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**The Aarhus Convention and the Politics of Process:  
The Political Economy of Procedural Environmental Rights**

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On 25 June 1998, thirty-one out of fifty-five Member States of the United Nations Economic Commission for Europe (UNECE) signed the Aarhus Convention, an international agreement designed to strengthen democratic environmental governance.<sup>1</sup> Unlike other international environmental agreements, the Convention does not address substantive environmental issues, such as ozone depletion or climate change. Instead, it establishes procedural obligations for policy-making, implementation, and enforcement with the aim of enhancing public participation.

The Convention is based on the premise that “every person has the right to live in an environment adequate to his or her health and well being”.<sup>2</sup> To achieve this goal, the Convention grants citizens the right to obtain environmental information, to participate in environmental decision-making, and to appeal to courts or non-judicial bodies. These three pillars of the Convention - collectively known as procedural environmental rights - are interdependent.<sup>3</sup> They assume that meaningful participation in policy-making depends on access to environmental information and that access to justice guarantees individuals and organizations that their participation and information rights can be exercised. Although regional in scope, it may serve as a model for strengthening procedural environmental rights in all United Nations member states.<sup>4</sup>

The number of signatory nations has now grown to forty-four, but only eleven have ratified the Convention.<sup>5</sup> Most of those are post-Communist countries without a strong administrative law tradition. The goal of this paper is to analyze and explain this seeming anomaly. Why have several Central Asian republics ratified the Convention while France, Germany and the United Kingdom have not? Are there explanations for this disparity that go beyond the complexity of fitting the Convention’s provisions into

existing legal structures? Is ratification being delayed by political constraints that depend upon the parliamentary structure of the West European democracies?

Before moving to the political-economic analysis, one needs to understand the strengths and weaknesses of the Convention itself. Part I argues that the Convention, although it would require increased participation rights in most signatory countries, is a moderate document designed to accomplish marginal changes. Nevertheless, signatories have not been in a hurry to ratify the Convention. To explain this foot dragging, Part II develops a positive political-economic analysis of a legislature's motivations to create procedural environmental rights. We build on existing work to show that parliamentary systems have little incentive to establish such rights. Part III follows up the conceptual arguments with case study material that shows how procedural environmental rights differ in practice under different political systems.<sup>6</sup> The cases are broadly consistent with our conceptual scheme, but they also reveal some interesting nuances. Part IV concludes with a discussion of the relationship between the Aarhus Convention and the European Union (EU). This linkage is of interest as all EU Member States have signed the Convention and the European Community itself is a signatory. EC ratification requires both changes in EC legislation that affect member states as well as modifications in the practices of EC institutions.<sup>7</sup> We suggest that the separation of powers characteristic of EC institutions may work to spur EC ratification and, in turn, may raise the salience of the Convention in member states with less accommodating systems of public law.

### **Part I. The Aarhus Convention**

The Aarhus Convention is motivated by the claim that environmental protection policy requires participation from ordinary citizens as well as from scientists and other experts. Policymakers face two ways: toward public accountability and toward technical competence. The public may be uninformed about scientific and economic factors, but the technocrats may be uninformed or uninterested in the opinions of ordinary citizens.

Some political systems seek to separate environmental policymaking from implementation. The ideal in such systems is for politically accountable politicians to make policy and then delegate implementation to the professional bureaucracy. The bureaucracy ought to consult with technical experts before implementing a statute, but,

under this view, officials need not elicit the opinions of organized pressure groups or ordinary citizens. These actors should exercise their influence at the legislative stage through party representatives and legislative hearings. If ordinary citizens do participate at the implementation stage, it is only to complain about violations of their individual rights.

This sharp division of labor sounds sensible at first, but it ignores the realities of democratic life. The legislature is uninformed about many technical aspects of environmental issues, and in a complex world where time is scarce, this is as it should be. The result is laws that delegate many of the details of implementation to the bureaucracy. These “details” are not mere technical gaps but often determine the policy impact of environmental laws. This basic feature of environmental implementation raises the issue of public participation when the administration fills in the gaps. In practice, there is no sharp distinction between political concerns and technical matters. The latter can only be decided in light of the former.

Even case-by-case implementation can raise policy issues beyond the protection of individual rights. Local decisions on protecting wetlands, building roads, expanding airports, and licensing industrial facilities can have regional environmental impacts. Participants frequently combine an individual claim of harm with a public-spirited concern for policy. This will be especially true if the implementing agency has avoided promulgating general rules or if, in doing so, it has failed to consult with interested groups and citizens.

These arguments for open and accountable administrative procedures that permit public involvement are reflected in the Aarhus Convention. However, as we will see, worries about the costs of too much openness are also reflected in language that is sometimes vague and deferential to existing national laws. We first summarize the provisions of the three pillars of the Convention – access to information, public participation, and access to justice -- and then analyze the probable effectiveness of its provisions.<sup>8</sup>

#### **A. Access to Information**

The definition of environmental information in Article 2 includes: (1) information on the state of elements of the environment (for example, air, water, and soil) and the

interaction among these elements; (2) factors affecting or likely to affect the elements of the environment (for example, substances, energy, as well relevant activities and measures ranging from administrative measures and legislation to cost benefit and other economic analysis and assumptions used in environmental decision-making); and (3) information on the state of human health and safety, conditions of human life, cultural sites, and built structures in as much as they relate to or are affected by the above environmental factors.

Article 4 of the Convention establishes the general principle that information on the environment -- or relevant to the environment -- held by public authorities must be accessible to any party without a need for the party to state a particular interest. This is the key feature of freedom-of-information acts of this type. Those requesting the information do so as interested citizens; they do not have to explain why they want the information. The goal is to give those outside of government better access to the information and reasoning behind the internal decisions of the executive.

Article 4 also defines procedures for information disclosure and several categories of information that are exempted from disclosure.<sup>9</sup> A demand may also be refused if the information is not available, if a request is manifestly unreasonable, or if the request concerns material in the course of completion. Refusals to all exceptions must be interpreted in a restrictive way, taking into account the public interest served by the disclosure. Refusals must be made in writing if the request was made in writing. Where only part of the information requested falls within one of the exempt categories, the remainder of the information must be separated out and made available.

Article 5 addresses issues of active information disclosure and dissemination. It places obligations on public authorities to develop national information systems and procedures that ensure systematic and periodic dissemination of environmental information, for example, through state-of-the-environment reports, or national pollutant inventories or registers. These systems must also provide sufficient product information to enable consumers to make informed environmental choices. All efforts should be made to provide environmental information in electronic format that is easily accessible through public telecommunications networks.

## **B. Public Participation**

Requirements for public participation in environmental decision-making are addressed through article 6 (decisions on specific activities), article 7 (plans, programs and policies), and article 8 (preparation of executive regulation and legally binding normative instruments). Activities under Article 6 generally include activities subjected to the environmental impact assessment (EIA) procedure under the UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context, as well as activities subject to the Integrated Pollution Prevention and Control (IPPC) directive of the European Community<sup>10</sup>

Many activities referred to under Article 6 of the Convention are likely to have a potential impact at the local level. For such activities, the Convention prescribes a fairly formal and detailed public participation process. Required elements include public notice of the proposed activity, detailed information on the proposed activity, transparent opportunities for public comment and participation, reasonable timeframes for participation, and full information disclosure on all relevant aspects of the decision-making process. Participation should take place early in the process when options are still open, and due account must be taken of the outcome of the public participation.

Participation requirements related to plans, and programs (article 7) are not specified in similar detail. Public participation should take place in a transparent and fair framework and follow several of the principles established in article 6, including reasonable timeframes, early participation, and due consideration of the outcome of the participation. As far as the development of policies is concerned, article 7 merely specifies that each Party shall, to the extent appropriate, endeavor to provide opportunities for public participation, without further defining the concept.

Article 8 of the Convention addresses public participation in the preparation of executive regulations and legally binding normative instruments. It stipulates that draft rules be published or otherwise be made publicly made available, that the public should be given the opportunity to comment directly, or through representative consultative bodies, and that the results shall be taken into account as far as possible. This article is even less precise than article 7 and hence gives considerable leeway for individual countries to interpret the provisions differently.

### **C. Access to Justice**

The access-to-justice provisions (article 9) of the Convention are closely linked to the first two pillars of the Convention. First, any person who considers that his or her request for information was not addressed in accordance with article 4 of the Convention has, in accordance with national law, access to a judicial or non-judicial review procedure. Second, members of the public - and any non-governmental organization - have access to a review procedure to challenge the substantive and procedural legality of decisions or omissions related to article 6 of the Convention (as well as for other relevant provisions of the Convention, if so provided by national law). The claimant should, however, have a sufficient interest, or maintain impairment of a right if national administrative law requires this as a precondition. Third, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene national law relating to the environment, subject to access criteria as they may be specified by national law. References to national law, of course, mean that the impact of this section will depend upon the way courts interpret their own national laws in light of the Convention.

### **D. Analysis and Discussion**

The Aarhus Convention is celebrated by the international community of environmental non-governmental organizations as an important instrument which “promotes citizen involvement as key to combating environmental mismanagement” (Petkova and Veit, 2000). One Convention delegate pointed out that the Convention will require legal changes in almost all of the participating countries.<sup>11</sup> Questions arise, however, as to whether the various provisions of the Convention really have “teeth” and whether or not the Convention will actually trigger fundamental change in the way countries involve the public in developing, implementing and enforcing environmental decisions.

