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**The Global Aspirations of the Aarhus Convention
and the Case of the World Bank
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INTRODUCTION

Towards a New Benchmark in Environmental Governance

The 1998 Aarhus Convention¹ of the United Nations Economic Commission for Europe (UNECE) contains important administrative guarantees that are to be respected by the public authorities of the State parties to the Convention when making rules and decisions in environmental matters. In particular, it establishes three Pillars of good environmental governance, namely access to information, public participation, and access to justice.

This paper argues that the Aarhus Convention is in addition invaluable in the sphere of global governance, as an instrument to enhance the accountability of international administrative bodies.² This thesis rests on the assumption that, notwithstanding the limits inherent to such a process, it is possible to apply principles of domestic administrative law in order to evaluate and improve administrative procedures and institutions on the global level.³

¹ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on 25 June 1998; entered into force on 30 October 2001, ECE/CEP/43 (hereinafter “the Aarhus Convention”, “the Convention”, or “Aarhus”). See <http://www.unece.org/env/pp/>.

² The arguments put forward in this paper are part of a larger project concerning the relevance of the Aarhus Convention in global governance. The main thesis has been developed more comprehensively in an earlier paper: Benjamin Dalle, *The Globalization of Environmental Democracy on the Model of the Aarhus Convention* (December 23, 2005) (unpublished paper, on file with the author). The essence of this theory is in line with the ideas of a few other authors. See, e.g., Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ELR 10428 (2002) (providing a detailed analysis of the different regional initiatives, with the objective of achieving a global framework). See also Elisa Morgera, *An Update on the Aarhus Convention and its Continued Global Relevance*, 14 RECIEL 138 (2005) (analyzing the recent developments concerning the Aarhus Convention, including concerning its promotion in international forums).

³ Hence application is made of the bottom-up approach in Global Administrative Law. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 53-57 (Summer/Autumn 2005) (discussing the bottom-up approach and its constraints).

Although originally designed to improve domestic administrative laws, the Aarhus Convention has a more universal significance, in view of the fact that it is the most detailed international legal text providing fairly adequate and comprehensive accountability principles pertaining to environmental governance. The claim that the Aarhus Convention has a broader meaning in the global administrative space is buttressed by four additional arguments, based respectively on a normative approach, the practice of international organizations, the example of the European Union (EU), and the Convention itself.

In the first place, the use of the Aarhus Convention in global governance is crucial from a normative perspective. The Aarhus Convention implements Principle 10 of the Rio Declaration,⁴ which is a fundamental and solemn environmental proclamation explicitly describing the three Aarhus Pillars as individual rights. Moreover, the Aarhus Convention gives a central importance to human rights⁵ which are foundational for its development.⁶ Because of this close relation with human rights and sustainable development, it is important that any administrative body active in environmental decision-making takes these three Pillars into account, irrespective of its domestic or international nature. Also, transparency, participation, and the entitlement to review are seen as such fundamental legal principles, that it has been argued that they are part of a body of emerging principles of Global Administrative Law.⁷ The Aarhus Convention

⁴ Cf. the second preambular paragraph of the Aarhus Convention.

⁵ This human rights perspective is stressed in Article 1 and throughout the preamble of the Aarhus Convention.

⁶ The three Pillars have their foundations in human rights documents and treaties, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which all contain provisions on access to information, the right to associate, and access to justice.

⁷ Kingsbury, Krisch & Stewart, *supra* note Errore: sorgente del riferimento non trovata, at 39-40.

gives voice to this idea, and provides a skeleton for the operational translation of these procedural principles.

Secondly, a large number of international organizations already apply important elements of the three Pillars at this very moment.⁸ Global governance in the last decades has been characterized by a progressive awareness of the need for transparent and participatory decision-making. However, the values of transparency and accountability can only be guaranteed if these principles are applied in a coherent and predictable manner. Currently, the many international institutions apply different norms, guidelines, or *ad hoc* practices, to an extent that it becomes difficult to see the wood for the trees. The Aarhus Convention could be a useful tool to bring order to this chaos.

The thesis of this paper is further supported by the example of the EU, which is a full Party to the Aarhus Convention. The EU not only has taken steps to ensure that its Member States implement the Aarhus rules in their domestic legislation,⁹ but is also in the process of making the Aarhus Convention applicable to its own “institutions and bodies”,¹⁰ terms broadly defined in order to include a vast number of European

⁸ This phenomenon has been described quite thoroughly in a UNECE background document: Addendum to *Access to information, public participation and access to justice in international forums: Survey of selected access to information, public participation, and access to justice rules and practices in international forums*, MP.PP/2002/18/Add.1; CEP/2002/13/Add.1, 12 September 2002. See also Bruch & Czebiniak, *supra* note Errore: sorgente del riferimento non trovata, at 10429-31.

