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REMARKS ON THE FRENCH PUBLIC PARTICIPATION FRAMEWORK RELATING TO THE COMMUNICATION ACCC/C/2007/22

INTRODUCTION

The "*Fos sur mer*" case underlines a crucial question that results from article 6 of the Aarhus Convention. In this question, the incinerator that is under the lights is submitted to article 6 of the Convention. It is clearly included in the annexe of the Convention.
During the authorization procedure, the participation process kept limited to a public inquiry, called "enquête publique" in French.
As a consequence, in our view, the main question that the Aarhus Convention Compliance Committee (ACCC) has to answer is:
Is the French "public inquiry" procedure sufficient, as itself in the procedure, to comply with the provisions of article 6 of the Aarhus Convention? Or, is the "public debate" procedure necessary, in addition to the "public inquiry" to comply with article 6 of the Convention?
These questions imply other secondary questions such as:
Do the public inquiry comes early in the authorization procedure? Should the public participation start earlier to comply with the Convention? We will focus on it in the first part of this document **(I).**
When the participation process is limited to a "public inquiry", can the public have a real influence on the decision, when all options are open? We will focus on it in the second part of this document **(II).**
For France, the impact of the final decision of the ACCC is limited. The public debate procedure has now a large field of application and provides the necessary public participation to comply with the Aarhus Convention. However, as the ACCC is competent to interpret the Convention, its decisions have an impact on every Party to the Aarhus Convention. We will focus on it in the third part of this document **(III).**

I/ REMARKS ABOUT THE POINT I, 2, (C) OF THE DRAFT DECISION: PUBLIC PARTICIPATION AT AN EARLY STAGE?

The point I, 2, (c) says that: "*The decision of the National Commission for Public Debate on 28*

September 2004 to reject a request for a public debate violated article 6 of the Convention;"
We do believe that this affirmation is valid. In fact, in our view, to comply with the Aarhus Convention, French law would need to oblige the CNDP to organise a public debate for every project listed in the annexe of the Convention. In other words, procedures that only plan a public inquiry for the public participation do not comply with the Aarhus Convention. Indeed, according to the civil society as to the public authorities, the French public inquiry is done too late during the procedure to provide effective participation of the public. As it comes too late, the public inquiry is not done when all options are open. So, the public can have a real influence on the decision. Usually, for a Classified Installation procedure, the public inquiry happens about a month before the authorization, whereas the procedure started a year before.

1) The public authorities position about the public inquiry

a) The parliament views

In France, public authorities knows that the public inquiry come too late in the procedure. The main proof to show that is the parliamentary discussions around the reform of the public debate procedure in 2002, just after the entry into force of the Aarhus Convention. This reform of the public debate procedure has been undertaken through the "*démocratie de proximité*" act, adopted by the parliament in February 2002. The member of the parliament, David Hoeffel, who has been the special "*rapporteur*" of this act to the Senate, wrote in its report that:
"*The public inquiry, according to everybody, comes too late. The public often feel that the main options of the project are already decided and that the opportunity of the project can be contested. However, the Aarhus Convention precise in the article 6 that public participation has to happen early, when all options are open*"[1].
The Professor Yves Jegouzo confirms this. He recently wrote that: "*The parliament thinks that the public participation, early in the decision making process was now provided through the extension of the field of application of the public debate*"[2].
After the "*Grenelle de l'environnement*", a large negotiation process about environmental policies, the parliament has the opportunity to confirm this position and to go further. The motivation (exposé des motifs) of draft legislation on the "*Grenelle de l'environnement*", currently in 2nd lecture at the parliament, is written has follow: "*the draft reform of the public enquiries* (included to this legislation)*, has also as a goal to improve public participation, in compliance with the EU*

[1] In French : "*3. Les modalités de la participation du public aux différentes étapes du projet. Le troisième alinéa du texte prévu pour l'article L. 121-1 du code de l'environnement précise à quel moment la participation du public a lieu. La participation à l'élaboration de projets répond à une revendication récurrente du public.* ***L'enquête publique, de l'avis de tous, intervient trop tardivement. Le public concerné a trop souvent l'impression que les principales options du projet ont déjà été arrêtées et que l'opportunité de l'infrastructure en cause ne peut plus être remise en cause. La convention d'Aarhus précise pourtant dans son article 6 que cette participation doit intervenir très en amont, alors même que toutes les possibilités sont encore ouvertes***", Rapport n° 156 (2001-2002) de M. Daniel HOEFFEL, fait au nom de la commission des lois, déposé le 19 décembre 2001, available on: http://www.senat.fr/rap/l01-156/l01-156_mono.html#toc625.