Its challenge to the status quo in Western Europe is suggested by the fact that only one established European democracy, Denmark, had ratified the Convention by July 2001 even though all EU Member States are signatories. This suggests that politicians view ratification as creating new rights and as requiring the amendment of existing statutes. Most of the countries that have ratified the Convention are in Central and Eastern Europe

and a few are outside of Europe in the post-Communist countries of Central Asia. These are mostly countries with no existing set of administrative practices that are challenged by the provisions of the Aarhus Convention. However, many of them are also countries with little capacity to implement the Convention and with only a few, weak non-governmental interest groups.<sup>12</sup> At present, the Convention is not in force and is mainly useful as a guide to law reform in the transitional economies in the former Soviet Union and in Central and Eastern Europe. It has yet to have any significant impact on public access in Western Europe. We turn now to an analysis of the Convention's three pillars.

### *1. Access to Information*

Despite the range of exemptions contained in the access-to-information pillar, the information and right-to-know provisions of the Convention seem extensive and comprehensive. The definition of environmental information goes beyond the European Community's directive on access to environmental information.<sup>13</sup> Thus, in agreeing on articles 2, 4 and 5, Member States of the European Union indirectly acknowledged deficiencies in the legal framework of the EU in the area of environmental information disclosure.

The Convention - through article 6, section 9 - is also likely to have a major impact on the development of community right-to-know programs in participating countries. The Convention calls for parties to establish a nationwide and publicly accessible system of pollutant inventories through standardized reporting. This will trigger the development of national reporting systems that resemble the US Toxic Release Inventory (TRI).<sup>14</sup>

In some signatory states that have parliamentary governments and powerful professional bureaucracies, this pillar of the Aarhus Convention is likely to be controversial. Even the more limited EC directive was very controversial in Germany. Although Germany did eventually pass conforming legislation, the debate raised questions about whether information disclosure was consistent with German democratic principles.<sup>15</sup> Subsequent disputes have tried to narrow the definition of "environmental information" to exclude information collected by ministries dealing with issues such as highway construction that have environmental impacts but are not under the jurisdiction of the environmental ministry.<sup>16</sup> As we argue below, the constitutional structures of most

West European governments have not produced actors within government with much incentive to encourage disclosure to groups and individuals who might make life difficult for them.

## ***2. Public Participation***

The sections on public participation in environmental decision-making are likely to prove controversial in Western Europe, because they are written with the aim of increasing public involvement in traditionally rather secretive processes. Nevertheless, it is difficult to believe that the practical effect will be very dramatic.

Considering just the German case, a narrow reading of the Convention's provisions related to public participation in specific activities (article 6) is largely consistent with existing German practice which provides for participation of the concerned public in a range of licensing and approval processes with environmental consequences.<sup>17</sup> The main break with existing requirements in article 6 is that the "public concerned" is defined in the Convention to include "non-governmental organizations promoting environmental protections." The Convention, however, permits governments to require such groups to meet "requirements under national law," and German statutes already permit citizen groups to participate in some administrative processes.<sup>18</sup> Article 6 includes numerous places where requirements are to be "in accordance with national \*law," thus, possibly limiting its impact.<sup>19</sup> The provisions in articles 7 and 8 for public participation in "plans, programs, and policies" and in "executive regulations", respectively, are much vaguer. True, it is the "public", not just the "public concerned" that can participate, but governments can decide who falls into that category. Process is left vague. For "plans and programs" in article 7, governments shall establish "a transparent and fair framework" that establishes reasonable time frames, occurs early in the process, and is structured to take account of public comments. However, unlike the procedures for specific projects, there are no requirements for information disclosure, hearings, or reason giving. For "policies", there are no requirements at all. The Convention simply asks those states that ratify it to "endeavor" to provide participation opportunities.

The procedures in article 8 for promulgating legally binding regulations are likely to have little impact on European practice. The Convention only says that Parties "shall

strive” to promote effective public participation and “should” take various steps. There are no requirements. The Convention suggests that notice and an opportunity for comments would be desirable, but does not recommend formal statements of reasons.

The Convention has no provisions for Regulatory Negotiation in the promulgation of policies or rules.<sup>20</sup> The only hint of support for participatory decision-making processes is in article 6, section 5 where the Convention suggests that Parties “should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their applications before applying for a permit.” This provision only applies to the approval of specific projects where a private firm or public authority is applying for permission to carry out a project.

Thus, insofar as public participation in administrative processes is concerned, the Convention is likely to encourage more participation in decisions with respect to specific projects. However, it does not present a major challenge to executive-branch rulemaking and policymaking. Signatories could ratify the Convention and do little to open up such processes. Nevertheless, parliamentary governments used to closed-door rulemaking, may be reluctant to put the Convention before their legislatures simply because it opens such issues for discussion. In this, they are likely to be supported by the professional bureaucracy. The Convention, in spite of vague and permissive language, clearly views increased public participation at all levels as desirable. It also represents a commitment to including organized environmental groups in the regulatory process. In spite of signing the Convention, sitting Western European politicians have little incentive to further this goal on their own. For instance, with the Green Party part of the coalition government in Germany, it is not obvious that their leaders will endorse procedural policies that require them to solicit the views of outside groups. Thus, countries with parliamentary democracies are only likely to ratify the Convention if pressured by external forces, such as public opinion or the EC

### ***3. Access to Justice***

Judicial review of the provisions on access to information seems comprehensive and clear (article 9.1) and give that portion of the Convention real bite. Thus, these provisions provide one more reason why some governments and bureaucracies - in

particular those that feel threatened and bothered by public access to information - may not push for ratification of the Convention.

Judicial review of decisions with respect to specific projects under article 6 are weaker (article 9.2). Because this provision is hedged by references to national law, a Party might be able to deny review of any kind. Assuming that some review is granted, the main object of controversy is likely to be the standing requirements. These give not only individuals, but also environmental organizations the ability to challenge substantive and procedural matters so long as they assert a sufficient interest or, under other legal systems, the impairment of a right. If judicial review of executive decisions is seen as mainly a way to protect individuals against an overbearing state, the notion of giving standing to organizations runs against the grain. The idea that courts might be monitors of the democratic accountability and policymaking competence of the state is threatening.<sup>21</sup> In a parliamentary system, the government would have no incentive to create such constraints on its own. A written constitution may build in some measure of judicial oversight, but politicians in power would not have such an interest and neither would professional bureaucrats. Organizations are only given standing if they have a “sufficient interest” or assert “impairment of a right”, but the Convention asserts that organizations fulfill these conditions if they claim to be promoting environmental protection. The only escape for the government is to establish restrictive requirements that limit the number of organizations that are licensed in the first place. This provision is thus part of the tilt toward organized environmental groups that permeates the Convention, and it is likely to give pause to the party-centered states of Western Europe.

Nevertheless, the judicial review provisions fall far short of the provisions under the American Administrative Procedures Act.<sup>22</sup> The Convention fails to endorse the review of legally-binding rules as provided under the USAPA, and there is no review of policymaking decisions. Article 9.2 simply states that if national law provides for review of such decisions, then its provisions apply. Thus, to the extent its provisions broaden standing, the Convention may deter signatories from expanding judicial review of regulations. It states that *if* review is granted, then it must be made broadly available. A Party might wish to increase judicial involvement but only if access to the courts is restricted to a limited class of plaintiffs. The Aarhus Convention makes such restrictions

more difficult to impose. The Convention in article 9, section 3 makes an interesting stab at providing for citizen suits to force both public authorities and private parties to comply with environmental laws. The section is full of caveats and references to national law, but it does say that, subject to conditions, parties “shall” permit members of the public to challenge acts and omissions by private parties and public authorities contravening national environmental law. This section follows several American environmental statutes that permit such suits.<sup>23</sup> The section, however, makes no mention of the payment of attorneys’ fees. In the United States, one-sided fee shifting applies. Citizen suit statutes provide that the victorious plaintiff has attorneys’ fees paid by the defendant but need not pay the defendants’ fees in the event of a loss. If the plaintiff is performing a public service by bringing a suit, this makes sense.<sup>24</sup> Unfortunately, European courts generally enforce two-sided fee shifting, a practice that if applied here, would have a sharply chilling effect on the willingness of citizens and organized groups to bring suits. Because the Convention simply requires that such suits be possible, it is unlikely to mean much in practice, but may, of course, be another reason for opposition.

In short, the references to existing national legislation recognize that countries have fundamentally different approaches regarding the role of the judiciary in environmental policy development, implementation, and enforcement. In comparison to American practice, the access-to-justice provisions seem limited and constrained. However, because courts in several European countries have limited standing rights for individuals and non-governmental organizations, the Convention would likely require some changes in practice. For example, Denmark, the host country of the Aarhus Convention and first western democracy that ratified the agreement, had significant difficulty complying with the access-to-justice provision.<sup>25</sup> To the extent these changes - - like those for access to information and public participation -- challenge established practices, they are likely to make ratification an unattractive prospect.

