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Participation and Litigation Rights of Environmental Associations in Europe: Current Legal Situation and Practical Experience

David A. Wirth
Washington and Lee University

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PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE: CURRENT LEGAL SITUATION AND PRACTICAL EXPERIENCE

Edited by Martin Führ and Gerhard Roller. Frankfurt am Main: Peter Lang, 1991. 196 pp.

*Reviewed by David A. Wirth**

It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.¹

INTRODUCTION

The most recent Presidential election in the United States clearly demonstrated the relationship between electoral politics and the environment.² More generally, broad-gauge popular demands for environmental quality, at least in a democracy, can exert a powerful influence on the direction of public policy.³ A general level of concern among the electorate is a desirable, and perhaps necessary, precondition for crafting effective governmental strategies with respect to the environment. Less well appreciated, however, is the potentially critical role of the public generally, and private citizens' organizations in particular, in more focused and specific undertakings associated with making, implementing,

* Assistant Professor of Law, Washington and Lee University, Lexington, Virginia. This work was supported by grants from the Creswell Foundation and the Frances Lewis Law Center of Washington and Lee University. The author gratefully acknowledges the advice and assistance of Mary M. Brandt and Kevin C. Wells. A condensed version of this review appears simultaneously in *International Environmental Affairs*.

1. *American Communications Association v. Douds*, 339 U.S. 382, 422, 442-43 (1950) (Jackson, J., concurring and dissenting).

2. See, e.g., Keith Schneider, *Environmental Fight in Prime Time*, N.Y. TIMES, Aug. 9, 1992, § 4, at 1; Michael Weisskopf, *At Issue in '92: The Environment: Rival Running Mates Clash on Shades of Green*, WASH. POST, Aug. 8, 1992, at A1.

3. See, e.g., LYNTON K. CALDWELL ET AL., *CITIZENS AND THE ENVIRONMENT: CASE STUDIES IN POPULAR ACTION* (1976); ZYGMUNT J. B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 22-23 (1992); SCIENCE ADVISORY BOARD, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS* (1987); John H. Adams, *Responsible Militancy—The Anatomy of a Public Interest Law Firm*, 29 REC. ASS'N B. CITY N.Y. 631 (1974).

enforcing, and adjudicating environmental law.

Participation and Litigation Rights of Environmental Associations in Europe is a brief yet groundbreaking comparative law survey in which seventeen authors address precisely these questions in eleven states of Western Europe—Belgium, Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, and Switzerland—in the Eastern European states of Hungary and Poland, in the United States, and at the level of the European Community. Designated the first in a series of studies of the Environmental Law Network International, this volume grew out of a two-day conference sponsored by the German ÖKO-Institut in Frankfurt in June 1990. Appendices reproduce the minutes of the Frankfurt conference and selected legislative excerpts. Judged by effective use of the English language, the contributions vary widely in quality. Nonetheless, the book is dense with information and will amply reward the careful and attentive reader.

Although the authors identify relevant legal theories in their countries, for the most part they also describe practical legal results. This perspective, which appears to have been gained at least in some cases from hands-on experience, is useful, as it tempers the high expectations created by legal doctrine. The coverage of the essays spans a wide spectrum. For instance, Laura Bulatao addresses only citizen suits under the United States Clean Water Act. While this is a worthy subject in its own right, the contribution gives little sense of the importance of the subject matter within the larger context of public participation in environmental law and policy in the United States. Likewise, Thomas Ormond concentrates quite narrowly on access by private organizations to legal remedies in Germany. By contrast, the pieces on Greece and the Netherlands by Angelique Kallia and Marga Robesin, respectively, convey a more comprehensive, if necessarily less detailed, picture of the role of the public within those national legal systems.

Lamentably, the monograph as a whole makes little attempt to compare the approaches taken in different countries. Rather, the essays generally confine their analysis strictly to each individual legal system taken on its own terms. The editors, moreover, make little attempt to articulate any broad or generic conclusions to be drawn from their highly informative study. These omissions are particularly unfortunate in light of the wealth of analysis and perspective that *Participation and Litigation Rights of Environmental Associations in Europe* contributes to existing thinking on this very timely subject.