[2] In French : « *Le législateur a considéré que la participation du public à un stade amont du processus décisionnel était désormais assurée par l'extension du champ d'application du débat public* », Yves Jegouzo, « L'enquête publique en débat », in *Etudes offertes au professeur René Hostiou*, Litec, Paris, 2008, p. 281. Yves Jegouzo is the director of the CERDEAU, the centre of research of the University Paris I Sorbonne, that is focussed on environmental law. He is also the director of the French administrative law review (AJDA). In 2008, he advised the French ministry of the environment concerning the project of reform of the public enquiries law and wrote a report in that goal.

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legislation and with international law (Aarhus Convention)"[3]. We can also read in the motivation that a new article is created within the code of environment: "*the article L. 120-1 having for object to transpose the article 6 § 4 of the Aarhus Convention*"[4]. Does it mean that the article 6 § 4 of the Convention is still not transposed in domestic law until this draft legislation is adopted?
For the information of the ACCC, the article L. 120-1 above is a repetition of article 6 § 4, this is not new procedure to guaranty that these goals will be reached in the future. It seems like an article designed only to justify a fictive transposition.

Then, more than the parliament, other state authorities affirmed that the public inquiry come too late in the authorization procedure.

b) The MEEDDAT (ministry of the environment) view

During the "*Grenelle de l'environnement*" process, an expert group wrote a report about environmental governance. The MEEDDAT was part of this expert group.
On the page 69 of the report, we can read a proposal: "*To develop the consultation of the public (such as public debate) early in the elaboration procedure of plans, and not only at the end of the procedure (public inquiry)*"[5]. This proposal has been notably made by the IGE, *Inspection Générale de l'Environnement*, which is the internal inspection department of the MEEDDAT. The proposal clearly shows that the public inquiry come at the end of the procedure and moreover that the public debate is much better, as the public debate is quoted as an example between brackets.
Then, Guillaume Sainteny also made a proposal for this report. He was, at that time, the director of the D4E, an internal department of the MEEDDAT dedicated to studies and policies evaluation. He proposed a: "*simplification and improvement of public enquiries law and the creation of a procedure of information of the public at an early stage, ie before the public inquiry when there is no public debate or a consultation*"[6]. It underlines that, in the case where there is no public debate, France miss an early stage information procedure. In fact, the public inquiry is an opportunity to inform the public, but happens too late in the procedure.
Moreover, the § 90 of the French national implementation report for the COP 3 in Riga (ECE/MP.PP/IR/2008/FRA), written by the ministry of the environment justify the full implementation of the article 6 § 4 with the public debate procedure. In the "*Fos sur mer*" case,

[3] "*le projet de réforme des enquêtes publiques a également pour but d'améliorer la participation du public, en conformité avec les textes communautaires (directive 85/337/CE du 27 juin 1985 modifiée par la directive 2003/35 concernant l'évaluation des incidences de certains projets publics et privés sur l'environnement) et internationaux (convention d'Aarhus du 25 juin 1998 sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement)*", exposé des motifs du projet de loi n° 155 (2008-2009) portant engagement national pour l'environnement, available on www.senat.fr.

[4] "*Le I de l'article 1 crée, après le titre II « Information et participation des citoyens » du livre I^er « Dispositions communes » du code de l'environnement, un article L. 120-1 ayant pour objet de transposer le point 4 de l'article 6 de la convention d'Aarhus".*

[5] In French « *Développer le dispositif de consultation du public (du type des débats publics) à l'amont de l'élaboration des documents de planification territoriale, et pas seulement à l'aval (enquête publique)* », Group 5 report « Construire une démocratie écologique : Institutions et gouvernance », september 2007, p. 69, available on www.grenelle-environnement.gouv.fr.

[6] In French "*Simplification et amélioration des régimes d'enquête publique et création d'une procédure d'information du public en amont cad avant l'enquête publique en l'absence de débat public ou de concertation"* Group 5 report « Construire une démocratie écologique : Institutions et gouvernance », september 2007, p. 103, available on www.grenelle-environnement.gouv.fr.

there wasn't any public debate. As a consequence, it wasn't compliant.

c) The local authorities view

Local authorities are used to practice public enquiries. Lots of it take place at the local level.
During the "*Grenelle de l'environnement*", the "*Association des maires de France*", French mayors coalition, proposed: "*For the biggest project, to plan a consultation and an information of the public very early in the procedure, ie during the definition of the project, without waiting for the public inquiry*"[7]. As other public authorities, French mayors agree on the fact that the public inquiry comes too late.