#### ***4. Conclusions***

All three pillars to the Aarhus Convention threaten – to various degrees -- some established practices in the democracies of Western Europe. They incorporate a view of democratic accountability that is at odds with accountability based solely on elections and political parties that form governing coalitions. Thus, the political will to ratify Aarhus is

unlikely to come from within parliamentary governments. The Convention also challenges the authority of professional bureaucracies that are used to deciding for themselves whom to consult and what use to make of this information. Thus, career officials are also unlikely to push for ratification. Furthermore, the silence from some organized private interests suggests that they are satisfied with the privileged access that they obtain in the status quo. Pressure for change must come from members of the public and from organized groups excluded from present processes. This will be difficult because groups may have little incentive to organize at present given their marginal impact under present practices.

## **Part II. The Political Economy of Procedural Environmental Rights**

Almost all Aarhus signatories are democracies. But this category embraces many different types of parliamentary and presidential systems. In some participating countries, the democratic tradition stretches back hundreds of years, but it is very recent in others. Paradoxically, some of the countries with the longest and most well-established democratic traditions are likely to find the Convention most in tension with their traditional modes of operation.

Despite broad-based international consensus, proposals to strengthen procedural environmental rights often face considerable opposition and are subject to intense debate at the national level in some countries, while widely accepted in others. What are the origins of these differences? What institutional or political factors affect the substantive and procedural aspects of environmental policy-making? Does the structure of existing political institutions matter? This section presents a framework for thinking about these questions that suggests that ratification of the Aarhus Convention will be a slow process.

### **A. Government Decisiveness**

George Tsebelis (1995) has developed a way to predict the potential for policy change (decisiveness) across different types of regimes, legislatures, and party systems. He demonstrates that policy stability (or, in other words, the difficulty of changing the status quo) increases with the number of veto players. For example, a system where both houses of a bi-cameral legislature and the president must approve before a bill becomes a law will be relatively stable. Similarly, a large number of political parties, control of

institutions by parties with significant differences in opinion, and diverse views within veto players are all factors which make changing the status quo difficult. Conversely, countries with only one veto player and two major parties are in a better position to trigger policy change. Thus, Tsebelis's analysis predicts that a polity with many veto points – characterized by separation of powers, a federal structure, and bi-cameralism - is likely to under-supply public goods, such as environmental quality, due to its incapacity to change the status quo. Matthew Shugart and Stephan Haggard (1997) make a similar argument, pointing out that presidentialism (which is characterized by at least two veto points) tends to reduce legislators' interest in providing public goods at the national level.

The above analysis, however, does not necessarily allow one to make predictions about the procedural aspects of environmental decision-making -- the focus of this essay. In order to proceed, we need to introduce some theoretical concepts developed in the field of analytical comparative politics.

## **B. Presidentialism v. Parliamentarism**

Presidential democracies and parliamentary democracies are two fundamentally different regime types. In the former, the chief executive (the president) and the legislature are separately elected; in contrast, in parliamentary democracies, the head of government is appointed by and dependent on the legislature. Thus, the executive and the bureaucracy (which is supervised by the executive) are directly accountable to the parliament.

Terry Moe and Michael Caldwell (1994) predict that statutes in parliamentary regimes will place few procedural requirements and constraints on the executive and will provide the bureaucracy with more leeway than it will have in a presidential system. The major reason is that in parliamentary democracies, the majority party (or majority coalition) has, via the executive, direct control over the bureaucracy. Thus, one of the primary objectives of national civil servants is to implement the political will of their masters (that is, the parliament and their respective ministers) as closely as possible. This direct relationship between the legislature and the bureaucracy is also likely to reduce the chance that narrow interests can capture the bureaucracy. Consultation with interested parties could still take place, but the emphasis of such consultation would be on enhancing the technical capacities of the administration to develop sound regulations.

Just as procedural protections are not needed in a unitary system to implement the will of the majority, they are likely to be ineffective with a change in government. New parliamentary majorities have the power to overturn decisions made by old majorities. Therefore, the incentive to establish procedural constraints and/or strong procedural environmental rights are weak, at least from within political institutions.

Civil servants in presidential systems, like their counterparts in parliamentary democracies, have the task of implementing national legislation developed by the legislature. But, the top official of an agency may represent a different party from that of the majority party in the legislature.<sup>26</sup> The potential conflict between presidential appointees and the legislature may pull national bureaucrats in various directions. The legislators who draft environmental legislation may, therefore, include procedural and institutional measures in statutes in order to “lock in” their political interests and to hedge against future changes in political majorities.

Here is the connection to Tsebelis’s work. Statutes are more difficult to change in presidential than in parliamentary systems because of the multiple veto points. If the political will exists at one point in time to enact a new law, that law can be structured to limit the damage done by a subsequent president who is hostile to the aims of the law. One way to do this is to give outside interests a legally protected role in implementation. This, in turn, may increase the stability of the rules that are promulgated since transparent processes may make the rules more credible and acceptable.

But, one might ask, if a coalition exists to pass a law, why not constrain the executive by including substantive detail instead of procedural constraints? First of all, this *does* happen. Second, the compromise that produces the new law may require some vagueness about how it will be implemented, and procedural protections can give something to everyone -- those supporting business interests as well as environmental activists and consumers. Our discussion of chemicals control in Part III illustrates this point particularly well. Finally, delegation to the bureaucracy may be justified by the complex and fluid nature of the underlying environmental problem. The legislature does not wish to be overly precise because it wants the executive to be able to respond to changed conditions. However, when the executive does respond, the statute contains

built-in procedures that require consultation with outside groups affected by any changes in the rules.

For these reasons, Roger Noll (1989) argues that statutory environmental legislation in presidential systems can be expected to contain procedural rights. These may include, for example, prescriptions to make the rule-making process public and transparent, requirements for the agency to consult certain stakeholder groups during the rule-making process to ensure that “preferred” views are taken into consideration, obligations to provide strict evidentiary criteria and use of analytical tools such as policy analysis or cost-benefit analysis, and opportunities for judicial review of regulations -- including granting of liberal legal standing rights for individuals and interest groups.

### **C. Electoral Rules**

Electoral rules and district magnitude also may have an impact on the incentives of legislators to focus on procedural issues. First, the electoral system has an impact on whether or not a small party running on an environmental platform has a chance of entering the legislature. Second, electoral rules may create incentives (or disincentives) for legislators to support national policies that provide broad-based public goods as opposed to help for narrow interests. Third, as a consequence, patterns of interest group organization may be significantly different under alternative electoral systems, and this may affect these groups’ demands for procedural protections.

Electoral rule and district magnitude help determine the number of political parties. Plurality-voting rules generate “winner-take-all” systems and are often coupled with a district magnitude size of one.<sup>27</sup> They tend to result in two parties with positions located close to the political center. In this situation, groups with relatively narrow interests are forced to join a larger party since no small party alone is in a position to obtain the majority.<sup>28</sup> They may seek alternative routes to influence through legislative provisions that give them access to the administrative process.

A proportional representation (PR) voting system is likely to generate several parties that can play an active role in national politics. As the district magnitude increases, so does the theoretical number of parties.<sup>29</sup> PR may allow a party running on an environmental platform to enter the national legislature. Most systems limit party proliferation by imposing a cutoff vote share, say five percent, below which no seats are

awarded. Thus, an environmental party would need to exceed that threshold and would only be able to do so if a significant portion of the population ranks environmental issues highly.<sup>30</sup> In that case, environmentalists may concentrate on influencing the legislative process through “their” political party and put relatively less emphasis on implementation.<sup>31</sup>

However, all PR systems are not alike. Some have closed lists (CLPR), where the party determines the order of candidates, and others have open lists (OLPR), where voters rank candidates. OLPR promotes candidate-centered choices and creates incentives for individual legislators to run on narrow interests and to provide favors to particular groups of constituents.

Candidate centered electoral systems, such as system with plurality electoral rules or OLPR, may lead to sub-government structures, such as sub-committees within the legislature, that, according to Gary Cox and Mathew McCubbins (1997), tend to favor narrow interests and under-supply public goods. Such systems also decrease the internal cohesion of parties and weaken the position of party leaders -- yet another factor which may reduce provision of national public goods. John Carey and Matthew Shugart (1995) point out that in countries with open voting lists, the incentive of candidates to run personal campaigns increases with the size of the district magnitude. In countries with closed voting lists the opposite result holds: the larger the district magnitude, the larger the incentive for individual candidates to put the party position in the center of their campaign.

A country’s voting system may affect the way interest groups with a stake in environmental matters organize themselves. For example, in parliamentary systems, like the UK or a CLPR case, with only one veto player and strong parties, lobbying of individual legislators by a relatively small interest group is unlikely to be effective. In such cases, corporatist patterns of interest group organizations, therefore, can be expected. Here, industry develops consolidated positions through so-called “peak associations” rather than lobbying individually. The weight of such groups in national policy-making is likely to be significant; few policies will be accepted unless peak associations, in particular those representing economic interests, have made their positions clear and provided some type of consent.

In contrast, pluralist interest groups patterns are likely to be more effective in countries with several veto players, such as the US presidential system, or in countries with weak parties, as in OLPR regimes. Cox and McCubbins (1997) point out that in such cases, interest groups may be better off influencing individual actors rather than the whole governing parties. This may be an important reason why pluralist interest group structures develop in countries with personal vote systems.

