocol on Water and Health for the Implementation of the Right to Drinking Water and Sanitation', in H. Smets (ed.), *Le droit à l'eau potable et à l'assainissement en Europe: Implementing the Right to Drinking Water and Sanitation in 17 European Countries*, Éditions Johanet, Paris, 2012, pp. 115-124; M. Fitzmaurice, 'Note on the Participation of Civil Society in Environmental Matters—Case Study: The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', *Human Rights & International Legal Discourse*, vol. 4/1, 2010, pp. 47-65; M. Pallemaerts (ed.), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, Groeningen, 2011; C. Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes', in T. Treves et al. (eds.), *Non-Compliance Procedures and Mechanisms*, *supra*, n. 7, pp. 251-262.

Under the 'Committee initiative',[31] the Committee can act motu proprio when it 'becomes aware of possible difficulties in the implementation by a Party of or the possible non-compliance by a Party with the Convention'.[32] The fact that this awareness can arise as a result of 'information received from the public'[33] undoubtedly confirms the increasing relevance of the role of NGOs in the context of the implementation and review of environmental agreements. Despite the lack of a formal recognition, it is fair to say that public participation is given significant relevance in the mechanism under review precisely through the Committee initiative procedure insofar as it may be initiated upon information received from the public.

In determining whether to take the initiative, the Committee has to take into account some general criteria, namely that the source of the information is not anonymous, that the information provides grounds for a reasonable assumption of possible implementation difficulties and relates to the implementation of the Convention, and that the consideration of the matter will not take an inappropriate amount of the Committee's time and resources.[34] Despite the existence of these general criteria it is as of yet too early to predict the possible extent of the impact of non-state actors on the activities of the Committee initiative, as it is not known what criteria the body will apply in dealing with information received from the public. Indeed, during its First Meeting, the Implementation Committee discussed the modalities for undertaking a Committee initiative and agreed that it would be useful to develop a working document setting out some general criteria, or factors, to guide the determination of when a Committee initiative might be taken with a view to ensuring consistency in action.[35] During its Second Meeting, the Implementation Committee again considered such a possibility and decided to review the matter at a later stage on the basis of lessons to be learned from future experience.[36] This is a delicate issue since, although the role of NGOs has the potential to positively affect the work of the Implementation Committee and to certainly enhance the effectiveness of the system, it might also lead to difficulties. As has been noted by one of the present authors, the indiscriminate acceptance of communications from the public can bring the system to a standstill if it overloads the committee's agenda. Moreover, 'the non-confrontational nature of the procedure could be undermined by assuming a quasi-judicial function based on the model of the various committees under human rights conventions'.[37]

Interestingly, the Implementation Committee has already found itself considering information from the public, namely from a Kazakhstani NGO expressing concerns on difficulties between Kazakhstan and the Russian Federation in transboundary water cooperation in the Irtysh River Basin, shared by the Russian Federation, Kazakhstan, China and Mongolia. The Committee wrote a letter to the concerned Parties enclosing the information provided by the NGO and an analytical report drafted by the Committee.[38] Moreover, Kazakhstan and the Russian Federation were asked to express their views on the matter and to provide any further appropriate information. At the same time, the NGO was informed of the procedure undertaken by the Committee.[39]

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31 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, paras. 28-29.

32 *Ibid*., para. 28.

33 *Ibid*.

34 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, para. 29.

35 UN Doc. ECE/MP.WAT/IC/2013/2, para. 12, 29 October 2013.

36 UN Doc. ECE/MP.WAT/IC/2013/4, para. 9.

37 A. Tanzi, C. Pitea, 'Emerging Trends in the role of Non-State Actors', *supra,* n. 2, p. 276. On the possible increasing number of communications to the Compliance Committee of the Aarhus Convention, S. Kravchenko ('The Aarhus Convention and Innovations in Compliance', *supra*, n. 19, p. 49) observes that '[i]f that happens, the Committee […]may have to ask for more staff, take actions to restrict the numbers of cases that it accepts, or demand that communications become more lawyer-like and precise in arguing points. Each of these options has its costs, however'. In subsequent work, ('Giving the Public a Voice in MEA Compliance Mechanisms', in L. Paddock et al. (eds), *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation*, Edward Elgar, Cheltenham, 2011, pp. 83-110), Kravchenko concludes that fears and concerns about the involvement of NGOs in the compliance procedure of the Aarhus Convention, such as the misuse of the compliance mechanism for pursuing a political agenda, the overloading of the Committee activities, and the threat to their non-confrontational and non-adversarial nature, have proved to be unjustified.

38 UN Doc. ECE/MP.WAT/IC/2013/4, paras. 4-8.

39 *Ibid*.

## V. PARTICIPATION IN COMMITTEE'S DISCUSSIONS AND DECISION-MAKING PROCESS

The Decision establishing the Implementation Committee recognizes the role of the public in the context of discussions related to Committee activities, providing that 'the member of the public submitting information to the Committee […] shall be entitled to participate in the discussions of the Committee with respect to […] Committee initiative'.[40] As for the preparation and adoption of any findings and measures, only the members of the Committee can take part in them.[41] Nevertheless, the body must keep all parties entitled to participate informed by sending a copy of its draft findings and measures, including the information considered and its reasoning, and must invite them to send comments within six weeks.[42] The Committee is required to take such comments into account in the finalization of its findings and measures.[43]

As already anticipated, another aspect on which public participation can have an impact on Committee decision-making is the gathering of information. As pointed out by one of the present authors, '[t]he effectiveness of [the compliance review procedures] depends largely on the committee's ability to collect all the necessary factual, technical and legal information needed for it to best ascertain a non-compliance situation, its degree of seriousness, its causes and, ultimately, the most appropriate action to recommend. For this reason the committees are normally afforded a broad power to seek information and technical advice from different sources.'[44] This also holds true for the Implementation Committee of the Helsinki Water Convention, which, in order to perform its functions, 'shall take into account all relevant information made available to it, including from the public, and may consider any other information it deems appropriate'.[45] As recalled in its Core rules of procedure, the acquisition of accurate and more detailed information has to be conducted through a pragmatic and cost-effective approach that involves several sources, from the information available in the public domain to the ones provided by experts, Governments, academia and intergovernmental and non-governmental organizations.[46] NGOs and other non-state actors can therefore play an important role by submitting documents and providing technical advice to the Committee.

## VI. THE RIGHT OF ACCESS TO INFORMATION

As for information on water-related matters, it has already been emphasized that by providing pertinent documentation, non-state actors can impact on the triggering of the Committee initiatives, as well as on its decisions. Of equal importance is the recognition of the public's right of access to information, which enhances the capacity of national and local civil society to focus the political agenda on the implementation of water conventions. Once the public is informed of the status of the domestic implementation of environmental treaties, civil society may exert significant pressure towards greater compliance on the State concerned through campaigns, lobbying and legal proceedings. Access to information is, therefore, a prerequisite for public participation.

As to the nature of the obligations stemming from the provisions on the right of access to information, the UNECE Water Convention provides a general obligation to the effect that 'information shall be made available to the public'.[47] With regard to the type of information concerned, it mentions: the condition of transboundary waters; the measures taken or planned to be taken in relation to transboundary impact, as well as the effectiveness of those measures, including water quality objectives; permits issued and the conditions required to be met; and

40 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, para. 37.
41 *Ibid.*, para. 38.
42 *Ibid.*, para. 39.
43 *Ibid.*, para. 40.
44 A. Tanzi, C. Pitea, 'Emerging Trends in the role of Non-State Actors', *supra,* n. 2, p. 277.
45 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, para. 31.
46 UN Doc. ECE/MP.WAT/2012/L.4, Appendix II, paras. 26-30.
47 Art. 16, para. 1 of the UNECE Water Convention.

results and evaluation of water sampling.[48] As for the time limit for responding to a request for information, the UNECE Water Convention provides for a reasonable time standard.[49]

Under the Decision establishing the Implementation Committee, access to information is equally guaranteed with regard to the activities of the Committee. As for confidentiality, in fact, it is provided that 'no information held by the Committee shall be kept confidential', except for any information that has been provided in confidence. It appears that the latter principle should be given a restrictive interpretation.[50] Namely, access to information is generally guaranteed with respect to all documents related to the Committee's activities, such as the Committee reports to the Meeting of the Parties,[51] the provisional agenda and meeting report, essential information concerning any request for advice, submission or Committee initiative, decisions and recommendations of the Committee and any related decisions of the Meeting of the Parties.[52] While Committee documents are usually to be made available to the public through the Convention web site,[53] the sole exception to the lack of confidentiality is documentation related to discussion papers prepared by the secretariat or by members of the Committee.[54]

Public access to information would nonetheless be further enhanced by the establishment of a reporting system under the UNECE Water Convention. As is known, despite the heterogeneous nature of the non-compliance mechanisms, their common feature is that committees are in charge of two activities, namely, consideration of submissions by the Parties and a general monitoring function on the basis of periodical reports submitted by States. Under the UNECE Water Convention and its related instruments, such a monitoring function based on periodical reports is currently not foreseen. Nevertheless, during its First Meeting, the Implementation Committee examined the need for reporting under the Convention, as the Working Group on Integrated Water Resources Management, in consultation with the Implementation Committee, was mandated to carry out such analysis, whose possible outcome would be submitted for adoption by the Meeting of the Parties at its seventh session. The Committee emphasized that a reporting mechanism would contribute to an improved level of implementation by identifying gaps as well as providing a basis for evaluating the effectiveness of the Convention and for the exchange of experience between Parties.[55] In its Second Meeting, the Committee reaffirmed that, despite the existence of reporting systems under various international agreements in the water sector, an appropriate, tailor-made reporting mechanism would be an asset for both the Parties in implementing the Convention and the Committee in carrying out its functions.[56]

Finally, the Decision setting up the Committee under consideration also provides that meetings of the Committee should be in principle open to the public, unless the body decides otherwise.[57] A Committee meeting is held in private only when findings and measures are prepared and adopted as well as when this body finds it necessary to ensure confidentiality of information. The presence of observers is, therefore, generally allowed, subject to registration with the secretariat no later than two weeks before the meeting they wish to attend.[58]

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48 *Ibid*.

49 Art. 16, para. 2 of the UNECE Water Convention.

50 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, paras. 32-34.

51 *Ibid*., para. 44.

52 UN Doc. ECE/MP.WAT/2012/L.4, Appendix II, paras. 22, 24-25.

53 *Ibid*.

54 UN Doc. ECE/MP.WAT/2012/L.4, Appendix II, para. 23.

55 UN Doc. ECE/MP.WAT/IC/2013/2, paras. 13-15.

56 UN Doc. ECE/MP.WAT/IC/2013/4, paras. 10-12.

57 UN Doc. ECE/MP.WAT/2012/L.4, Appendix I, para. 35. On compliance mechanisms operating in a non-transparent manner, see V. Koester, T. Young, 'Compliance with Environmental Conventions: the Role of Public Involvement', *Environmental Policy and Law*, vol. 37/5, 2007, pp. 399-401, who criticize the usual argument in favour of secrecy, according to which the cases of non-compliance involve politically sensitive issues.

58 UN Doc. ECE/MP.WAT/2012/L.4, Appendix II, paras. 18-21. The Second Meeting of the Implementation Committee was attended by three observers (see UN Doc. ECE/MP.WAT/IC/2013/4, para. 2). On the different participation status between observers and members of the general public before the Aarhus Convention bodies, see C. Pitea, 'The Legal Status of NGOs in Environmental Non-Compliance Procedures', *supra*, n. 5, pp. 189-190.

# VII. CONCLUSION

An innovative trend within the UNECE framework may be detected consisting of the formal recognition of direct access to compliance procedures for the public. In this respect, the Compliance Committees of the Aarhus Convention and of the Protocol on Water and Health are the most relevant examples, thanks to the primarily domestic scope of the instruments establishing them. Although the Implementation Committee of the UNECE Water Convention does not formally recognize the role of non-State actors in the context of compliance and implementation procedures, civil society can still participate in them, acquiring a potentially relevant status. Indeed, as has been stressed throughout the present paper, the public can enhance the implementation procedures in several ways. By providing information to the Implementation Committee, the public can potentially impact on both the Committee initiative and its decision-making, while through the right of access to information on the Committee's activities, it can participate in the monitoring of implementation and compliance with the UNECE Water Convention. In the future, this aspect could further be enhanced through a reporting mechanism if adopted.

Finally, although it is too early to predict the impact of public participation on the Implementation Committee for the management of water resources, it should also be recalled that the Helsinki Water Convention, adopted within the framework of the UNECE and ratified by 39 Parties (38 States and the European Union),[59] has a potentially global membership as it is also open to non-UNECE members.[60] The implications of public participation under this water instrument could, therefore, go beyond the pan-European region.

## FURTHER READING


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59 For the status of ratification, see the United Nations Treaty Collection web site, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&lang=en#1.

60 On the amendments that allow the accession by non-UNECE countries, see M. Fitzmaurice, P. Merkouris, 'Scope of the Convention', in A. Tanzi, O. McIntyre, A. Kolliopoulos, A. Rieu-Clarke (eds.), *The UNECE Convention on the Protection, supra*, n. 6, and I. Trombitcaia, S. Koeppel, 'Evolving Participation to the Convention—The 2003 Amendment on Accession of non-UNECE States: from a Regional Towards a Global Instrument', in *ibid*.

# THE AARHUS CONVENTION AND WATER RESOURCES MANAGEMENT

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## ABSTRACT

*The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is the only legally binding international instrument ensuring the public broad rights to have access to information, to participate in decision-making and to have access to justice in environmental matters. The Aarhus Convention's compliance mechanism is also very special in international environment law, as it may be directly triggered by members of the public. While the Convention's provisions apply to environmental matters generally, water resources management is also specifically addressed in several provisions. By providing the public with rights to have access to information regarding water resources management, to participate in decisions, plans, programmes, policies, and legislation on water resources management and to have access to justice to enforce these rights and to challenge contraventions of national environmental law, the Convention stands as an important tool for better water resources management.*

## RÉSUMÉ

*La Convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement est le seul instrument international juridiquement contraignant au monde, qui garantit les droits généraux du public d'accès à l'information, de participation au processus décisionnel et d'accès à la justice en matière d'environnement. Le mécanisme d'examen de conformité de la Convention d'Aarhus est également très unique en droit international de l'environnement, car il peut être déclenché par des membres du public. Bien que les dispositions de la Convention s'appliquent aux questions d'environnement en général — y compris la gestion des ressources en eau - ce secteur est également spécifiquement abordé dans plusieurs dispositions. En fournissant au public les droits d'accès à l'information en matière de gestion des ressources en eau, de participation du public au processus décisionnel, ainsi que le droit de participation du public en ce qui concerne les plans, programmes, politiques et législation relatifs à la gestion des ressources en eau et d'accès à la justice pour faire respecter ces droits et de contester les violations au droit de l'environnement national, la Convention se présente comme un outil important pour une meilleure gestion des ressources en eau.*



**Key words:** Aarhus Convention, public participation, Compliance Committee

**Mots clés :** Convention d'Aarhus, participation du public, Comité d'application

# I. INTRODUCING THE AARHUS CONVENTION

Secretary General of the United Nations Ban Ki-moon, has said of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention') that it:

> …remains the most ambitious venture in the field of environmental democracy under the auspices of the United Nations. The Convention is the only international legally binding instrument giving the public broad and concrete rights of participation in decision-making and access to information and justice regarding the environment...The Aarhus Convention's twin protections for environmental and human rights, and its focus on involving the public, provide a mechanism for holding governments to account in their efforts to address the multi-dimensional challenges facing our world today, including climate change, biodiversity loss, poverty reduction, increasing energy demands, rapid urbanization, and air and water pollution.[1]

The Aarhus Convention was adopted on 25 June 1998 in the city of Aarhus, Denmark, at the Fourth Ministerial Conference of the 'Environment for Europe' process. It entered into force on 30 October 2001 and as of June 2014 it has 47 Parties. To date all of its Parties are from the region covered by the United Nations Economic Commission for Europe (UNECE), though it is open to accession globally,[2] and Parties have expressed particular encouragement to countries from other regions to ratify.