⁹ This happened through the adoption of directives. For a brief overview of these efforts, see Aine Ryall, *Implementation of the Aarhus Convention Through Community Environmental Law*, 6 ENV. L. REV. 274, (2004). See also <http://europa.eu.int/comm/environment/aarhus/>.

¹⁰ Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC Institutions and bodies, COM(2003) 622 final, 24 October 2003.

institutions.¹¹ This shows that it is possible for international organizations to live up to the Aarhus standards, although it is acknowledged that the EU is a *sui generis* international organization, due to its sophisticated institutional structure and its broad competences.

Finally, the Aarhus Convention itself gives a powerful argument for this view, by obliging every Party to “[...] promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”¹² With the purpose of implementing this requirement, guidelines were adopted to provide guidance to the Parties about the promotion of access to information, public participation, and access to justice in international organizations.¹³ In addition, a Task Force was established to enter into consultation on the guidelines with the relevant international forums.¹⁴ The guidelines are important evidence of the feasibility of applying the Aarhus principles to international institutions, and they could contribute to the development of a code of conduct for international administrative bodies in respect of all three Pillars of the Aarhus Convention.

¹¹ See Vera Rodenhoff, *The Aarhus Convention and its Implications for the ‘Institutions’ of the European Community*, 11 RECIEL 343, 350 (2002).

¹² Article 3(7).

¹³ UNECE, *Report of the Second Meeting of the Parties, Decision II/4. Promoting the Application of the Principles of the Aarhus Convention in International Forums*, ECE/MP.PP/2005/2/Add.5, 20 June 2005. The adopted guidelines are less ambitious than the draft version, in particular with regard to the third Pillar (see UNECE, *Draft guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums*, ECE/MP.PP/WG.1/2005/8/Add.1, 23 November 2004).

¹⁴ For the most recent state of affairs, see UNECE, *Report on the First Meeting of the Task Force on Public Participation in International Forums*, ECE/MP.PP/WG.1/2006/3, 27 January 2006.

The claim that the Aarhus Convention is a promising instrument for global governance does not imply, however, that it is assumed that all of its rules can be linearly transposed to the context of international organizations. The inherent differences between the domestic administrative context and the conditions prevailing in global governance may complicate this effort or even render it impossible. The objective of this paper is to demonstrate that the Aarhus Convention could become a point of reference for analyzing and improving accountability mechanisms of bodies active in environmental governance.

In this paper the World Bank¹⁵ is presented as a case study in order to evaluate the potential of the Aarhus Convention in the area of global governance. The analysis will focus on the comparison between some of the Bank's rules and the three Aarhus Pillars.¹⁶ The similarities and differences will be clarified and emphasis will be put on possible improvements of the Bank's accountability mechanisms. The paper is structured in three Parts, following the three Pillars of the Aarhus Convention.

¹⁵ This includes the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

¹⁶ A more detailed assessment has been made in a previous paper: Benjamin Dalle, *World Bank Accountability in Light of the Aarhus Convention* (May 10, 2006) (unpublished paper, on file with the author).

PART I. ACCESS TO INFORMATION

THE WORLD BANK DISCLOSURE POLICY

The first World Bank Policy on Disclosure of Information was published in 1994 and the present-day policy dates back to 2002 and comprises the World Bank Policy on Disclosure of Information¹⁷ and the Disclosure Handbook.¹⁸ However, both documents were amended by a revision on March 8, 2005.¹⁹

The Disclosure Policy starts by proclaiming a central “presumption in favor of disclosure”,²⁰ and in doing so demonstrates a definite commitment to openness. This is clearly in line with the Aarhus Convention, which introduces the fundamental principle that access to information is the default rule.²¹

On the other hand, the Aarhus Convention contains an exhaustive list of exceptions.²² Access to information in the World Bank is also subject to a number of exceptions, which are described as “constraints”.²³ The question is whether these constraints can be conciliated with the categories of exceptions in the Aarhus Convention.