The important question for us is how legislative and interest group organization maps onto preferences for procedural protection in implementation. Our claim is that systems that encourage the development of multiple interest groups with focused agendas will be likely to draft laws that permit these groups to play a role *ex post* during implementation. Both the United States and OLPR parliamentary systems are in this category. This prediction overlaps with arguments about the way legislative compromise can lead to vaguely drafted statutes. If laws represent compromises between interests groups and among political actors, this may produce both vague laws and procedural guarantees that permit the groups that lobbied for the act to play a role in implementation. These groups will want that role to be formalized in legal provisions the greater the risk that they may be left out of informal, closed-door consultations. In contrast, both majoritarian parliamentary systems, such as the UK, and CLPR systems, such as Germany, are likely to feel less pressure to include procedural provisions in environmental laws. However, majoritarian and CLPR systems will differ if the latter includes a distinct environmental party, such as the German Greens. The legislative visibility of an environmental party, even if it is not in the majority coalition, will help put environmental issues on the policy agenda. However, its members are likely to push for strong substantive statutes and be less interested in the administrative process than environmental groups in more pluralistic systems. The basic point we are making here is that the content of environmental laws, especially their provisions for public participation in executive branch policymaking and implementation, may be a function of the underlying structure of the electoral system and the pattern of interest group organization that it produces.

## **D. Judicial Review**

The courts can be an additional veto player. Judicial review mechanisms are likely to be strong in countries that have more than one veto player. Each veto players may want to have access to an independent entity within the political system to serve as a mediator in cases of disputes or differences in interpretations. Therefore, if there are two veto players, they may support enhanced judicial review to limit each other's power and, as a consequence, produce a third veto player. Politicians in parliamentary systems that are based on the UK model or that use CLPR will have little interest in creating independent judicial fora to review their decisions.

Countries with a strong role for the courts in monitoring legislative and administrative decisions will probably have rather liberal policies on access to information in order to permit informed challenges. Such policies are particularly important if legal standing rights are provided not only to individual citizens, but also to groups that can represent common interests, such as the protection of the environment. In addition, full access to documentation and underlying information used in decision-making is an important input for credible and successful judicial review.

In short, widespread judicial review and broad public access to information are likely to go together and to be associated with systems that have multiple formal veto points and widespread organization of interest groups. Parliamentary systems, especially those on the Westminster model or ones operating by CLPR, are likely to have relatively weak provisions both for access to information and to judicial review. Only widespread public outcry, unmediated by political parties, is likely to convince politicians to move toward a regime with greater openness and oversight of administrative decisions.

## **Part III. Procedural Environmental Rights Under Different Political Structures**

Although a full analysis of the links between political structure and environmental policy-making is beyond the scope of this essay, we provide several examples to illustrate such linkages focusing on the differences between the United States, on the one hand, and Germany and the United Kingdom, on the other. First, we argue that differences in the electoral systems between the United States and Germany appear to shape the way popular demands for environmental quality are channeled into the environmental policy

making process. Second, the different regulatory cultures of the United Kingdom and the United States seem to have had an impact on freedom of information policies in each country. Third, we examine the control of industrial chemicals.

In all three cases, the United States has broader participation rights and broader access to information in line with its separation of powers constitutional structure. However, pressures for greater openness are being felt even in the established parliamentary democracies. For example, the United Kingdom recently passed a Freedom of Information Act and participation opportunities appear to be expanding in Germany. The case of chemical regulation, however, illustrates that broad participation opportunities are not sufficient to produce higher levels of protection for human health and the environment. Also important is the character of the underlying law and the identity and influence of participants. Recall that our theoretical discussion did not claim that American-style democracies necessarily will do more to further the interests of the general public, only that there are political reasons for legislators to write statutes that include participation rights for all influential interests. These cases suggest that broad framework laws such as the Aarhus Convention or the United States Administrative Procedures Act are better ways to assure evenhanded participation rights than reliance on individual substantive statutes produced through narrowly focused political bargaining.

#### **A. Electoral Rules and Environmental Interests: The US and Germany**

The United States has a long history of providing freedom of information, public participation, and access to justice. As early as 1946, the Administrative Procedures Act required agencies to comply with notice and comment procedures for rulemaking.<sup>32</sup> In the environmental policy arena, the National Environmental Policy Act (NEPA) of 1969 provided comprehensive participation opportunities and legal standing rights to individuals and interest groups related to the planning of certain development projects which would have an impact on the environment.<sup>33</sup> The Freedom of Information Act was passed in 1966 and has been amended several times since then to keep up with changes in information technology.<sup>34</sup> The Emergency Planning and Community Right-to-Know Act (1986) expanded the freedom of information concept by providing communities (and others) with emission data from industrial facilities in their neighborhoods.<sup>35</sup> The

Government in the Sunshine Act requires that most high-level decision-making meetings are open to the public.<sup>36</sup>

In contrast, Germany had no strong procedural environmental rights in its first generation of environmental statutes and has not been a driving force towards strengthening procedural environmental rights at the level of the European Union. Germany's administration carries out many of its regulatory rule-making activities under the presumption of confidentiality.<sup>37</sup> Germany's record of providing the public with environmental information relevant to regulatory and administrative decision-making is therefore rather modest. Although several environmental statutes state that interest groups should be consulted in developing implementing rules and regulations, such generic guidance provides significant leeway for civil servants to manage and control consultative processes, including decisions about which specific groups should be involved.<sup>38</sup>

Yet, Germany is considered a leader in environmental performance in the European Union.<sup>39</sup> One explanation for this mixture of weak participation rights and apparently strong environmental commitment is the organization of the political system. However, we also argue that Germany's reputation hides a number of important weaknesses that could be mitigated by increased public participation.

Germany's electoral system of proportional representation has allowed the Green Party, a small party running on an environmental platform, to shape policies from within the parliament, and nowadays from within the government. As a consequence, the political system has channeled popular demands for environmental quality into political decision-making processes. In contrast, the pluralistic US electoral system does not favor the establishment of small parties with a focus on relatively narrow issues (such as a Green Party). This creates niches and opportunities for public interest groups to shape environmental policies from outside the party system. These groups, however, could not function without strong procedural rights in place, such as access to government information, participation opportunities in decision-making processes, as well as liberal legal standing rights. The logic of our political\economic argument may explain, why the introduction of procedural environmental rights into the German system of environmental governance has not organically evolved in the context of national politics.

Although a push for greater participation rights is unlikely to come from inside the political system, their creation would benefit the German policymaking process. As one of us has argued previously, the high level of delegation to the executive under German law leaves the policymaking and implementation process open to excessive influence from technically oriented groups with an industrial orientation because there are few formal participation opportunities.<sup>40</sup> True, the underlying statutes are quite stringent, but the implementation process leaves many important aspects to be decided by relatively closed-door processes.<sup>41</sup> In fact, German policymakers have recognized this weakness, and some recent initiatives are attempting to increase public involvement. Nevertheless, the EC is not satisfied; the Commission has sent a final warning about Germany's failure to comply fully with the EC directive on access to environmental information.<sup>42</sup>

### **B. Freedom of Information Legislation in the US and the UK**

National policies to provide access to environmental information cannot be viewed in isolation either from overall freedom of information (FOI) policy of a particular country or from the overall national policy-making practices. Information policies in the US and UK seem to be deeply embedded in the regulatory structures of each country. In the case of the US freedom-of-information legislation was introduced, in part, to make the notice and comment procedures of the rule-making process under the Administrative Procedures Act more effective. Enhanced transparency through enhanced information access allows Congress and the public to better monitor rule-making processes and reduce the chance that regulatory agencies will be captured by special interests.<sup>43</sup>

Britain, in contrast, has a parliamentary democracy with a strong alliance between the executive and the bureaucracy and a long-standing history of neutral competence of the civil service staff. The development of regulations has traditionally been undertaken through rather closed processes within the bureaucracy that has the discretion to consult with interested parties when considered appropriate. This pattern of secrecy is, according to Debra Silverman (1997), a result of the exclusive accountability of ministers to parliament and results in the control of information flows by ministers.

Over the past decade, the UK government has come under severe pressure from outside groups to provide greater public access to information policies. Following several unsuccessful attempts<sup>44</sup>, a Freedom of Information Act was passed by parliament in November 2000.<sup>45</sup> The Act, however, will not come into force for central government departments until summer 2002, and for other authorities only in stages afterwards.<sup>46</sup>

Passage of a general FOI law was facilitated by UK compliance with the EC directive concerning freedom of information about the environment.<sup>47</sup> A paper published by “The Campaign for Freedom of Information” in 1993 asserts this linkage.<sup>48</sup> It asks: “If ministers can accept the case for a broad and (albeit weakly) enforceable right of access to environmental information, why not a similar right for information about, say, safety, public health, consumer protection, education, the NHS, social services - and everything else?”<sup>49</sup> Established principles on access to environmental information – triggered by the EC directive -- provided one of the benchmarks for the UK FOI legislation. In its review of the draft 1999 bill, Friends of the Earth (FOE) referred to the EC directive when criticizing some of the proposed exemptions<sup>50</sup> and also referred to the UK’s commitment to ratify the Aarhus Convention. Thus, international commitments provided not only driving forces to enhance transparency in environmental matters, but also contributed to a broader freedom of information reform process in the UK.

