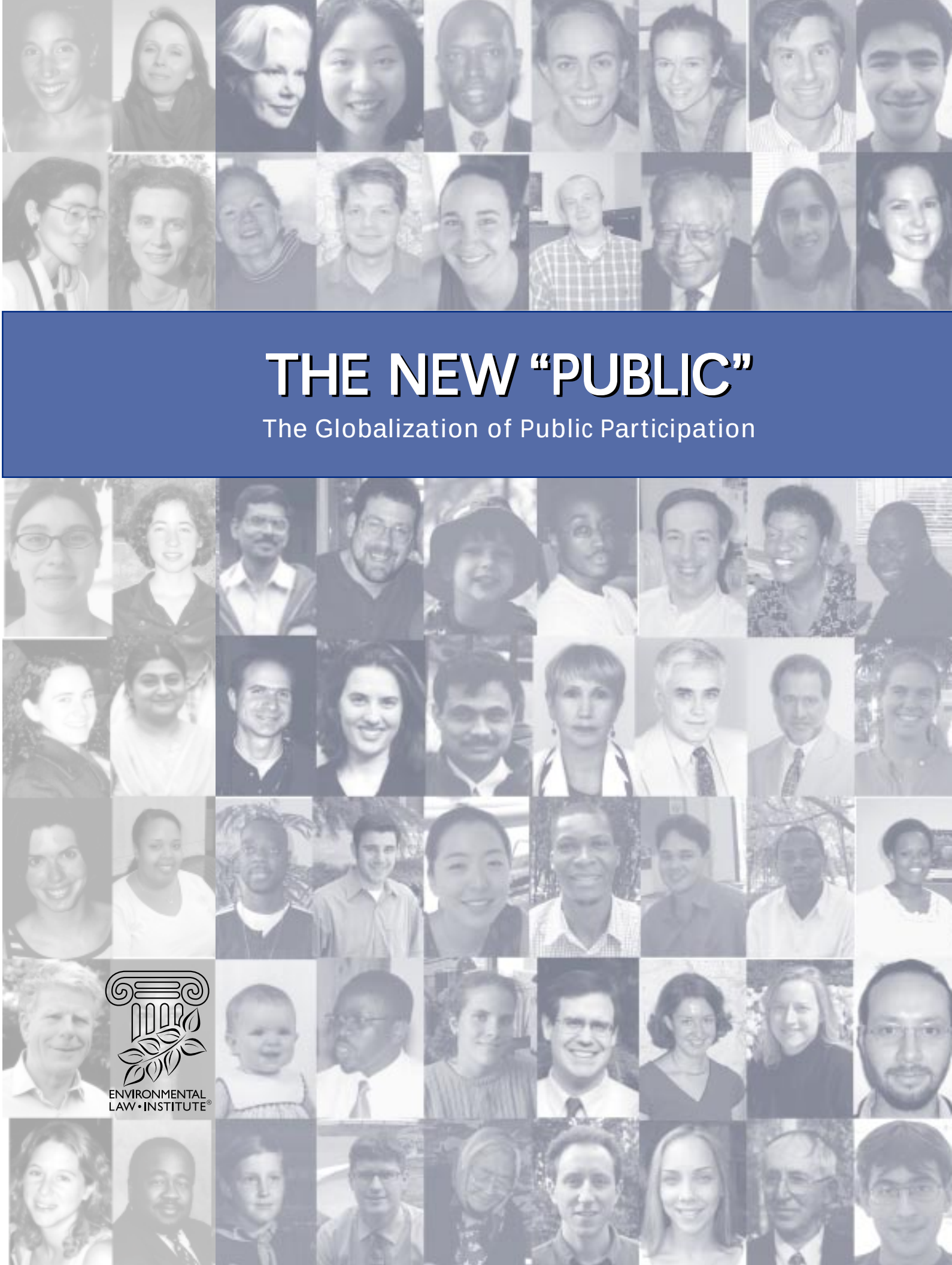

THE NEW "PUBLIC"

The Globalization of Public Participation

ENVIRONMENTAL LAW • INSTITUTE®

THE NEW "PUBLIC"

The Globalization of Public Participation

Carl Bruch
Editor

Environmental Law Institute®

The New "Public": The Globalization of Public Participation

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PREFACE

This volume builds upon more than a decade of work by the Environmental Law Institute and other nongovernmental organizations (NGOs) around the world to promote good environmental governance. At the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, the critical role of the public was recognized and articulated in Principle 10.

Since 1992, there has been a proliferation of regional initiatives expanding upon Principle 10 and providing guidance to nations on how to ensure that the public has the information it needs, that people can have a voice in decisions that affect them, and that there are legal channels to resolve disputes peacefully and equitably. At the same time, international institutions, instruments, and processes have started to involve citizens and NGOs in their conceptualization, negotiation, and implementation. However, these regional and international processes have evolved largely independently of one another.

Through the research and advocacy leading up to this volume, ELI and many of the contributors have sought to link the often disparate and seemingly ad hoc efforts. In doing so, there is at once a remarkable consistency in what constitutes the core standards for public involvement as well as some striking innovations in norms and mechanisms. By examining these regional and international initiatives, global norms are seen to be emerging. To be certain, some (such as environmental impact assessments) are more widely accepted and adopted than others (such as citizen suit provisions with attorney fees for public interest litigants). There are some differences in the specific mechanisms adopted by international institutions and those set forth in regional instruments for implementation at the national level. In addition, the degree of specificity or implementation varies from one institution or instrument to another.

Despite these differences, there is now a strong body of norms and practice from regions around the world—at the local, national, regional, and international levels—that unambiguously points to emerging global norms for public access to information, participation, and justice.

The World Summit on Sustainable Development (WSSD) offers a unique opportunity to examine the experiences of expanding the governance processes to include citizens, NGOs, and other civil society actors. The stated purpose of the WSSD is to focus on implementing the existing commitments to protect the environment while promoting economic and social development. A central theme of the WSSD has been—and must be—involving all interested parties in decisionmaking for sustainable development. Public involvement is critical to making sound decisions and building the popular support for decisions.

In the year leading up to the WSSD, ELI, the Peruvian Environmental Law Society (SPDA), EcoPravo-L'viv, the Advocates Coalition for Development and Environment (ACODE), and other NGOs created a Partnership for Public Participation. This Partnership pursued a two-pronged approach to promoting public involvement through the WSSD process. First, the partner institutions conducted research on the various regional and international initiatives that have advanced public involvement. In many instances, we sought out experts to contribute related scholarship. This volume is the result of that research.

Second, the Partnership for Public Participation was actively engaged in the Preparatory Committee meetings leading up to the WSSD, as well as at the WSSD itself. The Partnership convened official and unofficial side events to share regional and international experiences in promoting public involvement, drawing upon research that was ultimately developed into the chapters of this volume. The Partnership also worked with civil society organizations to propose and promote provisions in the Johannesburg Plan of Action that call for specific commitments to promote public involvement through, for example, the development of global guidelines on public access to information, participation, and justice; commitments of bilateral and multilateral funding to support initiatives implementing public involvement; strengthening regional initiatives; and linking environment and human rights, including procedural rights.

Ultimately, though, the WSSD represents just one opportunity to articulate norms and gain commitments for ensuring that all people have a voice in decisions that could affect them. After the Summit, the nongovernmental and governmental champions of public participation will continue their campaigns at the national, regional, and international levels. In fact, the First Meeting of the Parties of the Aarhus Convention will be held less than two months later. However, through the WSSD and the Partnership for Public Participation, we hope to provide a broader view of public access to information, participation in decisionmaking, and accountability. The past year has seen increasing linkages among the various regional initiatives and between the regional and international levels. This volume seeks to encourage that exchange.

Carl Bruch
Washington, DC
August 2002

EMERGING GLOBAL NORMS OF PUBLIC INVOLVEMENT

*Carl Bruch and Meg Filbey**

Following the fall of the Soviet Union, the 1990s saw a dramatic increase in efforts to develop new democratic political structures around the world. Less heralded, but probably more significant, reforms that attempt to open up governmental processes have increasingly allowed people to have a more direct voice in decisions that could affect them. While efforts to implement electoral reform and multiparty democracies have had mixed results, governance initiatives to ensure public involvement continue to gain momentum.

Once the province of bureaucrats, institutions of government (often referred to as "public authorities") are increasingly engaging the "public." People—citizens, and often non-citizens—in many places now have the right to obtain information about government actions and to seek government-held information. Public institutions operate in a more transparent manner, holding public hearings on proposed projects, as well as on broader program, policy, and regulatory matters. And people are increasingly able to hold their public institutions and officials accountable through judicial and administrative mechanisms.

These advances in opening up governance structures are not necessarily tied to electoral processes. A multiparty representative democracy is not a predicate to involving the public in decisionmaking, and good governance practices of transparency, inclusion, and accountability may be seen in monarchies and traditional tribal structures.[1] Moreover, international institutions are rarely "democratic," in that the officers are not elected by the populace, and in many cases they are effectively appointed by the largest financial contributors. However, as this volume shows, international institutions have responded to international pressure to engage the public, as well as practical considerations for doing so. While these institutions often only focus on the "affected" public—those individuals who may be directly affected by an institution's decision—measures to promote transparency also can reach a broader audience.