Finally, in this report from the "*Grenelle de l'environnement*", the measure proposed at the page 27 appears like a consensus[8]: "*To reform public enquiries by looking for a better implementation of European and international law, (...), with a better implication of the public before the public inquiry (...)*"[9].

2) The legal doctrine view

Before moving to the legal doctrine, it is necessary to draw our attention on a sociological approach. Indeed, a French sociologist, including Pierre Lascoumes, probably the best French sociologist in environmental policies wrote about the public inquiry: "This inquiry often only has the role to artificially legitimate a choice that is already made"[10]. The French ministry of the Environment sponsored this research. Since this research, public inquiry law did not change substantially.

Moreover, it exists a consensus between the French law professors to say that the French public inquiry is not a good procedure regarding the article 6 of the Aarhus Convention.
We mainly focus on the best specialists of environmental and planning law[11]. The following quotes

[7] In French « *Pour les projets d'une certaine envergure (restant à déterminer), prévoir l'organisation d'une consultation et d'une information du public très en amont. C'est à dire dès la définition du projet, sans attendre le stade de l'enquête publique* », Group 5 report « Construire une démocratie écologique : Institutions et gouvernance », september 2007, p. 69, available on www.grenelle-environnement.gouv.fr.
[8] The report lists all the proposals that were made. Moreover, the role of the report was also to clearly show the proposed measures that were shared by everybody (The State, the unions, NGOs, companies and local authorities). This measure was listed as a consensus, reflecting the French society.
[9] In French: « *Réforme des enquêtes publiques dans le sens d'une meilleure application des textes européens et internationaux, d'une simplification et lisibilité accrues des procédures, d'une amélioration de la qualité des consultations, d'une implication du public plus en amont de l'enquête proprement dite, d'un travail des commissaires enquêteurs axé davantage sur la concertation et la motivation des décisions au regard de la consultation* », Group 5 report « Construire une démocratie écologique : Institutions et gouvernance », september 2007, p. 27, available on www.grenelle-environnement.gouv.fr.
[10] In French: « *Cette enquête ne sert bien souvent qu'à légitimer artificiellement un choix déjà réalisé*», see E. JOLY-SIBUET, P. LASCOUMES et A. GUCHAN, R. LEOST, *Conflits d'environnement et intérêts protégés par les associations de défense ; Aquitaine, Alsace, Bretagne, Rhône-Alpes*, Ministère de l'environnement, Mai 1988, p. 148.
[11] See as well: Jacques CAILLOSSE, "The public inquiry do not offer the garanties of a democratic procedure", in French "*Même réformée, l'enquête publique n'offre toujours pas les garanties d'une procédure démocratique"*, Revue Juridique de l'Environnement (French Environmental Law review), 1986, p. 166, quoted by Raphael ROMI, *Droit et administration de l'environnement*, Montchrestien, 6ème édition,

come from the best French law treaties (the collection « Précis » from the editor « Dalloz ») and from an article focussed on the French public inquiry regarding the Aarhus Convention.

a) French Law Treaties

Michel Prieur[12] considers, in its treaty, that: "*The main inconvenient of the current system is that it only allow the participation of the public at the end of the procedure, at a time when the applicant considers its project as a final project. Admittedly, the public authorities can obligate him to modify its project after the public inquiry. But, it would have been much better to plan an earlier participation of the public, when it is still possible to amend the project*"[13].
Then, he writes that: "*it would be necessary to announce in advance that a public authority or a company is preparing an impact assessment for such a project. The non-profitable organisations would have time to seriously prepare a counter project and could, during the period before the public inquiry, start a dialog with the applicant. Currently, a very large secret still cover the projects submitted to environmental impact assessment until the public inquiry starts*"[14].
"*Although it was implemented for a long time, the public inquiry procedure has always been seen as not sufficient by the public. It is due to the modalities of the procedure which do not facilitate the dialog and the exchange of information. (...) The lack of information of citizens is still the main characteristic of the public inquiry*"[15].

Moreover, specialists of Planning Law follow the same direction. Thus, Henri Jacquot[16] and François Priet, writes that: "the public inquiry often starts late in the planning process, when it is hard to come back on the initial choices already made"[17].

2007, p. 106.

[12] Michel PRIEUR created the French Environmental Law Review (RJE) and the French Association for Environmental Law (SFDE) in 1976. He has been involved in the elaboration of the french environmental code and was vice-chair of the working group of the *Grenelle de l'environnement* relating to *Environmental Governance* in 2007.