### **C. Control of Toxic Chemicals in the United States and Germany**

Traditionally, information on chemical hazards and the assessment of chemical risks have been considered purely scientific and technical exercises designed to generate probability estimates that indicate the potential of a particular substance to cause harm to human health or the environment under different exposure scenarios. Economic and social considerations – and related public preferences and values -- were only to be considered when management and control options were evaluated. This view is under challenge. For example, a report by the United States National Research Council concluded that public participation and stakeholder involvement should become an integral aspect of both risk assessment and risk management processes.<sup>51</sup> This section takes a closer look at the issue of public participation by examining procedural constraints affecting hazards testing, risk assessment, and risk management of industrial chemicals in the United States and Germany.

### *1. The United States*

In 1976, the US Congress adopted the Toxic Substances Control Act (TSCA)<sup>52</sup> following several years of legislative bargaining and lobbying by interest groups.<sup>53</sup> TSCA provides the Environmental Protection Agency (EPA) with authority to gather information about the toxicity of chemicals, to collect human and environmental exposure data, to identify chemicals which pose unreasonable risks to humans and the environment, and to take actions to control these risks. TSCA also requires EPA to review new chemicals before they are manufactured.

In the absence of clearly agreed policy goals and lack of agreement among interest groups, TSCA delegated many policy choices to the EPA. In order to protect special interests from bureaucratic discretion, legislators built a range of procedural safeguards into TSCA.<sup>54</sup> TSCA confirms Roger Noll's argument that statutes in a separation of power regime – with multiple veto points - are likely to include a range of procedural measures which allow interest groups to actively participate in the law implementation process.

One of the main goals of TSCA was to generate data on chemicals that have the potential to cause harm to human health and the environment. To achieve this goal, TSCA provided EPA with authority to require testing data for chemicals from industry.<sup>55</sup> However, reports published by major US environmental groups in 1987 and 1998, revealed significant gaps in knowledge concerning the potential hazards of thousands of chemicals on the market.<sup>56</sup> A study issued by EPA in 1998 pointed to a similar conclusion. It stated that “no basic toxicity information, i.e. neither human health nor environmental toxicity, is publicly available for 43 % of high volume chemicals manufactured in the US and that a full set of basic toxicity data is available for only 7% of these chemicals”.<sup>57</sup>

Given that the statute was passed with the goal of gathering information, the lack of data is troubling. Among the reason for the information gaps are the procedural requirements that must be satisfied before the EPA can order industry to carry out tests under section 4 of TSCA. EPA may only require testing *after* finding that: (1) a chemical may present an unreasonable risk of injury to human health or the environment, and/or the chemical is produced in substantial quantities that could result in significant or

substantial human or environmental exposure; (2) the available data to evaluate the chemical are inadequate; and (3) testing is needed to develop the needed data. Robert Haemer (1999) points out that the rulemaking process, as well as judicial review and related judicial decisions, have practically stifled test rules. This is an example of procedural rights favoring the regulated industry in a way that allows environmental progress to stall. They were part of the legislative deal that permitted the act to pass in 1976.

In addition to the difficulties of forcing industry to conduct tests under TSCA, banning a chemical is also difficult in the US. The case of asbestos illustrates the potential burden of participatory rule-making processes. In 1979, EPA announced plans to ban all remaining uses of asbestos under section 6 of TSCA.<sup>58</sup> Following ten years of preparation, a final rule was issued in 1989<sup>59</sup> only to be challenged in court by the asbestos industry.<sup>60</sup> In *Corrosion Proof Fittings v. EPA*, the U.S. Court of Appeals for the Fifth Circuit Court held that EPA did not present -- as required by TSCA -- sufficient evidence to justify the ban of asbestos.<sup>61</sup> The court also expressed its “regret that this matter must continue to take up the valuable time of the agency, parties, and, undoubtedly, future courts”. As in the case of generation of data for hazard assessment, banning a chemical proved difficult because the statute’s procedural provisions placed a high burden of proof on the agency – at least as interpreted by the federal courts.

Learning from these experiences, EPA’s Chemical Right to Know Initiative and Existing Chemicals Program have employed more cooperative and voluntary methods as first approaches to reduce or eliminate the likelihood of harm to human health and the environment.<sup>62</sup> Under the Citizen Right to Know Initiative, industry may voluntarily submit relevant data to EPA. This program was developed with the help of the chemical industry and the Environmental Defense Fund, a moderate environmental group. However, it was criticized by an animal rights group that was excluded from the early stages of the process.<sup>63</sup>

Citizen involvement in the Existing Chemicals Program takes place via comment and consultation on topics ranging from risk assessment to pollution prevention and risk-reduction actions. The information generated is made publicly available through an “administrative record”.<sup>64</sup> This EPA alternative relies on voluntary cooperation, but it is

being carried out in the shadow of underlying statutory provisions that can be invoked by the agency if cooperation fails.

Under TSCA, EPA's rulemaking responsibility is difficult to trigger because of the high burden of proof on the agency to justify moving forward to require the testing or banning of individual chemicals. The EPA sought alternatives to rulemaking that were based on voluntary and collaborative efforts between industry and one segment of the environmental community. But once it settled on one such alternative under the Right to Know Initiative, it was criticized by a group that was left out during early stages of the process. The agency's pragmatic effort at voluntary compliance permitted it to move forward, but its actions are less transparent and participatory than standard American rulemaking processes.

The TSCA experience illustrates the way interest groups can bargain over process as well as substance at the legislative drafting stage. This can produce procedural provisions that favor particular organized interests. One conclusion to be drawn from this case is that broad framework statutes, such as the Aarhus Convention or the US Administrative Procedures Act, are likely to produce more evenhanded procedural requirements than those that arise from the effort to produce statutes covering particular, contested substantive areas. Relying on voluntary, cooperative agreements may sound like an attractive alternative to legal mandates, but they raise difficult problems of fairness and access.

## ***2. Germany***

In Germany, chemical control efforts have focused on the classification and labeling of chemicals, notification and assessment of new chemicals, and risk evaluations and control measures for existing chemicals as called for by EC legislation.<sup>65</sup> If a risk evaluation reveals an unacceptable risk to human health or the environment, the German chemicals law allows the government to issue a regulation to ban or severely restrict the chemical, following consultation with the Bundesrat (the second chamber of the German parliament) and with affected and interested parties. Environmental groups, according to article 17 (7) are included among those groups "to be selected" for prior consultation. This provision is of interest because requirements for consultation with environmental groups in the implementation of law are an exception rather than the rule in German

environmental law.<sup>66</sup> Even here, however, the bureaucracy remains in control since it can select which groups to permit to participate. More important, due to the fact that existing chemicals are directly addressed through an EC regulation, German law cannot require chemical firms to generate additional testing data on existing chemicals beyond data they have generated on their own. Thus, in contrast to the United States, the problem is not biased procedural constraints but weak underlying substantive requirements.

For other matters pertaining to implementation, such as the development of risk reduction strategies and recommendations for control actions, the law allows the establishment of committees (Ausschuesse) by regulation (article 20b). Public participation opportunities are not clearly defined.<sup>67</sup> The work of the committees lacks transparency and stand in sharp contrast to the US Existing Chemicals Program, which is subject to public scrutiny through the administrative record.

In addition, the German government makes use of advisory committees that are not formally established by regulation to support its work in the area of chemicals management. For example, the Advisory Committee on Existing Chemicals (BUA) was established in 1992 through collaboration of the German government, the chemical industry and the scientific community, as a “neutral” scientific committee to develop initial assessments for priority chemical substances.<sup>68</sup> These collaborative efforts are executive branch innovations that are consistent with Germany corporatist traditions. They are not the result of legislative initiatives, and they are not broadly participatory. Representatives of environmental groups are not members of BUA.<sup>69</sup>

The BUA is considered a success (even) by the present Minister of Environment from the Green Party, and BUA itself points out that “currently there is no committee nationally or internationally that has assessed more existing chemicals than BUA”.<sup>70</sup> However, a mere count of the number of chemicals assessed is not a strong recommendation. Involvement of experts from environmental groups might have generated different conclusions concerning environmental or human health risks. Because chemical hazards are not country specific, one way of assessing the German procedure would be to compare its decisions with those generated by the EPA under TSCA. Such comparisons might be of limited value, however, if German and American scientists and risk management specialists share information and are influenced by each

others' decisions. German chemicals' policy is difficult to evaluate. The most that can be said is that it is constrained by EC directives and regulations and that it includes little formal public and environmental group participation, especially on technical implementation issues. Selected environmental groups must be consulted under one part of the law, but various committees with closed memberships seem central to the development of policy. Procedural issues may be relatively unimportant, however, because the underlying law - in particular for existing chemicals - seems weak. Nevertheless, the Social Democratic\Green coalition government has taken the initiative in controlling several chemical substances and has proposed that the EC take action.<sup>71</sup> The political coalition controlling the German government has limited legislative authority, however, because it must conform to EC chemicals' legislation. Stronger participation rights could provide a better balance in administrative deliberations, but this will be of limited value if the underlying laws continue to be relatively weak. Such rights could, however, publicize issues that might otherwise remain unexamined and might facilitate legislative changes both at the EU and in Germany.

#### **D. Discussion**

The three cases illustrate several aspects of our political\economic analysis. They are broadly consistent with our speculations although they are obviously not a rigorous test of our ideas.