Initiatives to engage citizens, nongovernmental organizations (NGOs), and other civil society actors have occurred at the local, national, regional, and international levels. This volume focuses largely on regional and international experiences, especially as they relate to issues of environmentally sustainable development.[2] By examining the various regional conventions, declarations, and other instruments, along with the growing practice of international institutions, one can safely conclude that global norms and mechanisms to ensure public involvement are emerging and crystallizing. This volume pays particular attention to the common elements of these disparate endeavors. While many regional and global approaches are highlighted, some notable institutions (such as the United Nations and its organs, the Organisation for Economic Co-operation and Development, and the World Commission on Dams) and their experiences are not fully addressed.[3] These additional experiences, however, simply reinforce the thesis of this volume that effective governance requires transparency, public engagement, and accountability.

Taken in isolation, the public involvement provisions of any particular regional initiative or international institution may seem ad hoc, unique, vague, or secondary to the central matter, depending on the endeavor under consideration. Taken together, though, the analysis of such initiatives in these chapters provides compelling evidence that public access to information, par-

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[1] *See, e.g.*, Ali Ahmad, *Righting Public Wrongs and Enforcing Private Rights: Public Involvement in Islamic Law*, in this volume (citing a multitude of norms and traditional practices for ensuring public involvement under Islamic law); Collins Odote & Maurice O. Makoloo, *African Initiatives for Public Participation in Environmental Management*, in this volume (highlighting traditional African structures); Mikael Hildén & Eeva Furman, *Towards Good Practices for Public Participation in the Asia-Europe Meeting Process*, in this volume (describing cultural and political sensitivities to promoting public involvement in Asian countries).

[2] For a thorough examination of public involvement at the national level in many countries, see "The Access Initiative" website and related publications at www.accessinitiative.org.

[3] *See* University of Victoria's Centre for Global Studies, "Rethinking Governance" Handbook: An Inventory of Ideas to Enhance Accountability, Participation, and Transparency; United Nations Environment Programme, Enhancing Civil Society Engagement in the Work of the United Nations Environment Programme—Implementation of GCSS.VII/5: Revised Strategy Paper (Draft 3b) (Aug. 4, 2002).

ticipation in decisionmaking, and access to judicial and administrative remedies constitute a core set of governance principles. Thus, instruments or institutions focused on managing international watercourses may emphasize water rights, but they also increasingly assure public involvement in their substantive decisions.[4] Other instruments may include only a general statement on the role of citizens, interest groups, and other elements of civil society; on its own, without a broader body of norms and practices, such a statement may be considered merely hortatory. However, in light of the growing specificity of "best practices" for government decisionmaking—and in some cases, express recognition of human rights for citizens to be involved in decisions—even these general provisions may be viewed as invoking the more extensive body of specific norms and mechanisms.

The first part of this volume examines the various foundations for broad public involvement in governance. These include human rights (as exemplified through constitutional guarantees), religious and ethical considerations (particularly in the context of Islamic law), and elements of sound business practice. The practical benefits to government decisionmaking, including producing better decisions and better public support for the decisions, are highlighted in many of the other chapters.

The second part sets forth regional experiences in promoting public involvement through conventions and treaties, strategies, memoranda of understanding, declarations, and other regional initiatives. Significantly, experiences from regions all around the world are considered: Africa and East Africa, the Americas and North America, Asia and Europe, and Europe and Central Asia. While the geographic spread of these initiatives does not encompass all countries, it does represent a diverse cross-section of countries with different cultures, stages of economic development, and political systems.

The third and final part of the volume analyzes experiences of various international institutions in promoting public access to information and public consultation, as well as mechanisms for ensuring that NGOs and affected individuals have access to quasi-judicial international dispute resolution mechanisms to protect their rights. These include multilateral and bilateral financial institutions, human rights bodies, international water management authorities, trade organizations, and international bodies involved in mining. The experiences highlighted in this part, relating to international institutions, are perhaps the most diverse. Some institutions have proven to be quite open, while a few others (including most export credit agencies and bodies relating to mining) are only beginning to effectively involve the public. In many instances, international bodies have made strides in making information available and in consulting with the public, but effective public participation in decisions and meaningful access to justice remain elusive.

As an introduction to the volume, this chapter provides an overview of the ongoing globalization of public participation. The first section briefly examines the various aspects of public involvement, how they relate to one another, and their nature. It then considers the underlying ethical, human rights, business, and governance bases for public involvement. The second, third, and fourth sections sets forth the common elements of public access to information, participation in decisionmaking, and access to justice, respectively. Both the well-established and emerging norms and mechanisms are examined. The fifth section looks forward, laying out specific measures to implement existing commitments to involve the public in governance processes, as well as opportunities for further clarifying the scope and nature of participatory governance approaches.

I. THE FOUNDATIONS OF PUBLIC INVOLVEMENT

Public involvement is generally recognized to include three elements, or "pillars": public access to information, public participation in decisionmaking processes, and public access to judicial and administrative redress (often termed "access to justice"). Access to information can be either "passive" or "active." Passive access to information ensures that governmental and other entities must provide information to the public, but generally only upon receiving a specific request. Active access to information imposes affirmative obligations on governmental authorities to collect and publicly disseminate certain information. Gradually, access to information provisions are also being applied to private entities. Public participation seeks to ensure that members of the public have the opportunity to be notified, to express their opinions, and ideally to influence decisions regarding projects, programs, policies, and regulations that could affect them. Access to justice provides a mechanism for the public to ensure that their procedural rights to information and participation are respected, and often also allows them to make substantive challenges to actions by public or private entities that may violate established laws or standards. These three pillars are discussed in more detail in the following three sections.

As a practical matter, effective public involvement also implicates other rights, including the rights of free association and free speech. In order to be more effective in their participation, people must have the right

[4] Carl Bruch & Dorigen Fried, *Public Involvement in the Management of International Watercourses*, in this volume.

to establish groups to peacefully advocate for their cause. However, repressive NGO registration laws can result in an NGO being deregistered if it challenges a government action.[5] Similarly, the right to free speech is central to ensuring that people have a voice in decisions that affect them.

These rights operate synergistically. Public access to information allows for more informed and effective public participation and judicial redress. Public participation improves the information that is available and provides a means for resolving disputes before they escalate. Access to justice ensures that government agencies and others respect the procedural rights of access to information and participation. Together, these rights establish a governance structure that is more robust.

A. Historical Overview of Public Involvement[6]

International recognition of public involvement—including provisions for transparency, participation, and justice—dates back more than 50 years.[7] As early as 1948, the Universal Declaration on Human Rights provided the kernels for generalized rights of access to information (Article 19) and justice (Articles 8 and 10), as well as the right to associate (Article 20).[8] Similarly, the 1966 International Covenant on Civil and Political Rights guarantees the "freedom to seek, receive and impart information and ideas of all kinds."[9] The 1982 World Charter for Nature requires public disclosure of conservation information "in time to permit effective consultation and participation" as well as "the opportunity [for all persons] to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and [to] have access to means of redress when their environment has suffered damage or degradation."[10]

Following the elaboration of various regional environmental instruments,[11] the 1992 Rio Declaration crystallized the emerging norms of public involvement in Principle 10:

> 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 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.[12]

It would be difficult to overstate the significance of Principle 10 in providing a mandate to regional and international governance developments over the past decade. The clarity and comprehensiveness of its language, as well as its international acceptance as a distinct principle of the Rio Declaration, have made Principle 10 an anchor for regional initiatives and developments in international institutions, as well as an underlying commitment motivating national laws. Moreover, since the Rio Declaration, various international undertakings have linked human rights and environmental

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[5] *See, e.g.*, Rugemeleza Nshala, The Freedom of Association in Tanzania: Implications for Civil Society and Sustainable Development, Lawyers' Environmental Action Team Policy Brief No. 1 (1997); Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 Colum. J. Envtl. L. 131, 176-78 (2001).

[6] This historical summary is adapted with permission from Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 Envtl. L. Rep. 10428, 10429-30 (2002). Another good history of international instruments that incorporate public participation principles is Stephen Stec & Susan Casey-Lefkowitz, The Aarhus Convention: An Implementation Guide 10-14 (2000), *available at* www.unece.org/env/pp/acig.htm (last visited Aug. 4, 2002).

[7] Indeed, the 1909 International Boundary Waters Treaty included strong provisions for public access to information and participation. *See* Bruch & Fried, *supra* note 4. Further, Islamic law, which dates back 14 centuries and is recognized in many countries in North Africa, the Middle East, and Asia, has a wealth of provisions recognizing public access to information, participation, and justice. *See* Ahmad, *supra* note 1.

