The Role of International Environmental Standards within the EU

Astrid Epiney[*]

Dieser Beitrag (Stand 2012) wurde erstmals wie folgt veröffentlicht:
***Astrid Epiney*, The Role of International Environmental Standards within the EU, in: Mauro Bussani/Lukas Heckendorn Urscheler (Hrsg.), Comparisons in Legal Development. The Impact of Foreign and International Law on National Legal Systems, Zürich 2016, 73-98. Es ist möglich, dass diese publizierte Version – die allein zitierfähig ist – im Verhältnis zu diesem Manuskript geringfügige Modifikationen enthält.**

I. Introduction

The European Union is an important actor at the international level (also) in relation to environmental matters. So, the EU is a party to numerous international treaties, normally alongside its Member States, as the conditions for an exclusive EU competence are generally not met in connection with environmental topics. Thus, international treaties concluded by the EU in this area are, in the main, mixed agreements.[1]

The European Union frequently adopts secondary legislation either prior or subsequent to its ratification of environmental agreements in order to ensure – at the EU level – conformity with international law. This process means that international standards are in some sense transposed into EU law. Not all provisions of international treaties are subject to such a transposition; for a variety of reasons, some conventional dispositions are not taken up in secondary legislation. This situation does not alter the fact that those treaty provisions form an integral part of the applicable law within the framework of the European Union as the Union has far reaching competences in the field of environmental policy-making and the provisions of mixed agreements become integral components of EU law if the European Union has an external competence to conclude treaties on the relevant topic.[2] The gaps in the process of transposition at the EU level, however, give rise to questions concerning whether and under

[*] I would like to thank Joanna Bourke Martignoni for her help as linguistic aspects are concerned.

[1] Cf. as to the competence of the EU to conclude international treaties in environmental matters and the relationship to the competences of the Member States, a topic which is not the subject of the present contribution, e.g. Dominik Thieme, European Community External Relations in the Field of the Environment, EELR 2001, 252 et seq.; Cornelia Eberle, Die EG als Partei internationaler Umweltschutzübereinkommen: Fragen des Abschlusses von Übereinkommen und deren Implementierung, 2001; Teresa Fajardo Del Castillo, Revisiting the External Dimension of the Environmental Policy of the European Union: Some Challenges Ahead, JEEPL 2010, 365 et seq.; as to the external competences of the EU in general e.g. Paul Craig/Grainne de Burca, EU Law. Text, Cases and Materials, fifth edition, 2011, p. 303 et seq.; as to the specific problems raised by mixed agreements in the area of environmental protection e.g. Johanna Steyrer, Gemischte Verträge im Umweltrecht – die Folgen geteilter Kompetenz der Europäischen Gemeinschaft und ihrer Mitgliedstaaten ZUR 2005, 343 et seq.

[2] Cf. the references in note 1.

which conditions the provisions of international treaties may have legal consequences within the framework of the EU and its Member States.

The aim of the present contribution is to analyse these questions, first (II.) by providing a general overview of the effects of international (environmental) law within the legal system of the EU, second (III.) by illustrating and exploring some of the problems related to these issues using three recent ECJ judgments concerning the Aarhus Convention in connection with access to information, participation in decision-making and access to justice in environmental matters.[3] The same Convention will also be referred to as an example in Part II. The contribution concludes with some remarks on the effectiveness of international environmental law within the framework of the European Union (IV.).

The Aarhus Convention contains three main elements ("pillars"):[4]

- The first pillar provides for access to environmental information held by public authorities: individuals and NGOs are guaranteed access without any additional conditions (as far as their possible interests are concerned). This right can only be restricted for certain reasons enumerated exhaustively in the Convention.
- The second pillar concerns public participation in decision-making in environmental matters: the public shall have a right to participate (which includes information and comments) on certain activities that are particularly relevant to the environment listed in Annex I (essentially authorisations concerning large projects normally also subject to an EIA).
- Finally, the third pillar provides for access to justice in connection with the possible violation of the principles of access to environmental information (Article 9(1)), the legality of decisions about certain activities particularly relevant for the environment (annexe I) and compliance with national environmental laws.

II. International Environmental Law and the EU legal framework – Overview

As soon as an international agreement enters into force for the European Union, it becomes an "integral part" of EU law.[5] According to Article 216(2) TFEU those agreements are binding

[3] Which is ratified by the EU and all Member States. Cf. the text of the agreement in ILM 38 (1999), 517 et seq., OJ 2005 L 124, 1 (annex to the decision of the EU to adhere to the Convention).

[4] Cf. in detail to the Aarhus Convention e.g. Astrid Epiney, UN/ECE-Konvention über den Zugang zu Informationen, die Öffentlichkeitsbeteiligung an Entscheidungsverfahren und den Zugang zu Gerichten in Umweltangelegenheiten („Aarhus-Konvention"), Kommentar, in: Fluck/Theuer (Hrsg.), Informationsfreiheitsrecht mit Umweltinformations- und Verbraucherinformationsrecht IF-R/UIG, Kommentar, F II.1, 2003; Astrid Epiney/Martin Scheyli, Die Aarhus-Konvention. Rechtliche Tragweite und Implikationen für das schweizerische Recht, 2000; Martin Scheyli, Aarhus-Konvention über Informationszugang, Öffentlichkeitsbeteiligung und Rechtsschutz in Umweltbelangen, ArchVR 2000, 217 et seq.; Michael Zschiesche, Die Aarhus-Konvention – mehr Bürgerbeteiligung durch umweltrechtliche Standards?, ZUR 2001, 177 et seq.; Petra Jeder, Neue Entwicklungen im Umweltrecht vor dem Hintergrund der Aarhus-Konvention, Jahrbuch des Umwelt- und Technikrechts (UTR) 2002, 145 et seq.; Vera Rodenhoff, The Aarhus-Convention and its Implications for the „Institutions" of the European Community, RECIEL 2002, 343 et seq.; Sabine Schlacke, Überindividueller Rechtsschutz, 2008, 232 et seq.; Alexander Schink, Die Aarhus-Konvention und das deutsche Umweltrecht, EurUP 2003, 27 et seq.; Thomas von Danwitz, Aarhus-Konvention: Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu den Gerichten, NVwZ 2004, 272 et seq.; Jerzy Jendroska, Aarhus Convention and Community Law. The Interplay, JEEPL 2005, 12 et seq.; Marc Eric Butt, Die Ausweitung des Rechts auf Umweltinformation durch die Aarhus-Konvention, 2001.