I. INTERNATIONAL ENVIRONMENTAL LAW AND PUBLIC PARTICIPATION

David Rehling's chapter on Denmark is one of the few in *Participation and Litigation Rights of Environmental Associations in Europe* to suggest that developments on the international level might have some impact on national legal systems. This piece advocates the adoption of an international charter on environmental rights that "would serve as a useful basis for [nongovernmental] participation in decision-making on the environment."⁴ As noted in the essay, these proposals received considerable attention during European preparations on the regional level for the United Nations Conference on Environment and Development (UNCED), the so-called "Earth Summit," held in Rio de Janeiro in June 1992, after *Participation and Litigation Rights of Environmental Associations in Europe* had gone to press.

No charter of the sort advocated by Rehling was adopted at UNCED. However, the Rio Declaration on Environment and Development,⁵ one of the principal instruments to be adopted at the Earth Summit, embodies many of the same concepts. Principle Ten of that document specifies that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their [sic] communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Given the global character of UNCED, this statement is a ringing affirmation of the necessity for accountability in governmental processes to assure real world environmental quality. Principle Ten is among the

4. David Rehling, *Legal Standing for Environmental Groups within the Administrative System—The Danish Experience and the Need for an International Charter on Environmental Rights*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 151, 152 (Martin Führ and Gerhard Roller eds., 1991).

5. The Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF.151/5/Rev. 1 (1992), reprinted in 31 I.L.M. 876 (1992) [hereinafter Rio Declaration]. The Rio Declaration is a nonbinding, hortatory, "soft" instrument of an aspirational character. See, e.g., Pierre M. Dupuy, *Remarks*, 82 PROC. AM. SOC'Y INT'L L. 381 (1988); Pierre M. Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1991).

most forward looking portions of the Rio Declaration and can be read as establishing standards for democratic decisionmaking that transcend the limits of even UNCED's broad mandate to accomplish nothing short of "mov[ing] environmental issues into the center of economic policy and decision making."⁶ Indeed, notes András Sajó in the chapter on Hungary,⁷ the relationship between environment and democracy has been demonstrated empirically by the peaceful revolutions in Eastern Europe, in which environmental activism by the populace played a key role.

Even before UNCED, international legal instruments had addressed the role of the public in environmental policy and decisionmaking. A series of non-binding recommendations⁸ on transboundary pollution adopted by the Organization for Economic Cooperation and Development (OECD) in the late 1970s articulate principles of "equal right of access" and "nondiscrimination." According to those standards, a State should generally provide rights in administrative and judicial proceedings to foreign nationals potentially injured by transboundary pollution no less generous than that State provides for its own nationals. International

6. Maurice F. Strong, *ECO '92: Critical Challenges and Global Solutions*, 44 J. INT'L AFF. 287, 290 (1991) (Strong is Secretary General of the United Nations Conference on Environment and Development). See, e.g., David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645, 2666 (1991) [hereinafter *Legitimacy, Accountability, and Partnership*] (arguing that greater access to international procedures in development assistance context lays foundation for improved accountability of international processes generally).

7. András Sajó, *Participation Rights of Environmental Associations in Greece*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 57, 60 (Martin Führ & Gerhard Roller eds., 1991).

8. Recommendation of the OECD Council For the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, O.E.C.D. Doc. C(77)28, reprinted in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD AND THE ENVIRONMENT 150 (1986); Recommendation on Equal Right of Access in Relation to Transfrontier Pollution, O.E.C.D. Doc. C(76)55, reprinted in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD AND THE ENVIRONMENT 148; Recommendation on Principles Concerning Transfrontier Pollution, O.E.C.D. Doc. C(74)224, reprinted in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD AND THE ENVIRONMENT 142. Recommendations express nonbinding undertakings for those OECD members that agree to them. Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, art. 5(b), 12 U.S.T. 1728, 888 U.N.T.S. 179. The Organization can also adopt decisions which are binding on Member States that agree to them. *Id.* art. 5(a). For the legal significance of nonbinding international instruments in the environmental field, see *supra* note 3. The members of the Organization are Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. 1 YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1256 (Union of Int'l Ass'ns ed., 1992).

standards in specific areas, such as risk communication,⁹ likewise require both public access to information and public participation.