[8] Universal Declaration of Human Rights, adopted on Dec. 10, 1948, UNGA Res. 217A(III), U.N. Doc. A/810, at 71 (1948). Regional human rights declarations expand upon and reinforce the global declarations. *E.g.*, San Salvador Protocol, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, art. 11, done on Nov. 17, 1988, entered into force Nov. 16, 1999, *available at* www.oas.org/juridico/english/Treaties/a-52.html (proclaiming a right to a healthy environment); *see also* Danièle M. Jean-Pierre, *Access to Information, Participation and Justice: Keys to the Continuous Evolution of the Inter-American System for the Protection and Promotion of Human Rights*, in this volume.

[9] International Covenant on Civil and Political Rights, art. 19(2), done at New York on Dec. 16, 1966, entered into force Mar. 23, 1976, UNGA Res. 2200 (XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316, 6 I.L.M. 368 (1967).

[10] World Charter for Nature, arts. 18, 23, adopted on Oct. 28, 1982, UNGA Res. 37/7, UN GAOR Supp. (No. 51) 21, UN Doc. A/37/L.4 and Add. 1 (1982); *see also id.* arts. 15, 18.

[11] For example, in Europe, consider the Salzburg Declaration on the Protection of the Right of Information and of Participation, adopted by the Second European Conference on the Environment and Human Rights, at Salzburg on Dec. 3, 1980.

[12] Rio Declaration on Environment and Development, prin. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

rights, highlighting the central role of procedural rights to both.[13]

Since the Rio Declaration, various international conventions addressing specific environmental issues have incorporated public involvement norms and mechanisms. For example, the 1994 Desertification Convention rejected the previous centralized approach, which had proven ineffective in addressing desertification, and instead adopted a model that emphasized "the participation of populations and local communities" in developing and implementing environmental programs.[14] The Convention on Biological Diversity Convention incorporated similar public participation principles,[15] and the Clean Development Mechanism of the Kyoto Protocol set forth general requirements for public access to information and participation.[16]

The global effort to include civil society in environmental decisionmaking extends to many international institutions whose actions affect the environment. For example, World Bank Group institutions to varying degrees make many of their documents (including environmental impact assessments of projects) publicly available, consult the public on particular projects and broader policies, and have developed an Inspection Panel and Compliance Advisor/Ombudsman to investigate claims by citizens and NGOs that a Bank-funded project harmed the environment or human rights (ostensibly by failing to follow internal Bank guidelines).[17] Regional development banks have also implemented mechanisms for public involvement.[18] Even the World Trade Organization has made some tentative steps to become more transparent and participatory.[19] At the same time, other international organizations—such as the United Nations and its organs, the Organization of American States, the European Union, and the North American Commission for Environmental Cooperation—have increasingly provided for public access to information and participation in their deliberations.[20]

The global development of public involvement norms has complemented and enhanced regional and national initiatives to promote public participation. Global declarations and conventions lend authority to, and in some cases mandate, regional and national efforts to clarify and implement their norms. In turn, the experiences in the different countries and regional bodies provide lessons that then may be incorporated—or avoided—in subsequent international documents. Through this iterative approach, governments are able to learn from the experiences in various countries and contexts, become comfortable with international principles, and gradually implement the principles in their own countries.

In fact, since the general statement of Rio Declaration Principle 10, a number of regional initiatives have

[13] *E.g.*, Review of Further Developments in Fields with which the Sub-Commission has been Concerned on Human Rights and the Environment, UN Doc. E/CN.4/Sub.2/1994/9, app. 1 (Draft Principles on Human Rights and the Environment), *available at* fletcher.tufts.edu/multi/www/1994-decl.html (last visited Feb. 17, 2002). The UN Draft Principles address both substantive and procedural rights, including the rights to information, expression, education, participation, association, and justice. Draft Principles, arts. 15-20. *See also* Final Text, Meeting of Experts on Human Rights and the Environment, *available at* www.cedha.org.ar/conclusions.htm (last visited Feb. 17, 2002) (report of a meeting of experts convened by the UN Commission on Human Rights (UNCHR) and the United Nations Environment Programme (UNEP) on Jan. 14-15, 2002 in Geneva).

[14] Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, art. 3, done on June 17, 1994, entered into force Dec. 26, 1996, 33 I.L.M. 1328 (1994). The primary mechanism adopted is a national action program that provides a framework for identifying the causes of desertification, as well as steps to be taken to combat and mitigate its effects. In addition to "specify[ing] the respective roles of government, local communities and land users," the national action programmes are required to "facilitate access by local populations to appropriate information and technology" and "provide for effective participation at the local, national and regional levels of non-governmental organizations and local populations . . . in policy planning, decision-making, and implementation and review of national action programmes." *Id.* art. 10(2)(e), (f).

[15] United Nations Framework Convention on Biological Diversity, art. 14(a)(1)(a), done on June 2, 1992, entered into force Dec. 29, 1993, UN Doc. DPI/130/7, 31 I.L.M. 818 (1992); *id.* arts. 14(1)(a) (encouraging public participation in "environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity"), 17 (promoting the exchange of publicly available information). The 2000 Biosafety Protocol to the CBD also relies on access to information (Articles 20, 23(1), and 23(3)) and public participation (Articles 23(2) and 29(8)). *See, e.g.*, Richard M. Saines, *Rotterdam Treaty on PIC and Biosafety Protocol: Examples of Increased Transparency, Technology Sharing, and Accountability in International Law*, 24 (BNA) INT'L. ENVTL. REP. 623 (2001).

[16] *See* Nathalie Eddy & Glenn Wiser, *Public Participation in the Clean Development Mechanism of the Kyoto Protocol*, in this volume.

[17] *See* Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*, in this volume.

[18] *See id.*; Aboubacar Fall, *Implementing Public Participation in African Development Bank Operations*, in this volume.

[19] *See* Nicholas Gertler & Elliott Milhollin, *Public Participation and Access to Justice in the World Trade Organization*, in this volume.

[20] *See* Elizabeth Dowdeswell, *The North American Commission for Environmental Cooperation: A Case Study in Innovative Environmental Governance*, in this volume; Jorge Caillaux et al., *Environmental Public Participation in the Americas*, in this volume; Jean-Pierre, *supra* note 8; Bruch & Fried, *supra* note 4. *See also* INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, ACCREDITATION SCHEMES AND OTHER ARRANGEMENTS FOR PUBLIC PARTICIPATION IN INTERNATIONAL FORA (1999); Michel Prieur, *Environmental Agreements: Legal Aspects*, 7 REV. EUR. COMMUNITY & INT'L ENVTL. L. 301 (1998); Chiata Ciorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 115 (1998); Fe Sanchis Moreno, Case Study: Fisheries, Transparency, and Participation (Nov. 20, 2000) (unpublished manuscript on file with authors); CLAUDIA SALADIN & BRENNAN VAN DYKE, IMPLEMENTING THE PRINCIPLES OF THE PUBLIC PARTICIPATION CONVENTION IN INTERNATIONAL ORGANIZATIONS (1998).

elaborated similar constructions of the general principles, including:

- *1993 North American Agreement on Environmental Cooperation* (NAAEC) (for Canada, Mexico, and the United States).[21]
- *1997 Charter of Civil Society for the Caribbean Community* (for the 14 CARICOM nations).[22]
- *1998 UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)* (for the 55 countries in the ECE region; 39 nations and the European Community have signed it; 22 countries have ratified, adopted, or acceded to it).[23]
- *1998 Memorandum of Understanding for Cooperation on Environment Management in East Africa* (for Kenya, Tanzania, and Uganda).[24]
- *1999 Mediterranean Commission on Sustainable Development Recommendations and Proposals for Action on the Theme of: Information, Public Awareness, Environmental Education and Participation*.[25]
- *2000 Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (ISP)* (for the 34 member states of the Organization of American States).[26]
- *2002 Asia-Europe Meeting (ASEM), Draft Document Towards Good Practices for Public Involvement in Environmental Policies* (for 10 Asian nations, the 15 EU member states, and the European Commission).[27]
- *Draft Revisions to the 1968 Convention on the Conservation of Nature and Natural Resources in Africa* (for all African nations).[28]

Drawing upon this multitude of regional initiatives and their common elements, some government and NGO representatives have further advocated linking and globalizing these regional initiatives.[29]

[21] *See* Dowdeswell, *supra* note 20.

[22] Charter of Civil Society for the Caribbean Community, done at St. Johns, Antigua and Barbuda, on Feb. 19, 1997, Caribbean Community and Common Market (CARICOM) Governments, *available at* www.caricom.org/chartercivilsoc.html (last visited Aug. 4, 2002).

[23] *See* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

[24] *See* Godber Tumushabe, *Public Involvement in the East African Community*, in this volume.

[25] UN Doc. UNEP(OCA)/MED IG.12/9, annex IV, app. I, adopted in Malta on Oct. 27-30, 1999.

[26] *See* Caillaux et al., *supra* note 20.

[27] *See* Hildén & Furman, *supra* note 1.

[28] *See* Odote & Makoloo, *supra* note 1.

[29] *See infra* notes 69 to 71 and accompanying text.