on the institutions of the EU and its Member States. These effects raise the question of their precise legal consequences and meanings. In the context of the present contribution, six issues are of particular importance: the (potential) duty to transpose the provisions of an international agreement (1.), the obligations of Member States to transpose (2.), the manner of transposition (3.), the interpretation of the international agreements and the provisions of EU law concerning transposition of their principles (4.), the primacy of international agreements (5.) and, finally, the possible direct effect of provisions of international agreements (6.). These issues are of course also of general interest in the area of external relations law of the European Union; however, some or parts of them are particularly relevant in the areas of international and European environmental law, which is characterised by a certain lack of implementation and enforcement.

1. As to the duty of transposition of provisions of international agreements at the EU level

As mentioned above,[6] international environmental agreements concluded by the EU are, in general, mixed agreements. This means that at the international level, the EU and its Member States are, in principle, bound by the whole agreement, unless – and this is generally not the case with respect to international environmental agreements – it can be affirmed without any doubt that solely the Member States or only the EU are responsible or competent to fulfil certain obligations.[7]

At the EU level, however, the question arises as to the circumstances in which there may be a legal obligation – grounded in EU law – to transpose the provisions of international environmental agreements into the framework of the European Union. Such an obligation could be derived from Article 216(2) TFEU according to which international agreements are binding on the institutions of the EU and its Member States and from the characterisation, by the ECJ, of international agreements as forming an integral part of EU law.[8]

There is a clear obligation for the Union to transpose those international legal obligations that must be realised at the EU level. Indeed, in such a situation, only a transposition at the EU level can ensure that it meets its international obligations. Thus, the EU is obliged – through an application of Article 216(2) TFEU – to adopt the secondary acts necessary to fulfil its international obligations. One example of such a transposition are the provisions of the

---

5 Cf. already ECJ, case 181/73, Haegemann, ECR 1974, 449, para. 2/6; see also ECJ, case 104/81, Kupferberg, ECR 1982, 3641, para. 13; ECJ, case 12/86, Demirel, ECR 1987, 3641, para. 7; ECJ, case C-192/89, Sevince, ECR 1990, I-3461, para. 8; ECJ, case C-386/08, Brita, judgment of 25/2/2010.

6 Cf. I.

7 In detail, this issue raises a number of complex questions which cannot be dealt with in the present contribution. Cf. to this issue, with further references, Astrid Epiney, Zu den Implikationen der EU-Mitgliedschaft für die Stellung und Anwendung des Völkerrechts im innerstaatlichen Bereich, FS Rüdiger Wolfrum, 2012, 1909 (1915 et seq.).

8 Cf. already note 5.

Aarhus Convention as far as access to environmental information in the possession of EU institutions is concerned - it is up to the European Union to adopt the measures necessary to fulfil these obligations. The same is true for the guarantee of judicial review at the EU level.
On the other hand, however, it is apparent that there is no obligation for the EU to legislate in order to comply with international agreements in matters over which the EU itself has no competence. Again, using the example of the Aarhus Convention, this is the case in relation to judicial review in Member States of those national environmental laws that do not constitute an application, a transposition or an implementation of EU law. The competence of the EU, under the terms of Art. 192 TFEU, is restricted to the adoption of measures concerning judicial review of EU law or national law applying or implementing EU law.[9]
The situation is less clear cut at the Member State level, e.g. – with reference to the Aarhus Convention – when access to information held by authorities within Member States, public participation in decision-making in environmental matters at the national level or judicial review in Member States is concerned. While the EU may also adopt secondary legislation that imposes obligations on Member States in these situations (since the competence of the EU in environmental matters is relatively wide-ranging),[10] there may be no legal duty for the EU to do so. In this context, one may also highlight that in circumstances in which the Member States are parties to a Convention even if the European Union does not act, the States are still required to adopt the necessary legislative measures in order to comply with their international obligations. However, this conclusion does not consider all issues and aspects of the questions raised: In cases where the European Union itself adopts or has previously enacted legislative measures in the field covered by an international obligation, it can be argued that there is a legal obligation – which can be derived from Article 216(2) TFEU – to adapt this legislation to the international obligation. Indeed, in these situations, the EU acts in a field covered by an international obligation and it therefore must respect the applicable provisions of the international instrument and also consider its constituent elements at the EU level. It is argued here that this obligation is only fulfilled if the secondary act takes over the relevant elements of the international obligation. The obligation will not be discharged through a simple assertion that the secondary act does not prevent the Member States from

---

9 Cf. to this latter issue in detail already Astrid Epiney, Gemeinschaftsrecht und Verbandsklage, NVwZ 1999, 485 (491-492). Cf. in the same direction Christoph Meitz, Entscheidung des EuGH zum deutschen Umweltrechtsbehelfsgesetz, NuR 2011, 420 (421); Markus Appel, Umweltverbände im Ferrari des deutschen Umweltrechtsschutzes – Anmerkung zur Trianel-Entscheidung des EuGH, NuR 2011, 414 (415); Martin Gellermann, Europäisierte Klagerechte anerkannter Umweltverbände, NVwZ 2006, 7 (9); Bernhard Wegener, Anmerkung zu den Schlussanträgen der Generalanwältin Sharpston, ZUR 2011, 84; Angela Schwerdtfeger, Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention, 2010, 298-299; of another opinion, however, Felix Ekardt, Die nationale Klagebefugnis nach der Aarhus-Konvention, NVwZ 2006, 55; Ingolf Pernice/Vera Rodenhoff, Die Gemeinschaftskompetenz für eine Richtlinie über den Zugang zu Gerichten in Umweltangelegenheiten, ZUR 2004, 149 (150-151).