[13] In French: « *Le système actuel présente l'inconvénient majeur de ne permettre la participation du public qu'en fin de procédure, à un moment où le pétitionnaire considère son projet comme définitif. Certes, l'administration peut lui imposer des modifications à la suite de l'enquête publique. Mais, il eût été plus satisfaisant de prévoir la participation du public plus en amont dans le processus à un moment où il est encore possible d'amender le projet* », Michel PRIEUR, *Droit de l'environnement*, 5ème édition, Précis, Dalloz, 2004, p. 91.

[14] In French: « *Il faudrait annoncer à l'avance que telle administration ou telle entreprise est en train de préparer une étude d'impact pour tel ouvrage. Les associations auraient alors le temps de préparer sérieusement un contre-projet et pourraient pendant la période précédent l'enquête publique dialoguer avec le pétitionnaire. A l'heure actuelle, le secret le plus grand entoure encore les projets soumis à étude d'impact jusqu'au jour où l'enquête est ouverte* », Michel PRIEUR, *Droit de l'environnement*, *idem*, p. 91.

[15] In French: « *Bien que bénéficiant d'une longue pratique, la procédure d'enquête publique a toujours été considérée comme peu satisfaisante par le public du fait des modalités de son déroulement ne facilitant ni le dialogue, ni la transmission d'information. (...) La sous information des citoyens reste la caractéristique des enquêtes publiques* », Michel PRIEUR, *Droit de l'environnement*, *idem*, p. 125.

[16] Henri JACQUOT is the former director of the GRIDAUH, the French public research institute in the field of Planning and Housing Law.

[17] In French: « *l'enquête publique intervient souvent assez tard dans le processus d'aménagement, à un moment où il est difficile de remettre fondamentalement en cause les choix initiaux*», Henri JACQUOT et François PRIET, *Droit de l'urbanisme*, 6ème édition, Précis, Dalloz, Paris, 2008, p. 107.

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b) The article "*L'enquête publique en débat"* ("*The public inquiry in debate*")

This article, "The public inquiry in debate", has been written by Yves Jegouzo. Professor Jegouzo is the former director of the CERDEAU, the centre of research of the University Paris I Sorbonne that is focus on environmental law. He is also the director of the French administrative law review (AJDA). In 2008, he advised the French ministry of the environment concerning the project of reform of the public enquiries law and wrote a report about it for the ministry.
The quotes below come from an article written in 2008 where he shows the lack of compliance between the French public inquiry and the Aarhus Convention.
Thus, Professor Jegouzo notably wrote: "the application of certain international law provisions (Aarhus Convention) or European law provisions (directive 85/337/CEE) obligate France to modify public inquiry law or to plan substitution mechanisms"[18]. As a consequence, when there isn't a substitution mechanism such as the public debate, it means that the public inquiry, alone, is not sufficient to comply with the Aarhus Convention.
Then, he follows writing that the provisions of the article 6 "impose a global reorganization of the information and participation procedures"[19]. Moreover, he adds that "*a finest examination of current procedures shows that French law comply with international and European law when a public debate or a consultation is organised at the beginning of the process*. In these cases, the Aarhus Convention and the article 6 § 4 of the 27 June 1985 directive that plan that the public should be able to participate to the decision making before the public inquiry are respected. The problem is only relevant for certain kind of decisions which are included in the Aarhus Convention and the 27 June directive scopes of application and for which the decision making process only plan a public inquiry. The public inquiry do not provide an early information and do not provide a public participation for the conception of the project. The solution for this kind of project is for it to be submitted, in addition to the public inquiry, to the public debate or to an early consultation of the public. These procedures usually play this role"[20].
The « problem » described by the Professor Jegouzo is exactly the case for the « *Fos sur mer* » incinerator. In this case, the incinerator was submitted to article 6 of the Aarhus Convention, but, in French law, it was only submitted to public inquiry, not to the public debate. Professor Jegouzo explains that in that particular case, French law do not comply with article 6 of the Convention. To