B. Bases for Public Involvement

There are numerous reasons and bases for involving the public in decisionmaking processes. From a human rights perspective, people have the right to be involved in decisions that affect them and their environment, as well as the right to obtain information from the government and to seek judicial redress to protect their substantive and procedural rights. Further, there are often legal, ethical and moral obligations on citizens to ensure good governance, and corresponding requirements on government officials and others not to interfere with, and even to support, these obligations. From a purely instrumental point of view, public involvement improves the outcome of government processes, and it makes good business sense.

By engaging a broad cross-section of society, participatory approaches improve the quality of information that is available to decisionmakers. Existing assumptions can be tested against different perspectives and experiences. As a practical matter, citizens often know the environment in which they live—whether urban or rural—intimately and in a richer way than decisionmakers do or can. A stream, for example, is not just a conduit for carrying away waste from an industrial facility; it may also be a source of drinking and cooking water, a playground for children, fish habitat (and a thus an important source of food), and a site of daily ablutions. And people who live near the stream are likely to know how often it runs low, whether there are dangers of flooding, and its place in the wider ecological and social context. By broadly and openly sharing the information upon which a proposed decision is based, decisionmakers can better account for these additional perspectives and considerations.

Transparency and public participation also improve governance by fostering public support for the ultimate decision. The public is more likely to understand a decision if they know the competing interests at stake and the basis for the decision. Moreover, they are more likely to accept a decision—even if it is not the outcome they would prefer—if they have had the opportunity to fully present their views. As a practical matter, a decision in which the public has genuinely participated is also more likely to attempt to accommodate the concerns expressed, by altering the project, mitigating certain effects, or developing additional activities to meet specific articulated needs.

The transaction costs—in time, labor, and expense—of responding to information requests, conducting public hearings, or ensuring mechanisms for access to justice are often an annoyance to government agencies and businesses. However, the expenses and risk to the ultimate decision can be much higher if these mechanisms are short-circuited. Rich and Carbonell highlight

numerous examples where projects supported by export credit agencies were delayed due to public protest arising in part from a lack of adequate public participation.[30] In one project funded by the African Development Bank, a lack of transparency and adequate public consultation has led to opposition and an indefinite suspension of the project.[31] More generally, closed processes breed distrust, particularly where institutions such as the World Trade Organization have significant power to shape the economic futures of countries, yet operate without meaningful public involvement.[32]

Public participation also makes good business sense. In addition to avoiding potentially costly delays, or even failures, public involvement can enhance a company's reputation. As Feldman observes in numerous examples, businesses can improve their relationships with surrounding communities, and similarly their reputation, by engaging in various forms of collaborative governance.[33] These can include citizen or community advisory panels and voluntary initiatives that go "beyond compliance." Additionally, the process of collecting information legally required for monitoring and reporting, particularly in the context of the U.S. Toxics Release Inventory, has helped companies identify the volumes of raw materials that are being released into the environment as waste. In many instances, company executives expressed surprise at the amount and cost of waste, and subsequently modified production processes to recapture and reuse much of the formerly wasted material.[34]

More fundamentally, public involvement is increasingly being considered a basic human right. People have the right to have a meaningful and effective voice in the health, environmental, and social conditions in which they live. History shows that "when in the course of human events" these rights have been manifestly neglected or systematically abused, political strife and revolution has ensued.[35] Thus, as discussed above, numerous human rights instruments have enshrined the rights of access to information, participation, and redress. National constitutions have also guaranteed these rights in their "Bills of Rights" and other enumerations of fundamental rights.[36]

These ideas are also grounded in traditions that predate the Western notion of constitutional rights. In addition to being a body of moral, ethical, and religious norms, Islamic law constitutes a concrete body of law for many communities and nations. It recognizes foundational rights and obligations to obtain information, participate in decisions, and seek redress for environmental wrongs and other violations of *huquq Allah* ("the rights of Allah," or rights that are shared by all).[37] In this volume, Ahmad describes a comprehensive set of obligations and rights under Islamic law that traditionally ensured the engagement of the broader population in decisionmaking processes. One significant aspect of Islamic law is the link between rights and obligations. Muslims are obliged to make informed decisions. Thus, Islamic law enjoins others to share information upon request: "He who is asked something, he knows it and conceals it, will have a bridle of fire put on him on the Day of Resurrection."[38]

C. Other Considerations

What is the scope of public involvement? Do people have the right to access all information, or only environmental information? If there are no significant environmental impacts of a decision, but there are other significant social or economic impacts, can people participate in an EIA-like process? Shouldn't people and NGOs have the right to go to court to contest violations of shared social rights that are not necessarily "environmental"?

Much of this volume focuses on public involvement in the environmental context. People depend on clean water, food, and air for their life. In countries and areas in which populations are largely rural, local and national economies are largely dependent on natural endowments —and the environment plays a central role in the lives of many. Accordingly, over the past decade and more, environment has been a "wedge issue" for generally opening up governance processes to public involvement. In cases where it is not politically possible to pass a general law ensuring access to information, it has sometimes proven easier to pass laws ensuring public access to environmental information. Similarly, public participation and access to courts have been developed and advanced through environmental laws.

With the 2002 World Summit on Sustainable Development (WSSD), however, it is perhaps appropriate to inquire whether public involvement in *environmen-*

[30] Bruce Rich & Tomás Carbonell, *Public Participation and Transparency at Official Export Credit Agencies*, in this volume.
[31] *See* Fall, *supra* note 18 (discussing the Bani River Project in Mali); *cf.* Bruch & Fried, *supra* note 4 (discussing the Pak Mun Dam).
[32] *See* Bruch & Czebiniak, *supra* note 6, at 10431, n.21 (discussing the popular protests at WTO and other meetings).
[33] Ira Feldman, *The Stakeholder Convergence: Public Participation and Sustainable Business Practices*, in this volume; see also Rich & Carbonell, *supra* note 30 (discussing reputational risk that can arise from a lack of public involvement in ECA-supported activities).
[34] *See* Feldman, *supra* note 33; Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy 624-26 (1992).
[35] *Cf.* The Declaration of Independence (U.S. 1776).
[36] *See* Carl Bruch & Sarah King, *Constitutional Procedural Rights: Enhancing Civil Society's Role in Good Governance*, in this volume.
[37] *See* Ahmad, *supra* note 1.
[38] *Id.*

tal matters is sufficient. While the term "environment" can be construed quite broadly, it still fails to ensure that the public is effectively involved in all aspects of sustainable development. The WSSD presents an opportunity to build upon experiences in environmental governance and to extend participatory approaches to the economic and social components of sustainable development. In developing norms and practices for public involvement in sustainable development, advocates and governments will need to address the fact that the three legs of sustainable development—economic, social, and environmental—have dramatically different perspectives on transparency, public participation, and accountability.

Another point worth highlighting is the trend toward blurring of public and private decisionmaking.[39] Increasingly, the private sector is making decisions that have significant environmental, social, and economic implications, without sufficient input from the public. Yet, most of the norms and mechanisms currently in place focus on government decisionmaking. New approaches or new applications of the older approaches are necessary.

The instruments analyzed in this volume have varying levels of authority: the Aarhus Convention has entered into force, the ISP contains only policy recommendations, the ASEM initiative is still in draft form, and so forth. Similarly, international institutions characterize their frameworks for public involvement variously as "requirements," "guidelines," "policies," and ad hoc "good practices." Nevertheless, these instruments and practices share many core principles and mechanisms, and represent emerging international norms of public access to information, participation, and justice in decisionmaking. The following three sections examine the common elements of the three pillars of public involvement, as well as emerging norms that have yet to reach the same level of global acceptance.

Finally, before embarking on a review of the elements of the emerging global norms for public involvement, it is worth briefly noting the innate characteristics of the procedural aspects of governance on which this volume focuses. Procedure can be dull. It is difficult to make procedural issues interesting, let alone compelling. Funders, politicians, and the general public prefer to focus on substantive issues: protecting children, promoting the arts, fighting poverty, and so forth. It is only when people are denied a voice, when their request for information is rejected, or when they have been wronged but have no way to seek redress that they become interested in process. And then they are passionate.

[39] *See, e.g.*, Feldman, *supra* note 33.

II. ACCESS TO INFORMATION

With respect to access to information, norms and mechanisms may be characterized as either "passive" or "active," depending on the nature of the obligation they place on governmental and other entities to disclose and disseminate information.

A. Passive Access to Information

Passive access to information typically refers to the right of people to request information and the duty of government authorities to provide the requested information. The government is not obligated to provide this information until requested to do so.

Ideally, the person requesting the information need not have or demonstrate any specific interest in the requested information. In fact, they often do not need to be a citizen of the country where the information is located, or any particular country. One striking aspect of this right is that people usually have a right to obtain information simply by asking, whereas the rights to participate or seek redress sometimes are limited to people who might be more directly affected. Nevertheless, the request should reasonably identify the information sought, and requests that are vague or overly broad may be rejected.

A government authority can charge for providing requested information, but the charge must be reasonable (for example, to cover the cost of photocopying the information). In addition, the requestor is generally allowed to inspect the documents free of charge. The requested information may be located in a wide range of media, such as microfiche, computer files, and documents.