The Convention adopts a rights-based approach. In keeping with this, the objective of the Convention, set out in Article 1, states that

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

> In so stating, it stakes an important claim for the recognition in international law of a fundamental right to a healthy environment. To achieve its objective, the Convention establishes minimum standards for access to information, public participation in decision-making and access to justice in environmental matters. It sets a floor but not a ceiling—it expressly states that Parties may maintain or introduce measures providing for broader access to information, more extensive public participation or wider access to justice than required by the Convention.[3]

Most of the rights under the Convention are bestowed on the public generally—defined as one or more natural or legal persons and their associations, organizations or groups.[4] In addition, certain rights are reserved for the 'public concerned', meaning the public affected or likely to be affected by, or having an interest in,[5] an environmental decision. For the purposes of this definition, non-governmental organizations (NGOs) promoting environmental protection and meeting any requirements under national law are deemed to have an interest.[6]

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1 Excerpt from the foreword by the Secretary General to the second edition of the Aarhus Convention Implementation Guide, ECE/CEP/72/Rev.1 (2014, forthcoming).

2 Countries from outside the UNECE region may become Parties with the approval of the Meeting of the Parties.

3 Art. 3.5, of the Convention.

4 Art. 2.4.

5 For more on what constitutes 'having an interest', see the commentary to the definition of the 'public concerned' in *The Aarhus Convention: An Implementation Guide*, 2nd edition, 2014, ECE/CEP/72/Rev.1, online: http://www.unece.org/env/pp/implementation_guide.html.

6 Art. 2.5.

Consistent with its rights-based approach, the Convention requires each Party to ensure that persons exercising their rights under the Convention are not penalized, persecuted or harassed in any way for their involvement.[7] The public is also entitled to exercise its rights under the Convention without discrimination on the basis of citizenship, nationality or domicile.[8] Parties must provide for appropriate recognition and support of organizations and groups promoting environmental protection and must endeavour to ensure that their officials assist and guide members of the public seeking to exercise their rights.[9] The Convention also requires Parties to promote the application of its principles within the framework of international organizations and processes in matters relating to the environment.[10]

In the main, the obligations under the Convention fall on public authorities, defined widely to include government at all levels (national, regional, local, etc.) as well as natural or legal persons performing public administrative functions under national law or having public responsibilities or functions or providing public services in relation to the environment under the control of a public authority.[11] While the Convention is not primarily focused on the private sector, private companies providing public services or functions in relation to the environment and which are under the control of a public authority in respect of those functions are also within the scope of the definition. This may be particularly relevant in water resources management sector, given that water and sewerage services are often provided by private companies.[12]

## II. THE CONVENTION'S THREE PILLARS

As its full name suggests, the Aarhus Convention is structured around three broad themes or 'pillars': access to information, public participation and access to justice in environmental matters.

The access to information pillar includes both 'passive' and 'active' obligations. With respect to the former, public authorities should respond to requests from the public for requests for access to environmental information in a timely manner, in the form requested, without requiring an interest to be stated or reasons to be given for the request.[13] Regarding the latter, public authorities should actively collect and disseminate certain types of environmental information to the public.[14]

The public participation pillar requires public authorities to ensure early and effective public participation in environmental decision-making, and in particular, in decisions on whether to permit specific activities that are considered to have a significant effect on the environment.[15] Parties should also make appropriate provisions for the public to participate during the preparation of plans, programmes, and to the extent feasible, policies relating to the environment.[16] They should also strive to promote effective public participation during the preparation of executive regulations and other generally applicable legally binding rules.[17]

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7 Art. 3.8.

8 Art. 3.9.

9 Arts. 3.2, 3.4.

10 Art. 3.7.

11 Art. 2.2.

12 A case currently pending before the Aarhus Convention Compliance Committee alleges that the Party concerned failed to comply with the Convention due to a ruling by a domestic tribunal that water and sewerage companies were not public authorities and thus not subject to the requirements of the Convention to provide access to environmental information. The case is currently suspended, awaiting the outcome of proceedings at the domestic level. See Aarhus Compliance Committee, Communication ACCC/C/2010/55 (United Kingdom), online: http://www.unece.org/env/pp/compliance/Compliancecommittee/55TableUK.html

13 Art. 4.

14 Art. 5.

15 Art. 6.

16 Art. 7.

17 Art. 8.

The access to justice pillar underpins the other pillars, first by requiring the public to have access to review procedures with respect to information requests and second by entitling the public concerned to challenge decisions subject to the Convention's public participation requirements.[18] In addition, in recognition of the important role the public plays in environmental enforcement more generally, the third pillar ensures public access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment.[19] The Convention requires that review procedures be fair, timely, equitable, not prohibitively expensive and provide adequate and effective remedies.[20]

## III. THE AARHUS CONVENTION AND WATER RESOURCES MANAGEMENT

While its provisions apply to environmental matters generally, the Aarhus Convention specifically addresses water resources management in several of its provisions. The preamble to the Convention calls on Parties to bear in mind the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes.[21] The definition of environmental information set out in Article 2.3(a) of the Convention includes any information on the state of elements of the environment, and specifically includes water within the scope of that definition. This means that the right to request access to environmental information under Article 4 of the Convention and the requirement for public authorities to collect and disseminate environmental information set out in Article 5 encompass water-related information.

The public also has the right to participate in decisions on whether to permit a range of activities related to water resources management, including waste-water treatment plants,[22] inland waterways and ports,[23] groundwater abstraction or artificial groundwater recharge schemes,[24] works for the transfer of water resources between river basins[25] and dams and other installations designed for the holding back or permanent storage of water.[26] The public also has the right to participate in decisions on whether to permit any other activity where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation,[27] as well as decisions on other proposed activities which the Party determines may have a significant effect on the environment.[28] Article 6 of the Convention sets out a step-by-step model, discussed in more detail below, that public authorities must follow to ensure the public can participate effectively in decisions on whether to permit the abovementioned activities.[29]

More generally, the Convention's provisions also ensure the public the right to participate during the preparation of plans and programmes regarding water resources management,[30] as well as to have an opportunity to comment during the preparation of legislation or regulations on this issue.[31]

Likewise, the Convention's general provisions on access to justice apply to members of the public seeking to challenge a refusal on an information request regarding water-related information, a decision to permit a water resources management activity within the scope of the Convention, or any other act or omission by a public authority or private person that may contravene national law regarding the environment.[32]

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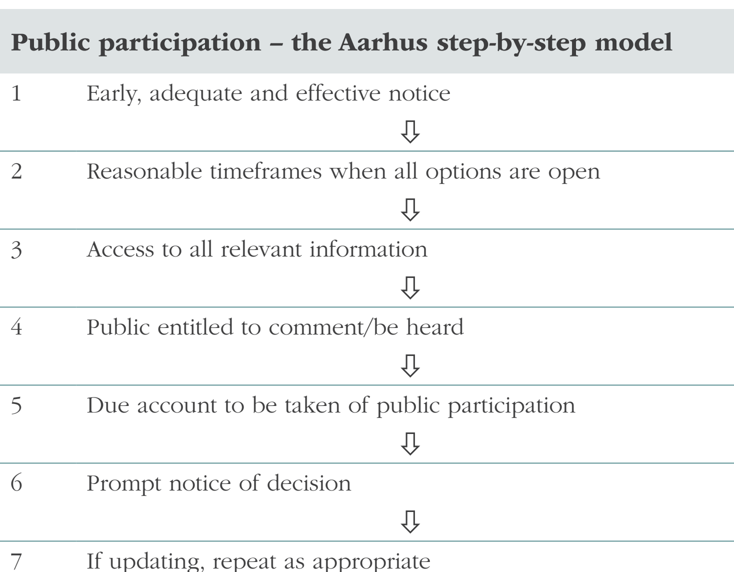
18 Art. 9.1- 9.2.
19 Art. 9.3.
20 Art. 9.4.
21 Preamble, para. 23.
22 Annex I, para. 6.
23 Annex I, para. 9(a).
24 Annex I, para. 10.
25 Annex I, paras. 11(a)-(b).
26 Annex I, para. 13.
27 Annex I, para. 20.
28 Art. 6.1(b).
29 Art. 6.
30 Art. 7.
31 Art. 8.
32 Art. 9.

The provisions of article 6 of the Aarhus Convention provide a model on how to effectively involve the public in decision-making on specific activities. More than a decade of experience since the Convention's entry into force has demonstrated that when properly implemented, the Aarhus model is a powerful tool to ensure effective public participation.

An overarching prerequisite is the requirement for decision-makers to provide for public participation early on, when all options are open and effective public participation can genuinely take place.[33] In keeping with this, the public concerned should be identified at an early stage and given notice of the proposed environmental decision-making procedure. Such notice should include adequate, timely and effective notice of, among other things, the proposed activity, the nature of the possible decisions, the public authority responsible for making the decision and the public participation procedure envisaged (including timeframes and opportunities to participate).[34]

Throughout the public participation procedure, reasonable timeframes should be ensured, allowing sufficient time for informing the public and for the public to prepare and participate effectively in the decision-making.[35] In order for the public to prepare effectively to participate, the competent public authorities should give the public concerned access to all information relevant to the decision-making, free of charge and as soon as it becomes available.[36] The public should be entitled to submit any comments, information, analyses or opinions it considers relevant to the proposed activity, in writing or, as appropriate at a public hearing or enquiry.[37]

Once the public participation has taken place, the competent public authorities must ensure that due account is taken of the outcome of that participation.[38] After the decision on whether or not to permit the proposed activity is taken, the public should be promptly informed of the decision. The text of the decision itself should also be made publicly accessible, along with the reasons and considerations on which it is based.[39] If the conditions of activity are subsequently updated, the above requirements shall be applied mutatis mutandis and where appropriate.[40]



| **Public participation – the Aarhus step-by-step model** | |
|---|---|
| 1 | Early, adequate and effective notice ⇩ |
| 2 | Reasonable timeframes when all options are open ⇩ |
| 3 | Access to all relevant information ⇩ |
| 4 | Public entitled to comment/be heard ⇩ |
| 5 | Due account to be taken of public participation ⇩ |
| 6 | Prompt notice of decision ⇩ |
| 7 | If updating, repeat as appropriate |

33 Art. 6.4.
34 Art. 6.2.
35 Art. 6.3.
36 Art. 6.6.
37 Art. 6.7.
38 Art. 6.8.
39 Art. 6.9.
40 Art. 6.10.

# IV. THE AARHUS CONVENTION COMPLIANCE COMMITTEE

The Aarhus Convention's compliance mechanism is very special in international environment law, as it may be directly triggered by any member of the public who considers that a Party has failed to comply with its obligations under the Convention. It is also special in that members of the Compliance Committee serve independently, in their personal capacity, rather than as representatives of Parties to the Convention. Moreover, NGOs may nominate persons to be considered for election to the Compliance Committee.

Article 15 of the Aarhus Convention requires the Meeting of the Parties to establish 'optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention'. In line with this obligation, at its first session (Lucca, Italy, October 2002), the Meeting of the Parties adopted decision I/7 on review of compliance establishing the Compliance Committee. The Compliance Committee is made up of nine members with recognized competence in the fields to which the Convention relates. Members are elected by the Meeting of the Parties, based on nominations by the Parties, Signatories and NGOs promoting environmental protection. Members serve in their personal capacity.

Reviews by the Compliance Committee can be triggered in four ways:

a. A Party may make a submission about compliance by another Party;

b. A Party may make a submission concerning its own compliance;

c. The secretariat may make a referral to the Committee; and

d. Members of the public may make communications concerning a Party's compliance with the Convention.

In addition, the Committee may examine compliance issues on its own initiative and make recommendations; prepare reports on compliance with or implementation of the provisions of the Convention at the request of the Meeting of the Parties; and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under the Convention.

To date, all cases have been brought to the Compliance Committee by means of communications from members of the public. One of these cases was also the subject of a submission by one Party against another: the communication and the submission in that case were heard together.[41]

According to decision I/7, a communication may be first brought to the Committee by members of the public 12 months after the entry into force of the Convention with respect to the Party concerned. Within that period, the Party is entitled to opt out of receiving such communications for a period of not more than four years. Thus far, no Party has made use of the possibility to opt out of accepting communications.

The Compliance Committee makes findings and recommendations which are forwarded to the Meeting of the Parties for endorsement. To date, all findings of non-compliance by the Compliance Committee have been endorsed by the Meeting of the Parties. Although the Compliance Committee's findings and recommendations are not in themselves legally binding, they provide important information for Parties on what is required by the Convention and how it should be implemented, not only for the Party concerned in the specific case.

The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures:

41 Communicant ACCC/C/2004/3 concerning Ukraine and submission ACCC/S/2004/1 by Romania concerning Ukraine.

a. Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;

b. Make recommendations to the Party concerned;

c. Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;

d. In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

e. Issue declarations of non-compliance;

f. Issue cautions;

g. Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention; and

h. Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may, in consultation with the Parties concerned, take the measures listed in subparagraph (a) above. Subject to agreement with the Party concerned, the Compliance Committee may take the measures listed in subparagraphs (b), (c) and (d) above.

Since it became eligible to receive communications in October 2003,[42] to June 2014 the Committee has received 98 communications from members of the public and one submission by a Party concerning the compliance of another Party. The Committee has adopted findings in 48 cases to date.[43] Of these, non-compliance was found in 30 cases and in 18 cases, no non-compliance was found. Twenty-five further cases were found non-admissible. In two further cases, due to the Party concerned already having been found in non-compliance with the issues raised in a previous case, the Committee applied its summary proceedings procedure, and five cases were closed due to having been already resolved at the domestic level. The remaining 19 cases are currently pending.

## V. THE COMPLIANCE COMMITTEE AND WATER RESOURCES MANAGEMENT

Several cases brought before the Compliance Committee to date have concerned water resources management, including the only case to have been the subject of a submission brought by one Party to the Convention against another. Submission ACCC/S/2004/1 brought by Romania and communication ACCC/C/2004/3 brought by a Ukrainian NGO each alleged that Ukraine had failed to provide for access to information and public participation as required under the Convention in relation to decision-making on the proposed construction of the Bystroe deep-water navigation canal in a UNESCO world heritage wetlands area. The Committee considered the communication and the submission together. In its joint findings adopted on 18 February 2005,[44] the Committee found that Ukraine had failed to comply with provisions of the Convention on access to information, public participation in decision-making and the requirement for a clear, transparent and consistent framework to implement the Convention. The Committee's findings were endorsed through decision II/5c and confirmed

42 In accordance with paragraph 18 of decision I/7, the Committee became eligible to receive communications 12 months after the adoption of decision I/7.

43 This includes partial findings on communication ACCC/C/2008/32 (European Union), with the second part of the case still pending.

44 ECE/MP.PP/C.1/2005/2/Add.3.

through decisions III/6f and IV/9h. Due to Ukraine's failure to take measures to fully implement those decisions, it is currently the subject of a caution issued by the Meeting of the Parties. Ukraine's progress will be reviewed by the Meeting of the Parties at its upcoming fifth session (Maastricht, 29 June – 2 July 2014).

Communication ACCC/C/2009/37 alleged that Belarus had failed to provide for access to information and public participation in the decision-making with respect to a proposed hydro-power plant project on the Neman River. In its findings adopted on 24 September 2010, the Committee found that the Party concerned had failed to comply with provisions of the Convention on access to information and public participation in decision-making.[45] The Committee's findings were endorsed through decision IV/9b and Belarus' progress to implement that decision will be reviewed by the Meeting of the Parties at its upcoming fifth session.

More recently, communication ACCC/C/2010/55 alleged that the United Kingdom failed to comply with the Convention due to a ruling of its Upper Tribunal which held that water and sewerage companies were not public authorities and thus not subject to the requirements of the Convention to provide access to environmental information held by them. The case is currently suspended, awaiting the outcome of proceedings at the domestic level.

The Compliance Committee is viewed by Parties to the Convention as a valuable tool to further the implementation of the Convention. The Riga Declaration, adopted by the Meeting of the Parties at its third session (Riga, 11-13 June 2008) states:

The Convention's compliance and reporting mechanisms have provided essential information on the extent to which the objective and principles of the Convention have become a reality on the ground and on the problems that remain. We note that the public involvement in those mechanisms has enriched them, increased the sense of broad ownership of the Convention and helped to expose problems with regard to implementation and compliance which would otherwise not necessarily have come to light.[46]

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45 ECE/MP.PP/2011/11/Add.2.