10 Cf. to his issue e.g., with further references, Astrid Epiney, Umweltrecht in der EU, 2th edition, 2005, 56 et seq.; Jan H. Jans/Hans H.B. Vedder, European Environmental Law After Lisbon, 4th edition, 2012, 59 et seq.; Ludwig Krämer, Droit de l'environnement de l'Union européenne, 2011, 35 et seq.

transposing EU legislation in conformity with the relevant international agreement by legislating on additional elements. Article 216(2) TFEU clearly states that agreements are binding on the institutions of the EU, this must also mean that the EU itself – at least when legislating – is required to consider the totality of its international obligations. Otherwise, there would be the risk of Member States transposing secondary acts in total conformity with the relevant EU secondary act without considering the international obligations that underlie them. Over and above this, only this approach may assure the effectiveness of international obligations. It can therefore be affirmed that the EU is legally bound to formulate secondary acts in such a way that ensures compliance with international obligations when legislating in the relevant field. Again, using examples drawn from the Aarhus Convention, if the EU has previously adopted or decides to enact a directive on access to environmental information held by national authorities, it must formulate the directive in conformity with the Aarhus Convention in such a way that it also obliges the Member States to comply with the intent underlying the Convention provisions. When legislating on the authorisation procedure for administrative decisions falling within the scope of the second pillar of the Aarhus Convention (concerning public participation in decision-making in environmental matters), the secondary act has to encompass the relevant provisions of the Aarhus Convention as well as the general obligations referring to judicial review of such decisions (cf. Article 9(2) Aarhus Convention).

Over and above this, there are strong arguments to support the view that there is also a legal obligation of the EU to transpose international obligations when an EU action seems to be the only effective means to achieve the desired outcome (contingent, of course, on the possession of EU competence). The precise conditions giving rise to the finding of such obligations will depend upon a number of different factors. The leitmotiv must be effectiveness: if a legislative act on the EU level appears to be the only way to ensure the effective application of and compliance with the international obligation, the binding effect of international agreements implies that the Union is under a legal duty to legislate at the EU level.

2. Obligations of Member States

In cases where the EU has not (yet) adopted secondary legislation in the field covered by an international environmental agreement, the Member States are obliged under EU law (and not only on the basis of their international obligations) to adopt measures necessary to implement the international agreement (if, at is the case in environmental matters, the provisions of the international agreements fall within the scope of EU competence).[11]

[11] Cf. ECJ, case C-239/03, Commission/France, ECJ 2004, I-9325, para 25, 26.

3. Manner of transposition on the EU level

The manner in which provisions of international agreements are transposed into EU law may differ. From a legal point of view, however, the transposition has to be able to ensure conformity with international obligations.

The form taken by the transposition will be dependent on the content and scope of the international provision and either directives or regulations may fulfil this condition. For example, the right of access to environmental information has been transposed at the EU level by a regulation[12], while a directive[13] has been used to cover the issue of access to information held by national authorities.

As to the content of such transposition, it may of course differ depending on the international provision to be transposed. At times, it may be necessary to further specify the wording of a provision in an international agreement to enable it to be accurately reproduced in an EU secondary act while, at others, a complete transposition is used. So, e.g., article 10a Directive 85/337[14] reproduces more or less literally Article 9(2) Aarhus Convention.

4. Interpretation

As far as issues of interpretation are concerned, at least three clusters may be identified:

- First, in connection with the interpretation of the international agreement itself, the principles of international law – and not the specific principles of EU law – have to be applied. The fact that the international agreement becomes an integral part of EU law does not mean that its character changes; it remains international law which applies as such in the framework of the EU.[15]

---

12 Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264, 13. This Regulation has to be seen and applied in relationship with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, 43.

13 Directive 2003/4 on public access to environmental information and repealing Directive 90/313, OJ 2003 L 41, 26.

14 Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175, 40.

15 Cf. ECJ, case 270/80, Polydor, ECR 1982, 329, para 18 et seq. Cf. in detail to the interpretation of international agreements concluded by the EU, with further references, Astrid Epiney/Andreas Felder, Europäischer Wirtschaftsraum und Europäische Gemeinschaft: Parallelen und Divergenzen in Rechtsordnung und Auslegung, ZVglRWiss. 2001, 425 et seq.; Roland Bieber, Die Bedeutung der Rechtsprechung des Gerichtshofs der Europäischen Union für die Auslegung völkerrechtlicher Verträge, in: Astrid Epiney/Beate Metz/Robert Mosters (eds.), Das Personenfreizügigkeitsabkommen Schweiz – EU: Auslegung und Anwendung in der Praxis / L'accord sur la libre circulation des personnes Suisse – UE: interprétation et application dans la pratique, 2011, 1 et seq.