First, the United States separation-of-powers system has produced far more procedural rights than has Germany's system of parliamentary democracy. However, Germany has strong laws protecting the environment in spite of little public participation in rulemaking. This is, in part, a reflection of the Green Party's role under the country's proportional representation voting system. However, we also argue that the apparent strength of the German statutes needs critical review. Our analysis suggests that German executive branch policymaking and implementation leave a good deal to be desired and appear slanted toward participation by industry.

Second, the United States has long had much stronger laws on public access to information than the United Kingdom. This may be the result of their contrasting constitutional structures. Pressure for change in the UK has come from the public and from some organized interests. Compliance with the EC directive on freedom-of-

information about the environment as well as discussion of the Aarhus Convention informed a broader debate on freedom of information that apparently changed the political calculations.

Third, the procedural biases of TSCA produce high benchmarks for EPA to initiate action and appear to be a major reason for slow progress in US chemicals' control. The transparency of the law-making process combined with public participation opportunities at the implementation stage have not been sufficient to guarantee effective control. In the US, the weakness of the underlying statute has been challenged by public pressure and by the publications of environmental groups. These led to innovative action by EPA and the chemical industry to address key issues outside the formal legal processes. However, these innovations create risks of their own. In Germany, legally required procedures are not elaborated in much detail and hence cannot introduce much bias. However, the weakness of the substantive law, combined with traditional, industry-centered regulatory practices, suggest that the interests of the general public and the environmental community may not be taken into account very well. One needs to know more about how requirements to consult with environmental groups work in practice and about the operation of powerful advisory committees.

Our aim in reviewing these cases is as much normative as positive. We seek to understand the incentives for establishing or failing to establish procedural rights. However, we are also interested in the role that participation of all affected interests can play in making the regulatory process more democratically legitimate. The challenge is to design participation, judicial review, and right-to-know programs so that they can contribute to creating a government that can protect the public interest and can achieve results. Determining the public interest is a difficult task. It is not simply a question of business versus the environment or management versus labor. Rather, as illustrated by our example of chemicals' regulation, there may be sharp clashes between organized groups (in this case, environment and animal protection organizations) each of which considers itself a representative of the "public interest".

We have also seen that administrative procedures are not per se desirable. Poor process can bias or unduly delay implementation. The goal of reformers concerned with democratic legitimacy should be to isolate procedures that are balanced and fair and that

do not involve agencies in a procedural morass. If procedural rights place very high burdens of proof on groups with fewer resources than other powerful interests or if the bureaucracy must spend a good deal of its time defending itself in the courts, agency credibility and efficiency will suffer. Excluding the public and certain groups from policy implementation, and making deals behind closed doors, is anachronistic at a time that is characterized by free flow of information and moves towards more citizen involvement and responsibility.

#### **Part IV. Procedural Rights and the Separation of Powers in the European Union**

Our positive political-economic analysis of procedural environmental rights suggests that most of the signatories of the Aarhus Convention will find some portions of the Convention in tension with existing practice. To the extent that this practice reflects underlying political and constitutional structures, ratification may prove difficult. The Convention is a challenge not just to established habits, but also to political practices that are rooted in the incentives faced by politicians and civil servants. Procedural environmental rights similar to those enacted under the United States separation-of-powers regime may not be easy to transfer to parliamentary systems.

In spite of this difficulty, more open bureaucratic processes will, we believe, benefit the policymaking environment by improving the information available to officials and by increasing the legitimacy of executive branch policymaking. Even in established parliamentary democracies this possibility needs to be recognized. However, such rights may conflict with the interests of politicians and challenge the prerogatives of bureaucrats. Advocates of procedural rights must, therefore, understand that although political institutions in some countries may favor (or even require) procedural rights, the opposite situation may prevail in countries with different regime types.

What is the future of procedural environmental rights in Europe? Will the Aarhus Convention become a dead letter that serves merely as an idealized guide for law reformers in the post-socialist countries? Our political-economic analysis suggests that most signatory states in Western Europe would find ratification - in the absence of external driving forces - difficult and unattractive. It also suggests that countries with parliamentary democracies that ratify the Convention are likely to seek to limit its

impact. However, these observations ignore an important actor – the European Community. In conclusion, we argue that actions at the level of the EC may serve as a catalyst for change within Member States. The EC is one of the signatories of the Convention, and the Commission has initiated the legal changes needed for accession -- a move that could increase the visibility of the Convention in Member States of the EU and spur national ratification processes.<sup>72</sup>

The EC has, over time, developed the characteristics of a separation of powers regime. The Council and the directly-elected Parliament could be considered the upper and lower houses of a bicameral legislature, the European Commission serves as an executive with an administration attached to it, and the European Court of Justice is an independent body responsible for judicial review. Over time, the European Parliament has gained significant influence in the legislative decision-making process. Since the Amsterdam Treaty, all matters concerning the environment are subject to a co-decision procedure between the Council and the Parliament, which means that the Parliament has a veto right in all environmental matters.<sup>73</sup>

Yet, the EC has been severely criticized for its non-transparent decision-making procedures and its related lack of accountability. Together these are often referred to as the democratic deficit of the EC<sup>74</sup>. For example, risk assessment and risk management decision-making for existing chemicals is undertaken through a complex web of committee and “meeting” structures. Working under the rules of the EC “Comitology” processes<sup>75</sup>, a committee, composed of representatives of Member States and chaired by a representative of the Commission, assists the Commission.<sup>76</sup> The committee is informed by regular meetings of the Competent Authorities (CAs) who are designated by Member States. These CAs review and approve the recommendations of Technical Meetings where individual risk assessments are discussed. Industry and environmental interests groups may informally participate as observers at all three levels in the decision-making structure.<sup>77</sup> Christian Hey (2000) argues that this complex process has prevented meaningful participation of environmental groups and represents, in essence, negotiations between the chemical industry and public authorities that put the burden of proof on public authorities. The “formal pluralism” established under the regulation, according to Hey, does not take into account the “imbalances in resources between industrial

representatives and the representatives of public interests”. Environmental groups are simply unable to afford the time and resources needed to participate in decisions concerning individual chemicals.

Thus, the role of environmental groups, at least in the regulation of chemicals, has been marginal at best and has not benefited from any strong right to be included or heard. However, theory would predict that, due to the separation of powers in the EC political system and the number of veto players, procedural environmental rights should begin to play a role in the EC context if the Parliament asserts the power it gained under recent reform of the European Union Treaties. Might participation patterns and judicial review processes in the EC resemble the level of transparency associated with the United States in the not too distant future?

At present, the EC still can be viewed as a treaty of sovereign states, not a government controlled by its citizens. The pressure for procedural rights is part of the ongoing debate about the nature of the European Union project. Recent changes in the treaties governing the EU suggest a move in the direction of more public access and participation. For example, Article 255 of the Amsterdam Treaty formally established the right of the public to have access to EU documents and a general Freedom of Information law is in preparation. A recent Commission initiative addresses this issue in a comprehensive and consistent manner for all institutions of the EC that are involved in the development of community legislation.<sup>78</sup> The proposal refers not only to access to documents prepared by the EC, but also to those held by EC institutions, thus expanding the scope of access to documents prepared by Member States and used in the context of EC deliberations.

Similarly, public involvement in policymaking has become a major concern of the European Union. A discussion paper issued by the President of the Commission (1999) highlights shortcomings in non-governmental organizational (NGO) involvement in EC policy-making in the past and outlines suggestions for strengthening the dialogue between the Commission and NGOs. The paper makes clear that the decision-making process in the EC is “first and foremost legitimized by the elected representatives of the European people”.<sup>79</sup> However, it also points out that NGOs can make a contribution to fostering a more participatory democracy within the European Union.

In response to these developments more and more interest groups are establishing offices in Brussels.<sup>80</sup> At the national level in EU Member States, interest groups are usually organized through peak associations; however, at the EU level, large enterprises increasingly have their own representation. Although corporatist at the level of most EU Member States, at the EC level patterns of interest group organization resemble those associated with pluralism. These developments suggest that, in spite an absence of formal participation requirements, interest groups, including environmental groups, anticipate increasing opportunities to participate in EC decision-making processes.

These arguments are supported by recent evidence. For example, environmental groups have played a major role in the ongoing EC-wide policy dialogue on reforming the present chemicals control regime. The Chemicals Charter adopted by a consortium of environmental groups in Copenhagen<sup>81</sup> significantly contributed to a white paper that was recently published by the Commission.<sup>82</sup> Similarly, the Environmental Council, when discussing the EC chemicals control strategy in June 2001, recognized the importance of procedural environmental rights and agreed to “elaborate and implement all the relevant provisions of the new chemicals policy fully in line with the requirement laid down in the UNECE Aarhus Convention”.<sup>83</sup>

Perhaps, the EC Aarhus ratification process can help to inform and stimulate a debate on the strengths and weakness of participation rights at the level of EC institutions. The Commission, however, is only taking cautious steps to use Aarhus to increase the openness and legitimacy of the EC’s own procedures. So far, it is mainly concerned with incorporating Aarhus requirements into Directives that will have an impact on Member States, but that do little to democratize environmental policymaking in the Commission.<sup>84</sup> Of course, the Commission may not be the right organization to push this issue forward and it has its hands tied by EU Member States that are skeptical of procedural changes, in particular in the area of public participation and access to justice.