46 ECE/MP.PP/2008/2/Add.1, paragraph 21. Available at http://www.unece.org/fileadmin/DAM/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_1_e_Riga.pdf.

# VI. CONCLUSION

The subject of the Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement and an instrument on human rights but also a driver for greater government accountability, transparency and responsiveness. As noted by the Secretary General of the United Nations in the quotation at the start of this chapter, the Convention provides an effective mechanism for ensuring public input in defining and implementing the road map to a more sustainable and equitable use of natural resources. By providing the public with rights to have access to information regarding water resources management, to participate in decisions, plans, programmes, policies, and legislation on water resources management and to have access to justice to enforce these rights and to challenge contraventions of national environmental law, the Convention stands as an important tool for better water resources management.

## FURTHER READING

Findings of the Aarhus Convention Compliance Committee, 2005 to date, available at http://www.unece.org/env/pp/pubcom.html

Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, 2014, ECE/MP.PP/2014/8, online: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppppdm/ppdm-recs.html

*The Aarhus Convention: An Implementation Guide*, 2nd edition, 2014, ECE/CEP/72/Rev.1, online: http://www.unece.org/env/pp/implementation_guide.html

# PUBLIC PARTICIPATION AND WATER RESOURCES MANAGEMENT IN THE DANUBE DELTA: THE BYSTROE CANAL PROJECT AND THE ESPOO CONVENTION

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## ABSTRACT

*The contribution tries to briefly cover public participation issues concerning the Bystroe Canal Project built by Ukraine in the Danube Delta. Following an historical and geographical introduction into the specificities of the Danube Delta, the contribution concentrates on the submission brought by Romania against Ukraine before the Implementation Committee of the Espoo Convention. A detailed presentation of the Committee proceedings pertaining to this submission leads into the practicalities of the transboundary public participation in the Danube Delta.*

## RÉSUMÉ

*La présente contribution tente de couvrir de manière synthètique les différentes questions soulevées lors du différend relatif au projet de construction du Canal de Bystroe par l'Ukraine dans le Delta du Danube. Partant d'une introduction sur l'historique et le contexte géographique de l'affaire, la contribution se recentre sur la plainte déposée par la Roumanie contre l'Ukraine devant le Comité d'application de la Convention d'Espoo. Une présentation détaillée de la procédure suivie devant le Comité nous conduira à l'analyse des aspects pratiques de la participation du public dans le Delta du Danube.*

**Keywords:** Bystroe, Danube, navigation

**Mots clés:** Bystroe, Danube, navigation

# I. Introduction

Today, when speaking about transport, we rarely think of river transport. Water resources, (i.e. freshwater) management seems to be concerned with agriculture, energy, or the environment but very rarely with transport. To be fair, one should acknowledge that the literature in the field does not forget about navigation as one possible use of international watercourses. Indeed, in her already seminal contribution on international law and freshwater resources, Laurence Boisson de Chazournes places navigation prominently on the list of such uses.[1] But even there one has the feeling that the use of 'navigation' concerns solely its historical importance or its future potential.[2]

This contribution tries to reflect on a small aspect (public participation) of a different context, one where navigation as a water management issue remains an important matter still capable of giving rise to international disputes. That context is the Danube River.

When reflecting on Danube and international law, international lawyers recall the Gabcíkovo-Nagymaros Project dispute between Hungary and Slovakia,[3] but the case exposed here concerns a situation further downstream, close to the point where the Danube flows into the Black Sea.

# II. The Bystroe Canal Project

The Bystroe Canal Project case cannot be understood outside a brief geographical and historical background. It is only through the lenses of this background that one can begin to grasp the reasons why Ukraine was so determined not to apply the provisions of the Convention on Environmental Impact Assessment in a Transboundary Context. Economic and even 'strategic' reasons,[4] drove Ukrainian decision-makers to continually persist in the project, even in the face of negative international consequences.

## A. HISTORICAL AND GEOGRAPHICAL BACKGROUND

Before reaching the Black Sea, the Danube splits into several branches which form the Danube Delta: Kilia (Chilia), in the north, Sulina, in the middle, and Saint George (Sfantul Gheorghe), in the south. Of the three branches, Kilia carries the largest amount of water, over 45% of the Danube's total flow. While the three branches form together the largest European Delta, Kilia creates an additional, secondary delta at its mouth.

Following the Crimean War, the 1856 Treaty of Paris created an international organization, the second to be created in the world: the European Commission of the Danube River. The Commission's main task was to ensure that seagoing vessels could navigate the Danube Delta wetlands, and reach the Danubian upstream ports. With the assistance of the most famous civil engineer of the time, Charles Hartley, the European Commission undertook, during the late XIX and early XX centuries, massive works to build a navigable canal through the Delta, using the Sulina branch of the river.

After the Second World War, the Soviet Union began developing the area north of the Danube Delta. The Soviet authorities implemented an impressive plan that transformed two previously minor Lower Danube ports on the

1 L. Boisson de Chazournes, *Fresh Water in International Law*, Oxford University Press, Oxford, 2013, p. vii.

2 '[n]avigation activities constitute one of the oldest forms of utilizing international watercourses. In this respect, their regulation has contributed significantly to the evolution of the law of international watercourses…', or about the future: '… navigation on international rives … remains a vital strategic interest for many countries, especially for landlocked countries.' *Ibid.*, pp. 13, 54.

3 *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997.

4 Ukraine argued that the canal would contribute to the development of a poor region, promote shipping on the Danube River, and enhance Ukraine's strategic position in the region. See Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats, *Report of the On-the-spot Appraisal*, T-PVS/Files (2004), p. 3.

Soviet Union (today Ukrainian) border with Romania, Reni and Ismail, into two important specialized ports.[5] During the same period, in Romania, the port of Galati developed into a port for iron ore and coal, used to fuel one of the largest steel mills in Europe.

The competitive advantage of these ports was that they could accommodate seagoing ships that used the Sulina canal to enter and exit the Danube River. Since 1952, the canal has been administered entirely by the Romanian Ministry of Transport, which applies a levy on all ships traveling the canal in order to cover maintenance expenses.

For both economic and 'strategic' reasons[6] Soviet authorities decided to dredge several canals, including the Bystroe canal, in the secondary delta of the Kilia branch to allow sea-going ships to reach the ports of Ismail and Reni directly without passing through the Romanian-controlled Sulina canal. Because of the Kilia's large flow, these canals silted constantly, and Kilia itself continued to be difficult to navigate. Moreover, for safety reasons, many of the heavily laden ships coming from or going to the two Soviet (Ukrainian) ports continued to use the Sulina canal.[7] After 1990, the investment required to maintain the navigability of the Kilia branch dried up and the branch became more and more difficult to navigate by seagoing ships. Moreover, traffic to all Lower Danube ports decreased dramatically after 1990.

Traffic on the Sulina canal decreased significantly and rapidly, and this decline was further accelerated when a Ukrainian ship sunk, almost blocking the canal. The Romanian authorities decided to raise the levies for transiting the Sulina canal, and because Ukrainian ships were almost the only ones to use it at the time, Ukrainian authorities began reevaluating the need for a Ukrainian-controlled canal using the Kilia branch[8] and one of the smaller branches in its secondary delta.

## B. BUILDING THE BYSTROE CANAL

In 1998, the Ukrainian Government approved a complex program aimed at improving the decaying infrastructure built by the former Soviet Union. Among the projects listed as a priority was the 'renovation of the Danube-Black Sea Deep Navigation Route'.[9] The project involved dredging the Kilia and the Bystroe canal, building a dam to prevent silting at the mouth of Bystroe, as well as other infrastructure works needed to keep Kilia and Bystroe accessible for seagoing ships. During the same year, however, the Ukrainian government also decided to declare the secondary delta of the Kilia branch a Biosphere Reserve. A year later, the Romanian-Ukrainian-Danube Delta Transboundary Biosphere Reserve was established under the United Nations Education, Scientific, and Cultural Organization (UNESCO) Man and Biosphere Programme.

In 2002, the Ukrainian authorities initiated the procedure for authorizing the project[10] and selected a developer who submitted an environmental impact assessment report showing, inter alia, that the project did not have any significant adverse transboundary impacts on the Romanian part of the Danube Delta.[11] The initial report also seemed to suggest that the canal, which was to cut the Biosphere Reserve in half, would actually have beneficial

5 Reni was designed mainly as an oil port, where oil was transferred from ships coming from the Soviet Union, onto barges bound upstream. Ismail was designed to be an all-cargo port, with a special sector, with rubber coated berths, used for ships transporting nuclear fuel from and to the Bulgarian Nuclear Power Plant at Kozloduy.

6 Romania had started building another canal further south from the Danube Delta, connecting the Danube River with the Port of Constantza.

7 All (including Soviet) ship owners had to pay two taxes for using the Sulina canal. One, calculated based on the load of the ship, and one for the pilotage services provided by the Romanian-controlled Lower Danube River Administration. The system remains the same to this day.

8 For almost all its course, the Kilia forms the border between Romania and Ukraine.

9 B. Aurescu, 'The Ukrainian "Bystroe Canal" Project in the Danube Delta between Political Interest and International Environmental Law, The Report of the First Espoo Inquiry Commission', *Revue Hellénique de Droit International*, 2006, vol. 59, p. 401.

10 Meeting of the Parties to the Conv. on Environmental Impact Assessment in a Transboundary Context, Report of the fourth Meeting, ECE/MP.EIA/10, p. 87, para.26.

11 To this day, the subsequent Ukrainian environmental impact assessment reports maintain the same conclusion, despite the contrary determination of an independent international organ, the inquiry commission created under the Espoo Convention.

effects on the environment. Based on this report, Ukraine approved the project in April 2004[12] and one month later inaugurated the works.[13] In the meantime, Ukraine informed Romania about the project. Although Ukraine later claimed the contrary, this information was not provided under the Espoo Convention on Environmental Impact Assessment in a Transboundary Context,[14] but only under the bilateral border regime and border water management treaty between the two countries.[15]

Works started in May 2004, were discontinued later that year, only to be resumed the year after, suspended in June 2005, and resumed, following new environmental authorization, in November 2006.[16] The official opening of the Canal was celebrated on May 2, 2007.[17]

The Ukrainian authorities divided the Project into two phases. Phase I involved extensive dredging of Kilia and Bystroe, and building a sea dam at the mouth of the Bystroe Canal. Phase II involved additional dredging,[18] an extension of the sea dam, and some other less substantial infrastructure works on the Ukrainian banks of the Kilia branch.

Based on this division, Ukraine conducted two environmental assessment procedures, one for Phase I and another for the whole project. But while Ukraine considered that the procedures had been conducted in accordance with the Espoo Convention, Romania disagreed.

## II. The Espoo Convention Implementation Committee

In May 2004, the Government of Romania made a submission to the Committee concerning the Ukrainian Project.[19] Several months later it requested the establishment of an inquiry commission under Article 3.7 of the Convention with respect to the same project.[20] The inquiry commission had a difficult start,[21] but in July 2006 its three members[22] unanimously found that the project was likely to have a significant adverse transboundary environmental impact on the territory of Romania.[23] The report of the inquiry commission was followed by a rapid succession of requests from Romania to Ukraine, asking for involvement in the environmental impact assessment procedure. Ukraine, however, argued that the report of the inquiry commission did not prove that there was a transboundary impact.[24]

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12 *Supra*, n. 10, para. 26, p. 87. Romania had identified 11 November 2003 as the date of the final decision (the approval of the project by the Ukrainian Cabinet of Ministers), and the Committee concluded that 'it is difficult to identify which of a number of consecutive decision-making procedures should be considered as the final decision to authorize a proposed activity'. See Romania's written statement for the twelfth meeting of the Implementation Committee (2007) (on file with the author); Findings and recommendations further to a submission by Romania regarding Ukraine (EIA/IC/S/1), Report by the Implementation Committee, para. 31, ECE/MP.EIA/2008/6, pp. 6-7.

13 B. Aurescu, *supra*, n. 9, p. 400.

14 It did not follow the requirements of the Convention.

15 Agreement between the Government of Romania and the Government of Ukraine on cooperation in the field of border waters management, signed in Galati, on 30 September 1997 (available in Romanian and Ukrainian only), M.Of. (Official Journal of Romania) 13/1999.

16 See the references to 'Ukraine's Report Materials' in Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, *supra*, n. 10, para. 30.

17 *Ibid*., para. 32.

18 The dredging aimed at increasing the depth of the river from 7 meters to 8.2 meters. See M. Koyano, 'The Significance of the Convention on Environmental Impact Assessment in Transboundary Context (Espoo Convention), in International Environmental Law: Examining the Implications of the Danube Delta Case', *Impact Assessment and Project Appraisal*, vol. 26, 2008, p. 303.

19 Meeting of the Parties to the Conv. on Environmental Impact Assessment in a Transboundary Context, *supra*, n. 10, para. 1, p. 83.

20 *Ibid*., para. 2, p. 83. Because of the second request, the Committee decided to postpone the consideration of the submission until the inquiry commission had reached a decision.

21 M. Koyano, *supra*, n. 18, p. 304.

22 A Ukrainian national, appointed by the Government of Ukraine, a Romanian national appointed by the Government of Romania, and a Dutch national selected by the other two members to chair the commission.

23 Meeting of the Parties to the Conv. on Environmental Impact Assessment in a Transboundary Context, *supra*, n. 10, para. 4, p. 83.

24 *Ibid*., para. 5, p. 83.

As a consequence, Romania filed a second submission with the Implementation Committee in January 2007.[25] Only after this second submission, did Ukraine really begin to engage with Romania, allegedly to implement the provisions of the Convention,[26] while nevertheless continuing with the implementation of the Bystroe Canal Project.

After analyzing Ukraine's actions, the Committee concluded that Ukraine, besides the specific issue with the Bystroe Canal Project, had an even more important problem concerning the general domestic implementation of the Convention. The confusion regarding critical issues such as the final decision and the responsible authority led the Committee to find Ukraine in non-compliance with the general provisions of art. 2 of the Espoo Convention.[27] In the end, the Committee determined that Ukraine had breached practically all the provisions of the Convention.

Having concluded that Ukraine was in non-compliance with the provisions of the Convention, the Committee and the Meeting of the Parties had the difficult task of drawing up recommendations to steer what proved to be a very long implementation process. These recommendations included the threat of issuing a caution, in order to convince the Ukrainian authorities that they had to make real efforts to implement them.[28]

Following some progress on the part of Ukraine, the Committee decided not to activate the caution in 2008. At the same time, the Committee specifically requested that Ukraine comply with the provisions of the Convention in relation to Phase I of the Project, and to prepare the environmental impact assessment satisfactorily.[29]

Ukraine however, continued works on Phase I, as well as on Phase II.[30] The members of the Committee were particularly concerned with the fact that in its environmental impact assessment documentation, the Government of Ukraine continued to underline that there was no significant transboundary adverse environmental impact on the territory of Romania.[31]

The September 2009 meeting of the Committee changed the situation completely for Ukraine. The clarifications provided by the Ukrainian representatives, both in writing and in an oral presentation by a delegation invited to the meeting, seemed to indicate that Ukraine had indeed continued works for both Phases in clear non-compliance with the provisions of the Convention and completely ignoring the recommendations of the Committee and the Meeting of the Parties.[32] As a consequence, the Committee found that Ukraine continued to be in non-compliance, and that the caution should have been activated (effective).[33]

At the fifth session of the Meeting of the Parties, a large Ukrainian delegation headed by the Minister of Environment and his deputy,[34] negotiated intensely on the basis of an alternative draft, to change the draft decision submitted by the Implementation Committee.[35] The decision, as approved by the Meeting of the Parties, activated the caution retroactively but also acknowledged that Ukraine had fulfilled some of the recommendations issued during the previous Meeting of the Parties, including in relation to the transboundary environmental impact procedure conducted with Romania.[36] The Meeting of the Parties specifically referred to 'the holding of a public consultation meeting in Tulcea (Romania) on 9 June 2009'.