- Second, the interpretation of secondary legislation transposing provisions of international agreements must on the one side refer to specific EU principles. On the other side, the fact that the secondary provision aims at the transposition of an international obligation needs to be taken into account. The interpretation therefore must consider the meaning of the relevant international provision and adopt a reasoning that conforms with it.[16]
- Finally, the interpretation of EU law and national law must comply with the terms of international agreements. This obligation implies also a careful examination of the relevance of international agreements for the interpretation of EU or national law. The case law of the General Court is not always convincing in this respect. In T-366/03,[17] the conformity of an Austrian measure providing for an area free from genetically modified organisms with EU legislation had to be examined. The question in this context was also if the Alpine environment in Austria had special characteristics that would justify specific measures of protection as far as genetically modified plants and animals are concerned. The Court answered this question in the negative, without, however, considering the Alpine Convention[18] which explicitly mentions that the alpine environment constitutes an "outstanding unique and diverse habitat" and demands measures that take into account "variety, uniqueness and beauty of nature and the countryside" in order to preserve this area on a permanent basis (preamble and Article 2 Alpine Convention).

5. Primacy of international agreements

According to Article 216(2) TFEU, international agreements are binding upon the EU institutions and Member States.

The supremacy of EU law applies, in principle,[19] to binding agreements concluded by the EU and international law is binding on the Member States in the same way as primary and secondary law.

As far as the relationship between international agreements and secondary legislation is concerned, the agreements prevail over secondary legislation.[20] So, secondary legislation that does not conform to an international agreement may not be applied. The General Court has not always correctly applied this principle in its rulings on environmental matters:[21] in the

16 Cf. e.g. ECJ, case C-548/09 P, Bank Melli Iran/Rat, judgment of 16 november 2011.

17 General Court, joined Cases T-366/03 and T-235/05, Land Oberösterreich and Austria/Commission, ECR 2005, II-4005.

18 Ratified by the EU, cf. Decision 96/191, JO 1996 L 61, 31.

19 As far as the treaty provision lies within the competence of the EU. Cf. as to the specific problems of mixed agreements the references in note 1.

20 See e.g. ECJ, case C-344/04, IATA and ELFAA, ECR 2006, I-403, para 35.

21 Cf. to the following remarks Ludwig Krämer, Comment on Case T-362/08, JEEPL 2011, 225 et seq.

case T-362/08[22], the Court applied Article 4(1.a) R 1049/2001[23] which allows access to a document to be refused if the disclosure could undermine protection of the economic policy of a Member State. The Court therefore maintained the Commission's refusal of access to a letter from the former German Chancellor Schröder concerning the construction of an airport in a Natura 2000 area. The Aarhus Convention, however, does not provide for such an exception to the disclosure of environmental information. Therefore, the General Court should not have applied this provision of R 1049/2001; furthermore, Article 2(6) of that Regulation clearly states that the Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law.

6. Direct effect

As already mentioned, international treaties are, as such, an integral part of the EU legal order, the consequence being that they are – while being interpreted using international legal methods of interpretation[24] – binding for the Member States and the institutions as "normal" EU law. This implies, in particular, that EU law principles such as the (possibility) of direct effect (but also the supremacy of EU law already mentioned[25]) are applicable.

Member States are thus obliged to apply the agreements when they enter into force at the international level. Member States cannot invoke, against such an applicability of international treaties binding for the EU, their internal legal order, which may exclude the direct effect of international treaties. On the contrary, in applying principles of EU law, provisions of international treaties can in principle also have a direct effect in Member States. Individuals may, therefore, under certain conditions, invoke provisions of international agreements in order to derive individual rights and the authorities in the Member States are, under certain conditions, obliged to apply provisions of international agreements.

However, the question of when international provisions may have such a direct effect has to be answered not through the simple "automatic" application of the principles relevant in this respect for EU law provisions. Given that international treaty law applies as such and does not lose its character as international law, the question of which conditions a provision must fulfil in order to have direct effect must be answered by taking into consideration the particularities of the international treaty.[26] According to the case law of the ECJ, the direct effect of

---

22 General Court, case T-362/08, IFAW Internationaler Tierschutz-Fonds, judgment of 13 january 2011.

23 Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, 43.

24 Cf. II.4.

25 Cf. II.5.

26 Cf. the relevant case law: ECJ, case 104/81, Kupferberg, ECR 1982, 2641; ECJ, case 12/86, Demirel, ECR 1987, 3747; ECJ, case C-432/92, Anastasiou, ECR 1994, I-3116; ECJ, case C-162/96, Racke, ECR 1998, I-3688; ECJ, case C-63/99, Gloszczuk, ECR 2001, I-6369, para. 38; ECJ, case C-235/99, Kondova, ECR 2001, I-6427, para. 33; ECJ, case C-192/89, Sevince, ECR 1990, I-3461; ECJ, case C-265/03,

provisions of international agreements may be admitted if the provision is unconditional, sufficiently precise, and if its direct application falls within the purpose and the nature of the agreement.[27]

As far as international environmental law agreements are concerned, this aspect seems to be of a certain importance despite the fact that the direct effect of such agreements has not been frequently invoked in Member States:

- Authorities in Member States must apply – even independently of individual rights – provisions of international environmental agreements if the specific conditions mentioned above are fulfilled, and this is also true in cases where the EU and/or the Member State have not transposed the agreement into secondary or national law. This obligation is a real EU law obligation since the principle of direct effect can be deduced both from EU law principles and from the characterisation of international agreements as an integral part of EU law.
- Furthermore, individuals may invoke (and enforce) directly applicable provisions of international environmental agreements under the conditions mentioned above if those provisions confer individual rights. The question if this latter condition is fulfilled must be answered on the basis of the relevant principles of EU law. According to these principles, an individual may invoke a provision if it aims at protecting an individual interest (such as health protection) and if the individual is or may be concerned.[28]

Despite the fact that most international environmental agreements contain rather broadly formulated provisions, which do not fulfil the requirements of being unconditional and sufficiently precise, there are, however, some cases in which the conditions may be met, e.g. some provisions of the Aarhus Convention[29], the ESPOO Convention[30], the MARPOL Convention[31], the Bern Convention[32] or the Seveso Convention[33].