¹⁷ World Bank, *The World Bank Policy on Disclosure of Information*, June 2002, available at <http://www1.worldbank.org/operations/disclosure/documents/disclosurepolicy.pdf> (hereinafter “Disclosure Policy”).

¹⁸ World Bank, *The Disclosure Handbook*, December 2002, available at <http://www1.worldbank.org/operations/disclosure/documents/disclosurehandbook.pdf>. This document is a guide for the Bank’s staff about the workflow arrangements for disclosing operational information in accordance with the Disclosure Policy (*idem*, paragraph 1).

¹⁹ World Bank, *World Bank Disclosure Policy: Additional Issues. Follow-Up Consolidated Report* (Revised), February 14, 2005, available at <http://www.worldbank.org/disclosure> (follow the hyperlink in the column on the right, under the heading “What’s New”). The two abovementioned documents (notes Errore: sorgente del riferimento non trovata and Errore: sorgente del riferimento non trovata) are being revised to reflect the changes introduced by this revision. According to information provided by the Disclosure Helpdesk, the consolidation will be finalized by the end of July 2006.

²⁰ Disclosure Policy, *supra* note Errore: sorgente del riferimento non trovata, paragraph 4.

²¹ See, e.g., Articles 4(1) & 5(1).

²² These categories of exceptions are enumerated in Article 4(3) & (4).

²³ Disclosure Policy, *supra* note Errore: sorgente del riferimento non trovata, paragraphs 82-90.

At the beginning, two more general critiques have to be put forward. First, the Aarhus Convention requires that the reasons for refusal are stated and information on access to a review procedure is provided, every time a request for information is denied.²⁴ The Disclosure Policy does not mention any of these two requirements and there are no reasonable justifications for this discrepancy, especially with regard to the requirement to give reasons for a refusal, which is an essential element of good administration.²⁵

Second, the Disclosure Policy fails to mention any deadlines or schedules that should be respected by the Bank, when answering requests for information. This is problematic in the light of the Aarhus Convention, which requires that information is made available “[...] as soon as possible and at the latest within one month after the request has been submitted.”²⁶

Most exceptions in the Disclosure Policy can be framed within the broad boundaries of the list of exceptions of the Aarhus Convention. For instance, the exception for information that is subject to the attorney-client privilege or that might prejudice an investigation,²⁷ is allowed under Article 4(4), (c) of the Aarhus Convention. Another example concerns an exception for privacy-sensitive information about World Bank staff members,²⁸ which is also permitted under the Aarhus Convention.²⁹ However, in a limited

²⁴ Article 4(7).

²⁵ Kingsbury, Krisch & Stewart, *supra* note Errore: sorgente del riferimento non trovata, at 39.

²⁶ Article 4(2). If the volume and the complexity of the information justify it, there can be an extension up to two months after the request.

²⁷ Disclosure Policy, *supra* note Errore: sorgente del riferimento non trovata, paragraph 85.

²⁸ *Idem*, paragraph 89.

²⁹ Article 4(4), (f).

amount of cases it is not entirely clear how exceptions should be pigeonholed in the different Aarhus categories.³⁰

In a number of cases, the Aarhus Convention provides useful recommendations for improving the Bank's rules. For example, in respect of documents provided to the Bank by third parties, the Disclosure Policy states that if that information is provided on the explicit or implied understanding that they will not be disclosed without the consent of the source or even that access within the Bank will be limited, that information will be treated accordingly.³¹ This exception is reflected in Article 4(4), (g) of the Aarhus Convention, but only to the extent that the third party is legally bound to do so. This exception has been included in order to promote the voluntary flow of information from private persons to the administration.³² If third parties are required to deliver certain information to the Bank, disclosure should not be restricted.

Finally, the Disclosure Policy is clearly inconsistent with the Aarhus principles in respect of a *catch-all* provision that states that “[...] information may be precluded on an ad hoc basis when, because of its content, wording, or timing, disclosure would be detrimental to the interest of the Bank, a member country, or Bank Staff.”³³ The “detrimental to the interest of” criterion is extremely broad and may have a virtually unlimited scope of application. Although the Aarhus Convention contains several provisions that allow administrations to derogate from the general principles because

³⁰ For instance with regard to confidential financial information (Disclosure Policy, *supra* note Errore: sorgente del riferimento non trovata, paragraph 88).

³¹ *Idem*, paragraph 84.

³² STEPHEN STEC & SUSAN CASEY-LEFKOWITZ, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 61 (2000).