For the purposes of passive access, information is broadly defined. It typically includes all information that even arguably relates to the environment, human health, and factors that affect them. Exceptions may be defined to preclude the release of specific types of information, but these exceptions are normally to be construed narrowly, with ambiguities resolved in favor of disclosure.[40] Such exceptions might include trade secrets and information that could directly compromise national security.

B. Active Access to Information

In contrast to passive access, active access to information refers to affirmative obligations on government authorities and international institutions to collect, syn-

[40] However, some institutions such as the international financial institutions and export credit agencies allow the confidential business information exception to be construed so broadly that it creates a large loophole for institutions to avoid releasing much information that affected people need. *See, e.g.*, Bernasconi-Osterwalder & Hunter, *supra* note 17; Rich & Carbonell, *supra* note 30.

thesize, and disseminate information to the public. No request is necessary to trigger these obligations, the scope and timing of which are often spelled out directly in the underlying legal or policy provision.

One common mechanism is the development of periodic state-of-the-environment (SOE) reports. These reports allow the public to understand the current state of the environment, and frequently identify trends and potential threats. Most regional instruments require SOE reports. Additionally, certain international institutions conduct regular assessments.[41] Similarly, NGOs have stepped in to collect and provide alternative interpretations of data to supplement official SOE reports.[42] The timeframe for producing these reports has not been standardized across instruments or institutions. For example, the Aarhus Convention requires that they be released at least once every four years.[43] The NAAEC, on the other hand, requires that state-of-the-environment reports be generated "periodically," and also requires the secretariat to prepare a report annually that includes relevant views of individuals and NGOs.[44]

Another common mechanism is the development of a pollution index or pollutant release and transfer register (PRTR). PRTRs track and report on the release of specified pollutants to the air, land, and water (as well as transfers to other facilities). Information is usually made available by facility, sector, region, and chemical. Frequently, the information is placed on the Internet so that people have ready access to the database. Ultimately, PRTRs allow the public to know about releases of pollutants in their area that may affect them or their environment. PRTRs are included in many regional instruments, and a PRTR Protocol to the Aarhus Convention is currently being negotiated.[45] The North American Commission on Environmental Cooperation has also undertaken to develop a common PRTR report for North America—*Taking Stock*—that draws upon the national systems.[46]

Environmental impact assessment (EIA) is an almost universally recognized requirement when a state activity or state-regulated private activity will have a significant effect on the environment. EIAs are required or strongly encouraged by practically all the regional instruments, as well as in many international institutions. In addition to its public participation requirements (which are discussed further in the next subsection), EIA typically requires information on proposed projects to be made publicly available for review before making a decision.

Ecolabeling and certification are emerging mechanisms that enable the public to be informed about processes used to create a product and to choose whether to support such practices by purchasing the product. Ecolabeling of consumer products is encouraged in the regional instruments of the Aarhus Convention and the draft ASEM Document. An example of certification is found in the forest industry, where various organizations, such as the Miombo Forum and the Forest Stewardship Council, authorize forest certification schemes to reflect the use of sustainable forest management practices. In the broader context of sustainable development, labeling and certification can be used to designate products that relied on union labor, were produced without child labor, or were produced in humane conditions. Certification schemes can also be used to address some of the causes of armed conflicts: the Kimberley Process has sought to develop a global system for certifying that diamonds were legally mined and are the product of legally authorized transactions.

Another emerging norm is the obligation to ensure that the public is able to understand the information it is provided. One part of encouraging this understanding is state-sponsored education, so that people can interpret the different forms of information that they are given.[47] Another aspect of encouraging public understanding is the provision of information through means that are broadly accessible.[48] For example, many popula-

[41] UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 3 (2002), *available at* www.unep.org/Geo/geo3/index.htm (last visited Aug. 5, 2002); UNITED NATIONS DEVELOPMENT PROGRAMME, OVERCOMING HUMAN POVERTY: POVERTY REPORT 2000 (2002), *available at* www.undp.org/povertyreport/ENGLISH/Arfront.pdf (last visited Aug. 5, 2002).

[42] *E.g.*, CHRISTOPHER FLAVIN ET AL., STATE OF THE WORLD 2002 (2002) (produced by Worldwatch); WORLD RESOURCE INSTITUTE, WORLD RESOURCES 2000-2001: PEOPLE AND ECOSYSTEMS—THE FRAYING WEB OF LIFE (2001).

[43] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, art. 5.4, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention].

[44] North American Agreement on Environmental Cooperation, arts. 2.1, 12.2(d), 12.3, done Sept. 8-14, 1993, entered into force Jan. 1, 1994, U.S.-Can.-Mex., 32 I.L.M. 1480, *available at* www.cec.org/pubs_info_resources/law_treat_agree/naaec/naaec02.cfm?varlan=english (last visited July 23, 2002) [hereinafter NAAEC].

[45] *See* Kravchenko, *supra* note 23.

[46] *See* Dowdeswell, *supra* note 20.

[47] *E.g.*, Towards Good Practices for Public Involvement in Environmental Policies (Draft June 28, 2001), paras. 20, 25, produced by AEETC for the Consideration of the Environment Minister's Meeting, *available at* www.vyh.fi/eng/intcoop/regional/asian/asem/junedraft1.RTF (last visited Feb. 20, 2002) [hereinafter Draft ASEM].

[48] *E.g.*, Organization of American States Inter-American Council for Integral Development (OAS CIDI), Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, Proposed Actions 1.3, 2.2, CIDI/RES. 98 (V-O/00), OEA/Ser.W/II.5,CIDI/doc.25/00 (Apr. 20, 2000), adopting Organization of American States, Unit for Sustainable Development and Environment, Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (1999) [hereinafter ISP].

tions lack effective access to the Internet, and literacy is also a limiting factor in many rural areas. To address these constraints, the World Bank has developed a set of participatory methods and techniques that are applied during the assessment and evaluation phase of projects in poor rural and urban communities, which includes the use of visual techniques to enable illiterate people to participate fully.[49] A final aspect of encouraging public understanding is the provision of information in the appropriate languages of the affected population.[50]

III. PUBLIC PARTICIPATION

Public participation in government decisions applies to several different categories of decisions, including those regarding proposed projects and activities (EIA), as well as broader programs, policies, and regulations. There are a number of general principles that apply to public participation generally.

First, the public should be involved early in the decisionmaking process, "when options are still open."[51] Early involvement by the public can help to identify the various aspects of the project and its impacts that merit particular attention in the planning and assessment process. As a practical matter, regional instruments and international institutions usually recognize that NGOs have a legitimate interest and are allowed to participate in the decisionmaking process from the outset. For example, the Global Environmental Facility, the North American Commission for Environmental Cooperation, and other institutions allow NGOs to attend council meetings and even provide travel grants for NGOs to facilitate their participation. Frequently, there are also joint meetings with NGOs the day before the formal meetings, which can help to elicit civil society perspectives on the matters before the international institution.[52] While funding of NGOs to attend meetings is not yet universal, its importance in allowing broader participation has been recognized.

Second, the decisionmaker needs to provide timely notice to the public of impending decisions that may affect them. This notice should include the nature of the decision to be made, the time and place that it will be made, and the means for submitting comments. The public usually has a chance to submit written or oral comments on the proposed decision. This comment period should be sufficient for the public to have time to prepare and submit meaningful comments. The decisionmaker must take these public comments into account when reaching the final decision. The decision does not have to exactly follow the public comments, but it should explain which comments were incorporated and offer legitimate reasons for not incorporating the others.

Another emerging norm is the inclusion of the public in the decisionmaking process for policies rather than just for specific projects. For example, the Aarhus Convention encourages, but does not require, public participation in the preparation of plans and programs relating to the environment.[53] This language is in contrast to the strict language the same convention employs in mandating public participation for government actions involving a specific project, such as licensing or permitting.[54]

IV. ACCESS TO JUSTICE

While access to justice is a prominent concept in the legal systems of many nations, internationally it is the least developed of the three public involvement pillars. However, global norms do exist and continue to emerge for ensuring public access to justice in environmental matters.

Generally, people must have access to judicial and administrative institutions in order to fully protect their rights. There can be no effective right without a corresponding remedy, and the opportunity to seek that remedy. In the context of public involvement, existing instruments most commonly recognize the right of people and NGOs to seek access to justice to ensure that their procedural rights of access to information and participation are respected. In this context, access to justice operates as the enforcement provision for the other two kinds of public involvement rights.

Increasingly, however, regional mechanisms and international institutions also have recognized "citizen suits" for violations of substantive international and national environmental laws. These mechanisms recognize and ensure that the public has the right to seek redress for environmental wrongs. An essential aspect of these citizen suits is the broadening of "standing to sue" so that even if a person or organization has not been directly harmed in a way that is different from injuries suffered by others, they can still have access to the justice system to vindicate environmental harms. Although some states and international institutions have been hesitant to broaden standing out of the fear of increased caseloads, the trend is to recognize this concern but to place a higher priority on improving the ability of citizens to redress environmental harms. Even

[49] "RETHINKING GOVERNANCE" HANDBOOK, *supra* note 3, at 141.