Simutenkov, ECR 2005, I-2579. See in the literature e.g. Nanette A. Neuwahl, in Emiliou/O'Keeffe (eds.), The European Union and World Trade Law, 1996, p. 313 (317 et seq.); Eckart Klein, Zur Auslegung von völkerrechtlichen Verträgen der EG mit Drittstaaten, in A. Epiney/F. Rivière (eds.), Auslegung und Anwendung von „Integrationsverträgen"/Interprétation et application des traités d'intégration", 2006, 1 (14 et seq.); Craig/De Burca (note 1), 344 et seq.

27 Cf. already ECJ, case 104/81, Kupferberg, ECR 1982, 2641; cf. furthermore the references in note 26.

28 Cf. ECJ, case C-361/88, Commission/Germany, ECR 1991, I-2567; ECJ, case C-58/89, Commission/Germany, ECR 1991, I-4983; ECJ, case C-237/07, Janecek, ECR. 2008, I-6221; cf. in detail to this issue Astrid Epiney, Primär- und Sekundärrechtsschutz im Öffentlichen Recht, VVDStRL 61 (2002), 361 (386 et seq.). Cf. also more recently e.g. Christine Steinbeiß-Winkelmann, Europäisierung des Verwaltungsrechtsschutzes als Effektivitätsgewinn?, in: Wilfried Erbguth (ed.), Verwaltungsrechtsschutz in der Krise: vom Rechtsschutz zum Schutz der Verwaltung?, 2010, 117 (121 et seq.); Bernhard Wegener, Rechtsschutz im europäischen (Umwelt-) Recht. Richterrechtliche und sekundärrechtliche Bausteine und Fehlercodes unionaler Dogmatik, UTR 2008, 319 (323 et seq.); Silvia Pernice-Warnke, Effektiver Zugang zu Gericht. Die Klagebefugnis für Individualkläger und Verbände in Umweltangelegenheiten unter Reformdruck, 2009; Christian Klöver, Klagefähige Individualrechtspositionen im deutschen Umweltverwaltungsrecht und nach Maßgabe von Umweltrichtlinien der Europäischen Gemeinschaft, 2005; Ulrich Baumgartner, Die Klagebefugnis nach deutschem Recht vor dem Hintergrund der Einwirkungen des Gemeinschaftsrechts, 2005; Thomas von Danwitz, Europäisches Verwaltungsrecht, 2008, 511 et seq.

29 Cf. III.

The principle of direct effect can be of particular importance in situations where the EU and / or the Member States have not sufficiently transposed provisions of international environmental agreements as the following example shows: In Cases C-213/03[34] and C-239/03[35] the scope and effect of Articles 6(1) and 6(3) of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources[36] was in question. The Court states that Article 6(1) of the Protocol sets the objective to "strictly limit" pollution by substances or sources listed in Annex II. The documents submitted to the Court clearly show that the inflow of a hydroelectric power station situated near the Etang de Berre was highly disproportionate in comparison to the volume of the pond and that France had not taken all appropriate measures to prevent, abate and combat heavy and prolonged pollution from a land-based source. Article 6(3) of the Procotol clearly, precisely and unconditionally lays down the obligation for Member States to subject discharges of the substances listed in Annex II to the issue, by the competent national authorities, of an authorisation taking due account of the provisions of Annex III. These considerations also apply to the interpretation of Article 6(1) of the Protocol. These provisions were found to have direct effect so that every discharge of the substances listed in Annex II is subject to an authorisation and any interested party is entitled to rely on these provisions before national courts.

This judgment illustrates that even provisions of international agreements that leave a certain margin of appreciation to Member States can have direct effect to that extent that a national court may find breaches of their core content and individuals may rely on their provisions before domestic jurisdictions. Furthermore, the judgement shows the broad interpretation of the scope of rights conferred by European Union law, since it seems sufficient that the provisions are aimed at addressing an individual interest and that such an interested individual seeks access to justice in order to engage them; these conditions were held to have been fulfilled in this case in relation to the discharge of dangerous substances into a lake.[37]

III. The example of the Aarhus Convention – selected aspects

The effects of international environmental law within the framework of the EU and of EU law must be examined in connection with every different environmental agreement, in light of the principles developed above. In the framework of the present contribution, it is not possible to

30 Convention on Environmental Impact Assessment in a Transboundary Context, 25 of february 1991, ILM 1991, 802 et seq.
31 International Convention for the Prevention of Pollution from Ships (1978).
32 Convention on the conservation of European wildlife and natural habitats (1979), CETS no. 104.
33 UNECE Convention on the transboundary effects of industrial accidents (1992), OJ 1998 L 326, 5.
34 ECJ, case C-213/03, Etang de Berre, ECR 2004, I-7357.
35 ECJ, case C-239/03, Commission/France, ECR 2004, I-9325.
36 Cf. the original version in OJ 1983 L 67, 1; cf. the modifications in OJ 1999 L 322, 18.
37 Cf. in detail to the topic the references in note 28.

deal with all or even most international environmental agreements. The legal effects of international environmental agreements are, therefore, illustrated using selected aspects – with a particular focus on judicial review – of the Aarhus Convention. This choice can be explained by the fact that all relevant principles dealt with above are also addressed within the Convention and that the ECJ has recently specified a certain number of elements in this respect. The following remarks draw on three rulings of the ECJ to highlight those aspects of the relationship between international, EU and Member State law dealt with in this contribution.[38]

1. Case C-263/08 (Djurgarden-Lilla)

In Case C-263/08[39], the precise scope of Article 10a D 85/337[40] - which takes over Article 9(2) Aarhus Convention – was one of the main issues. According to this provision, Member States shall ensure access to a review procedure before a court or another independent and impartial body established by law for members of the public concerned having a sufficient interest, or, alternatively, maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition. This access must serve to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive. Access to justice must thus be accorded against administrative decisions concerning projects for which an EIA must be conducted in application of the Directive. Article 25 D 2010/75[41] contains a similar provision.