[18] In French: « *l'application de certaines dispositions internationales (la Convention d'Aarhus du 25 juin 1998 (...)) ou communautaires (directive du Conseil n° 85/337/CEE du 27 juin 1985 modifiée par la directive n° 2003-35) impose à la France soit d'apporter certaines modifications au droit des enquêtes publiques, soit de mettre en place des mécanismes de substitution* », Yves JEGOUZO, « L'enquête publique en débat », in *Etudes offertes au professeur René Hostiou*, Litec, Paris, 2008, p. 275.
[19] In French: « *imposent une réorganisation globale des procédures d'information et de participation* », Yves JEGOUZO, « L'enquête publique en débat », *idem*, p. 280.
[20] In French: « *Un examen plus attentif des procédures en vigueur en droit français conduit à penser que les obligations issues du droit international et du droit communautaire sont satisfaites dans toutes les hypothèses où la décision est précédée (ou peut l'être) dès le début du processus par une procédure de débat public ou une concertation. Dans ces hypothèses est assuré le respect tant de la Convention d'Aarhus que du paragraphe 4 de l'article 6 de la directive du 27 juin 1985 qui exigent que le public puisse participer au processus de décision en amont de l'enquête publique.* ***Le problème*** *ne se pose donc que pour un certain nombre de décisions entrant dans le champ d'application de la Convention d'Aarhus et de la directive du 27 juin 1985 et dont la procédure ne comporte que l'enquête publique qui ne permet ni d'assurer une information sur les premières phases des projets ni de faire participer le public à leur conception. La solution à laquelle on pense en premier est d'étendre à ces projets les procédures de débat public ou de concertation qui jouent habituellement ce rôle* », Yves JEGOUZO, « L'enquête publique en débat », *idem*, p. 280.

stop this non-compliance, he proposes to submit such incinerator to a public debate. In the « *Fos sur mer* » case, there was no public debate.

Moreover, there is also a consensus between Environmental NGOs on that point. Friends of the Earth France and France Nature Environment, which practice public enquiries on the ground, also agree to say that a public inquiry, alone, is not enough for France to comply with article 6 of the Aarhus Convention.

II/ REMARKS ABOUT THE POINT I, 2, (D) OF THE DRAFT DECISION : THE REAL INFLUENCE OF THE PUBLIC?

The point I,2, (d) says that: "*In the authorization procedure in 2005 and 2006, the Prefect of Bouches-du-Rhône failed to provide for effective public participation when all options were open, as set out in article 6 of the Convention, by informing members of the public at too late a stage about the authorization procedure, limiting the public inquiry to only three locations and allowing too short a period of time for participation in the decision-making*;".

In our view, this question needs to be reformulated. Indeed, as we showed before, the public inquiry is done too late in the authorization procedure. As a consequence, at this late stage, all options are not open. Consequently, the public can have a real influence on the decision.
According to the Professor Jegouzo, « *il existe une autre contradiction évidente entre l'état actuel du droit et l'esprit des procédures de participation. Pour le public, il serait logique que la personne responsable puisse tirer les conséquences du processus de participation en modifiant le projet dans le sens souhaité par la population. Or, on le sait, ce n'est pas le cas* »[21].
Moreover, a statistic view on that issue is useful. Indeed, the statistics of the ministry of the environment show that, each years, about 6 000 authorizations are given to classified installations (see the figure below)[22].

[21] Yves JEGOUZO, « L'enquête publique en débat », *idem*, p. 283.
[22] Source: dossier de presse du MEEDDAT, Chantal JOUANNO, secrétaire d'Etat à l'écologie, présenté le 8 avril 2009, bilan de l'action de l'inspection des installations classées pour 2008. Available on: http://installationsclassees.ecologie.gouv.fr.