[50] *E.g.*, Draft ASEM, *supra* note 47, para. 11 (stating that "ASEM members will actively publicize the availability of texts of international legal instruments, to which they are a party, and which establish procedures for public access to environmental information or public participation rights, preferably in their own language(s) and taking into account the needs of illiterate persons").

[51] *E.g.*, Aarhus Convention, *supra* note 43, art. 6.4.

[52] *E.g.*, "RETHINKING GOVERNANCE" HANDBOOK, *supra* note 3, at 135.

[53] Aarhus Convention, *supra* note 43, art. 7.

[54] *Id.* art. 6.

in the case of transboundary environmental impacts, the East Africa MOU grants access to the justice system to any affected persons.[55]

There is universal agreement that access to justice entails a fair, affordable, and transparent justice system. It helps ensure that all parties to a suit, whether a profitable corporation or a poor worker, are treated equally; that access to the justice system will be affordable; and that access to legal processes will be nondiscriminatory. All persons, regardless of nationality, should be allowed access to justice.

A related norm is the obligation on governments and international institutions to protect advocates when they choose to exercise their right to advocate, whether it is on their own behalf or on behalf of a client, and whether it is in court or through other processes. This emerging norm is actually a key component of ensuring that the public truly has access to justice. In many regimes around the world, the public does not take advantage of their right to access to justice due to fear of retaliation by the government or private sector actors. To address this explicitly, the draft ASEM Good Practices Document states that ASEM members "will ensure that persons involved in public participation in environmental matters are not penalized in any way for activities that are lawful."[56] In addition, a number of jurisdictions have introduced "Whistleblower Protection Acts" to protect employees who report the environmentally or socially harmful behaviors of their employers.[57] An additional measure to protect the advocate is ensuring the freedom of speech.

An interesting development in many international institutions is the creation of an obligation on the institution to investigate public complaints against the institution. Rather than requiring the public to file a complaint against an institution and then bring this complaint through the justice system, this approach places the obligation on the institution to investigate the complaint before a formal case is brought. For example, the World Bank established an Inspection Panel in 1993 to investigate complaints by private citizens who believe that they have been or may be adversely affected by World Bank-funded projects in their country.[58] Such approaches can work if there are appropriate safeguards to ensure the independence of the investigating body from its parent organization.

As norms of access to justice continue to evolve, advocates and decisionmakers should bear in mind that public access to justice can equally be used to undermine environmental measures. For example, Chapter 11 of NAFTA empowers businesses to complain about so-called "business losses" resulting from environmental regulations.[59] While much remains to be done in guaranteeing effective public involvement, experiences such as those with Chapter 11 should also be considered to reduce the risk of creating mechanisms that harm the public interest and governments' ability to regulate.

V. ADVANCING A GLOBAL FRAMEWORK FOR PUBLIC INVOLVEMENT[60]

Although many regions and international institutions have undertaken initiatives to promote environmental governance, there remains a need for a global framework. As discussed below, this normative framework could take the form of a "toolkit," guidelines, or even a legally binding convention. Such a global undertaking would engage scores of nations that do not fall within the existing frameworks and that often lack effective national institutions and laws to ensure public access to information, participation, and justice.[61] A set of normative provisions, institutional mechanisms, and practices with general global applicability could spur the further development and implementation regionally, as well as nationally.[62] Nations that seek to implement principles of public involvement would have a set of tools and guidelines that they could consider when seeking to develop their national systems. Similarly, international institutions would have added guidance on specific ways to improve transparency, participation, and accountability in their operations. Finally, a collaborative process of developing a global framework itself could foster increased cooperation and respect between civil society and governments.

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[55] Memorandum of Understanding between the Republic of Kenya and the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environmental Management, arts. 16.2(d), 16.3, approved at Nairobi, Kenya on October 22, 1998 [hereinafter East African MOU].

[56] Draft ASEM, *supra* note 47, para. 26.

[57] "RETHINKING GOVERNANCE" HANDBOOK, *supra* note 3, at 45.

[58] *Id.* at 65; Bernasconi-Osterwalder & Hunter, *supra* note 17.

[59] www.sice.oas.org/trade/nafta/naftatce.asp (last visited Aug. 5, 2002). *See* Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment, Working Paper, *available at* www.iisd.org/pdf/nafta.pdf (last visited Aug. 5, 2002).

[60] This section expands upon ideas advanced first in Bruch & Czebiniak, *supra* note 6.

[61] For example, most nations in Sub-Saharan Africa, North Africa and the Middle East, and the Pacific, and many in Asia.

[62] Discussions of global principles and practices for public involvement will likely face questions as to their relevance to different cultural traditions, histories, legal systems, and economic stages of development. These legitimate concerns, however, are often invoked disingenuously to forestall meaningful discourse and commitments. As many chapters to this volume indicate, the fundamental principles are well-established. Moreover, there is widespread agreement on many of the specific mechanisms and norms. Nonetheless, it will be necessary to consider some innovative approaches for developing and implementing a global framework for public involvement.

The 2002 World Summit on Sustainable Development (WSSD) offers a unique opportunity for nations to strengthen their commitments to implementing environmental governance at the local and national levels, as well as in international institutions. Ten years after the 1992 United Nations Conference on Environment and Development, the WSSD is focusing on the lessons learned in trying to implement sustainable development over the past decade. Accordingly, the Summit process provides a platform for highlighting the essential role that public involvement and good environmental governance play in achieving sustainable development.[63]

The Summit is significant in part because it represents a once-in-a-decade opportunity for the international community to clearly articulate and reinforce the central role of civil society in implementing sustainable development. Agenda 21, the Rio Delcaration, and the other outcomes from the 1992 UNCED set the agenda for the United Nations Environment Program, the funding priorities for the Global Environment Facility, and the path for the Commission for Sustainable Development. They also influenced regional and national developments. The WSSD similarly could have a profound influence on the development and implementation of domestic and international environmental law and policy for the coming decade.

In addition to fostering a general discussion of public involvement, the Summit can strengthen the international mandate for environmental governance by advancing specific institutional practices and mechanisms. These opportunities include: placing language in the Johannesburg Declaration that strengthens international commitment to Rio Principle 10; committing to the development of global guidelines on environmental governance; adopting an independent monitoring mechanism for tracking progress in implementing these principles; and strengthening regional and national commitments.

A. Strengthening "Soft Law" on Environmental Governance

The World Summit provides a forum in which the international community can strengthen international law and "soft law" on environmental governance. While Rio Principle 10 established a general mandate for national environmental governance, it could benefit from further specificity and expansion by ensuring inclusion of all affected persons, application to regional and international institutions, and explicit protection of the essential freedoms of advocacy, speech, and association.

Most importantly, Rio Principle 10 should be revised to encompass "all affected persons," in addition to citizens. Most provisions of this Principle—including those specifically addressing access to information, participation, and justice—appear to apply to individuals at the national level. However, the first sentence of the principle specifically refers to "concerned citizens."[64] This ambiguity should be resolved so that all affected people are ensured access. In instances of transboundary pollution and other environmental impacts, all affected people should have access to information, have their voice heard, and have access to justice to protect their human right to a clean and healthy environment. Similarly, resident non-citizens (including foreign nationals) should have equal access.[65]

Further, the role of international institutions in developing, financing, and implementing sustainable development has grown dramatically in recent years. Accordingly, the values enshrined in Rio Principle 10—transparency, participation, and accountability—should be extended to apply explicitly to international institutions, including those responsible for helping to develop and implement environmental treaties, laws, and pro-

[63] Indeed, the preparatory processes have already emphasized the central role of public involvement. Report of the Secretary General, *Implementing Agenda 21*, UN Doc. E/CN.17.2002/PC.2/7 (Dec. 19, 2001) at 37, 38, *available at* www.johannesburgsummit.org/html/documents/no170793sgreport.pdf; Arab Declaration to the World Summit on Sustainable Development (WSSD), art. 3(c) (Meeting of the Arab Ministers, Cairo, Oct. 24, 2001), UN. Doc. E/CN.17/2002/PC.2/ (Oct. 24, 2001), *available at* www.johannesburgsummit.org/html/documents/westasiaministerial.pdf (participation and governance); African Ministerial Statement, from Rio de Janeiro to Johannesburg, para. 8 (African Preparatory Conference, Nairobi, Oct. 18, 2001), UN Doc. E/CN.17/2002/PC.2/5/Add.4, *available at* www.johannesburgsummit.org/html/documents/no172059af_min_statmt.pdf ("full participation"); Phnom Penh Regional Platform on Sustainable Development for Asia and the Pacific, paras. 6, 24, 30, 44 (High-level Regional Meeting, Phnom Penh, Nov. 27-29, 2001), UN Doc. E/ESCAP/HRM/WSSD/1/Add.1, *available at* www.johannesburgsummit.org/html/prep_process/asian_platform_for_action_final29nov_1030.doc (good governance, public participation, and multistakeholder participation); Report of the UNECE Regional Ministerial Meeting for the World Summit on Sustainable Development, paras. 21, 22 (Regional Ministerial Meeting, Geneva, Sept. 14-15, 2001), *available at* www.johannesburgsummit.org/web_pages/final_report_ece_prepcom.pdf (transparency, participation, access to justice); Rio de Janeiro Platform for Action on the Road to Johannesburg 2002, para. 11 (Regional Preparatory Conference of Latin America and the Caribbean, Rio de Janeiro, Oct. 23-24, 2001), *available at* www.johannesburgsummit.org/html/prep_process/regional_docs/plataforma_final_ingles_7dec2001.pdf (transparency and participation); Singapore Declaration of the Alliance of Small Island States, at 3 (Inter-regional Preparatory Meeting, Singapore, Jan. 7-11, 2002), UN Doc. E/CN.17/2002/PC.2/5/Add.6 ("significant partnership between civil society and the public sector in the implementation of Agenda 21").