Three aspects of the judgment are of particular importance in this context:

- Access to justice for the public concerned must be accorded regardless of the role the public might have played in taking part in the procedure leading to the decision being challenged. Both procedures have to be distinguished and have different purposes. This approach by the Court implies that Member States may not instate a relationship between access to justice and participation in the (administrative) procedure leading to the decision challenged.
- Furthermore, the Court distinguishes clearly between the access to justice of natural or legal persons on the one hand and non-governmental organisations which promote environmental protection on the other. For the latter, Article 10a D 85/337 requires, according to the Court, access to justice (on condition any requirements under national

38 Cf. as to this part of the contribution already and in a more detailed way Astrid Epiney, Rechtsprechung des EuGH zur Aarhus-Konvention und Implikationen für die Schweiz. Zugleich ein Beitrag zu den Vorgaben der Aarhus-Konvention in Bezug auf das Verbandsbeschwerderecht, AJP 2011, 1505 et seq.

39 ECJ, case C-263/08, Djurgarden-Lilla, ECR 2009, I-9967.

40 Cf. to this article already II.3.

41 Directive 2010/75 on Industrial Emissions (integrated pollution prevention and control), OJ 2010 L 334, 17.

law are met) since they have to be regarded either as having sufficient interest or as having a right, which is capable of being impaired by projects falling within the scope of the Directive. The Directive stipulates – as does the Aarhus Convention – an altruistic access to justice for environmental organisations.

- Finally, the Court deals with the requirements of national law in respect of a non-governmental oganisation that promotes environmental protection in order to have a right of appeal under the conditions set out above: The national rules must ensure a wide access to justice and may not endanger the effectiveness of the provisions of Directive 85/337 on judicial remedies. So, a national provision may require that an organisation has as its object the protection of nature and the environment. Also, the condition that such an organisation must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, a minimum number of members of 2,000 persons would run counter to the objectives of Directive 85/337 and, in particular, the objective of facilitating judicial review of projects: Indeed, such a condition has as a consequence that local or regional environmental organisations would not be eligible to demand access to justice, thereby defeating one of the purposes of Directive 85/337 which also covers projects on a local or regional level.

  This approach by the Court implies that a system in which only those organisations active at the national level could be recognised as environmental organisations having access to justice is not compatible with Directive 85/337. Thus, criteria for the recognition of the associations must be formulated in such a way that local or regional associations are capable of fulfilling them. Furthermore, one may deduce from the judgment that the criteria formulated by national law may only serve to examine the 'seriousness' of the associations, in terms of their real existence, the object of environmental protection and the duration of their activities. It would not be in accordance with the directive to 'filter' out organisations on the basis of other criteria.

In the present context, it is of particular importance that the Court bases its findings on an interpretation of Article 10a D 85/337 that conforms with the object and purposes of the Aarhus Convention.

2. Case C-115/09 (Bund für Umwelt und Naturschutz)

Case C-115/09[42] also concerned the interpretation of Article 10a Directtive 85/337 and therefore of Article 9(2) of the Aarhus Convention in relation to access to justice by environmental organisations. In Germany, the *Umweltrechtsbehelfsgesetz* (UmwRG) enables

[42] ECJ, case C-115/09, Bund für Umwelt und Naturschutz Deutschland, judgment of 12 may 2011.

environmental associations to challenge administrative decisions but only if they refer to environmental provisions intended to protect the legal interests of individuals, an approach which has to be considered in light of the so called *Schutznormtheorie* which links access to justice to the legal interests of individuals so that this access is, in comparison to other possible systems, rather narrow.[43] In the judgment of the Court, the compatibility of the transposition of EU law (and the Aarhus Convention) was the central question.

The point of departure of the ECJ to the different questions submitted in this context was that Article 10a D 85/337 was introduced in the Directive in order to transpose the Aarhus Convention into EU law to enable the EU to ratify the Convention. Considering the objectives of the Aarhus Convention, the Court stated that it would be contrary to Article 10a D 85/337 if environmental organisations were not allowed to rely on the impairment of rules of EU environmental law solely because those rules protect only public interests and not (also) individual interests. Another approach would deprive those organisations of the opportunity to verify compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such. The rules that can be challenged by environmental organisations include those of national law implementing EU environmental law and the rules of EU environmental law having direct effect. Since these provisions of D 85/337 are precise and not subject to other conditions they have direct effect. This latter aspect is of particular importance since the provision of the *Umweltrechtsbehelfsgesetz* may not be able to be interpreted in conformity to EU law as its wording may be held to be sufficiently clear.[44]

This approach of the Court also implies that national courts must be able to examine the question if there is infringement of the rules that may be challenged on the basis of the interpretation of Article 10a D 85/337. The judgment is convincing:[45] A limitation of the access to justice of environmental organisations to situations in which the legal interests of

---

43 Vgl. to this conception in relationship to environmental law and with further references Astrid Epiney/Kaspar Sollberger, Zugang zu Gerichten und gerichtliceh Kontrolle im Umweltrecht, 2002, 29 et seq.; cf. also in relationship with the relevant provision of the Umweltrechtsbehelfsgesetzes Appel, NuR 2011 (note 9), 414, with further references.