The European Union is in the midst of a debate about the openness of its procedures. The increasing openness of EC decision-making, coupled with political support from some EU Member States, seems to have triggered a reform process that may result in fundamental changes. Consistent with our earlier analysis, it is the

European Parliament that has provided the leadership to democratize EC decision-making processes. In 1999, the Parliament adopted a Resolution on openness within the European Union calling for a more open administrative culture to be developed within the various EU institutions and bodies.<sup>85</sup> The Parliament requested, for example, that all comitology texts be placed on the Internet and that criteria be developed - based on the US Government of Sunshine Act - to open up more meetings of EU institutions to the public. Both EU Member States and the Commission have responded to the call of the European Parliament. A White Paper on European Governance that addresses a range of EU governance issues, including the democratic deficit problem, is scheduled to be released during the summer of 2001 as the basis for broad based consultations.

These developments are partly a result of a strengthened European Parliament facing a European Commission with some independence from the legislature. Short of more dramatic changes in the constitutional structure of the EU, the Parliament is likely to support procedural guarantees that limit the direct control of member states and increase the influence of pan-European groups, as well as its own members and political groups. Thus, participation practices in the EC may be evolving in a direction that is more similar to United States patterns than to those in EU Member States.

Even though the EC is unlikely to ratify the Aarhus Convention in the immediate future, the Convention is "alive" and appears to have already had an impact on environmental policy making processes within EC institutions. Although some aspects of the Convention have already been addressed in the broader context of EC governance reform (that is, freedom of information and access to EU documents), others, for example, public participation in EC decision-making processes, are being addressed through a pragmatic approach which follows the principles of the Aarhus Convention

With momentum developing at the EC level, it may well prove difficult for EU Member States significantly to prolong ratification of the Aarhus Convention and to avoid an open discussion at the national level on the strengthening of procedural environmental rights. Such discussions are likely to move beyond the environmental dimension to raise questions of open governance in general, as was the case in the UK. Thus, in the long term, the Aarhus Convention may contribute to fundamental change at two levels. First, procedural environmental rights of citizens will be strengthened and,

second, administrative decision-making may become more democratic and accountable, not only in the former communist countries, but also in the established democracies of Western Europe.

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<sup>1</sup> The text of the Convention and other supporting documents can be found at <http://www.unece.org/env/pp/>. Although Germany and Russia actively participated in the negotiation process – and according to some commentators “watered down” various provisions of the Convention – neither country signed the Convention in June 1998. In both cases, domestic constitutional obstacles were put forward as the main reason for abstaining. See McAllister (1998). In the case of Germany, however, “constitutional obstacles” were overcome, and Germany signed the Convention following change in the ruling government coalition in late 1998. The US and Canada, although UNECE Member States, opted not to participate in the negotiation of the Convention. The US pointed out that the principles of the Convention were already firmly embedded in its domestic laws. However, leaders of non-governmental organizations claim that citizens in the US and Canada could have benefited from the active participation of both countries in the Aarhus process. See McAllister (1998).

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- <sup>2</sup> Preamble, para 7. For a general introduction to the economic arguments for government intervention to regulate environmental quality see Oates (1999).
- <sup>3</sup> For an introductory discussion on the definition and concept of procedural environmental rights see Anderson (1996) and Mason (1999).
- <sup>4</sup> Principle 10 of the Rio Declaration 1992, adopted by more than 150 Heads of State or Government at the Earth Summit in 1992, called for such strengthening. Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/rev.1 (1992). Article 19 of the Aarhus Convention specifies that any Member State of the United Nations may accede to the Convention upon approval by the conference of the parties.
- <sup>5</sup> At present, there are 44 signatories including the European Community. Eleven countries have ratified, accepted, approved, or acceded to the Convention – Denmark and ten former Communist countries. Three countries, Albania, Armenia and Italy informed the secretariat that ratification or accession procedures have been completed at the domestic level. See UNECE, *Aarhus Convention: News in Brief*, Bulletin No.1 2001, May 2001. The Convention will not enter into force until 16 countries have accepted its terms. See <http://www.unece.org/env/pp/ctreaty.htm>.
- <sup>6</sup> Although the United States, a UNECE member state, decided not to participate in Aarhus Convention process, particular attention will be devoted to the US as it is considered a frontrunner in the area of democratic environmental governance.
- <sup>7</sup> The Aarhus Convention is the first legally binding instrument signed by the EC that also applies to European Community Institutions. See European Commission (1999).
- <sup>8</sup> A detailed guide to the Convention can be found in United Nations, Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, New York and Geneva: United Nations, 2000.
- <sup>9</sup> Exemptions from information disclosure include: matters of confidentiality related to administrative proceedings; international relations, national defense or public security; course of justice in judicial matters; confidentiality of commercial and industrial information; intellectual property rights; personal data; and certain environmental information, such as breeding sites of rare species.
- <sup>10</sup> Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC), September 1996, Official Journal of the European Communities, L 257/26.
- <sup>11</sup> See McAllister (1998).
- <sup>12</sup> See Regional Environment Center (1998) pp.9-14.
- <sup>13</sup> Steps have recently been taken to align Directive 90/313/EEC with articles 2, 4, and 5 of the Aarhus Convention. See Commission of the European Communities (2000), *Proposal for a Directive of the European Parliament and of the Council on Public Access to Environmental Information*, COM (2000) 402 final, Brussels, 29.06.2000.
- <sup>14</sup> TRI was established under the US Emergency Planning and Community Right-to-Know Act. In a recent development under the Aarhus Convention, steps have been undertaken by the signatories to develop a legally binding instrument to mandate the establishment of what is now internationally known as Pollutant Release and Transfer Registers (PRTRs).
- <sup>15</sup> Rose-Ackerman (1995) pp. 113-115.
- <sup>16</sup> It took Germany until 1994 to transpose directive 90/313/EEC into national law. Since then, Germany was challenged and defeated several times in front of the ECJ on the matters of access to environmental information. Case C-231/96 (Wilhelm Mecklenburg v. Kreis Pinneberg der Landrat) dealt with the refusal by local civil servants to provide information to an interested citizen related to a highway construction permit. It revealed weaknesses in the transposing German legislation of the EC directive. In Case C-217/97 (Commission of the European Communities v. Germany) the issue was the transposing law itself. The ECJ ruled that German must change its legislation in two areas: to ensure access to information related to administrative proceedings and to ensure that charges are not made for information refusals.
- <sup>17</sup> Rose-Ackerman (1995) pp. 82-93.
- <sup>18</sup> Rose-Ackerman (1995) pp. 86-87.
- <sup>19</sup> Article 6.1(b), 1(c), 6(f).
- <sup>20</sup> For a brief introduction to the concept of negotiated rule-making in the US see Percival, Miller, Schroeder, and Leape (2000) p.173. For critical reviews see Coglianese (1997) and Rose-Ackerman (1994).
- <sup>21</sup> Rose-Ackerman (1995) pp. 7-17, 126-131, 134-139.
- <sup>22</sup> US American Administrative Procedures Act 5 U.S.C. secs 701-706.

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<sup>23</sup> Citizen suits provisions are, for example included in: the Clean Water Act (CWA), 33 U.S.C. sec. 1365; the Safe Drinking Water Act (SDWA), 42 U.S.C. sec. 300j-8; the Clean Air Act (CAA) 42 U.S.C. sec. 7604; the RCRA, 42 U.S.C. sec. 6972; and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. sec. 9659. Citizen suits typically allow actions against both private violators of the act and government agencies who have failed to perform non-discretionary duties.

<sup>24</sup> Rose-Ackerman (1995) pp. 129-130.

<sup>25</sup> See Tunesen and Simonsen (2000)

<sup>26</sup> In contrast, this will occur in a parliamentary system only in a coalition government where a small party is given a key cabinet post to keep it from defecting.

<sup>27</sup> Cox and McCubbins (1997).

<sup>28</sup> Of course, there are exceptions. The most obvious is a party with a regional base as in India or Quebec, Canada. See Cox (1997) for a full analysis.

<sup>29</sup> For a mathematical model which allows one to calculate the theoretical number of parties as a function of district magnitude see Cox (1997).

<sup>30</sup> For a brief discussion how ideology may shape voter behavior see Hinich and Munger (1997).

<sup>31</sup> Rose-Ackerman (1995) pp. 8-12.

<sup>32</sup> Codified at 6 U.S.C. 551-559, 701-706. For an excellent overview of how US rule-making process developed from agency controlled process to a more transparent process see Strauss (1996).

<sup>33</sup> 42 U.S.C. 4321-4307f.

<sup>34</sup> 5 U.S.C. 552.

<sup>35</sup> 42 U.S.C. 11001-11050.

<sup>36</sup> The public must be provided notice of the time, place, and subject of any meeting at least one week in advance. Only a few exceptions apply. The act only requires public observation, not participation, in the meetings. 5 U.S.C. sec 552b.

<sup>37</sup> Brickman, R., Jasanoff, S. and T. Ilgen (1985) p. 44.

<sup>38</sup> Rose-Ackerman (1995) p. 67.

<sup>39</sup> Rose-Ackerman (1995) p. 18.