[64] *See supra* note 12.

[65] *See supra* part IV (non-discrimination).

grams,[66] as well as those that provide the financing and financial governance necessary to implement sustainable development.[67] Particular attention should be placed on export credit agencies, which provide significant financial support to international activities affecting the environment but have yet (in most cases) to take meaningful measures to be transparent or participatory, let alone accountable to the public.[68] The policies, practices, and decisions of these institutions can affect many people's lives, health, and environment, just as do those of governments. Despite recent changes by some of these institutions, most have yet to incorporate adequate mechanisms for including the public in their decisionmaking processes.

Finally, freedom of advocacy, speech, and association should be recognized as essential for people to have their voices heard. These fundamental rights are implicit in the existing pillars, particularly participation and access to justice. Explicit recognition of these rights will facilitate their free exercise and the engagement of the public in sustainable development. The WSSD consensus document could also clarify that the mandates provided in Rio Principle 10—compelling governments to ensure public access to information, participation, and justice—represent rights held by people, individually and collectively. These procedural guarantees themselves represent human rights and should be explicitly recognized as such.

B. Development of Global Guidelines

The Summit provides an opportunity to secure an international commitment to developing global guidelines on public involvement in sustainable development decisions. Regional initiatives have laid the groundwork for the elaboration of non-binding guidelines.[69] Accordingly, Kofi Annan, Secretary-General of the United Nations, has observed that "[t]he 2002 Special Session of the United Nations General Assembly marking the 10th anniversary of the Earth Summit would be a timely occasion to examine the relevance of the Aarhus Convention as a possible model for strengthening the application of Principle 10 in other regions of the world."[70] While the WSSD preparatory process has emphasized public involvement, the discussions have been broader than the Aarhus Convention. Through three Preparatory Committee meetings in 2002, the issue of global guidelines for public involvement still remains unresolved on the eve of the WSSD.[71]

Such guidelines could help provide a common set of tools for local, national, and international authorities and institutions to consider when determining how to improve public involvement in sustainable development. As with the development of regional initiatives, the elaboration of global guidelines should provide for the active participation of civil society.[72] Particular attention should be paid to ensuring the participation of NGOs and governments from nations that are not currently engaged in a regional dialogue on environmental governance.

The guidelines should apply generally to sustainable development matters, not only to environmental issues. Given the Summit's focus on the interplay of the economic, social, and environmental dimensions of sustainable development, the guidelines as well as the declaration could broaden these governance principles. Guidelines could also encourage nations and international institutions to adopt and better implement legislation and institutional governance mechanisms.

The guidelines may adopt one of a variety of approaches. It may be a "tool box," from which nations and international institutions may choose particular mechanisms that are perceived to be the most appropriate for them. It may provide a general framework, with some guidelines applicable to all institutions at all levels, and then encourage the development of other sets of guidelines and approaches specifically applicable to a particular region or group of institutions. Alternatively,

[66] For example, the United Nations Environment Program (UNEP), the United Nations Development Program (UNDP), and the Food and Agricultural Organization (FAO), as well as secretariats of multilateral environmental agreements; regional bodies such as the African Union, the Organization of American States (OAS), and Association of South East Asian Nations (ASEAN); and the various international water management authorities.

[67] For example, the World Bank Group institutions, regional development banks, and the World Trade Organization (WTO).

68 *See* Rich & Carbonell, *supra* note 30.

[69] There is some impetus for a global framework, and perhaps even a global governance convention. *See also* 1996 IUCN World Conservation Congress, *available at* iucn.org/Resolutions/IUCN_Enx/EN-index.pdf, rec. 1.43 (calling for "all States to consider the need to develop a global Convention, within the framework of the United Nations, ensuring that the democratic rights to information and participation are upheld throughout the world"); Brussels Declaration of the European ECO Forum (Jan. 21, 2002), *available at* www.participate.org/publications/international_conference_on_aarh.htm, at paras. 9.1, 9.2.

A global convention could harmonize governance principles and provide clarity and consistency among all nations and peoples and a level playing field for all business enterprises wherever they may operate. By providing a common set of practices, including reporting requirements, it could reduce the operating costs for companies and governmental authorities.

[70] Kofi Annan, *Foreword*, *in* Stec & Casey-Lefkowitz, *supra* note 6, at v.

[71] While there has been significant support for non-binding guidelines, the United States and a few countries in the Group of 77 have persistently opposed even such a modest proposal.

[72] *See, e.g.*, Lidija Zivcic, The Role of Environmental Non-Governmental Organizations in Forming International Environmental Instruments, Master of Science thesis, Department of Environmental Sciences and Policy, Central European University (Budapest, 2001) (on file with authors).

the guidelines could provide essential elements (or norms) and mechanisms that should be adopted by institutions at all levels.

While a number of different institutions (such as the Commission for Sustainable Development) could take the lead in developing global guidelines, UNEP would seem to be the logical institution to facilitate the review of the regional initiatives and coordinate development of the guidelines.[73] Financial resources will be necessary, and could come from donors on the international, regional, or bilateral level. And while funding will be necessary for many aspects of the development, particular attention (and funds) will need to focus on ensuring that governments and NGOs from less developed nations are able to participate effectively.

Several potential impediments to this process remain. As noted above, a process to develop guidelines will require funding, particularly to include a broad cross-section of nations and civil society organizations, and many donor nations have expressed their reluctance to increase aid. If guidelines are connected to assessments of current norms and practice, some institutions and nations may be concerned about what such an evaluative process might disclose.

It also may be challenging to agree upon the content of the guidelines. Linguistic diversity poses special challenges, since many nations simply cannot afford to translate all appropriate documents into all the relevant languages. For example, Ethiopia has over 80 different recognized languages and dialects, and many African nations have even more (e.g., Nigeria has more than 250).[74] Even in countries with a single official language, rural people frequently have at best a rudimentary grasp of that language. Similarly, many nations lack the financial or technical resources to establish publicly accessible electronic databases, and such databases might be of little use to villages outside urban areas. New mechanisms and approaches will be necessary to ensure that the public has effective access to information, can participate meaningfully, and knows about its right of access to justice. For example, low literacy rates and the absence of electronic media, newspapers, and other written media could be circumvented by use of other avenues (including radio) when necessary to disseminate environmental information.[75]

It is precisely because of these challenges that global guidelines may prove useful. Development and dissemination of the guidelines would highlight different approaches that reflect a diversity of cultural, legal, and economic realities. The linguistic, literacy, and financial difficulties should not be a bar to guaranteeing that people in those countries have a voice in decisions that could affect them and that they are not further marginalized. Guidelines drawing upon the experiences in many regions and contexts, as well as commitments that nations have made through regional instruments, can highlight many innovative approaches that take these challenges into account.

C. An Independent System for Monitoring Public Involvement

In light of the various experiences in developing and implementing environmental governance at the local, national, regional, and national levels, the Summit could endorse the establishment of an independent mechanism for monitoring progress and exchanging experiences. This independent monitoring mechanism could produce regular profiles—particularly of countries and international institutions—that utilize a set of agreed-upon benchmarks of access to information, participation, and justice. By applying a common set of benchmarks or indicators, nations and international institutions can report on progress that has been made, identify gaps that remain, exchange experiences that may help to address those gaps, and ultimately promote the development and implementation of measures to improve public involvement. For example, steps that one regional development bank has taken to make its processes more transparent can provide an approach for other regional development banks to consider adopting.

This independent monitoring mechanism could draw upon the existing Access Initiative and its indicators. The Access Initiative is a global network of NGOs that promote and analyze environmental governance processes in an effort to establish "common global practices for public access to information, participation, and justice in environmental decision-making."[76] The network is currently developing indicators and method-

[73] UNEP, including INFOTERRA, could draw upon its experience in assisting nations and regions in advancing access to information, participation, and justice in environmental matters. Considering the recent collaboration between the two organizations on human rights and the environment (addressing both substantive and procedural rights), the United Nations Commission on Human Rights (UNCHR) could collaborate with UNEP in developing global guidelines. *See* www.cedha.org.ar/conclusions.htm.