³³ Disclosure Policy, *supra* note Errore: sorgente del riferimento non trovata, paragraph 90.

specific interests could be harmed, it does not allow for this kind of *carte blanche*. In particular, the final clause of Article 4(4) of the Aarhus Convention emphasizes that the grounds for refusal shall be interpreted in a restrictive way, taking into account – *inter alia* – the public interest served by disclosure.

The fact that the World Bank reserves for itself the authority to refuse disclosure on the basis of such an open-ended provision seems inconsistent with the relatively stringent character of the other exceptions.³⁴ In addition, this type of provision is not present in MIGA's and IFC's disclosure policies, which proves that it is definitely not necessary for the proper functioning of the institution.³⁵ For all these reasons, it is argued that this provision is completely unjustifiable.

In addition to these exceptions to the presumption in favor of disclosure, the importance of this notion is limited by the inclusion of a list of categories of information that are available from the World Bank.³⁶ The positive affirmation that different kinds of information are publicly available gives the impression that other categories of information which are not mentioned are not available and thus casts doubts on the sincerity of the presumption in favor of disclosure.³⁷

³⁴ Cf. Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks, in THE NEW "PUBLIC". THE GLOBALIZATION OF PUBLIC PARTICIPATION* 151, 155 (Carl Bruch ed., 2002) (commenting on similar broad exceptions): "Because these grounds are not well defined, they are subject to the discretion of the relevant MDB staff. If broadly defined exceptions such as these are not interpreted very narrowly, they could render the disclosure requirements useless."

³⁵ IFC, *IFC's Policy on Disclosure of Information*, April 30, 2006, available at <http://www.ifc.org/ifcext/policyreview.nsf/Content/DisclosurePolicyReview>; MIGA, *MIGA's Disclosure Policy*, 1999, available at <http://www.miga.org/index.cfm?aid=20>.

³⁶ Disclosure Policy, *supra* note Errore: sorgente del riferimento non trovata, paragraphs 5-81.

³⁷ Moreover, the Bank's staff members tend to presume that documents not on the list are not subject to disclosure (Bernasconi-Osterwalder & Hunter, *supra* note Errore: sorgente del riferimento non trovata, at 154).

Furthermore, sometimes the specific provisions introduce additional restrictions to the presumption in favor of disclosure. In the field of environmental governance, there are for instance specific rules on the disclosure of Environmental Action Plans (EAPs) and of Environmental Assessment (EA) Reports,³⁸ which are not entirely in conformity with the Aarhus Convention, due to the fact that their disclosure largely depends on the consent of the concerned State.³⁹

PART II. PUBLIC PARTICIPATION

WORLD BANK POLICIES, PROCEDURES, AND PRACTICE

³⁸ Disclosure Policy, *supra* note Errore: sorgente del riferimento non trovata, respectively paragraph 29, and paragraphs 31-33.

³⁹ For a more detailed assessment, *see* Dalle, *supra* note Errore: sorgente del riferimento non trovata, at 19-21.

An overall assessment of the Bank’s participatory rules is rendered very complicated due to the fact that there is no generally applicable “World Bank Public Participation Policy”. Instead, public participation is governed by a myriad of strategies, policies, procedures, best practices, and *ad hoc* undertakings.⁴⁰

The philosophy of the Aarhus Convention is to draw a distinction between public participation in policymaking and public participation in specific decision-making.⁴¹ This distinction has important ramifications for the applicable participatory procedures and for the description of the public that can participate. Although the analysis may be more intricate, the same distinction is by and large maintainable in the context of the World Bank, as lending-operations can be considered to be decisions on specific activities, whereas policymaking happens through the development of general documents such as strategies, policies, procedures, or best practices.

A. Participation in policy-making

The Bank has a double function in participatory governance, because not only it should ensure effective civic engagement throughout its own procedures like every domestic administrative agency, but also it bears an important responsibility to promote public participation at the country level. With regard to the latter responsibility, public participation and empowerment are the most central in the process of the Poverty Reduction Strategy Papers (PRSPs).⁴²

⁴⁰ See, for a starting point, <http://www.worldbank.org/civilsociety>.

⁴¹ Respectively Articles 7 & 8, and Article 6.