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25 *Ibid.*, para. 6, p. 83.
26 *Ibid.*, paras. 9-11 at 84.
27 M. Koyano, *supra*, n. 18, p. 305.
28 *Ibid.*, p. 306.
29 *Ibid.*
30 Implementation Committee, Report on the sixteenth session, paras. 11-13, ECE/MP.EIA/IC/2009/2 (2009).
31 *Ibid.*, para. 20. This was in contradiction with the findings of the inquiry commission.
32 Implementation Committee, *supra*, n. 30 paras. 12-13.
33 *Ibid.*, paras. 15-16. Procedurally, the Committee decided to close the Romanian submission, and wait for instructions from the Meeting of the Parties. *Ibid.*, para. 18.
34 See List of participants, online: http://www.unece.org/fileadmin/DAM/env/eia/documents/mop5/List_of_participants_MOP5_scanned.pdf
35 'The drafting group met repeatedly until the Meeting was able to agree on a revised version of the draft decision...'. Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, Report of the fifth Meeting, para. 14, ECE/MP.EIA/15 (2012).
36 *Ibid.*, paras. 17-18, 20.

# III. Public participation

This section provides a brief overview of how public participation requirements of the Espoo Convention were implemented in the Bystroe Canal Project.[37]

## A. PUBLIC PARTICIPATION UNDER THE ESPOO CONVENTION

When reading the Convention, the first provision that seems directly concerned with the participation of the public in the transboundary environmental impact assessment procedure is the last paragraph of Article 3. It is important to note here that the provision clearly establishes a common responsibility of the Party of origin and the affected Party for ensuring proper public participation in the environmental impact assessment procedure.

It is, however, just one of the provisions in the Convention to deal with public participation.[38] Article 1(x) defines the public as 'one or more natural or legal persons', Article 2.2 requires Parties to establish environmental impact assessment procedures that allow for public participation, and Article 2.6 requires the Party of origin to provide to the public in areas likely to be affected an opportunity to participate in relevant environmental assessment procedures and, very importantly, to ensure that the opportunity for participation provided to the public of the affected Party is equivalent to that provided to the public in the Party of origin. Moreover, the notification has to be made, in accordance with Article 3(1), as early as possible and no later than when the Party of origin informs its own public about a proposed activity. Parties are under a joint obligation to distribute the environmental impact assessment documents to the public of the affected Party in the areas likely to be affected and to receive the comments the public makes concerning these documents.[39] Finally, according to Article 6(1) these comments have to be duly taken into account in the final decision on the proposed activity.

The Implementation Committee has emphasized the importance of public participation within the transboundary environmental impact assessment procedure[40] and tried to clarify the content of the provisions mentioned above. For example, in relation to the joint responsibility underlined above, the Committee remarked that: '[i]f the affected Party refused to carry out its duties, the Party of origin could not be held responsible for organized public participation in the affected Party…'[41] In such a case, the Committee also remarked that the Party of origin should provide for possible participation by the public of the affected Party in the procedure of the Party of origin. The Committee went even further by underlining the duty of cooperation in the provision of effective public participation.[42]

As to the practical details of fulfilling the obligations Parties have in respect of public participation, the Committee, while insisting on the importance of bilateral agreements,[43] has addressed a number of issues. In relation to the translation of documents, for example, the Committee referred to the 'equivalent opportunity' obligation and held that this implied 'access to at least relevant parts of the documentation in the appropriate language of the affected Party'.[44] Such a translation was to be provided, in the absence of an agreement between the parties to the contrary, by the Party of origin, 'in line with the polluter pays principle'.[45] The Committee has also specifically referred to public hearings as 'an essential step in the effective public participation'[46] referring to the earlier guidance provided by the Meeting of the Parties and thereby confirming what had been a general practice of the parties to the Convention.

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37 It is useful to note here that in the submission before the Committee, the public participation issue was just one of many to be analyzed, along with notification, consultations, final decision and thus, for this reason, the references provided in the Committee's reports are not always very detailed.

38 Economic Commission for Europe, Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context, ECE/MP.EIA/7, 2006, p. 9.

39 See Article 4.2 of the Convention.

40 ECE/MP.EIA/WG.1/2006/4, para. 16.

41 ECE/MP.EIA/IC/2010/2, para. 37.

42 ECE/MP.EIA/IC/2010/4, para. 19(c).

43 *Ibid.*, para. 19(f).

44 *Ibid.*, para. 20.

45 ECE/MP.EIA/IC/2010/2, para. 35.

46 ECE/MP.EIA/IC/2013/2, para. 44.

## B. PUBLIC PARTICIPATION IN THE BYSTROE CANAL PROJECT

In its oral and written presentation before the Committee, Ukraine argued that it had fulfilled all of the public participation requirements of the Espoo Convention with respect to the Bystroe Canal Project. It showed that it had organized three 'public consultation meetings' with the inhabitants of the areas likely to be affected (in Ukraine). One of these meetings had been organized for Phase 1 of the Project on 3 March 2004, in Vylkove, and two for Phase II ('Full-Scale Project Development') on 17 December 2004 and 20 December 2006, in Ismail. Additionally, Ukraine organized public consultations regarding the whole project in Odessa, on 7 and 8 June 2005. Finally, on 18 June 2007, Ukraine organized public consultations in Vylkove concerning the environmental impact assessment of Phase II of the Project.[47]

Following repeated requests from Romania and the Implementation Committee, two public hearings were also organized in Romania. The first took place in Tulcea on 18 July 2007 and the second on 9 June 2009 in the same town.[48]

## C. WHAT CONSTITUTES PUBLIC CONSULTATIONS?

Before the Committee, Ukraine referred to several 'international events and forums' that it considered to be proof of an adequate public participation process. All of them had taken place in Odessa between 2003 and 2005, and, according to Ukraine, had been 'used to provide [a] forum for reviewing, among other matters, the information and data collected as part of the monitoring program'. Of course, '[n]o violations and/or non-compliances [had] been identified or recorded with respect to both national and international environmental laws.'[49]

In the list provided by Ukraine, these events were joined by the 21 September 2004 informal consultations with the representatives of several international environmental bodies as well as by four meetings of the Ad Hoc Romanian-Ukrainian Working Group on issues associated with navigation activities on the Kilia and Starostambulske Branches of the Danube which had taken place from 2004 to 2007.[50]

Romania disagreed that these events had constituted proper consultations, and the Committee agreed with the latter position.[51] What Romania underlined was that while some of these events had indeed provided the public with an opportunity to listen to information and to comment on the Bystroe Canal Project, they did not serve the purpose of public participation under the Convention. With respect to the four meetings of the Ad Hoc Working Group, Romania also disagreed that they had constituted 'public consultations' as such and argued that they had been 'dedicated mainly to questions regarding navigation conditions and pilotage on the said Danube arms and attended by governmental representatives in a bilateral format'.[52]

## D. PROPER PUBLIC CONSULTATIONS

Romania also presented additional deficiencies of the public consultations organized by Ukraine. 'As far as the 18 June 2007 meeting is concerned', Romania argued,

> [we] were informed on Ukraine's intentions to organize public consultation on 5 June 2007 and the exact date was finally communicated to the Romanian side on 12 June 2007—only 6 days in advance. The meeting took place on a vessel of the Ukrainian Ministry of Transport navigating on the Kilia and the Bystroe branch, which was a different venue than that originally indicated; naturally, participation was restricted only to those announced in due time (only five Romanian participants...were informed on this change sur place). The [other] participants were almost exclusively representatives of the Ukrainian authorities. Consequently, the meeting can be hardly referred to as 'public consultation', and the Romanian

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47 All the above information is taken from a document presented by the Ukrainian delegation during the twelfth meeting of the Implementation Committee (2007), called Public Consultation Process (on file with the author).

48 Online: http://www.mae.ro/node/1521

49 See *supra,* n. 46.

50 The Working Group also dealt with border and environmental matters.

51 ECE/MP.EIA/2008/6, para. 65, p. 13.

52 Romania's written statement for the twelfth meeting of the Implementation Committee (2007), on file with the author.

public can hardly be considered as having been give the same opportunity to participate as the Ukrainian representatives.[53]

This was far from the only complaint from Romania. For example, during the public hearings organized in Romania in 2007 and 2009, the questions which the Ukrainian representatives had not been able to answer properly were collected and transmitted in writing to Ukraine. The answers to the 2007 set of questions came only in 2009, long after the initial decision had been adopted. The answers to the 2009 set of questions arrived sooner, in 2010, but only 4 days before the transmittal of the final decision, which had again been taken before the written questions were answered.[54]

These realities reflected the situation under the Ukrainian legislation, which did not contain specific provisions for the participation of the public of affected Parties.[55]

## V. Instead of conclusions

Despite these deficiencies, in the end both Parties agreed that proper public consultations had taken place; the remaining issues to be settled were the consultations under article 5 of the Convention, and the final decision, which Romania argued did not fulfill the requirements of the Convention. Did public consultations have an effect? In relation to the Romanian public, especially the Romanian environmental NGOs, they certainly did. Being able to ask questions directly to the Ukrainian representatives seemed like a small victory after they had protested in front of the Ukrainian embassy in Bucharest against the Bystroe Canal Project. But it is debatable whether it had a meaningful effect on the final decision. In the end, the Ukrainian authorities stuck with their initial evaluation, that the Project did not have a significant adverse transboundary effect, and the final decision reflected this evaluation.

### Further reading


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Koyano, M., 'The Significance of the Convention on Environmental Impact Assessment in Transboundary Context (Espoo Convention) in International Environmental Law: Examining the Implications of the Danube Delta Case', *Impact Assessment and Project Appraisal,* vol. 26, 2008, pp. 299-314.


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53 *Ibid*.

54 Online: http://www.mae.ro/node/1521

55 Independent review of Ukraine's legal, administrative and other measures to implement the provisions of the Convention, para. 58, ECE/MP.EIA/IC/2009/5.

# JUSTICE BY ANY OTHER NAME? THE GRIEVANCE MECHANISMS OF MULTILATERAL DEVELOPMENT BANKS

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## ABSTRACT

*The activities of the multilateral development banks (MDBs) can have adverse impacts on water resources in an array of situations. It is obvious as regard their support to development projects related to agricultural or hydroelectric development, or to drinking water and sanitation infrastructure projects, but virtually all sectors of development can also result in water pollution or a reduction in access to water: mining, transportation, forestry, energy (other than hydroelectricity), housing… It is thus crucially important to ensure that people have the means to make themselves heard when harm to water resources occurs as collateral damage. In this contribution, access to justice is seen as a component of public participation. It allows public participation during the full lifecycle of norms, not only at the stage of decision- and law-making but taking account of their implementation and compliance-monitoring, possibly resulting in modifying the content of norms and/or procedures at issue.*

## RÉSUMÉ

*Les activités des banques multilatérales de développement sont susceptibles d'avoir des impacts négatifs sur les ressources en eau dans de très nombreuses situations. Il est ainsi crucial de s'assurer que le public a la possibilité de se faire entendre quand des atteintes aux ressources en eau se produisent. Cette contribution envisage l'accès à la justice comme composante de la participation du public. Il permet la participation du public au cours du cycle de vie entier des normes, pas seulement au stade de la prise de décision et de l'adoption de règles mais en tenant compte de leur mise en œuvre et du contrôle du respect des normes, ce qui peut déboucher sur une révision du contenu des normes et/ou des procédures concernées.*

**Keywords :** Bank, complaint, justice, accountability, international organisations, development

**Mots clés:** Banque, plainte, justice, accountability, organisations internationales, développement

Since the early 90's all MDBs—save for the Islamic Development Bank—have created accountability mechanisms that allow affected people to put forward their grievances. The role of each of these mechanisms is to assess, upon request of people affected by the activities of an MDB, the MDB's compliance with its own internal rules, policies and procedures related, for instance, to the disclosure of information, environmental and social impact assessment, or indigenous peoples' rights. The purpose of this chapter is to outline what role these grievance mechanisms can play in a normative (in the legal meaning of the term) protection of water resources.[1]

The first part sketches out the peculiarities of the MDBs' grievance mechanisms in terms of their eligibility criteria for complaints, procedure, law applied and outcome. The second part outlines some questions regarding the influence that international law related to public participation may have on these grievance mechanisms.

# I. AN OVERVIEW OF MDB GRIEVANCE MECHANISMS' FUNCTIONING TERMS

The MDBs that guarantee accountability through an international accountability mechanism are the World Bank Group, the African Development Bank Group (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB) and the Inter-American Development Bank (IDB).[2] It is worth noting that in their present form, these mechanisms all are independent bodies.

## A. EXISTING MDB GRIEVANCE MECHANISMS

The World Bank has created two grievance mechanisms. The first, and also the first of its kind, is the Inspection Panel, which addresses grievances arising from official development assistance provided by the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). It was created in 1993 and subsequently modified in 1996 and 1999. This independent body examines requests emanating from people who allege they are or will be harmed by a project financed by the IBRD or the IDA, where that present or potential harm results from a breach by the bank of the its operational policies and procedures.[3] The second grievance mechanism is the Compliance-Advisor/Ombudsman (CAO) created in 1999. It addresses grievances arising from the activities of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), which both promote private sector investment in development. In its 'Ombudsman' role, the CAO examines the complaints of currently or potentially project-affected people, regardless of whether the alleged harm stems from a breach of their internal rules by these agencies or not. In sensitive cases, the CAO may shift from its 'Ombudsman' mission to its 'Compliance' mission, and in addition may issue an audit of IFC/MIGA compliance with its procedures and policies.[4] The new (March 2013) version

1 How the rules applied by the MDBs address public information, consultation and participation is outside the scope of this contribution, which focuses on their grievance mechanism as a means of public participation. On the public participation dimensions of MDB safeguards and policies, see especially the very detailed analysis in D. D. Bradlow, M. S. Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards', *Erasmus Law Review,* vol. 4, 2011, pp. 89-123.

2 For comparative studies of MDB accountability mechanisms, see R. E. Bissell, S. Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges', *Manchester Journal of International Economic Law*, vol. 6, 2009, pp. 2-55; D. D. Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions', *Georgetown Journal of International Law,* vol. 36, 2005, pp. 403-493.

3 Operating Procedures of the Inspection Panel, 7 Apr. 2014. This version replaced the 19 Aug. 1994 Operating Procedure, online: http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf. See also Executive Directors of IBRD and IDA, 'The World Bank Inspection Panel', Res. IBRD 93-10 and IDA 93-6, 22 Sep. 1993; Review of the Resolution, 17 Oct. 1996; Clarification of the Second Review, 20 April 1999, online: http://go.worldbank.org/NN6UOKNBZ0.

4 CAO Operational Guidelines, 8 Jun. 2007, online: http://www.cao-ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf.

of the CAO Operating Guidelines *inter alia* clarify the vocabulary, replacing the 'ombudsman' function with a 'dispute resolution' function and relabeling 'compliance audit' as 'compliance investigation'.[5]

Activities of the ADB can be examined by an Accountability Mechanism that was created in 2003 to replace the Inspection Committee created in 1995-1996. The Accountability Mechanism was revised in May 2012 and includes both a Special Project Facilitator (SPF) which acts as a mediation forum where project-affected people can file complaints regardless of whether the ADB's operational policies and procedures have been breached or not, and a Compliance Review Panel (CRP) that examines complaints based on an alleged breach of ADB policies and procedures. The 2012 review process dropped the requirement that affected people start with the consultation process before they can file for a compliance review.[6]

The EBRD created an Independent Recourse Mechanism in 2003. It was replaced in 2010 by the Project Complaint Mechanism (PCM), which has both a compliance review mission and a problem-solving function, depending on whether the complaint is assessed as eligible for a compliance review, a problem-solving initiative, or both. The PCM Rules of Procedure were updated in May 2014. This update does not result in significant procedural changes but intends to clarify a number of provisions.[7]

As regards the IDB, in 2010 the Independent Consultation and Investigation Mechanism (MICI, for *Mecanismo Independiente de Consulta e Investigación*) succeeded the Independent Inspection Mechanism created in 1994. It works on a two-stage basis, with a consultation phase that, if unsuccessful, can proceed to a compliance review phase.[8]

In the framework of the AfDB, the Independent Review Mechanism (IRM) entrusted to a Compliance Review and Mediation Unit (CRMU) was set up in 2004 and modified in 2010. Like the EBRD mechanism, it has a twofold (problem-solving/compliance review) structure that can lead to a compliance review, a problem-solving initiative, or both.[9]

Finally, the Complaints Mechanism of the EIB was created in 2008 and revised in 2010. It offers the possibility to access mediation, or compliance control, or mediation followed by compliance control if mediation is unsuccessful. The grievance mechanism has an additional procedural level that consists in the possibility of an appeal before the European Ombudsman if requesters are not satisfied with the EIB Complaint Mechanism's findings.[10] This paper will refer only marginally to the EIB Complaint Mechanism, since it is the most opaque of its kind.[11]

## B. HARM: THE MAIN FOCUS OF THE GRIEVANCE MECHANISMS

The MDB grievance mechanisms address grievances from people who are affected or likely to be adversely affected by projects supported by (one or more) MDB. Hence 'the public' as such is not eligible to submit a request. Who these eligible, 'project-affected people' are depends on the specific eligibility requirements of each grievance mechanism.