44 Cf. to this question Wegener, ZUR 2011 (note 9), 84 (85); Sabine Schlacke, Anmerkung, NVwZ 2011, 804 (805).

45 Cf. already the arguments in Epiney/Sollberger, Zugang zu Gerichten (note 50), 324 et seq.; Epiney/Sollberger, Verwaltungsgerichtlicher Rechtsschutz (note 46), 168 et seq.; Epiney, in: Fluck/Theuer, Informationsfreiheitsrecht (note 4), F II.1, 2003, Art. 9, Rn. 10 et seq.; in the same sens Hans-Joachim Koch, Die Verbandsklage im Umweltrecht, NVwZ 2007, 369 (376-377); Sabine Schlacke, § 3. Rechtsbehelfe im Umweltrecht, in: Schlacke/Schrader/Bunge, Informationsrechte, Öffentlichkeitsbeteiligung und Rechtsschutz im Umweltrecht. Aarhus-Handbuch, 2010, 421; Jan Ziekow, Von der Reanimation des Verfahrensrechts, NVwZ 2005, 263 (266-267); Liane Radespiel, Entwicklungen des Rechtsschutzes im Umweltrecht aufgrund völker- und europarechtlicher Vorgaben – insbesondere das Umwelt-Rechtsbehelfsgesetz, EurUP 2007, 118 (122); Wegener, UTR 2008 (note 28), 319 (339 et seq.); Gabriele Oestreich, Individualrechtsschutz im Umweltrecht nach dem Inkrafttreten der Aarhus-Konvention und dem Erlass der Aarhus-Richtlinie, Verw 2006, 29 et seq.; cf. in detail with further references also Schwerdtfeger, Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention (note 9), 266 et seq.

individuals are concerned would mean that the access to justice of environmental organisations included in Article 10a D 85/337 would lose its *effet utile* since it could never be larger than the access to justice of individuals. Moreover, the wording of Article 10a D 85/337 and Article 9(2) Aarhus Convention clearly support this point of view.[46]

However, at least three questions may be raised in relation to the findings of the Court:

- First, the access to justice only has to be guaranteed under environmental law, a restriction which has its basis in the fact that the subject area of the Aarhus Convention is limited to environmental matters, the privilege of environmental organisations also being motivated by the fact that they are supposed to have special knowledge in the field of environmental law and politics.[47] The Court, however, does not specify the conditions under which it will be determined whether a rule concerns environmental matters. In any case, secondary law which is adopted on the legal basis of Article 192 TFEU has to be considered as forming part of environmental law. Furthermore, since environmental objectives may also be of some importance when the EU adopts secondary legislation on the basis of other provisions of the Treaty (what is confirmed by Articles 11, 114(3) TFEU), it seems appropriate to consider all rules which – in one way or another – have environmental objectives as environmental rules in respect of which access to justice has to be guaranteed. An analysis of whether these conditions are fulfilled must be conducted on a case-by-case basis.
- Second, the Court relies – as previously mentioned – on provisions of national law implementing EU law or on EU law having a direct effect: only those provisions must be challenged on the basis of Article 10a D 85/337, an approach which can be explained by the restricted competence of the EU in that the EU can only adopt provisions in the field of implementation if EU law is concerned.[48] This raises the question of which criteria will be used to determine whether a provision implements EU law, considering the fact that very large parts of national environmental law are in one way or another influenced by EU law. In regard of the restricted competence of the EU, only those national provisions that also implement EU law (including general principles as environmental principles) may satisfy this condition. On the other hand, the fact that a national provision implements ‘more’ than the EU standard does not prevent the

---

46 The compatibility of the mentioned provision of the Umweltrechtsbehelfsgesetz was indeed discussed very controversely and a majority of authors was of the opinion that it does not respect EU law. Cf. e.g. Gellermann, NVwZ 2006 (note 9), 7-8; Schlacke, Überindividueller Rechtsschutz (note 4), 301; Schwerdtfeger, Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention (note 9), 273 et seq. Of another opinion e.g. von Danwitz, NVwZ 2004 (note 4), 272 (278-279). Cf. to this discussion also Bernhard Wegener, European Right of Action for Environmental NGOs, JEEPL 2011, 315 (317-318).

47 Cf. Schwerdtfeger, Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention (note 9), 280-281.

48 Cf. the references in note 9.

simultaneous implementation of EU law.[49] In practice, delimitation may, however, prove to be rather complex.[50]

- The national legislator must decide if there are to be two different regimes, one for the access to justice in respect of the EU law or national law implementing EU law and another for access to justice only in respect of national law. Such a differentiation would not appear to be the most effective solution as it is unclear why access to justice should be broader in the first constellation than in the latter; furthermore, the substance of the law may be very similar in both cases. Finally, treating the two regimes in the same may avoid the inherent difficulties of delimitation mentioned above.[51]

Finally, it has to be stressed that the judgment does not refer to the admissibility of national provisions that limit judicial control. Such provisions exist e.g. in Germany in relation to rules which have not been invoked in the administrative procedure leading to the decision being challenged or in respect of certain provisions that have a purely procedural character.[52] When answering this question, the principle of the *effet utile* is usually decisive, as it has to be applied in respect of every national provision. However, the consideration of the Court in Case C-263/08[53] supports the view that the distinction made in EU law between participation in the administrative procedure on the one side and access to justice on the other implies that access to justice may not be subordinated to prior participation in the administrative procedure.