⁴² World Bank, *Poverty Reduction Strategies website*, <http://www.worldbank.org/prsp>. See, on the subject of its relations with human rights, Frances Stewart & Michael Wang, *Poverty Reduction Strategy Papers*

In respect of participation in the Bank's own policy-making, a large part is not based on any particular rules or guidelines but on *ad hoc* practices. There has been an evolution toward more participation which has in some recent cases amounted to a process that is very comparable to the classic notice and comment – rulemaking in U.S. administrative law,⁴³ which is, if systematically applied, in line with the requirements of the Aarhus Convention. A good example of this practice was the development and adoption of the Bank's policy on indigenous peoples.⁴⁴ After extensive consultations with stakeholders, the Bank issued a document which tried to justify the final Bank Policy, by answering to the critiques raised by twenty-one organizations and individuals.⁴⁵ Although some of the answers are not entirely satisfying, they do show that the Bank has considered the main thrust of the different critiques.

The problem with the Bank's approach is that the Bank's staff is by no means obliged to abide by any fixed procedures. As this leads to legal insecurity and a lack of transparency, it is a strong conviction that fairly detailed principles and procedures should be adopted. Such a document could be inspired by a Strategy of the Inter-American Development Bank (IADB) of 2004,⁴⁶ which establishes general guidelines and

within the Human Rights Perspective, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 447 (Philip Alston & Mary Robinson eds., 2005). See, on the subject of participation in the PRSP process, World Bank, *PRSP Sourcebook. Chapter 7. Participation* (2002), available at http://povlibrary.worldbank.org/files/13839_chap7.pdf.

⁴³ Cf. Sections 553-5 of the U.S. Administrative Procedure Act (APA). See generally STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 677 et seq. (5th ed. 2002).

⁴⁴ See *infra* note Errore: sorgente del riferimento non trovata.

⁴⁵ World Bank, *Staff Response to Public Comments. Revised Draft Policy on Indigenous Peoples (OP 4.10) of December 1, 2004*, April 6, 2005, available at <http://www.worldbank.org/indigenous> (click the "Staff Response to Public Comments on Draft Indigenous Peoples Policy - April 2005" hyperlink in the right column).

⁴⁶ Inter-American Development Bank, *Strategy for Promoting Citizen Participation in Bank Activities*, May 19, 2004, available at http://www.iadb.org/exr/pic/pdf/citizenpart_eng.pdf.

criteria and specifies areas of action in which the Bank can expand, strengthen and systematize citizen participation in its activities.⁴⁷ In particular, it emphasizes the principles of inclusiveness, pluralism, opportunity for timely input, transparency, efficiency and cultural sensitivity.⁴⁸ The adoption of a similar, though more comprehensive,⁴⁹ strategy by the World Bank would have the advantage of mainstreaming participatory governance in the Bank's operations and activities, and of introducing more predictability, consistency and accountability to its consultation processes.

B. Participation in project-lending

Like in the context of policy-making there are no all-encompassing participatory rules for lending-activities. The Bank's Good Practice statement "Involving Nongovernmental Organizations In Bank-Supported Activities"⁵⁰ and the World Bank Participation Sourcebook⁵¹ provide some guidance but lack the character of a clear and legally binding text. More concrete and binding rules can be found in the framework of specialized Bank policies, and particularly in the World Bank's environmental and social

⁴⁷ *Idem*, paragraph 1.14.

⁴⁸ *Idem*, paragraph 3.8.

⁴⁹ For instance, the document does not include any rules on internal Bank policies and strategies, which makes it incomplete.

⁵⁰ World Bank, *The World Bank Operational Manual. Good Practices: Involving Nongovernmental Organizations in Bank-Supported Activities*, GP 14.70, February 2000, available at <http://www.worldbank.org/civilsociety> (follow the "Bank Policies" hyperlink in the left column, and subsequently click the hyperlink on the bottom of the page).

⁵¹ World Bank, *The World Bank Participation Sourcebook* (1996), available at <http://www.worldbank.org/wbi/sourcebook/sbhome.htm>.

safeguard policies.⁵² Examples of policies with extensive rules on participation relate to indigenous peoples,⁵³ and to involuntary resettlement.⁵⁴

In connection with environmental governance, particularly relevant is the Bank's environmental assessment policy, which can be considered to be the umbrella policy for the Bank's safeguard policies. The policy is contained in OP/BP 4.01,⁵⁵ and described in more practical terms in the Environmental Assessment Sourcebook and its Updates.⁵⁶ Minor inconsistencies notwithstanding, the policy is in line with the requirements of the Aarhus Convention.⁵⁷

PART III. ACCESS TO JUSTICE

THE WORLD BANK INSPECTION PANEL

⁵² <http://www.worldbank.org/safeguards>. There are safeguard policies on environmental assessment, natural habitats, forests, pest management, cultural property, involuntary resettlement, indigenous peoples, the safety of dams, disputed areas, and international waterways.