5 CAO Operational Guidelines, Mar. 2013, online: http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines_2013.pdf.

6 Accountability Mechanism Policy 2012, 24 May 2012, online: http://www.adb.org/site/accountability-mechanism/.

7 EBRD, Project Complaint Mechanism: Rules of Procedure, 7 May 2014, online: http://www.ebrd.com/downloads/integrity/pcmrules2014.pdf.

8 Política de constitución del Mecanismo Independiente de Consulta e Investigación, 17 Feb. 2010, online: http://www.iadb.org/en/mici/.

9 Independent Review Mechanism, Operating Rules and Procedures, 16 Jun. 2010, online: http://www.afdb.org/en/about-us/structure/independent-review-mechanism-irm/.

10 EIB, Complaints Mechanism Principles, Terms of Reference and Rules of Procedure, Feb. 2010, online: http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf.

11 Before the EIB Complaints Mechanism, complaints are dealt with confidentially unless complainants waive their right to confidentiality, and conclusion reports are not published: *ibid*., para. 13.

| Operating Rules | Eligible Requesters |
|---|---|
| Accountability Mechanism Policy, para. 138 (ADB) | Any group of two or more people in a borrowing country where the ADB-assisted project is located or in a member country adjacent to the borrowing country who are directly, materially, and adversely affected |
| Independent Review Mechanism, Operating Rules and Procedures, para. 1 (AfDB) | Two or more persons with a common interest...who allege that an actual or threatened material adverse effect on the affected persons' rights or interests arises directly from an act or omission of...the Bank Group as a result of the failure...to follow any of its own operational policies and procedures |
| Project Complaint Mechanism: Rules of Procedure, paras. 1-2 (EBRD) | One or more individual(s) located in an Impacted Area, or who has or have an economic interest, including social and cultural interests, in an Impacted Area, may submit a Complaint seeking a Problem-solving Initiative…One or more individual(s) or Organisation(s) may submit a Complaint seeking a Compliance Review |
| Complaints Mechanism Rules of Procedure, paras. 2.1-2 (EIB) | Any person or group, including civil society organisations, who allege there may be a case of maladministration within the EIB Group...Members of the public who feel affected by the activities of the EIB Group but who are not aware of the rules, regulations, policies or procedures applying to the Group |
| Política de constitución del MICI, paras. 30 and 40f) (IDB) | One or more persons, groups, associations, entities or organizations... residing in the country(ies) where the Bank-Financed Operation is or will be implemented...[who] reasonably assert that it has been or could be expected to be directly, materially adversely affected by an action or omission of the IDB in violation of a Relevant Operational Policy in a Bank-Financed Operation |
| CAO Operational Guidelines 2013, para. 2.1.2 (World Bank - IFC and MIGA) | Any individual or group of individuals that believes it is affected, or potentially affected, by the environmental and/or social impacts of an IFC/ MIGA project |
| Operating Procedures of the Panel, paras. 10 and 12 (World Bank - IBRD and IDA) | [T]wo or more people with common interests and concerns who claim that they have been or are likely to be adversely affected by a Bank-financed operation, and who are in the country where the Bank-financed project is located..., [who] believe that their rights or interests may be adversely affected by a Bank-financed project, and [claim that] the material adverse effects (harm) that they believe they are suffering, or are likely to suffer as a result is linked to the project activities that the Requesters believe may be relevant to their concerns. |

One should also note that the identity of 'project-affected people' is not limited to who the Management of the concerned bank decided they were during the design, appraisal and/or implementation of the project. The MDB grievance mechanisms are empowered to look beyond the project definitions and can find that people who were left outside[12] the project's design/appraisal/implementation process are nonetheless eligible to participate in a problem-solving exercise and/or compliance review.[13]

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12 Either because some people were 'forgotten' or the project's area of influence was defined too narrowly with regard to the actual zone of impact.

13 Regarding the Inspection Panel, see for example *Jamuna Multipurpose Bridge Project* (Bangladesh, 1996), Eligibility Report, 26 Nov. 1996; *Western Poverty Reduction Project* (China, 1999), Investigation Report, 28 Apr. 2000; a useful reference is A. Naudé Fourie, 'The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and a Restatement', *Netherlands International Law Review,* vol. 59, 2012, pp. 199-234, especially pp. 227-231. See also for instance before the ADB Accountability Mechanism: *Mundra Ultra Mega Power Project* (India, 2013), Compliance Review Panel Eligibility Report, 27 Dec. 2013; before the IDB MICI: *Panama Canal Expansion Program* (Panama, 2011), Assessment and Consultation Phase Report, 27 Jun. 2012; before the CAO: *Environmental and Social Categorization of the Amaggi Expansion Project* (Brazil, 2004), Audit Report, May 2005; before the EBRD PCM: *EPS Emergency Power Sector Reconstruction Loan, EPS Power II and EPS Kolubara Environmental Improvement Projects* (Serbia, 2012, 2013), Eligibility Assessment Report, 2014; before the AfDB IRM: *Medupi Power Project (South Africa, 2010)*, Compliance Review Report, 19 Dec. 2011.

Regardless of the specificities of each grievance mechanism's eligibility requirements, harm—whether already occurring or potential—appears as the central concern, even more than the breach of an applicable internal rule of the MDB. It is therefore not surprising that all MDB grievance mechanisms offer a combination of problem-solving techniques—mediation, good offices, consultation, etc.—and compliance review (except for the Inspection Panel, which has exclusively a compliance-control function). Likewise, access to a grievance mechanism's problem-solving function is not conditioned on a claim that the alleged harm stems from a breach of an applicable rule. Only the Inspection Panel, the Independent Review Mechanism (AfDB) and the MICI (IDB) require that the harm be a consequence of an action or omission of the concerned MDB, in breach of applicable policies and procedures. In addition, only the MICI (IDB) requires that claimants go through a problem-solving exercise, that it be unsuccessful and that a breach of policies and procedures is alleged, before accessing compliance review.[14]

## C. PECULIARITIES OF THE COMPLIANCE REVIEW FUNCTION

The terms of the compliance review function of MDB grievance mechanisms show they are distinctively tailored to the kind of institutions (international organisations) and activities concerned, especially when it comes to the rules by which compliance is assessed and the possible outcomes of a compliance review.

As for the applicable rules, they are, according to the terminology of the Draft Articles on the Responsibility of International Organizations (DARIOs),[15] the 'rules of the organization'. The legal nature of such internal rules is highly contentious; there is indeed no consensus on whether they constitute part of international law, or can bind only the organisation's staff.[16] The DARIOs (Article 64) specify that unless the *lex specialis* of an organisation provides otherwise, the breach of an organisation's rules can amount to an internationally wrongful act only if those rules 'are part of international law' and, what is more, 'while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members'.[17] All in all, with respect to project-affected people, the only thing that is sure is that operational policies and procedures are rules made by and for MDBs and are thus not subject to judicial settlement. The one exception is the situation of the EIB: it is a product of the State members of the European Union alone, and is an organ of the EU. As such, it must comply with the entirety of the obligations the EU itself has committed to. In particular, it must comply with the European regulation that transposes the international obligations binding the European Union under the Aarhus Convention on Public Information, Public Participation, and Access to Environmental Justice.[18]

The rules that can be invoked before each MDB grievance mechanism is thus defined by each MDB, and whether a particular rule can be invoked is specified in the grievance mechanism's rules of procedure and/or in the rules themselves. Rules related to fraud/corruption[19] and procurement, for example, can generally not be invoked. Some grievance mechanisms distinguish between the rules that can be invoked when the project is public/sovereign-guaranteed and those which are relevant for projects that are private/non-sovereign guaranteed;[20]

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14 The ADB Accountability Mechanism previously had a similar requirement; it was dropped in the 2012 revision.

15 International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries, *Yearbook of the International Law Commission*, Part Two (2011), Article 2(b): ' "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.'

16 See the debates presented in Giorgio Gaja, Special Rapporteur, International Law Commission, *Third Report on Responsibility of International Organizations*, 13 May 2005, UN Doc. A/CN.4/553, paras. 18-19.

17 International Law Commission, *Draft articles on the responsibility of international organizations, commentary of Article 5(3)*.

18 In 2007 the Aarhus Compliance Committee received a communication of the Albanian NGO 'Civic Alliance for the Protection of the Bay of Vlora' (Albania) alleging that the European Community, through the European Investment Bank (EIB), was not in compliance with the Convention's article 6 by virtue of its decision to finance the construction of a thermo-power plant (TPP) in Vlora, Albania, without ensuring proper public participation in the process. The Committee found that the EC had not breached its obligations: Aarhus Compliance Committee, *Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community with its obligations under the Convention,* 23rd meeting, Geneva, 31 March – 3 April 2009, online: http://www.unece.org/env/pp/compliance/Compliancecommittee/21TableEC.html.

19 Fraud and corruption issues are dealt with by specific, separate bodies.

20 See IRM Operating Rules and Procedures, para. 2(xi). The World Bank Group created two separate mechanisms, one dealing with official development assistance (the Inspection Panel, which controls compliance with IBRD and IDA policies and procedures), the other with support to private projects (the CAO, which reviews compliance with the IFC's environmental and social safeguards, and its performance standards).

others do not. All MDBs' rules share a common distinction: there are standards that the bank itself must live up to, and those placing requirements on borrowers in the design and implementation of their project. Most banks list these two kinds of requirements in different categories of instruments.[21] The first are usually called policies;[22] the second are called performance requirements (EBRD), performance standards (IFC), operational safeguards (AfDB), or safeguard requirements (ADB). References to international law that might be included in these rules are addressed in more detail in the second part of this chapter.

As for the outcomes of compliance reviews, they differ quite substantially from those offered through judicial processes. The MDB grievance mechanisms do not record wrongful acts under international law that would be attributable to the bank, and they do not decide on a responsibility based on the *lex specialis* of the bank. When a bank is found non-compliant, it does not result in a legal implication or compensation for the victims. Compliance-control generally leads to the adoption of remedial measures, so as to allow the project to carry on on a basis more respectful of affected people. Grievance mechanisms' findings can also result in improvements to the applicable policies and safeguards.[23]

MDBs grievance mechanisms' compliance control function can only verify the existence of serious breaches and cannot decide on remedial measures. The MDBs' executive bodies (their Boards) are the only ones who can decide on the consequences of an investigation report: implementation of remedial measures, temporary suspension of their assistance, and even withdrawal from the project.[24] This is the case for the Inspection Panel,[25] the CAO,[26] and the ADB Accountability Mechanism.[27] The MICI (IDB), the IRM (AfDB) and the PCM (EBRD) can make recommendations on remedial measures, but the final decision is up to the Board.[28]

Moreover, when remedial measures are decided, some but not all grievance mechanisms are competent to follow up on post-decision implementation. The EBRD PCM is explicitly competent to monitor the implementation of recommendations.[29] The CRMU of the AfDB monitors the solution reached during a problem-solving exercise and, in the case of a compliance review, decides on the person in charge of monitoring the implementation of remedial measures.[30] The Compliance Review Panel of the ADB Accountability Mechanism monitors the implementation of Board-approved remedial measures.[31] The MICI can only monitor remedial measures upon request of the Board.[32] The CAO can 'keep the compliance investigation open and monitor the situation until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the noncompliance.'[33] As regards the Inspection Panel, it is not granted any monitoring competence. In several occasions however, the Board has asked the Panel to conduct a follow-up, and the Panel tries to keep in touch with claimants in order to get their feedback on the investigation and the consequences of the final report.[34]

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21 Note that in the framework of the World Bank however, 'operational policies' (OPs) designate the general conditions of the bank's activities, including both the bank's and the borrower's responsibilities. The World Bank's 'bank procedures' detail how the bank's staff must implement the requirements provided for in the OPs.

22 But note that the ADB calls these 'procedures'.

23 See for example AfDB IRM Operating Rules and Procedures, *supra,* n. 9, para. 52(c)(ii); ADB Compliance Review Panel, *Integrated Citarum Water Resources Management Investment Program - Project 1* (Indonesia, 2012), CRP Final Report, 18 Feb. 2013, para. 103(ii); CAO*, Participatory Water Monitoring. A Guide for Preventing and Managing Conflict*, Advisory Note, 2008, online: http://www.cao-ombudsman.org/howwework/advisor/documents/watermoneng.pdf.

24 This is what happened in the *Western Poverty Reduction Project* (China, 1999) case: on this project, that was to take place in Tibet, the Inspection Panel found violations so serious that, despite heavy pressure from the Chinese government, the World Bank decided to withdraw its support: see for example Center for International Environmental Law, 'World Bank Effort to Support China's Population Transfer Into Tibet is Defeated', Aug. 2000, http://www.ciel.org/Intl_Financial_Inst/pressreleasefinaltibet.html (last visited 15 Mar. 2014).

25 Articles 68 and 71 of its Operating Procedures, *supra*, n. 3

26 CAO Operational Guidelines, *supra*, n. 4, p. 25.

27 Accountability Mechanism Policy, *supra*, n. 6, para. 191.

28 Política de constitución del Mecanismo Independiente de Consulta e Investigación, *supra*, n. 8, paras. 64, 71; Article 25 of IRM Operating Rules and Procedures, *supra*, n. 9; Project Complaint Mechanism: Rules of Procedure, *supra*, n. 7, paras. 45-46.

29 Project Complaint Mechanism: Rules of Procedure, *ibid*., paras. 44 and 47.

30 IRM Operating Rules and Procedures, *supra*, n. 9, arts. 40, 52(c) and 60.

31 Accountability Mechanism Policy, *supra*, n. 6, paras. 191-194.

32 Política de constitución del Mecanismo Independiente de Consulta e Investigación, *supra*, n. 8, para. 72.

33 CAO Operational Guidelines, *supra*, n 4. p. 25.

34 Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15,* World Bank: Washington DC, 2009, especially pp. 44-45 and 57-61.

# II. ON THE INFLUENCE OF THE RULES OF INTERNATIONAL LAW RELATED TO WATER AND PUBLIC PARTICIPATION

The MDB's policies and safeguards (or procedures, or requirements) refer to—both hard and soft—international law, though direct and specific references are usually found in the safeguard/performance requirements aimed at borrowers. That does not mean that the MDBs' standards are less protective than international law; they are indeed much more detailed than most international law obligations, and this degree of precision allows grievance mechanisms to exercise in-depth control and review.