<sup>40</sup> See Rose-Ackerman (1995) p. 69. Consistent with this view, the German Council of Environmental Advisors (1996) criticized the deficiency of German environmental law to provide legally guaranteed participation opportunities to environmental groups in the development of environmental standards. The Council recommended that the government amend environmental statutes to ensure such participation in order to "offset the strong influence of business interest groups and to make an open discussion of issues possible". See The German Council of Environmental Advisors, English Summary (1996).

<sup>41</sup> Out of 154 environmental standard setting processes examined by the Council of Environmental Advisors (1996), 17 % of the cases allowed participation of concerned parties, while in 6 % any interested party or individual could participate. All other standard setting processes involved experts only, or no information about participation opportunities was available. For a more detailed discussion see Der Rat von Sachverständigen fuer Umweltfragen (1996), full report in German pp. 251-315.

<sup>42</sup> The European Commission sent a final warning to Germany in 2001 concerning its failure to comply with Access to Environmental Information Directive 90/313/EEC. Austria has also run afoul of the Commission which has referred a case to the European Court of Justice. "Public Gains Influence under EU's New Green Law," *Environmental News Service* February 5, 2001 (LEXIS/NEXIS)

<sup>43</sup> Strauss (1996) p. 755.

<sup>44</sup> For a history of attempts to introduce FOI legislation in the UK see Lewis (1989).

<sup>45</sup> The UK Freedom of Information Act 2000 is available at <http://www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm>

<sup>46</sup> See Campaign for Freedom of Information at <http://www.cfoi.org.uk>

<sup>47</sup> The EC directive on access to environmental information was implemented in the UK through Environmental Information Regulations 1992, which came into force on 31 December 1992.

<sup>48</sup> The Campaign for Freedom of Information is a non-profit organization that works towards eliminating "unnecessary official secrecy and to give people legal rights to information which affects their lives or which they need to hold public authorities properly accountable". It is supported by some 80 national bodies including leading consumer, environmental, civil liberty and legal groups, professional bodies, civil service and other trade unions and organizations representing journalists, newspapers and authors. See <http://www.cfoi.org.uk>.

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<sup>49</sup> See The Campaign for Freedom of Information, *Why Britain Needs a Freedom of Information Act*, 1993, available at <http://www.cfoi.org.uk/whyfoi.html>

<sup>50</sup> See Friends of the Earth (1999) Press Release: *Worse Than it Ever Was: "Freedom of Information Bill" Threatens Key Environmental Rights*. Available at <http://www.foe.co.uk/pubsinfo/infoteam/pressrel/1999/19990712000120.html>

<sup>51</sup> NRC (1994 ).

<sup>52</sup> 15 U.S.C. secs. 2601-2671.

<sup>53</sup> See Brickman et. al. (1985).

<sup>54</sup> The procedural provisions of TSCA include, for example: judicial review of regulations; citizens suits against anyone alleged to be in violation of TSCA or against the EPA administrator for failing to perform non-discretionary duties; and citizen petitions to initiate EPA rule-making proceedings.

<sup>55</sup> Section 2 of the Toxic Substances Control Act (TSCA) reads as follows: "It is the policy of the United States that adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and development of such data be the responsibility of those who manufacture and those who process such chemicals and mixtures."

<sup>56</sup> See Conservation Foundation (1987) and EDF (1997).

<sup>57</sup> A basic testing schedule established by the OECD known as SIDS (Screening Information Data Sets) covers six end points: acute toxicity, chronic toxicity, developmental and reproductive toxicity; mutagenicity; eco-toxicity; and environmental fate. EPA estimates that the full battery of basic SIDS screening tests costs about USD 205,000. See Percival, Miller, Schroeder, and Leape (2000) p. 376- 377

<sup>58</sup> 44 Fed. Reg. 60,061.

<sup>59</sup> 54 Fed Reg. 29,460.

<sup>60</sup> The process of preparing the final rule involved 22 days of public hearings, thousands of pages of testimony, and some 13,000 pages of comments from more than 150 interested parties. See Percival, Miller, Schroeder, and Leape (2000) pp. 470-471.

<sup>61</sup> *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5<sup>th</sup> Cir.,1991).

<sup>62</sup> Risk management activities in EPA's Existing Chemicals Program are divided into RM1, RM2 and Post-RM2 stages. The Risk Management 1 stage focuses on screening and selecting chemicals that appear to be of greatest concern to human health and the environment and identification of additional testing needs is a possible outcome. During Risk Management 2 options are framed for reducing or eliminating the risks posed by particular chemicals, including possible requirements for additional testing. Post-RM2 activities consist of the implementation of one or more of the risk reduction and/or testing options identified during RM2.

<sup>63</sup> In a letter to EPA in early 2000, the Animal Legal Defense Fund (ALDF) pointed out that the HPV chemical testing initiative was not compatible with section 4 of TSCA which requires EPA rule-making - and therefore full public transparency - prior to initiation of testing. ALDF argued that EPA had not given notice in the Federal Register about the voluntary industry testing initiatives. It also noted that the program was established in co-operation with only two interested parties: EDF and the Chemical Manufacturers Association. See letter dated January 7, 2000 addressed to EPA Office of Policy and Reinvention, available at <http://www.epa.gov/reinvent/stakeholders/public/aldf.htm>.

<sup>64</sup> The contents of the administrative record includes a screening dossier, summaries of major studies cited in the dossier, summaries of risk management meetings, letters of concern to industry or others and replies, and comments or correspondence from other parties outside of EPA. The screening dossier contains relevant exposure and hazard information, recommendations from the screening workgroup, and the supporting rationale for that decision.

<sup>65</sup> Existing chemicals are regulated by 93/793/EEC. Directive 67/548/EEC (implemented through articles 13-15 of the German Chemicals Law) covers classification and labeling.

<sup>66</sup> German environmental statutes which include participation requirements include the Nature Protection Law, the Atomic Law and the Immission Protection Law Control.

<sup>67</sup> Rose-Ackerman (1995) pp. 65-66.

<sup>68</sup> See <http://www.gdch.de/projekte/bua.htm> for an introduction to the work of BUA.

<sup>69</sup> See <http://www.gdch.de/projekte/bua2.htm> for a current list of BUA Members.

<sup>70</sup> See German Chemical Society, 1999, pp. 5-7.

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<sup>71</sup> For example, Germany recently decided to ban - without waiting for concerted action at the Community level – the chemical TBT, a persistent substance used mainly in ship painting. The action was taken because the Commission had not responded positively to an earlier German proposal a ban TBT at the Community level through an amendment of directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations. In this particular case, Germany is likely to face the problem that in principle banning or severely restricting a chemical falls clearly within the authority of Community legislation which aims at ensuring free trade among its Members States.

<sup>72</sup> The Commission does not expect ratification to occur until 2002/2003. Report by the European Commission on Work Undertaken to Prepare for Ratification by the European Community of the Convention on Access to Information, Public Participation in Environmental Decision-Making and Access to Justice in Environmental Matters to the Second Meeting of the Signatories to the Convention, Catvat-Dubrovnik, Croatia, 3-5 July 2000.

<sup>73</sup> Lindseth (1999) pp. 651-654.

<sup>74</sup> For a discussion of the democratic deficit in the EC see Douglas-Scott (1966).

<sup>75</sup> See Council Decision 1999/468/EC of 28 June 1999 laying down the procedure for the exercise of implementing powers conferred to the Commission, Official Journal L 184, 17/07/1999 p. 0023 – 0026. The decision does not spell out how the Commission should consult with the public in its deliberations. It merely instructs the Commission to inform the public about the work of the Committees.

<sup>76</sup> For a comprehensive discussion on the EC “Comitology” process see Egan and Wolf (1998) Bignami (1999) and Hey (2000).

<sup>77</sup> See Hey (2000).

<sup>78</sup> See European Commission COM (2000) 30 final/2 of 21.2 2000 and *Proposal for a Regulation of the European Parliament and Council regarding public access to European Parliament, Council and the Commission documents*, Document 500PC0030, 19.02.2001.

<sup>79</sup> European Commission (1999), p. 4.

<sup>80</sup> Mueller-Brandeck-Bocquet (1995).

<sup>81</sup> EEB, 2000.

<sup>82</sup> Commission of the European Communities, 2001. One major proposed change for chemicals control in the paper is a shift in the burden of proof. At present, public authorities are required to document that a particular chemical is unsafe; if the proposal is adopted, a greater burden will be placed on industry to prove that a chemical does not pose unacceptable risks to human health and the environment. The shift was one of the main demands of the Copenhagen Chemicals Charter.

<sup>83</sup> See Press Release of the 2355<sup>th</sup> Council Meeting – Environment, 7 June 2001.

<sup>84</sup> “Environment: Top EU Official Explains Delay in Ratifying Aarhus Agreement,” *European Report*, October 21, 2000; “Commission Takes Further Step Towards Ratification of the Aarhus Convention,” *RAPID*, January 26, 2001; “Public Gains Influence Under EU's New Green Law,” *Environmental News Service*, February 5, 2001 (all articles available on LEXIS/NEXIS).

<sup>85</sup> Parliament of the European Communities, *Resolution on Openness with the European Union*, adopted on 12/01/1999. For a detailed background on the resolution see European Parliament (1999).