⁵³ World Bank, Operational Policy, *Indigenous Peoples*, OP 4.10, July 2005; World Bank, Bank Procedure, *Indigenous Peoples*, BP 4.10, July 2005. See generally World Bank, *Indigenous Peoples Website*, <http://www.worldbank.org/indigenous>.

⁵⁴ World Bank, Operational Policy, *Involuntary Resettlement*, OP 4.12, December 2001; World Bank, Bank Procedure, *Involuntary Resettlement*, BP 4.12, December 2001. See generally World Bank, *Involuntary Resettlement Website*, <http://www.worldbank.org/resettlement>.

⁵⁵ World Bank, Operational Policy, *Environmental Assessment*, OP 4.01, January 1999; World Bank, Bank Procedure, *Environmental Assessment*, BP 4.01, January 1999. See generally World Bank, *Environmental Assessment Website*, <http://www.worldbank.org/environmentalassessment>.

⁵⁶ World Bank, *Environmental Assessment Sourcebook 1999* (Update number 5, October 1993, *Public Involvement in Environmental Assessment: Requirements, Opportunities and Issues*; Update number 26, May 1999, *Public Consultation in the EA Process: A Strategic Approach*). The latter update contains the currently valid version of the text.

⁵⁷ Dalle, *supra* note Errore: sorgente del riferimento non trovata, at 34-41.

The World Bank Inspection Panel⁵⁸ was instituted in 1993 by two identical resolutions by the Executive Directors of the IBRD and the IDA.⁵⁹ This document governs the authority of the panel, and within that framework the Operating Procedures⁶⁰ provide more detailed provisions.⁶¹ The panel has been established “[...] for the purpose of providing people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures.”⁶² Because it provides affected people access to a quasi-judicial body, the Inspection Panel can be analyzed as an access to justice mechanism.

Access to justice is a pivotal element within the Aarhus regime and can be seen as the “teeth” of the Convention,⁶³ since it is an essential element to force public authorities to respect their obligations both under the first two Aarhus Pillars, and under general environmental law. Although Article 9 of the Aarhus Convention is designed with the model of a domestic judiciary in mind, it provides for fairly general minimum standards that should be respected by any tribunal dealing with environmental claims. Several thematic keywords and principles can be distilled from the Convention, and the Panel’s procedures are well adapted to the majority of these principles. For instance, there are fairly adequate rules to ensure the Panel’s independence, elaborate rules concerning

⁵⁸ World Bank, *Inspection Panel website*, <http://www.worldbank.org/inspectionpanel>. For a general assessments of the Inspection Panel from an environmental point of view, see, e.g., Alix Gowlund Gualtieri, *The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel*, 72 BRITISH YEARBOOK OF INT’L L. 213 (2002).

⁵⁹ World Bank, Resolution No. IBRD 93-10 and Resolution No. IDA 93-6, *The World Bank Inspection Panel*, 22 September 1993 (hereinafter “IP Resolution”).

⁶⁰ World Bank, *Inspection Panel Operating Procedures* (1994) (hereinafter “Operating Procedures”).

⁶¹ *Idem*, introduction. In addition, two reviews have been conducted: World Bank, *Review of the Resolution Establishing the Inspection Panel. 1996 Clarification of Certain Aspects of the Resolution*; World Bank, *1999 Clarification of the Board’s Second Review of the Inspection Panel*.

⁶² Operating Procedures, *supra* note Errore: sorgente del riferimento non trovata, *Introduction: Purpose*.

⁶³ Rodenhoff, *supra* note Errore: sorgente del riferimento non trovata, at 348.

transparency, an entirely appropriate description of the scope of scrutiny, and a permitted rule on ripeness.⁶⁴

However, there are also major divergences, of which two can be easily remedied, whereas one is more fundamental. First, the standing rules require that claimants at least consist of a group of two people, excluding the possibility of an individual filing a complaint.⁶⁵ This is contrary to the idea of access to justice as an individual right, and an amendment is easy and without important ramifications, since there is no real danger for opening the floodgates of claims.⁶⁶

Second, concerning access to information, the Aarhus Convention requires that in addition to a (quasi-)judicial procedure, persons whose request for disclosure is denied have “[...] access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court.”⁶⁷ On the national level, there is, e.g., the example of the Commission on Access to Documents (CADA) in France, and on the international level, the UNDP has the Public Information and Documentation Oversight Panel.⁶⁸ The World Bank should establish a similar body which has the competence to deal with questions of information disclosure. Furthermore, a statement of the reasons in writing is

⁶⁴ Dalle, *supra* note Errore: sorgente del riferimento non trovata, at 43-58.