## A. REFERENCE TO INTERNATIONAL LAW IN MDBS' STANDARDS

First, compliance with the international law obligations that the borrower country has committed to, or that are in force in the country where the project of a private borrower is located, can be mentioned in broad terms as a condition for the validity of certain documents without which the bank will not support the project. For example, the World Bank Operational Policy 4.01 on Environmental Assessment (EA) specifies that the 'borrower is responsible for carrying out the EA'[35] and that the 'EA takes into account...transboundary and global environmental aspects...and obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA.'[36]

Second, many references to specific international instruments can also be found in the standards borrowers must comply with. The IFC's Performance Standard 6 (IFC PS6), Biodiversity Conservation and Sustainable Management of Living Natural Resources, states that 'the requirements set out in this Performance Standard have been guided by the Convention on Biological Diversity'[37] and IFC PS8, Cultural Heritage,[38] claims to be not only '[c]onsistent with the Convention Concerning the Protection of the World Cultural and Natural Heritage' but also 'based in part on standards set by the Convention on Biological Diversity.'[39] The AfDB's Operational Safeguard 3 (AfDB OS3), Biodiversity, Renewable Resources and Ecosystem Services, 'reflects the objectives of the Convention on Biological Diversity...[and] also aligns with the Ramsar Convention on Wetlands, the Convention on the Conservation of Migratory Species of Wild Animals, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the World Heritage Convention, the UN Convention to Combat Desertification and the Millennium Ecosystem Assessment...the International Plant Protection Convention.'[40] EBRD Performance Requirement 10 (EBRD PR10), Information Disclosure and Stakeholder Engagement, explicitly mentions the influence of the 'UNECE Aarhus Convention, which identifies the environment as a public good.'[41]

Regarding direct references to international law in normative instruments aimed at the banks' staff, they are usually found in the strategies of the institution, which cannot be invoked before MDB's grievance mechanisms.[42] One can nevertheless find direct mentions, either in general obligations—'ADB will not finance projects that do not comply with...the host country's social and environmental laws and regulations, including those laws implementing host country obligations under international law'[43]—or through the quotation of specific texts,

35 World Bank, OP 4.01 - Environmental Assessment, 2013, para. 4.

36 *Ibid.*, para. 3.

37 IFC PS6 - Biodiversity Conservation and Sustainable Management of Living Natural Resources, 2012, 'Introduction', para. 1.

38 Cultural heritage includes 'unique natural features or tangible objects that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls': IFC PS8 - Cultural Heritage, 2012, 'Scope of Application', para. 3.

39 *Ibid.*, 'Introduction', para. 1.

40 AfDB OS3 - Biodiversity, Renewable Resources and Ecosystem Services, 2013.

41 EBRD PR10 - Information Disclosure and Stakeholder Engagement, date unknown, para. 2.

42 The Compliance Review and Mediation Unit, in the framework of AfDB's IRM, has however taken account of AfDB strategy documents—the Clean Energy Investment Framework and the Climate Risk Mitigation and Adaptation Strategy—as relevant context when interpreting the AfDB's climate change commitments in the *Medupi* case: see IRM, *Medupi Power Project (South Africa, 2010)*, *supra*, n. 13, pp. 4-8 and 11-14.

43 ADB Safeguard Policy Statement, 2013, para. 6. Along the same lines, see World Bank OP 4.01, *supra*, n. 35.

such as the Rio Declaration and Agenda 21,[44] or the Aarhus Convention, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context and the EU Environmental Impact Assessment Directive.[45]

## B. MADE-TO-MEASURE STANDARDS AND COMPLIANCE-CONTROL

Though international law related to public participation influences the content of MDBs' standards—in some cases quite substantially, as in the EBRD example—one must keep in mind that these standards are above all tailored to the specific constraints of MDBs' activities and the concrete issues arising in the design, appraisal and/or implementation of development projects. They go far more into detail than any rule of international law, in turn allowing the compliance-control mechanisms to assess the way Management has complied with its obligations with a remarkable degree of case by case precision. For instance, the MDBs' environmental impact assessment policies and procedures provide for the actions the banks' staff must take during the project's lifecycle step by step, and their associated safeguards or performance requirements detail what is expected from the borrower, when and how. As regards the participation of affected or potentially affected people, MDBs' standards and grievance mechanisms are by far more practical than general international law and international judicial dispute settlement, at least in comparison to the approach in the International Court of Justice's (ICJ) *Pulp Mills* judgment.[46] According to this judgment, there is an international obligation to carry out environmental impact assessments, but the content of such assessments is left up to individual states.[47] What is more, the ICJ was 'of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina' (but what of international law beyond Argentina's reasoning?) and was satisfied with the fact that three public hearings were organized and 80 interviews of various stakeholders, without even questioning what kind of information was disclosed.[48]

In contrast, MDB grievance mechanisms rely on standards' 'substance and spirit'[49] to check up on the quality and quantity of information disclosed, as well as on the number and identity of the stakeholders able to participate in consultations. They also enter into the detail of actions and omissions of the Management to determine whether affected people were *effectively* informed and involved, including actions and omissions in Management's supervision of the borrower's own commitments.[50]

In addition, even a cursory glance at the *corpus* of standards of each MDB reveals that the banks have created a series of obligations that cannot be found in international law, such as standards on safeguards that the private sector must live up to,[51] on financial intermediaries, project-level grievance mechanisms—intended both to ease access for project-affected people and to make interventions more timely—, cumulative impacts and so on. All these may be subject to MDBs grievance mechanisms' in-depth control.[52]

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44 IDB Environment and Safeguards Compliance Policy, 2006, para. 2.3.

45 EBRD Social and Environmental Policy, 2008, para. 7:
'In particular, the EBRD expects clients to identify and interact with their stakeholders on an ongoing basis, and to engage with potentially affected communities through disclosure of information, consultation, and informed participation in a manner deemed by the Bank to be commensurate to the impacts associated with the project. Such stakeholder interaction should be consistent with the spirit, purpose and ultimate goals of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the EU Environmental Impact Assessment Directive and, for projects with the potential to have significant environmental impact across international boundaries, the UNECE Convention on Environmental Impact Assessment in a Transboundary Context, regardless of the status of ratification.'

46 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 Apr. 2010, online: http://www.icj-cij.org/docket/files/135/10779.pdf.

47 *Ibid.*, para. 205:
'it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.'

48 *Ibid.*, paras. 217-219.

49 *Jamuna Multipurpose Bridge Project* (Bangladesh, 1996), *supra*, n. 13, para. 47.

50 A. Naudé Fourie, *supra*, n. 13, pp. 227-231.

51 See in particular D. D. Bradlow, M. S. Chapman, 'Public Participation and the Private Sector', *supra*, n. 1.

52 On the depth of the Inspection Panel's and the CAO's compliance-control, see especially D. D. Bradlow, A. Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?', *International Organizations Law Review*, vol. 10, 2014, pp. 3-80.

Finally, on rare occasions, the MDB grievance mechanisms also refer to international law in situations where the applicable standards do not. This occurred, for example, in the *Chad pipeline* case, where the Inspection Panel, concerned with allegations of massive violations of human rights, 'felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies'.[53]

Do the MDB grievance mechanisms promote public participation in water resources management? They undoubtedly fill international justiciability gaps, given that they are the only remedy available to people who believe MDBs are responsible for the harms they suffered as a result of bank-supported development projects. Yet 'justiciability' here should not be understood narrowly as an access to purely legal remedies but rather as an access to justice in the broad sense. The grievance mechanisms contribute to a balancing of social relations; they open a direct communication channel between international organisations and affected people regarding the consequences of international organisations' activities, an area where power and voice used to be the monopoly of international organisations. They can be seen as a public participation avatar, since their functioning terms and outcomes, quite different from those of judicial *fora*, are tailored to allow project-affected people to be heard and the harm they suffer mitigated. Like other public participation mechanisms, they are also more than a procedure or institution, providing an element of legitimation to the activities of international organizations and hinting at the rule of law.

## Further reading

Bissell, R.E., S. Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges', *Manchester Journal of International Economic Law*, vol. 6, 2009, pp. 2-55.

Bradlow D.D., M.S. Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International legal Standards', *Erasmus Law Review,* vol. 4, 2011, pp. 91-125.

Bradlow, D.D., A. Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?', *International Organizations Law Review*, vol. 10, 2014, pp. 3-80.

53 Inspection Panel, *Petroleum Development and Pipeline Project* (Chad, 2001), Investigation Report, 17 Jul. 2002, para. 35. On the Inspection Panel and human rights, see A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-judicial Oversight: In Search of a 'Judicial Spirit' in Public International Law*, Eleven International Publishing, Utrecht, 2009, pp. 261-276; R. Oleschak-Pillai, 'Accountability of International Organisations: An Analysis of the World Bank's Inspection Panel', in J. Wouters et al. (eds.), *Accountability for Human Rights Violation of International Organisations*, Intersentia, Antwerp, 2011, pp. 401-429. By contrast, the ADB Accountability Mechanism's Complaint Review Panel recently declined to examine human rights-based allegations, considering that, though they do not mention human rights *per se*, applicable standards protected such rights in practice: CRP, *Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project* (Cambodia, 2012), CRP Final Report, 14 Jan. 2014, paras. 253-256 and Appendix 4.

# THE ROLE OF THE PUBLIC AND THE HUMAN RIGHT TO WATER

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## ABSTRACT

*The emerging international human right to water (and sanitation) has not yet been widely invoked before, nor declared upon by, international human rights courts, though some of the variants which it has inspired under national legal frameworks have been recognised and applied by domestic courts. However, many of the key elements of this purported derivative right, both procedural and substantive, have long been recognised by international human rights tribunals as arising independently, either under general international human rights law, international environmental law, or international law relating to sustainable development. Therefore, even in advance of clear judicial endorsement of the formal legal status and justiciability of the international human right to water, many of the key components for its effective implementation are already firmly in place.*

## RÉSUMÉ

*L'affirmation du droit international de l'homme à l'eau (et à l'assainissement) est encore ni justiciable ni reconnue par les juridictions internationales des droits de l'homme, alors que les variantes qu'il a inspiré en droit interne ont été reconnues et appliquées par les juridictions nationales. Cependant, la plupart des composantes, tant substantielles que procédurales, de ce prétendu droit dérivé ont été reconnues par ces juridictions de manière autonome à travers l'interprétation du droit international des droits de l'homme, du droit international de l'environnement et du droit international relatif au développement durable. Aussi, malgré les hésitations jurisprudentielles sur le statut et la justiciabilité du droit à l'eau, les éléments clés pour sa mise en œuvre efficace sont déjà bien établis.*

**Key words:** Human right to water, public participation, international human rights courts

**Mots clés :** Droit à l'eau, participation du public, juridictions internationales des droits de l'homme

# I. Introduction

As a formal source of justiciable rights for individuals or communities, or of corresponding binding obligations upon State or other actors, the human right to water (and sanitation) remains beset by uncertainty, both as to its legal status and its normative content.[1] The human right to water is a derivative construct, inferred primarily from two rights expressly included in the 1966 International Covenant on Economic, Social and Cultural Rights (ECSR) —the right to an adequate standard of living, set out under Article 11(1), and the right to the highest attainable standard of health, set out under Article 12. However, the precise scope and legal significance even of these two express rights remain somewhat unclear, while the practical justiciability of any right articulated under the ECSR Covenant is open to question. Thus, an implied right derived from these somewhat aspirational provisions would not normally inspire confidence. Nevertheless, in 2002 the UN Committee on Economic Social and Cultural Rights adopted General Comment No. 15[2] which, though it might fail to make an altogether compelling case for the right's binding legal status, provides a non-binding interpretation of Articles 11 and 12 that sets out a comprehensive and persuasive account of the purported right's normative content.[3] This account has now been endorsed by the United Nations General Assembly[4] and the Human Rights Council.[5] Indeed, even before such high-level political and diplomatic endorsement was forthcoming, the human right to water concept had operated a profound impact, in terms of measures taken at multiple levels of State and non-State action, thus attracting support from a range of types of actors, many of whom would not traditionally have had a recognised role in formal law-making. This reality has led certain commentators to analyse the human right to water concept in terms of the phenomenon of 'global administrative law',[6] whereby globally convergent principles and standards of good governance become increasingly normativised, regardless of the formal sources of norm-creation, through the practice of a wide range of actors operating at different levels of jurisdictional administration and in different State and non-State capacities.[7]

It is important to note that such principles and standards of good governance, which are now ubiquitous in administrative practice, primarily include procedural controls on administrative decision-making through requirements or arrangements relating to transparency, public participation, reason-giving, reviewability and legal accountability.[8] Indeed, the broad arc of practice supporting the human right to water concept, ranging from the formal adoption of General Comment No. 15, through the voluntary principles offered for the guidance of corporate actors by the UN Global Compact[9] or the OECD Guidelines for Multinational Enterprises,[10] to the three

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1 See, for example, S. McCaffrey, 'The Human Right to Water', in E. Brown Weiss, L. Boisson de Chazournes, N. Bernasconi-Osterwalder, *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005, pp. 93-115.

2 Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. DOC. E/C.12/2002/11, 26 November 2002.

3 See M. Williams, 'Privatization and the Human Right to Water: Challenges for the New Century', *Michigan Journal of International Law*, vol. 28, 2007, at 475. See also E. B. Bluemel, 'The Implications of Formulating a Human Right to Water', *Ecology Law Quarterly*, vol. 31, 2004, at 972.

4 UN General Assembly Resolution on the Human Right to Water and Sanitation, UNGA Res. A/RES/64/292, 28 July 2010.

5 UN Human Rights Council Resolution on the Human Right to Safe Drinking Water and Sanitation, A/HRC/RES/15/9.

6 See, for example, B. Morgan, 'Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law', *European Journal of International Law,* vol. 17, 2006, pp. 215-246; O. McIntyre, 'The Human Right to Water as a Creature of Global Administrative Law', *Water International,* vol. 37, 2012, pp. 654-669.

7 On the phenomenon of 'global administrative law' generally, see B. Kingsbury et al., 'Global Governance as Administration—National and Transnational Approaches to Global Administrative Law', *Law and Contemporary Problems*, vol. 68, 2005, pp. 1-13; B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', *European Journal of International Law*, vol. 20, 2009, pp. 23-57; C. Harlow, 'Global Administrative Law: the Quest for Principles and Values', *European Journal of International Law,* vol. 17, 2006, pp. 187-214; D. C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', *Yale Law Journal,* vol. 115, 2006, pp. 1490-1562; K.-H. Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation', *Transnational Legal Theory*, vol. 3, 2012, pp. 243-267.

8 Kingsbury (2009), *supra*, n. 7, p. 34.

9 See, for example, the CEO Water Mandate launched in 2007 by the UN Secretary-General and a group of committed business leaders, online: http://www.unglobalcompact.org/Issues/Environment/CEO_Water_Mandate/index.html

10 See Organisation for Economic Co-operation & Development, *OECD Guidelines for Multinational Enterprises*, June 21, 1976, online: http://www.oecd.org/dataoecd/56/36/1922428.pdf (revised 2000).

sets of technical guidelines adopted in 2007 by the International Standards Organisation (ISO),[11] also places great emphasis on procedural safeguards which aim to ensure the meaningful participation of the public in decisions on water services provision and policy. Therefore, we should expect that the public would have a significant role to play in the effective enforcement and continuing judicial elaboration of the human right to water concept through complaints taken before international human rights bodies and tribunals.

## II. THE HUMAN RIGHT TO WATER UNDER REGIONAL HUMAN RIGHTS INSTRUMENTS

Though the emergence of a right to water has received support in the national courts in a number of jurisdictions, this has been based on their domestic constitutional and legislative arrangements, of which Tully is dismissive, pointing out that 'national constitutional provisions may be distinguished between those proclaiming collective governmental responsibilities with respect to water and those contemplating an individual entitlement', and, further, that '[o]f the latter, weakly formulated provisions commonly provide that governments need only facilitate equality of access to water'.[12] India provides a notable example, given that its Supreme Court has held that the right to life includes the 'right to pollution-free air and water' and expressed the expectation that the State should 'take effective steps to protect this right'.[13] This is also true of South Africa, where the courts have examined the legal nature of the right to water supply[14] and sanitation,[15] and where section 27.1(b) of the 1996 Constitution grants to everyone a right of access to sufficient food and water and compels the government to adopt reasonable measures within its available resources to progressively realise this right,[16] while section 3(1) of the 1997 Water Services Act guarantees to everyone in South Africa the right to access a basic water supply 'to support life and personal hygiene' at no cost[17] and the 1998 National Water Act states that its aims are to meet the basic human need of present and future generations, promote equitable access to water, facilitate social and economic development, and reduce and prevent pollution of water resources.[18]

However, despite the fact that a number of regional human rights instruments would appear to support the existence of a right to water, there is little evidence of the public relying on the relevant provisions. For example, there does not appear to be any example of individuals invoking Article 14 of the 1990 African Charter on the Rights and Welfare of the Child, which expressly requires States to ensure the availability of safe drinking water for the 'best' attainable state of health,[19] or on Article 11 of the 1988 Additional Protocol to the American Convention of Human Rights in the area of economic, social and cultural rights, which provides that 'everyone shall have the right to live in a healthy environment and to have access to basic public services'.[20] Similarly, while

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11 ISO 24510:2007 Activities relating to drinking water and wastewater services—Guidelines for the assessment and for the improvement of the service to users; ISO 24511:2007 Activities relating to drinking water and wastewater services—Guidelines for the management of wastewater utilities and for the assessment of wastewater services; ISO 24512:2007 Activities relating to drinking water and wastewater services—Guidelines for the management of drinking water utilities and for the assessment of drinking water services. Online: http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_tc_browse.htm?commid=299764&published=on&includesc=true

12 S. R. Tully, 'The Contribution of Human Rights to Freshwater Resource Management', *Yearbook of International Environmental Law,* 2004, at 120.