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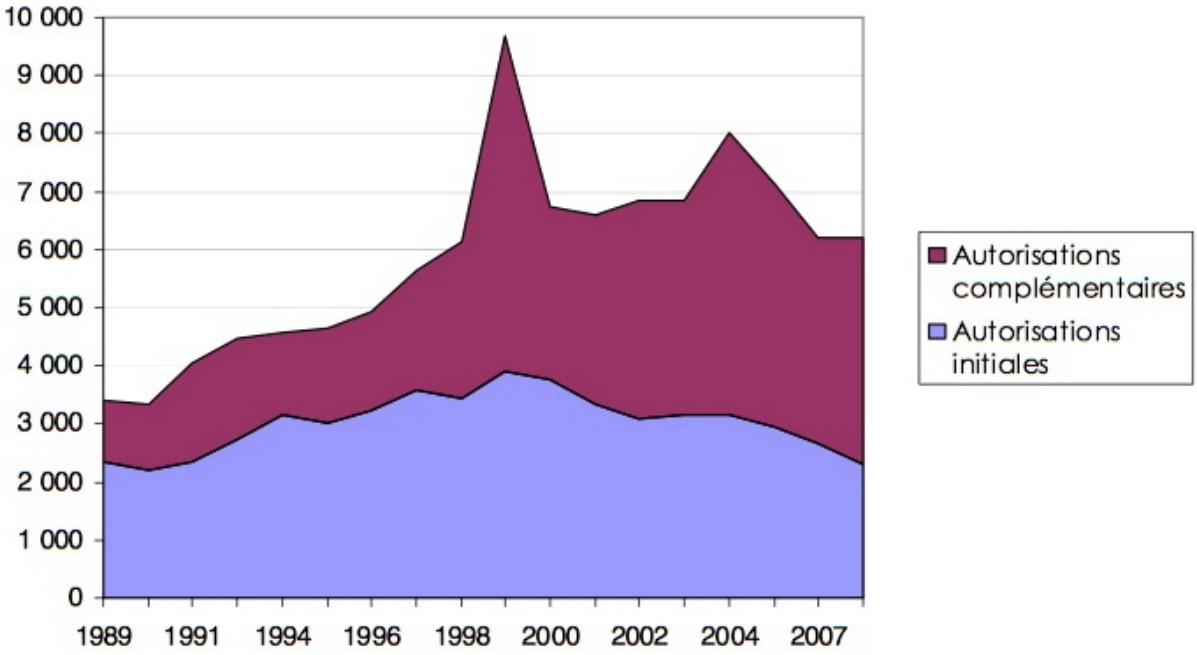
Evolution du nombre d'autorisations délivrées par l'inspection



Source: dossier de presse du MEEDDAT, Chantal JOUANNO, secrétaire d'Etat à l'écologie, présenté le 8 avril 2009, bilan de l'action de l'inspection des installations classées pour 2008. Available on: http://installationsclassees.ecologie.gouv.fr.

Thus, even if there would be 50 refuses per year, it is very few compared to 6 000 authorizations. Moreover, France does not show the links between these 50 refuses and public participation. No evidence is provided that the refuses are due to the participation process, to the fact the results of the public participation were taken into account. Thus, France failed to provide evidence of the real influence of the public participation on the authorization procedure. The argument of the 50 refuses provided by France would be relevant if France would have provided evidence that the public has a real influence. For example, interesting statistics would be, first, the number of negative written opinion[23] compared to the number of public inquiry that are organised every years, then, the ratio between the number of negative opinion and the 50 refuses.
Moreover, our experience of the Classified Installations legislation show that these refuses are mostly due to the fact that, during the instruction of the demand, it appears that the project do not legally comply with other rules such as Local town plans.
Then, France do not provide evidence showing that it was impossible to organise another stage of public participation, earlier than the public inquiry, when all options were opened.

[23] For each public inquiry, French law plan that a « commissaire enquêteur », who is the person responsible of the organisation of the public inquiry, gives a positive or a negative opinion on the project at the end of the inquiry.

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III/ THE POTENTIAL IMPACTS OF THE DECISION

As set out above, the ACCC is competent to interpret the Aarhus Convention. Every Party should follow its interpretation of the Convention. If the ACCC would confirm that a public enquiry such as the one France is sufficient to comply with Convention, the perspectives of progression of domestic law of the Parties would be really reduced.

The real question is to find how the ACCC can conciliate the harmonisation of domestic laws under the Convention and the full application of the Convention?
In our view, the harmonisation of domestic laws can't be a short-term goal. If it would be a short-term goal, this could have very bad consequences. In fact, the effect of the Convention would not be to improve domestic law of certain parties such as France, which has public participation procedures for a long time. As a result, the obligations of the Convention would just provide an harmonisation of domestic laws on a very low model.
When the parties signed the Convention, the level of implementation of its provisions was very heterogeneous. So, it is legitimate to take into account the necessary harmonisation. However, it is important not to forget the goal of article 6 § 4, "effective participation". For every Party, this goal is very far to be reached. As a consequence, in a short term perspective, it would be very important to ask the Parties to have the same level of progression to reach this goal of full application: effectiveness of the public participation.
Keeping the goal of an ambitious implementation of the Convention is the best way to reach the effectiveness of the public participation.

The consequences of the decision that the compliance committee will adopt should not be mainly seen in France. French plan the public debate for lots of projects. Even if the public debate procedure is also weak, it is a better procedure than the public inquiry.
The real consequence of this decision would be for other parties. In our view, the French public inquiry, alone, should absolutely not be seen as a modal and we do hope that the Aarhus Convention would provide more perspectives for French and pan European citizens.