A methodology known as "environmental impact assessment" (EIA) has been particularly noteworthy in encouraging broader public access to information and wider public participation in environmental decision-making. EIA is intended to assure the integration of environmental considerations into decisionmaking procedures for activities that may have adverse environmental effects. Principle Seventeen of the Rio Declaration,¹⁰ reflecting the widespread acceptance and application of EIA worldwide, asserts that, "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." Standards for EIA have been incorporated into binding treaties¹¹ and the necessity or desirability of the methodology established in numerous instruments adopted by a wide variety of international organizations.¹²

Generally, although not universally, effective analysis of the potential environmental effects of an anticipated action is thought to require input from the affected public. Although its principal purpose is to assure the integrity of governmental decisionmaking processes, EIA can also be an effective tool for realizing the secondary goals of expanding public access to information and improving the accountability of public officials. Consequently, as the existing international consensus on the utility of environmental impact assessment expands,¹³ increasingly widespread application of the methodology at the national level can be expected to

9. See, e.g., Decision-Making Processes Related to the Prevention of, and Response to, Accidents Involving Hazardous Substances, O.E.C.D. Doc. C(88)85, reprinted in 28 I.L.M. 249 (1989) (Decision-Recommendation Concerning Provision of Information to the Public and Public Participation). See generally Henri Smets, *The Right to Information on the Risks Created by Hazardous Installations at the National and International Levels*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francesco Francioni & Tullio Scovazzi eds., 1991) (emphasizing OECD instruments).

10. See Rio Declaration, *supra* note 5.

11. E.g., Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), Feb. 25, 1991, reprinted in 30 I.L.M. 802 (1991) (not in force) (adopted under auspices of UN Economic Commission for Europe).

12. E.g., WORLD BANK, OPERATIONAL DIRECTIVE NO. 4.00, ANNEX A: ENVIRONMENTAL ASSESSMENT (Oct. 31, 1989). See generally David A. Wirth, *International Technology Transfer and Environmental Impact Assessment*, in TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE 83 (Gunther Handl & Robert E. Lutz eds., 1989) (analyzing instruments adopted by OECD and UN Environment Program).

13. See generally ENVIRONMENTAL IMPACT ASSESSMENT (Peter Wathern ed., 1988) (analyzing application of EIA at national and international levels).

create more opportunities for public participation as well.

II. THE EUROPEAN COMMUNITY AS A SOURCE OF SUPRANATIONAL LAW

On the surface, European Community (EC) law would appear to be an effective tool for expanding public participation in governmental processes. Well before the adoption of the Single European Act,¹⁴ which amended the Treaty of Rome¹⁵ by clarifying and codifying the EC's competence with respect to environmental matters, the Community was active on environmental issues. In recent years, the EC has adopted directives on access to information¹⁶ and environmental impact assessment.¹⁷ However, Corrado Carrubba correctly observes that the existence of these instruments does not necessarily imply satisfactory performance in practice. Despite a deadline of 1988, the Community EIA directive still has not been fully implemented in Italy, and probably elsewhere as well.¹⁸ Perhaps even more tellingly, most of the authors in this volume barely acknowledge that Community law might have an impact at the national level on questions of public participation.

14. Single European Act, Feb. 17 & 28, 1986, art. 25, 19 BULL. EUR. COMM. Supp. (No. 2) 5 (1986), reprinted in 25 I.L.M. 506 (1986) (adding new Title VII consisting of articles 130R-130T on environment). See also Christian Zacker, *Environmental Law of the European Economic Community: New Powers Under the Single European Act*, 14 B.C. INT'L & COMP. L. REV. 249 (1991).

15. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

16. Council Directive 90/313/EEC of 7 June 1990 on the Freedom of Access to Information on the Environment, 1990 O.J. (L 158) 56. A directive is a binding legislative instrument containing an instruction from the Community to Member States to accomplish goals, often by a date certain, that "leave[s] to the national authorities the choice of form and methods." Treaty of Rome, *supra* note 15, art. 189. Directives, which have something of the character of regulatory legislation that mandates subsequent implementing legislation in domestic federal law, have been extensively used by the EC in the environmental area. See generally Philippe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511 (1991) (commenting on the development of environmental law within the EC).

17. Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40. Article 6 of this instrument specifies that the authorizing State must inform the public of the proposed project and give the public an opportunity to comment on it. Information from these public consultations, according to article 8, "must be taken into consideration" in the approval process. Article 9 states that the content of the final decision and any conditions on its approval are to be made public as well. See generally Peter Wathern, *The EIA Directive of the European Community*, in ENVIRONMENTAL IMPACT ASSESSMENT 192 (Peter Wathern ed., 1988).

18. Corrado Carrubba, *Participation Experience in Italy*, in LITIGATION AND PARTICIPATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 127, 128 (Martin Führ & Gerhard Roller eds., 1991).

With respect to public access at the Community level itself, Ludwig Krämer, a legal official in the Commission's Directorate General XI, which is responsible for the environment, offers an even more uniformly bleak outlook. Council meetings are closed to the public, and environmental organizations do not take advantage of those opportunities that exist to influence their national representatives on the Council. Environmental organizations are not represented in any advisory bodies to the Commission, which has no formal hearing process to facilitate consultation with the public. Although the Treaty of Rome appears to create a mechanism for judicial review of the legality of acts of the Commission or Council,¹⁹ restrictive standing rules and a narrow interpretation of the Treaty effectively eviscerate that guarantee. Intervention by public interest organizations in legal proceedings concerning the environment before the Court of Justice of the European Community is theoretically possible, but has never been attempted. Under some circumstances, Community law can create new causes of action for environmental organizations, but that phenomenon is erratic and far from uniform among the Member States. Elevation of environmental issues to the Community level, described as "a very efficient way of outbalancing national environmental interests,"²⁰ may actually undercut procedural rights for organizations that have a more effective voice at the national level.²¹

James Cameron of the nongovernmental Centre for International Environmental Law suggests some additional possibilities. The Community directive on freedom of information may create some unappreciated opportunities. The management board of the newly created European Environment Agency must include two independent "scientific personalities" nominated by the European Parliament, appointed in their personal capacities and not subject to instruction by Member State governments or the Commission. Although there may be no efficacious mechanism for assuring that the organs of the Community behave legally, the Treaty of Rome creates a reasonably effective avenue for enforcing Community law

19. Treaty of Rome, *supra* note 15, art. 173.

20. Ludwig Krämer, *Participation of Environmental Organisations in the Activities of the EEC*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 129, 137 (Martin Führ & Gerhard Roller eds., 1991).

21. Cf. David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377 (1992) (observing that internationalization of environmental issues may improve efficacy and efficiency of decisionmaking, but may have costs in terms of public participation, access to information, and accountability) [hereinafter *A Matchmaker's Challenge*].

against noncomplying Member State governments.²² Cameron, moreover, is relatively more sanguine than Krämer concerning the direct application of Community law by the courts of Member States and the potential for private environmental organizations to intervene in actions before the Court of Justice. Ultimately, however, Cameron appears to agree with Krämer that the entry points into the EC structure for members of the public and environmental organizations are too few and excessively constricted.

III. THE UNITED STATES AS REFERENCE POINT FOR NATIONAL LAW

As in Einstein's special theory of relativity, it is helpful in a comparative undertaking, such as this volume, to establish a fixed point of reference. Unfortunately, as noted above, Laura Bulatao's chapter on the United States in *Participation and Litigation Rights of Environmental Associations in Europe* does not perform that function. By concentrating on the narrow window of citizen enforcement actions, this contribution fails to capture the richness of the broad spectrum of public access to environmental policymaking in the United States. Although the article is quite informative on its own terms, the lack of a broader context for this piece creates a serious risk that its analysis may be downright misleading for a reader unfamiliar with the U.S. legal system. If this chapter on the United States is any indication, the other legal systems described may hold considerably more nuances than suggested by the contributions of this monograph.