13 *Charan Lal Sahu v. Union of India*, AIR (1990) SC, at 1495. Subsequently, in *F. K. Hussain v. Union of India*, AIR (1990) Kerala 321, at 340, the Kerala High Court has held that the right to water is an integral part of the right to life guaranteed under Article 21 of the Indian Constitution, while the Bihar High Court has recognised that the right to life includes the right to a healthy environment in *Subash Kumar v. State of Bihar* (1991) 1 SCC 598, at 608, a point reaffirmed by the Supreme Court of India in *M.C. Mehta v. Union of India* (1998) 9 SCC 589, at 607. See J. Razzaque, 'Trading Water: The Human Factor', *Review of European Community and International Environmental Law*, vol. 13, 2004, at 21.

14 See, for example, *Mazibuko v. City of Johannesburg*, Supreme Court of South Africa, 8 October 2009.

15 See, for example, *Beja v. City of Cape Town and Others*, Case No. 21332/10, Ruling of Judge Nathan Erasmus, 29 April 2011.

16 Constitution of the Republic of South Africa, adopted by the Constitutional assembly on 4 December 1996 and entered into force 4 February 1997.

17 Act 108 of 1997.

18 Act 36 of 1998.

19 OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 1999.

20 (San Salvador, 17 November 1988). Available at http://www.oas.org/juridico/english/Treaties/a-52.html. See J. Razzaque, *supra*, n. 13, p. 19.

Article 2 of the European Convention on Human Rights on the right to life is commonly regarded as requiring that States have an obligation 'not only to refrain from taking life 'intentionally' but further, to take appropriate steps to safeguard life',[21] one leading proponent of the current binding legal status of the human right to water can only suggest that the right might one day apply directly under the European Convention,

> if the European Court of Human Rights were to recognize that it is a necessary element of some protected general human rights (e.g., the right to dignity or the right to life). This could potentially occur, as the European Court is already moving towards recognition of the right to a clean environment (which did not exist when the Convention was adopted).[22]

In one much cited judgment from 1993, the European Court of Human Rights found that potential pollution of a complainant's well by a nearby waste facility was a violation of a civil right (to property) for the purposes of Article 6(1) of the European Convention on Human Rights,[23] though this finding ought not to be considered of direct relevance to the emergence of a distinct right of access to water.

It has been more usual, however, for regional bodies with responsibility for monitoring State compliance with human rights obligations to infer the existence of a right to water from the core obligations of States under more general regional human rights instruments. For example, in 1995, the African Commission on Human and Peoples' Rights found that Zaire (now the Democratic Republic of Congo) had violated the right to health under Article 16 of the African Charter[24] by failing 'to provide basic services such as safe drinking water',[25] while the 1997 report on Ecuador of the Inter-American Commission on Human Rights found that the 'considerable risk posed to human life and health by oil exploration activities … through, *inter alia*, contamination of water supplies'[26] could impact upon the right to life and the duty to protect the physical integrity of the individual under the 1969 American Convention on Human Rights.[27] However, in respect of the regional human rights instruments and cases cited above, McCaffrey once again cautions that, even where 'safe drinking water' or 'basic public services' are expressly mentioned, '[a] right to water was not recognized *per se*...Rather, the failure to meet basic water needs was found to constitute, or at least contribute to, violations of other rights'.[28]

## III. PROCEDURAL RIGHTS UNDER HUMAN RIGHTS AGREEMENTS

Of greater significance than those provisions of regional human rights instruments which might be argued to explicitly or implicitly include the human right to water, it is quite clear that all such instruments must now be interpreted and applied so as to require that States generally facilitate a participative approach in respect of projects or policies that might impact on human rights, by ensuring the adoption of procedures by which interested groups or individuals or communities likely to be affected by such projects or policies can receive and access relevant information, meaningfully participate in decision-making and, if necessary, have access to some

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21 See P. H. Gleick, 'The Human Right to Water', *Water Policy*, vol. 1, 1998, at 493, citing R. R. Churchill, 'Environmental Rights in Existing Human Rights Treaties', in A. E. Boyle and M. R. Anderson, *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996, pp. 89-108 and *Association X v. United Kingdom,* Application 7154/75, (1979) 14 *Decisions and Reports of the European Commission on Human Rights*, at 31-32.

22 See, H. Smets, 'Economics of Water Services and the Right to Water', in E. Brown Weiss, L. Boisson de Charzounes, N. Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005, at 178.

23 ECHR, *Zander v. Sweden* (1993), Series A, No. 279B. See Razzaque, *supra,* n. 13, at 20.

24 African Charter on Human and Peoples Rights, 1981, 21 *ILM* 58 (1982), entered into force 21 October 1986.

25 African Commission on Human and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93, Decision taken at the 18th Ordinary Session, 1995. See McCaffrey, *supra,* n. 1, at 99.

26 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador,* OEA/Ser.L/V/II.96, Doc. 10 rev. 1 (24 April 1997). See McCaffrey, *ibid.*

27 1144 *UNTS* 123; (1969) 9 *ILM* 673; (1971) 65 *AJIL* 679 (22 November 1969)

28 *Supra,* n. 1, at 99.

appropriate means of legal recourse.[29] Such a participatory approach to guaranteeing human rights would equally apply to projects or policies which might impact on the availability of water resources, particularly where this might arise by virtue of environmental risk, and procedural and participative rights are a very significant element of the normative content of the human right to water as put forward in General Comment No. 15.[30] Indeed, the requirement for States parties to the ICESCR to ensure a participatory and transparent process for the adoption and implementation of a national water strategy and plan of action is included among the non-derogable 'core obligations' of States under General Comment No. 15.[31] In the *Ogoni* case, the African Commission on Human Rights gave a broad participative reading to Article 24 of the African Charter on Human and Peoples' Rights, which acknowledges all peoples' right to a generally satisfactory environment, to include specific procedural guarantees concerning the carrying out of environmental and social impact assessment. According to Cullet and Gowlland-Gualtieri, the Commission

> indicated that compliance with the spirit of Article 24 must include a requirement to undertake and publicize environmental and social impact studies prior to major industrial development, as well as the appropriate monitoring of environmental conditions, the provision of information to communities exposed to hazardous materials and activities, and the provision of meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[32]

Clearly, such procedural requirements, which correlate closely with the procedural and informational requirements of the human right to water as set out under General Comment 15, would equally apply under existing regional human rights instruments to any major project or policy initiative, such as the privatisation of a water utility, which threatened the quality or availability of water supply or sanitation services. Similarly, the Inter-American Commission on Human Rights has, in the context of Article 11 of the 1988 Additional Protocol, repeatedly recommended the adoption of domestic legislation providing for meaningful and effective participatory mechanisms for indigenous peoples in the adoption of political, economic and social decisions that affect their interests.[33] In the *Awas Tingni Mayagna (Sumo) Indigenous Community* case,[34] the Inter-American Court of Human Rights recognised, in the context of Article 21 of the American Convention on Human Rights guaranteeing the right to property, related participatory rights for indigenous peoples in the case of activities relating to the exploitation of natural resources.[35] In addition, the European Court of Human Rights has held in the *Guerra* case[36] that Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life, imposes a positive duty of States to impart information in respect of the risks and the measures to be taken in the case of a major environmental accident as 'the right protected is infringed unless the subject can obtain information about the health risks to which she or he is exposed'.[37] Also, in the *Zander* case,[38] the European Court of Human Rights found that the lack of a procedure by which the applicants could review the decision of a licensing authority to permit the dumping of waste without the taking of precautionary measures to prevent pollution of the applicants' drinking water amounted to a breach of the

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29 See generally, P. Cullet, A. Gowlland-Gualtieri, 'Local Communities and Water Investments', in E. Brown Weiss, L. Boisson de Charzounes, N. Bernasconi-Osterwalder (eds.), *Fresh Water and International Economic Law*, Oxford University Press, Oxford, 2005 pp. 303-330.

30 See, for example, General Comment No. 15, paras. 12(c)(iv), 16(a), 24, 37(f), 48, 55 and 56.

31 See General Comment 15, para. 37(f). General Comment 15, para. 40, describes the core obligations set out in para. 37 as 'non-derogable'.

32 *Ibid.,* at 313-314, citing Communication No. 155/96, *The Social and Economic Rights Action Center and the Center for Social and Economic Rights v. Nigeria*, African Commission on Human and Peoples' Rights, 30th Ordinary Session, (13-27 October 2001), at para. 53.

33 See, Chapter X to the Second Report on the Situation of Human Rights in Peru, Inter-American Commission on Human Rights; Chapter IX to the Report on the Situation of Human Rights in Ecuador, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Recommendations) (24 April 1997); Case 7615 (Brazil), Inter-American Commission on Human Rights, 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), the *Yanomami* case. See Cullet and Gowlland-Gaultieri, *supra,* n. 29, at 314-315.

34 *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua,* Judgment of 31 August 2001, Inter-American Court of Human Rights, (Ser. C), No. 79 (2001).

35 See Cullet and Gowlland-Gaultieri, *supra,* n. 29, at 315-316.

36 *Guerra and Others v. Italy* (1998) 26 *European Human Rights Reports* 357.

37 Cullet and Gowlland-Gualtieri, *supra,* n. 29, at 316.

38 *Zander v. Sweden* (1993) 18 *European Human Rights Reports* 175, at para. 29.

right to a fair and public hearing under Article 6 of the Convention, thus supporting the participatory right of access to justice, at least in relation to environmental matters.[39]

These procedural requirements appear all the more widely accepted and applied when one considers that broad informational and participatory rights are generally also included under regional and global environmental instruments. The concept of participation in international environmental law is exemplified by the 1998 Aarhus Convention,[40] which involves three components, namely freedom of access to environmental information, participation in environmental decision-making, and access to justice (administrative or judicial recourse) in environmental matters. Such participation requirements are also central to the carrying out of an adequate environmental impact assessment (EIA) consistent with the standards established under international law.[41] More generally, in the field of sustainable development, all seminal instruments purport to establish participatory standards which apply not only to States but also to international organisations, including multilateral development banks (MDBs). Participatory rights are also absolutely central to Chapter 18 on freshwater resources of Agenda 21,[42] in relation to which Cullet and Gowlland-Gualtieri point out that

> Chapter 18 sets forth standards regarding the participation of local communities in water resources management. For instance, it mandates States to design, implement, and evaluate projects and programmes based on the full participation of local communities … in water management policy-making and decision-making.[43]

Therefore, the accumulated practice of regional human rights enforcement bodies outlined above strongly suggests that the CESCR's General Comment 15 largely involves a codification, for the purposes of environmental protection of water resources and social protection relating to access to water and sanitation services, of existing State obligations arising under general international human rights law and general international environmental and sustainable development law,[44] rather than an attempt at the progressive development of participatory principles applying to matters of access to water. The same might be said of the origins and normative basis of the principle of non-discrimination, which forms another essential substantive element of the human right to water as set out under General Comment 15 and is also included among the non-derogable 'core obligations' of States.[45] Likewise, the inclusion of special protections for indigenous peoples under General Comment 15[46] might be traced to and justified under ILO Convention 107 and its successor, ILO Convention 169,[47] which includes clear obligations for member States to facilitate the participation of peoples concerned. For example, Article 6 of ILO Convention 169 obliges member States to 'consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly', while Article 7 provides a right of

39 See Cullet and Gowlland-Gualtieri, *supra,* n. 29, at 317.

40 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, 38 *ILM* 517 (1999).

41 See, for example, arts. 2.2, 2.6, 3.8 and 4.2 of the Convention on Environmental Impact Assessment in a Transboundary Context, 1991, 30 *ILM* 800 (1991). See also, the Protocol on Strategic Environmental Assessment, 2003.

42 Agenda 21, 1992, U.N. Doc. A/CONF.151/26 (Vols. I, II & III) (1992).

43 *Supra,* n. 29, at 305.

44 Para. 4 of General Comment No. 15 itself notes that '[t]he right to water has been recognised in a wide range of international documents, including treaties, declarations and other standards', before going on to cite such instruments as the Dublin Statement on Water and Sustainable Development (A/CONF.151/PC/112) and Agenda 21 (A/CONF.151/26/Rev.1) – soft-law instruments which are centrally concerned with achieving sustainable development. Regarding the overlap between General Comment No. 15 and the requirements of international environmental law, see O. McIntyre, 'Environmental Protection and the Human Right to Water: Complementarity and Tension', in L. Westra, C.L. Soskolne, D.W. Spady (eds.), *Human Health and Ecological Integrity: Ethics, Law and Human Rights*, Routledge, Oxford, 2012, p. 225.

45 See General Comment 15, paras. 13-16 and 37(b). On the emergence of the principle of non-discrimination in the context of international environmental law, see H. Smets, 'Le principe de non-discrimination en matière de protection de l'environnment', *Revue Européenne du Droit de l'Environnement,* 2000, n°1, pp. 3-33 ; See also, J. H. Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment', *American Journal of International Law*, vol. 96, 2002, at 296-301, who regards the proliferation of instruments requiring transboundary EIA as a logical extension of the development of a comprehensive set of national EIA regimes and the application of the non-discrimination principle.

46 See, for example, General Comment 15, paras. 16(d), and 37(b), (f) and (h).

47 Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957; Convention concerning Indigenous and Tribal peoples in Independent Countries, 1989. See further, Cullet and Gowlland-Gaultieri, *supra,* n. 29, at 323-324.

indigenous peoples to participate in the development of policies and programmes affecting them. More generally, Article 15.1 provides unequivocally that

> [t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be especially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

Clearly, the natural resources in question might include water resources[48] and, in the course of a number of complaints concerning the adequacy of arrangements for such consultation and participation, made under Article 24 of the ILO Constitution, the ILO Committee of Experts on the Application of Conventions and Recommendations has taken every opportunity to expound a general interpretation of the requirements under ILO Convention 169 and to emphasise 'the central importance of participation by stating that the spirit of consultation and participation constitutes the cornerstone of Convention 169'.[49]

## IV. CONCLUSION

Therefore, while international and regional human rights tribunals have yet to declare and elaborate upon the existence and normative content of a human right to water (and sanitation) *per se*, they have long given ready support to key aspects of any such right, particularly the procedural aspects which serve to facilitate the meaningful and effective participation of affected individuals and communities in the making of administrative decisions potentially affecting their access to water services. Such procedural aspects are now firmly established in practically all regional and international human rights regimes as well as in the vast majority of national administrative and constitutional law frameworks, and the resulting public participation would generally be expected to function so as to promote the substantive values inherent to the human right to water concept, primarily that of ensuring for everyone 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[50] Similarly, certain substantive values, such as the principle of non-discrimination, have long been included in a wide range of international instruments and enthusiastically endorsed by international courts and tribunals. Thus, even in advance of clear judicial endorsement of the formal legal status and justiciability of the human right to water concept, the key components for its effective implementation are already firmly in place.

### Further readings


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McIntyre, O., 'The Human Right to Water as a Creature of Global Administrative Law', *Water International*, vol. 37, 2012, pp. 654-669.

Razzaque, J., 'Trading Water: The Human Factor', *Review of European Community and International Environmental Law*, vol. 13, 2004, pp. 15-26.