⁶⁵ IP Resolution, *supra* note Errore: sorgente del riferimento non trovata, paragraph 12; and Operating Procedures, *supra* note Errore: sorgente del riferimento non trovata, paragraph 4.

⁶⁶ Since the establishment of the Inspection Panel in 1993, there have been as little as 40 requests (on May 15, 2006). See also Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 403, 457 (2005).

⁶⁷ Article 9(1), paragraph 2.

⁶⁸ Respectively La Commission d’Accès aux Documents Administratifs (<http://www.cada.fr>); and United Nations Development Programme (UNDP) Public Information and Documentation Disclosure Policy, paragraphs 20-23, available at <http://www.undp.org/id/>.

required if disclosure is refused.⁶⁹ There are no provisions on this issue in the World Bank policies. The need to give reasons is an essential aspect of good governance, and should be respected by the World Bank.

A more fundamental divergence concerns Article 9(4) of the Aarhus Convention, which stipulates that the procedures “[...] shall provide adequate and effective remedies, including injunctive relief as appropriate.” The Inspection Panel does not have this kind of extensive powers that are typical for domestic judicial institutions, because of its subordinate position to the Board of Executive Directors.

First, the Panel makes a recommendation on the eligibility and the need for investigation, but the Executive Directors ultimately decide on this issue.⁷⁰ Second, the Panel submits a report to the Executive Directors and the President, but does not have any decision-making power about the dispute. The report concludes with the Panel’s findings on whether the Bank has complied with all relevant Bank policies and procedures,⁷¹ but again, the Executive Directors make the final decision, after the advice of the Management,⁷² and this decision is one of pure discretion, since there are no guidelines or rules that should be taken into account. So a possible effective remedy depends on the final decision of a non-independent, purely political organ. A third problem is that the Inspection Panel has no competences whatsoever as to the consequences of its decision.

⁶⁹ Article 9(1), paragraph 3, of the Aarhus Convention.

⁷⁰ IP Resolution, *supra* note Errore: sorgente del riferimento non trovata, paragraph 19. *See*, for more details, Operating Procedures, *supra* note Errore: sorgente del riferimento non trovata, paragraphs 30-41. The Board’s Second Review of the Panel of 1999 has decided that the Board can only refuse investigation on the basis of an exhaustive list of technical eligibility criteria (*supra* note Errore: sorgente del riferimento non trovata, paragraph 9).

⁷¹ IP Resolution, *supra* note Errore: sorgente del riferimento non trovata, paragraph 22. *See*, for more details, Operating Procedures, *supra* note Errore: sorgente del riferimento non trovata, paragraph 52.

⁷² IP Resolution, *supra* note Errore: sorgente del riferimento non trovata, paragraph 23. *See*, for more details, Operating Procedures, *supra* note Errore: sorgente del riferimento non trovata, paragraphs 54-57.

The Panel only makes a recommendation on the legality of the Bank's operation, but is not allowed to make propositions about possible solutions. Moreover, even if the Board agrees with the Panel's conclusion on legality and decides to take corrective measures, there are no guarantees for the claimant that the decision will be effectively respected, since the Panel does not oversee the implementation of that decision.⁷³

These very limited powers of the Panel are surely not consistent with the Aarhus requirement of an "adequate and effective" remedy by an "independent and impartial body". Two arguments seem to support this state of affairs. First, the panelists, although in all probability competent and independent, are not infallible, and the Board wants to retain the possibility to correct some of their conclusions. Second, and more importantly, the intrusiveness of the Panel's conclusions in a developing States' sovereignty and in the administration of the Bank requires that the final decision is taken at the highest level, by people with adequate political power and legitimacy. On the other hand, the final political decision of the Board should not lead to unfettered discretion in denial of the Bank's rules. In order to mitigate this fundamental tension, two reforms are proposed.

First, the Operating Procedures should be amended in order to oblige the Board to give reasons for its decision, when it decides to reject the Panel's report.⁷⁴ This motivation should include all relevant legal, factual and political reasons explaining why the different elements of the report were not accepted.