Widespread access to publicly held information and openness in official decisionmaking are central to modern notions of good government in the United States. Accordingly, statutes²³ of broad application setting out these fundamental guarantees apply generally and are not confined to the environmental field. The regulatory process—of considerable importance in the environmental area—generally requires notice to the

22. Treaty of Rome, *supra* note 15, art. 169. Article 169 creates a cause of action before the Court of Justice alleging that a Member State has failed to fulfill an obligation under the Treaty or has failed to implement a Community instrument, such as a directive. A private party cannot commence an action as of right, but must instead petition the Commission to initiate a proceeding against a Member State before the Court of Justice. See generally Alan Dashwood & Robin White, *Enforcement Actions Under Articles 169 and 170 EEC*, 14 EUR. L. REV. 388 (1989) (noting that informal communications between the Commission and the Member State normally precede formal action and reciting statistics of cases initiated and resolved).

23. *E.g.*, Freedom of Information Act, 5 U.S.C. § 552 (1988); Government in the Sunshine Act, 5 U.S.C. § 552b (1988); Federal Advisory Committee Act, 5 U.S.C. app. 2 (1988).

public of proposed rules, an opportunity for public comment, and a response to those comments from the regulatory authority.²⁴ Additional requirements specific to environmental law facilitate public availability of basic information and accountability in public processes. For instance, the National Environmental Policy Act,²⁵ which establishes the U.S. version of EIA requirements as contemplated by the international instruments previously discussed, requires public consultation for proposed federal activities that may have significant adverse environmental effects.

Public authorities in the United States can be compelled to implement these rights and others through the critically central institution of judicial review, which enables private parties to challenge the legality of governmental action and to obtain declaratory and injunctive relief to remedy illegal governmental behavior.²⁶ In her chapter, Laura Bulatao describes the way in which enforcement actions initiated by private parties directly against offending polluters²⁷ are conceptually distinct from suits for judicial review. Through a theory of judicial review, members of the public may be able to test the legality of rules of general application. Enforcement actions instead are applications of these general rules to particular cases of alleged noncompliance. So-called "citizen suits" are enforcement actions initiated by private parties based on a theory of members of the public as "private attorneys general" with an important role in supplementing governmental enforcement efforts. These private enforcement actions consequently further important public policies by assuring full implementation of the law. Members of the public also have the right to petition governmental authorities to prevent, abate, or

24. *E.g.*, Administrative Procedure Act § 4, 5 U.S.C. § 553 (1988) (notice and comment rulemaking) [hereinafter APA]; Clean Air Act § 307(d), 42 U.S.C. § 7607(d) (rulemaking) (1988).

25. 42 U.S.C. §§ 321-70 (1988). *See A Matchmaker's Challenge*, *supra* note 21, at 398 n.78 (citing regulations and cases).

26. *See, e.g.*, APA § 10 (judicial review of agency action); Mandamus and Venue Act of 1962, 28 U.S.C. § 361 (1988) (creating an "action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff"). *See* William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403, 407 n.13 (1985) (listing statutory provisions in substantive regulatory statutes authorizing judicial review of agency action).

27. *See* Timbers & Wirth, *supra* note 26, at 405 n.8 (listing statutory provisions for citizen suits).

ameliorate environmental harm.²⁸ Common law actions for damages, equitable relief, or both, based on theories of nuisance or toxic tort supplement these increasingly complex statutory schemes for environmental injuries suffered by members of the public.

Legal standards for establishing citizen "standing" and access to the judicial system are crucial prerequisites to obtaining relief from the courts based on any of these theories.²⁹ In the environmental field, the capacity of private organizations to initiate legal actions, often known in the United States as "associational standing," is a related but distinct question of great significance.³⁰

IV. THE ROLE OF THE PUBLIC AT THE NATIONAL LEVEL IN EUROPE

Despite the necessarily abbreviated treatment of each country in *Participation and Litigation Rights of Environmental Associations in Europe*, these same themes reverberate in virtually every chapter. In many of the countries examined in the monograph, most notably Italy and Spain, the opportunities for public access to environmental policymaking and enforcement appear minimal or nonexistent. Restrictive rules of standing for individuals and organizations in actions before specialized administrative courts in civil law countries such as Belgium—in many ways analogous to the institution of judicial review of administrative action in the United States—are a recurrent and disheartening leitmotif. Thomas Ormond, for example, asserts that in Germany "the safest way for environmental groups to obtain standing before the administrative courts is to acquire for themselves a plot of land (*Sperrgrundstück*) on the site of the intended project."³¹

Nonetheless, when considered as a group rather than individually, the

28. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); APA § 4 ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.")

29. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) (arguing in favor of "a federal rule that [would] allow[] environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."); Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1987).

30. See, e.g., David A. Wirth, *Keeping the Courthouse Door Open*, F. FOR APPLIED RES. & PUB. POL'Y, Fall 1988, at 85.

31. Thomas A. Ormond, *Environmental Group Actions in West Germany*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 77, 83 (Martin Führ & Gerhard Roller eds., 1991).

contributions to *Participation and Litigation Rights of Environmental Associations in Europe* are a revelation which none of the separate chapters even hint at. Although the countries surveyed represent a variety of economic, political, and legal systems that differ significantly in their fundamentals, several of the analyses offer unusual and significant insights into the role of the public in municipal environmental law that could well be replicated elsewhere. Viewed in this light, the individual chapters, taken together, provide raw data that give a broad sense of the wide universe of possibilities for effective citizen participation beyond that found in any one country or legal system. Unfortunately, the editors squander this unique opportunity to identify broader principles of public participation that might transcend the piecemeal summaries of the existing state of the law in this sample of countries.

In contrast to the United States, where criminal actions can generally be initiated only by the public prosecutor, members of the public or citizens' organizations can initiate or intervene in criminal prosecutions in France, Holland, Ireland, Poland, and Portugal.³² In a number of countries, such as Portugal,³³ money damages appear to be more readily available to private parties for regulatory violations than is customary in the United States. In several countries, such as Ireland,³⁴ public authorities can be liable in damages for negligent exercise of governmental powers.³⁵ In Greece,³⁶ the state can be liable for damages for acts or omissions of public functionaries, including even the legislature and the

32. Bernard Dyssli, *Information and Participation in French Environmental Law*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 19, 22 (Martin Führ & Gerhard Roller eds., 1991); Marga Robesin, *Participation of Environmental Organizations in Legal Procedures in the Netherlands*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 101, 113 (Martin Führ & Gerhard Roller eds., 1991); Yvonne Scannell, *Legal Basis of Participation in Administrative Procedures in Ireland*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 5, 13 (Martin Führ & Gerhard Roller eds., 1991); Jerszy Jendroska & Konrad Nowacki, *Participation Rights of Environmental Associations and their Possibilities of Taking Legal Action in Poland*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 39, 48-49 (Martin Führ & Gerhard Roller eds., 1991); Paul Lemos, *Participation Experience in Portugal*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 29, 30 (Martin Führ & Gerhard Roller eds., 1991).

33. Lemos, *supra* note 32, at 30.

34. Scannell, *supra* note 32, at 12.

35. *Cf.* United States Department of Energy v. Ohio, 112 S. Ct. 1627 (1992) (federal government not liable for punitive civil penalties under federal environmental laws governing surface water and hazardous waste).

36. Angelique Kallia, *Participation Rights of Environmental Associations in Greece*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 61, 66-67 (Martin Führ & Gerhard Roller eds., 1991).

courts! In the United States, private organizations generally have no greater rights in governmental processes than other members of the public. In contrast, statutes in Germany, Poland, and Switzerland³⁷ expressly create a special role for environmental organizations, in some cases identified by name, which have more expansive rights than individuals or the public at large.