3. Case C-240/09 (Lesoochranarske)

Case 240/09[54] concerned Article 9(3) of the Aarhus Convention (access to justice in respect of the possible violation of national environmental law). In the Slovak case, an environmental association sought access to justice in relation to the authorisation, by the competent national authorities, of exceptions from the protection regime for certain listed species, in relation to entry to a protected area and in connection with the use of chemical substances in those areas. The major legal question concerned whether Article 9(3) has sufficient direct effect to enable an environmental organisation to derive a right of access to justice from this provision, at least in respect of a national decision which allows exceptions from an environmental regime imposed by the Habitat Directive.[55]

---

49 In this context, it may, however, be useful to remember that also Member States are parties of the Aarhus Convention so that they have to respect their provisions.

50 Cf. to this issue also Appel, NuR 2011 (note 9), 414 (415).

51 Cf. also in this direction e.g. Schlacke, NVwZ 2011 (note 51), 804 (805).

52 Cf. the references of some of such rules in Meitz, NuR 2011 (note 9), 420 (421-422).

53 Cf. III.1.

54 ECJ, case C-240/09, Lesoochranarske, judgment of 8 march 2011.

55 Directive 92/43 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, 7.

The Court accepted its competence to interpret Article 9(3) of the Aarhus Convention,[56] but denied the direct effect of the provision on the basis that it does not contain any clear and precise obligation capable of directly regulating the legal position of individuals. This approach is not really surprising in view of the very open formulation of Article 9(3) of the Aarhus Convention.[57] However, it was held that the national court must – in relation to species protected by EU law – interpret domestic law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention, in order to ensure effective judicial protection in the fields covered by EU environmental law. Therefore, the national law has to be interpreted in such a way as to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

Thus, if the dispute falls within the scope of EU law or if national law transposing EU law is concerned, the Court admits certain legal effects of the provisions of these international agreements for the Member States even if the conditions for direct effect are not fulfilled: Member States have to interpret their national law in a way that is in conformity with the relevant treaty provision. This judgment does not, however, alter the large margin of appreciation that Article 9(3) of the Aarhus Convention confers to Member States. This is of particular importance in relation to access to justice for individuals since it can be subject to certain conditions even if it may not be totally excluded. As far as access to justice for environmental associations is concerned, the judgment seems to admit that under EU law this access may not be generally denied. This approach is far reaching since it obliges Member States to maintain or introduce access to justice for environmental organisations in respect of the possible breach of EU law or of national law transposing EU law.[58] Such an obligation goes much further than access to justice in respect of the authorisation of certain potentially dangerous activities or projects; moreover, this approach of the Court partly fills the gap

---

56 Even though the EU has not transposed this provision into EU law. A dispute falls nevertheless within the scope of EU law when it relates to a field covered in a large measure by EU law what is the case at present since the dispute concerns species protected by the Habitat Directive. So, the Court deduces from the material relevance of the Habitat Directive that the EU has exercised its powers and that the dispute falls within the scope of EU law. Cf. to this aspect of the judgment Sabine Schlacke, Stärkung überindividuellen Rechtsschutzes zur Durchsetzung des Umweltrechts – zugleich Anmerkung zu EuGH, Urteil vom 8. März 2011 – Rs. C-240/09, ZUR 2011, 312 (313 et seq.).

57 See, however, also the critical view of Ludwig Krämer, Comment on case C-240/09, JEEPL 2011, 445 (447), who supports the view that direct effect should be admitted in cases Member States had not made use of their right to lay down conditions under which access to justice was possible.

58 In this direction also the interpretation of the judgment of Schlacke, ZUR 2011 (note), 312 (315-316). It has to be stressed in this context that Article 9(3) Aarhus Convention has be interpreted by the majority of legal literature, also by the author of this contribution, as being of rather few practical significance since it does not contain really precise standards as the access of justice is concerned. Cf. Astrid Epiney/Kaspar Sollberger Verwaltungsgerichtlicher Rechtsschutz in Umweltangelegenheiten, 2003, 173-174. The Court, however, now states that this provision requires an access to justice of environmental organisations.

created by the failure to transpose Article 9(3) of the Aarhus Convention within EU law,[59] as it allows environmental organisations to indirectly challenge EU law.
Finally, it must be stressed that the Aarhus Convention is binding on the EU and the Member States (Article 216(2) TFEU) so that the EU legislator must also comply with its requirements. Logically, this would appear to imply that EU environmental legislation should be rounded out by provisions concerning access to justice in conformity with the Aarhus Convention. The EU legislator could implement this requirement by adopting a sepcific horizontal directive (a proposal which has, to date, been refused by the Member States) or by ensuring that every secondary act on environmental law contains such provisions.[60]

IV. Conclusion

This contribution demonstrates that international environmental agreements form an integral part of EU law and may contribute in a decisive way to the effectiveness of their provisions. This heightened effectiveness is largely due to the characteristics of EU law that are also applicable to international agreements. As the example of Article 9(3) of the Aarhus Convention illustrates, however, principles such as direct effect or the interpretation of EU and national law in conformity with international agreements, do not offer comprehensive solutions in all situations in which a transposition to the EU level is lacking: First, the conditions of direct effect are not always fulfilled and, furthermore, it may be difficult to determine if a provision of an international agreement satisfies these conditions. Second, the exact implications of an interpretation in conformity with EU law may also be subject to uncertainties. For these reasons, it is generally preferable to transpose obligations contained in international environmental agreements as fully as possible into EU law. For the time being, however, a careful reconsideration of the principles of direct effect and the interpretation of EU and national laws in conformity with international law as instruments for the enforcement of international obligations must be undertaken, especially at the national level.

[59] Vgl. the proposal of the commission, COM (2003) 624 final, which is, however, still blocked, cf. to this issue also Schlacke, ZUR 2011 (note 44), 312 (313).
[60] Cf. to this issue Krämer, JEEPL 2011 (note 45), 445 (448).