⁷³ Cf. Gowlland Gualtieri, *supra* note Errore: sorgente del riferimento non trovata, at 236 & 249. The only theoretical possibility is to file another claim with the Inspection Panel, provided that the procedural requirements are still fulfilled.

⁷⁴ The requirement to give reasons for administrative decisions is a fundamental aspect of good administration (*supra* note Errore: sorgente del riferimento non trovata).

A second suggestion is to reform the voting process for this decision. One could think of a reversal of the logic by making the approval of the report the default situation and obliging the Board to vote against the report if they opt for a rejection,⁷⁵ with a “reversed majority” or a “reversed qualified majority” (e.g. of 2/3 of the votes cast), and with special guarantees for the borrowing country concerned.⁷⁶ These possible measures could enhance accountability and the rule of law, and thus contribute to a gradual observance of the Aarhus Convention, while retaining the respect for arguments about sovereignty and political legitimacy.

CONCLUSION

By analyzing the example of the World Bank, this paper has tried to demonstrate that the Aarhus Convention is a useful tool to structure, evaluate and criticize the procedures of international administrative bodies. This process should, of course, take into account

⁷⁵ As is the case in the World Trade Organization (WTO), where the decisions of the Panel or the Appellate Body are automatically adopted, except if there is a negative consensus in the Dispute Settlement Body (respectively Article 16(4) and 17(14) of the WTO Dispute Settlement Understanding).

⁷⁶ Although the borrower is consulted both before the Panel’s recommendation on whether to proceed with the investigation and during the investigation (IP Resolution, *supra* note Errore: sorgente del riferimento non trovata, paragraph 21), it does not have any special rights during the Board’s decision-making on its lending project. A possible way of promoting their rights is to give them an *ad hoc* representative in the Board of Directors, with extra voting rights for the decision on the relevant Panel Report.

the specific nature and needs of those organizations. In general the provisions of the Aarhus Convention are broad enough to take into consideration the specific features of global governance, although they occasionally prove to be inadequate and maladapted to that specific context.

The conclusions are highly multifaceted depending on the Pillar that is analyzed. In the First Pillar, on access to information, the analysis is the most straightforward. The generally applicable World Bank Disclosure Policy facilitates the study and in most cases a full implementation of the Aarhus Principles can be defended. A very large part of the Bank's Disclosure Policy is already in line with the Aarhus Convention, although a number of amendments are proposed, including the abolition of a *catch all* provision, which is considered to be contrary to the requirements of rational decision-making.

In the Second Pillar, on public participation, the analysis is considerably more complicated because of the absence of generally applicable guidelines. In order to enhance transparency and to mainstream participatory governance, this paper thus suggests that the Bank should adopt a comprehensive and binding text, which contains central principles, minimum requirements, and procedural rules. This would improve transparency and contribute to a change in ethos with the Bank's staff, while the adoption of a policy brings those principles under the jurisdiction of the Inspection Panel. Apart from this general remark, the World Bank has done significant efforts to incorporate participatory governance in its specific policies, e.g. relating to indigenous peoples, involuntary resettlements, or environmental assessments.

In the Third Pillar, on access to justice, the analysis reveals the most critical problems. On the one hand, it is remarkable to notice how much resemblance there is between the Panel's procedures and the processes of a domestic administrative court. On the other hand, there are important divergences, some of which could be easily remedied on the basis of the Aarhus provisions. The differences regarding the decision-making power of the Panel are, to the contrary, more difficult to resolve, since they are based on fundamental assumptions about power and legitimacy within the World Bank structure. Moving toward a full respect for the Aarhus Convention therefore will necessitate a thorough rethinking of the balances of power and of the function of the rule of law in global governance.

The overall image is one of a Bank struggling in its relatively new role as a transparent and accountable institution, searching for the right balance between sometimes conflicting demands of accountability, State sovereignty and efficiency.

The reform of procedures and institutions from the perspective of the Aarhus Convention should be considered in the context of any body with decision-making powers in environmental matters.⁷⁷ This paper has tried to argue that the Aarhus Convention should be a philosophical starting point for any such effort, as well as a practical tool to improve specific provisions. The hope is that it will contribute to the globalization of accountability in environmental governance.

⁷⁷ For a very useful (and extensive) list of relevant international organizations, see *Draft List of International Forums*, Add. 2 to *supra* note Errore: sorgente del riferimento non trovata.