48 For example, Fuentes suggests that the requirements to protect the interests of indigenous and tribal peoples set out above might in certain circumstances constitute a relevant factor to be considered in determining the equitable utilisation of shared international freshwater resources under the key normative principle of international water law. See X. Fuentes, 'The Criteria for the Equitable Utilization of International Rivers', *British Yearbook of International Law,* vol. 67, 1996, at 377.

49 Cullet and Gowlland-Gaultieri, *supra*, n. 29, at 324.

50 General Comment No. 15, para. 2.

# ACCESS TO JUSTICE AND PUBLIC PARTICIPATION IN THE WATER SECTOR: A PROMISING LEGAL DEVELOPMENT

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## ABSTRACT

*Public participation in decision-making has been a growing demand for many years. In the water sector, it is a necessity for the management of this resource as it also allows progress to be made. The London Protocol on Water and Health is especially interesting in this regard, as it links environmental rights instruments and committees of the Economic Commission for Europe with human rights treaties and bodies. These bridges offer opportunities to innovate and improve consistency in the field of public participation as this concept is still marked by a wide range of instruments and formulations.*



## RÉSUMÉ

*La participation du public aux processus décisionnels est une exigence en pleine croissance depuis plusieurs années. Elle se retrouve dans le domaine de l'eau, où elle est une nécessité pour la gestion de cette ressource et où elle permet en plus de faire des avancées. Le Protocole de Londres sur l'eau et la santé est particulièrement intéressant à cet égard, en faisant le lien avec tant les autres instruments et comités de la Commission économique pour l'Europe, protégeant les droits environnementaux, que les traités et les organes de protection des droits de l'homme. Les passerelles ainsi établies offrent aussi bien des possibilités d'innovations que des possibilités d'amélioration de la cohérence en matière de participation, notion encore marquée par une diversité d'instruments et de formulations.*



**Key words:** Public participation, water management, human rights, environmental rights, right to water

**Mots clés:** Participation du public, gestion de l'eau, droits de l'homme, droits environnementaux, droit à l'eau

Public participation in the water sector is not only a moral interest or an interesting sociological trend. It is true that the idea of public participation has become relatively attractive in a context where political decisions are increasingly discussed or questioned and that it can increasingly be found in many recent national, regional or international instruments related to water management. Yet the notion is also part of a real legal development, linking human rights and environmental law, to which the right to water provides an interesting contribution.

## I. GROWING DEMAND FACING A VARIETY OF INSTRUMENTS

In the area of water management, a variety of procedures provide access to the public. At the national level, mechanisms such as environmental impact assessments or consultations on major development projects provide increasing opportunities to contribute to the discussion on issues related to water. At the international level, the procedures for protecting human rights (particularly well-established at the regional or universal level) with direct access to supranational bodies are also increasingly dealing with problems related to water. Other sectors, such as financial institutions like the World Bank and the European Bank for Reconstruction and Development (EBRD), may also in certain circumstances offer direct access mechanisms which allow public actors affected by projects having impacts on water to challenge the project design or implementation.[1] Finally, regional agreements, such as the North American Agreement on Environmental Cooperation, also include a communication mechanism allowing the public to make a claim alleging that a Party is failing to effectively enforce its environmental law.

Of course, these procedures are very diverse and it is still too early to speak of a coherent approach to participation efforts in this area. There are very different interests with respect to participation in water-related decision-making. Sometimes, the issue is purely one of formal access to water-related decision-making. In other circumstances it is access to water as a resource. Finally, it may be the overall management of the water ecosystem. The notion of participation is also not always clear. It can sometimes allow just the mere expression of opinions, and in other cases entail direct contributions to decision-making processes. We are still far from a unified and consistent approach to participation in the water sector. However, the public's growing demand to participate in decisions as well as the growing development of procedures to enable it, shows the growing importance of the notion and its location at the heart of a variety of public debates. In the context of water, in light of the increasing contradictions and tensions around the uses and needs of this vital resource, such developments are both positive and crucial. The various contributions to the colloquium on 'Public participation and water resources management: where do we stand in international law' emphasized this trend.

## II. SPECIAL CONTRIBUTION TOWARDS GREATER CONSISTENCY

In this perspective, the environmental policies and treaties of the Economic Commission for Europe of the United Nations (UNECE) represent a special contribution. These agreements have led to important innovations in the field of environmental regulation. For example, in the context of water resources management, the Helsinki Convention[2] has become universal and open to signatories beyond the European region.[3] Among these instruments are three well-known treaties recognized to have the most advanced links between human rights and environmental issues :

1 See in this regard the contribution of Vanessa Richard in this volume.

2 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992, online: http://www.unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf.

3 See the amendments to arts. 25 and 26 to the Helsinki Convention, ECE/MP.WAT/14, online: http://www.unece.org/fileadmin/DAM/env/documents/2004/wat/ece.mp.wat.14.e.pdf. See also art. 19(3) of the Aarhus Convention.

1. the Aarhus Convention, addressing public procedural rights in environmental matters;[4]
2. the Kiev Protocol, which guarantees the right to know about product emissions in the environment;[5] and
3. the London Protocol,[6] which provides standards for a right to drinking water.

In addition to guaranteeing fundamental rights, each of these treaties has a compliance review mechanism, directly inspired by the system of human rights treaty bodies.

The compliance review mechanisms of these three instruments share many similarities. They are also closely linked to the implementation mechanisms of other UNECE environmental instruments and even influence them, as demonstrated by recent developments in the Espoo Convention[7] or the Helsinki Convention. The Implementation Committee of the Espoo Convention, which has a traditional interstate structure with no provision for direct access to the public in its procedures, still took into consideration information from NGOs during one of its recent cases.[8] The Implementation Committee of the Helsinki Convention, which is at the very beginning of its work, also pays particular attention to the practice of these committees to understand what procedures allowing open communication from the public it can bring to its work.[9]

The Aarhus Convention was the first of the three instruments to establish its compliance review mechanism. Its mechanism was developed before the first Meeting of the Parties in Lucca, Italy, in October 2002 in accordance with Article 15 of the Convention which provided for the establishment of a mechanism to review compliance with the provisions of the Convention at the first Meeting. The Working Group of the Signatories, chaired by the United Kingdom, developed the mechanism, taking as its starting point a comparison between the working methods of the Compliance Mechanism of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Human Rights Committee of the International Covenant on Civil and Political Rights. In the end, the latter served as a very clear reference for the work of the Aarhus Working Group. Thus, the link between the two different legal regimes of international environmental law and human rights law is far from coincidental but rather constitutes an explicit and assumed act.[10]

The compliance review mechanisms of the three instruments introduced a number of innovations not seen in more traditional mechanisms. First, members of the compliance committees are appointed in their personal capacity rather than as representatives of States. This has implications both for the nature of the procedure they follow and the decisions they take, not least because the independence of the members depoliticizes the work of the committees and gives them greater strength and credibility. Second, the possibility to receive communications directly from the public enables challenges to the implementation of the instrument that would not otherwise have been known to be brought to light and addressed. Such Committees thus add another, more technical, form of discussion to the general debate among Parties which is essentially political in nature.

What some see as a weakness—that these Committees consist of experts whose decisions cannot have the same weight as those of judicial bodies —may prove to have certain advantages as well. These bodies are still too often considered only in comparison to judicial organ procedures, leading to the conclusion that they are similar to judicial bodies but without the same capacity for action.[11] It is true that their procedures for determining the facts and discussing different points of view can be quite similar. Yet the practice of receiving individual communications from the public demonstrates that the explicitly 'non-confrontational' nature of the

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4 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998. See the contribution of Fiona Marshall in this volume.

5 Protocol on Pollutant Release and Transfer Registers, 2003.

6 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1999.

7 Convention on Environmental Impact Assessment in a Transboundary Context, 1991. See the contribution of Felix Zaharia in this volume.

8 See cases EIA/IC/CI/4 and EIA/IC/CI/5 of the Implementation Committee of the Espoo Convention.

9 See the contribution of Attila Tanzi and Cristina Contartese in this volume.

10 See the contribution of Mara Tignino in this volume as well as M. Tignino, 'Les contours de la participation publique et la protection des ressources en eau transfrontières', *Vertigo : La revue en sciences de l'environnement*, 2010, online : vertigo.revues.org/9750.

11 M. Tignino, 'Quasi-Judicial Bodies', in C.M. Brölman, Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Law-Making*, Edward Elgar, Cheltenham, (forthcoming).

procedure provides opportunities for discussion and follow-up that are not available in more stringent judicial proceedings, and even more limited within an individual case-by-case approach. The compliance bodies report their findings and recommendations to the Meetings of the Parties (MOP) of their respective treaties, which, as political bodies, adopt decisions concerning the compliance of the States found by the compliance bodies not to be in compliance. The follow-up of these MOP decisions can also be performed by the compliance bodies. Thus, recommendations can be addressed in a continuous and long-term time frame, which is clearly different from the usual follow-up of judicial acts. With this opportunity to work on compliance over the long-term, these committees have powers without exact equivalents in either judicial settings or politicized intergovernmental forums.

It would be interesting to compare how the monitoring of the recommendations of the compliance bodies is done in the system of environmental rights to the way it is done with regard to international human rights when the Human Rights Council and the Universal Periodic Review play a role similar to the one played by the Meeting of the Parties. Environmental rights compliance committees, like human rights treaty bodies, must be considered as full-fledged organs, a category that has its limits but also its own virtues. In the future, it will be both useful and enlightening to compare in detail the two types of procedures in order to learn from all these early years.

## A. BUILDING BRIDGES

By building a link between human rights and the environment, this little 'family' of treaties[12] makes several contributions to both domains.

Drawing on experiences from international human rights law, these treaties developed similar procedures to monitor their implementation, most notably the possibility to receive communications directly from the public. These similarities provide a form of consistency with respect to the implementation of international obligations regarding public participation, in this still quite diverse institutional landscape.

One of the key principles of international instruments for the protection of human rights is the recognition of individuals and groups of individuals as real actors in environmental governance, and not only mere objects of political or administrative decisions. This procedural dimension provides a critical opportunity for environmental law to enhance its effectiveness, which is still so often questioned.

In the particular context of water resources management, the London Protocol provides an additional dimension by developing standards for the management of water resources and their ecosystems, as well as for the quality of water required for different uses. This substantial dimension of the right to water complements and strengthens the normative content defined by the UN human rights organs. For example, the Committee on Economic Social and Cultural Rights, in its General Comment No. 15, identified the main requirements of this right:

- availability: the water supply is sufficient and continuous, to cover personal and domestic uses;
- quality: the water must be safe and acceptable, and
- accessibility: the water must be physically accessible and within safe reach and affordable to all.

The London Protocol adds standards to these criteria to improve water management and to reduce and eliminate water-related diseases within a framework of integrated water-management systems aimed at a sustainable use of water resources.

## B. THE CHALLENGES OF PUBLIC PARTICIPATION IN THE WATER SECTOR

Facing growing public demand to take part in decision-making processes that affect them while having to cope with so many diversified instruments, public participation in the water sector must deal with several challenges.

12 The Aarhus Convention, the Kiev Protocol and the London Protocol.

## MONITORING IMPLEMENTATION

Making it possible for implementation procedures to receive communications from the public provides an opportunity to have a greater impact. The public can grasp the instrument more easily, as demonstrated by the example of the Aarhus Convention, and take ownership. International environmental law, which is often criticized for its limited effectiveness, has here an opportunity to strengthen its capacity to act. This is probably why instruments that do not have such procedures yet seem to be inspired by them.

The Compliance Committee of the London Protocol on Water and Health is still in its early years. It does not have the jurisprudence built up by the Committee Aarhus yet, but it offers the same options. The challenge is to make it easier for the public to take advantage of the peculiarities of these rights in the water sector.

## DEFINING PARTICIPATION

In terms of ensuring public participation in environmental matters, the Aarhus Convention is an essential instrument. It provides information on conditions for effective participation regarding both the method to be followed and the various stages of a public participation procedure, from its beginning with informing the public at an early stage when all options are still open to the consideration to be given to the public participation in the final decision. The Aarhus Convention thus provides a framework for public participation, which has been further elaborated upon and strengthened by the jurisprudence of the Aarhus Convention Compliance Committee. The concept of participation, which is present in many instruments but for the most part only in very vague, general terms, can now be transposed accurately and put into effect. The fact that different legal bodies, including the European Court of Human Rights[13] to the European Court of Justice[14] and even in the decision-making of international financial institutions like the EBRD[15] and the World Bank,[16] do not hesitate these days to refer to the work of the Aarhus Convention Compliance Committee shows that its work on public participation has had a broad impact beyond the Convention itself. Similarly, the Aarhus Convention provides a solid reference point for the diverse collection of instruments in the water sector to develop genuine public participation mechanisms. Over time, if bodies under the Aarhus Convention and London Protocol continue to cooperate, to exchange experiences and to learn from their mutual jurisprudence, a form of harmonization will emerge, clarifying and reinforcing the notion of public participation.

# III. MANAGING WATER AS A MAJOR LINK BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT

Water management is now the focus of an impressive number of international instruments, ranging from treaties on transboundary waters to instruments on integrated management[17] and to the definition of the right to drinking water and sanitation. The right to drinking water and sanitation also has several instruments that support and define it: the General Comment 15 of the Committee on Economic, Social and Cultural Rights, resolutions of the UN General Assembly and the Human Rights Council, and the recent reports and manuals of the Special Rapporteur of the Human Rights Council on the right to drinking water and sanitation.

Water is vital for everyone; this importance is set to continue to grow as the effects of climate change becoming increasingly evident. Water will thus have a growing importance in international relations. Public participation

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13 See *Tatar v. Romania*, judgment of 27 January 2009.

14 See judgements *Boxus e.a.* (C-128/09 to C131/09, C134/09 & C135/09, EU:C:2011:667); *Križan e.a.* (C416/10, EU:C:2013:8); *Edwards et Pallikaropoulos* (C260/11, EU:C:2013:221); *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen* (EU:C:2011:289); *Lesoochranárske zoskupenie* (EU:C:2011:125).

15 See EBRD, *Public Information Policy*, as approved by the Board of Directors at its Meeting on 7 May 2014.

16 See Institutional Development Fund, *Strengthening Aarhus Convention Implementation in Albania* (Grant Project), 2010.

17 Dublin Statement on Water and Sustainable Development (Dublin Principles), 1992 ; Johannesburg Plan of Implementation, 2002; UNESCO Integrated Water Resources Management Guidelines at River Basin Level, 2009.

will become increasingly critical. It is therefore not surprising that the water sector is the most advanced in connecting human rights and environmental issues.

The London Protocol on Water and Health has a special contribution to make here. By setting quantitative and qualitative objectives to be attained, it gives substantive content to the right to water, in addition to purely procedural elements such as public participation. By fully implementing such an instrument and continuing work in this direction globally, the water sector will be one of the first to harmonize not only the procedural aspects but also those related to the substance of those rights.

It is therefore essential to encourage all the bodies working on these issues to continue to exchange knowledge and experience, so that they can refer to each other, and give greater coherence to both States policies and individual actions in water management and the realization of the right to drinking water and sanitation.

## Further reading

UNECE, *Guide to Public Participation under the Protocol on Water and Health*, United Nations Economic Commission for Europe, Geneva, November 2013.

UNECE, WHO Europe, *The Equitable Access Score-Card. Supporting Policy Processes to Achieve the Human Right to Water and Sanitation*. United Nations Economic Commission for Europe & World Health Organization Regional Office for Europe, Geneva, November 2013.

# Public Participation and Water Resources Management:

## Where Do We Stand in International Law?

La présente publication rassemble les Actes de la Conférence « La participation du public et la gestion des ressources en eau : où en est le droit international? » organisée par la Plateforme pour le droit international de l'eau douce de la Faculté de droit de l'Université de Genève au Palais des Nations le 13 décembre 2013. Cette Conférence a été organisée en partenariat avec la Commission économique des Nations Unies pour l'Europe (CEE-ONU) avec l'appui financier du Fonds National Suisse de la Recherche Scientifique (FNS). Les Actes ont été publiés par le Programme hydrologique international (PHI) de l'UNESCO dans le cadre du programme de l'UNESCO sur la diplomatie de l'eau et avec l'appui financier de la Société académique de Genève.

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