By comparison with the U.S. system, a considerably greater proportion of the law of the environment in European states seems to be of constitutional origin. Unlike that of the United States, the constitutions of Greece, Hungary, the Netherlands, and Portugal, contain provisions specifically directed at environmental protection.³⁸ In Holland, a constitutional mandate directing the government to assure "the habitability of the country as well as the protection and improvement of the environment"³⁹ appears to be nonjusticiable.⁴⁰ In stark contrast, however, András Sajó describes a pending case in Hungary in which a court has been invited to measure governmental action against a constitutional guarantee of "the right of each and every person to a healthy environment."⁴¹ A similar provision in the Greek constitution also appears to create an individual, enforceable right to an environment of minimally acceptable quality.⁴² In Portugal, moreover, the constitution specifically establishes the standing of individuals or organizations in court proceedings seeking redress of environmental harm. The Greek constitution expressly establishes a procedure for the public to obtain access to governmentally held information.⁴³

37. Ormond, *supra* note 31, at 79–80; Jendroska & Nowacki, *supra* note 32, at 43; Jörg Leimbacher, *The Association Lawsuit in Wildlife and Heritage Conservation Procedures and in Environmental Impact Assessment Procedures in Switzerland*, in PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE 25 (Martin Führ & Gerhard Roller eds., 1991).

38. Kallia, *supra* note 36, at 62–64; Sajó, *supra* note 7, at 59; Robesin, *supra* note 32, at 102; Lemos, *supra* note 32, at 30.

39. Robesin, *supra* note 32, at 102.

40. Cf. *Robb v. Shockey Slip Found.*, 228 Va. 678, 324 S.E.2d 674 (1985) (article XI, section 1 of Constitution of Virginia, establishing conservation policy of Commonwealth "[t]o the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources," is not self-executing and nonjusticiable).

41. Sajó, *supra* note 7, at 59.

42. Kallia, *supra* note 36, at 63.

43. *Id.* at 64–65.

CONCLUSION

Although uneven in treatment and spotty in coverage, *Participation and Litigation Rights of Environmental Associations in Europe* nevertheless provides a valuable and unique glimpse of national practice on the increasingly important question of the public's role in environmental decisionmaking. The real insights come from generalizations that can be drawn from an amalgam of national practice in the fourteen countries and one regional economic integration organization surveyed in the book. Unfortunately, this is the weakest aspect of the monograph.

The data assembled in this short treatise may even have implications for international law. Although this approach is not always considered a productive source of law in the modern era, customary norms can be inferred "by derivation from general principles common to the major legal systems of the world."⁴⁴ Based on the information supplied in *Participation and Litigation Rights of Environmental Associations in Europe*, one can fairly conclude that making, applying, enforcing, and implementing environmental law are functions in which the public is entitled to have some input. In particular, virtually all the countries surveyed provide some legal mechanism, analogous to the U.S. institution of judicial review, through which individuals or organizations can contest the legality of governmental actions.

If public participation and judicial review are central to the concept of sound environmental policy on the national level—as the information in this volume suggests—why not on the international plane as well? Public access to certain international processes and institutions that may have considerably adverse environmental impacts, such as the World Bank and the General Agreement on Tariffs and Trade (GATT), is notoriously uneven and erratic.⁴⁵ The closed nature of many multilateral undertakings has given rise to perceptions that these processes are unaccountable and not subject to the rule of law.⁴⁶ Interestingly, the drafters of Principle Ten of the Rio Declaration,⁴⁷ which is otherwise quite progressive, appear to have overlooked or purposely ignored the role of the public in international, as opposed to national, decision-

44. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(c) (1987). Cf. Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1(c), 59 Stat. 1055, 1060, T.S. No. 993 ("general principles of law recognized by civilized nations" as a source of international law).

45. See *A Matchmaker's Challenge*, *supra* note 21, at 382 & n.21.

46. See generally *Legitimacy, Accountability, and Partnership*, *supra* note 6.

47. See Rio Declaration, *supra* note 5.

making.⁴⁸ If fundamental notions of public access and accountability are as pervasive as suggested by this book, it can only be a matter of time until similar principles of public participation also extend to the international law of the environment. *Participation and Litigation Rights of Environmental Associations in Europe* can quite credibly serve as a good reference work in the meantime and a blueprint for what to expect in the future.

48. Letter from Peter H. Sand, Principal Program Officer, United Nations Conference on Environment and Development, to David A. Wirth (Sept. 29, 1992) (On file with *Michigan Journal of International Law*).