[74] *See, e.g.*, Carl E. Bruch, Comparative Policy and Practice of Access to Environmental Information, Discussion Paper presented at INFOTERRA 2000, in Dublin, Ireland on Sept.11, 2000, UNEP/INF2000/WP/4, *available at* www.unep.org/infoterra/infoterra2000/Bruch-rev.pdf.

[75] *See, e.g.*, Draft ASEM, *supra* note 47, art. 9; John C. Duncan, Jr., *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 Colum. J. Envtl. L. 169 (1999).

[76] www.accessinitiative.org/access_summary.html (last visited Aug. 4, 2002). The views expressed in this Introduction on potential adoption of an independent monitoring mechanism represent those of the co-authors, and do not necessarily reflect the views or agenda of the Access Initiative.

ologies in order to assess various approaches aimed at promoting environmental governance, and it will present a nine-country report at the WSSD on the first application of its indicators.

To ensure its long-term sustainability, the monitoring mechanism will require an international commitment of technical, financial, and political support. It will also require the active participation of NGOs to maintain its credibility and independence. The most effective approach would probably be a collaboration between civil society and national governments.

D. Strengthening Existing Legal and Institutional Structures

At the World Summit and beyond, nations and international institutions will have the opportunity to reinforce their commitments to strengthening legal and institutional structures to ensure access to information, participation, and justice. In placing this priority on implementing environmental governance, local, national, and international authorities should commit the necessary resources to educate the public and engage them in developing the necessary norms, institutional mechanisms, and practices. Public education is an essential step in mobilizing a constituency to make use of existing opportunities to participate in decisionmaking, as well as to advocate for further legal and institutional developments.

Capacity-building activities should focus particularly on local communities that are affected by decisions. Such activities could include training on how to obtain the information they need, the nature of the decisionmaking process and how they can contribute, and access to technical experts as necessary. Costs of capacity building could be incorporated into the cost of the project.

Training and capacity building are also necessary for decisionmakers and staff in international and national agencies. Training is especially needed on participatory approaches for engaging the public in the decisionmaking process.

Developed nations and international institutions (including UN institutions, international financial institutions, and regional development banks) should place priority on providing financial and technical resources to assist national and local authorities in developing nations to build civil society and governmental capacity to implement these principles. For example, the United Nations Institute for Training and Research (UNITAR) could offer training for government officials implementing the laws and for the grassroots organizations that would likely take advantage of such information.

Local, national, and international authorities should publicly establish clear timelines and plans for developing and implementing these principles. For example, at the international level, institutions could develop and implement policies that will only allow projects to proceed once they have incorporated stakeholder perspectives.[77] These plans should include an active role for civil society, which can bring its expertise, energy, and resources to bear.

At the regional level, nations should commit to strengthening and implementing existing and proposed regional initiatives on environmental governance. For example, the relevant nations could commit to implementing the ISP and the East African MOU; EU member states could accelerate their ratification processes for the Aarhus Convention; and ASEM member states could finalize their statement on public involvement in environmental matters.[78] In almost all instances (including with the NACEC), nations could take steps to fortify the frequently inadequate funding for implementation.

Changes in domestic policies, laws, and institutions will have the greatest on-the-ground effects by increasing the role of local residents in addressing environmental impacts that affect their lives. A strong, unambiguous commitment to develop and modify domestic institutions is necessary. Financial and technical assistance is likely to be a catalyzing factor, and without it implementation will lag. Assistance may come from many sectors—NGOs, charitable foundations, bilateral aid, and regional and international institutions—and technical assistance will be especially important in implementing the laws and regulations. Similarly, promoting the exchange of best practices and lessons learned among nations in the same region could help promote environmental governance.

VI. CONCLUSION

Governance in public institutions is still evolving to include civil society. This has occurred largely in a piecemeal fashion, through national and regional initiatives, supplemented by provisions in international instruments and institutional practice. The 1992 Earth Summit seized an opportunity to recognize and affirm the importance of access to information, public participation, and access to justice in Rio Declaration Principle 10. Subsequent regional initiatives have put flesh on the skeleton of Principle 10 by establishing specific mechanisms, legal requirements, and practices to ensure good governance. Through binding and non-bind-

[77] *See, e.g.*, Fall, *supra* note 18 (African Development Bank); Bruch & Fried, *supra* note 4 (Border Environment Cooperation Commission).

[78] In fact, following a June 2002 meeting at which the Draft ASEM Good Practices Document was presented, the UN/ESCAP committed to taking the regional initiative to the next phase. The UN/ECE also committed to supporting the initiative as necessary.

ing regional initiatives, more than 80 countries have publicly committed to taking specific measures to ensure public access to information, participation, and justice. In some cases, these initiatives continue to advance apace; in others, a renewed commitment is necessary. In many instances, a more complete set of specific governance approaches and mechanisms are necessary to assist local and national authorities and international institutions in operationalizing public involvement in sustainable development.

Further articulation and implementation of governance norms is necessary to effectively achieve sustainable development, which can be realized only with the full engagement of all people. It is also necessary to protect human rights; to preserve the rights to life and to a clean and healthy environment in which to live that life; and to ensure that all people have a voice in decisions that could affect their health, livelihoods, and environment.

PART I

FOUNDATIONS OF PUBLIC INVOLVEMENT

INTRODUCTION

Public involvement has its roots in ethics, religion, and human rights. It is shaped by theories of democracy and good governance, as well as sound business practices. For most people, though, opportunities to know what is happening, to be able to have a voice in the decisionmaking process, and to seek redress are matters of fundamental fairness. This is particularly true when their procedural rights have been ignored or violated. This part explores three different foundations for public involvement: human rights expressed in national constitutions; ethical and religious bases within Islamic law; and the business case for public involvement.

In the first chapter, Bruch and King explore the trend of recognizing the procedural rights of individuals and organizations in constitutions. The rights to obtain information and seek redress are well-entrenched in most constitutions, and the right to participate is emerging. The correlative rights of freedom of association and free speech are also well-established. Significantly, courts have held that these provisions are not just aspirations; they are declarations of individual and collective rights that are enforceable in a court of law. While this chapter focuses on the texts of African constitutions, it draws upon examples from around the world. As such, it portrays the broad evolution of procedural rights as fundamental human rights enshrined in national constitutions that are given force by judiciaries around the world.

In the second chapter, Ahmad examines Islamic norms and practices that ensure the public the right to be involved in decisionmaking processes. Islamic law establishes a sophisticated set of rights and obligations for both the governed and the governors. It requires people to make informed decisions, which in turn requires a free flow of information. Islamic law also strongly encourages leaders to consult with the public on a range of matters, and various Islamic institutions have arisen to provide channels for soliciting public feedback. As with most legal and ethical systems, Islamic law also proscribes procedures for anyone who has been harmed to seek fair and equitable redress. Ahmad also explores how Islamic norms and institutions for involving communities in the management of natural resources may provide a specific context by which contemporary Islamic law on public involvement may be further developed and articulated. From a secular perspective, the integration of ethical, legal, and religious approaches of these provisions of Islamic law is fascinating. Yet, to millions of Muslims around the world, this is is how they live their lives. Accordingly, Islamic law offers another framework in which public involvement may be advanced, as well as a body of experiences and approaches that can illuminate the global discourse on emerging norms of public access to information, participation, and justice.

Feldman advances the business case for public involvement in the third chapter. He focuses on the convergence of public participation and sustainable business practices. This chapter examines some of the innovative approaches that businesses have developed in recent years to engage their workers and neighboring communities. These mechanisms for enhanced public participation include, among others, citizen or community advisory panels, good neighbor agreements, and sustainable community initiatives. Feldman concludes the chapter with a discussion of some cutting-edge approaches that are emerging to enhance public involvement in business activities.

In addition to these three chapters, many of the other chapters examining regional and international initiatives to engage the public set forth other bases for public involvement. Many of these emphasize the benefits of public involvement to the governance process.[1] Public involvement improves the ultimate decision by providing independent review of the proposed decision and analysis of the underlying factual and legal bases. It builds public support for the final decision. Conversely, when the public is not involved, projects often run into technical and financial difficulties arising from the failure to effectively engage the affected parties. Transparency and public participation, as well as the right to challenge illegal actions before an independent court, reduce opportunities for corrupt practices or arbitrary decisions. These are but a few of the ways in which public involvement improves governance.

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[1] *E.g.*, Aboubacar Fall, *Implementing Public Participation in African Development Bank Operations*, in this volume; Carl Bruch & Dorigen Fried, *Public Involvement in the Management of International Watercourses*, in this volume; Bruce Rich & Tomás Carbonell, *Public Participation and Transparency at Official Export Credit Agencies*, in this volume.

CONSTITUTIONAL PROCEDURAL RIGHTS: ENHANCING CIVIL SOCIETY'S ROLE IN GOOD GOVERNANCE

*Carl Bruch and Sarah King**

There has been a growing recognition that procedural rights are effective legal and policy tools through which the civil society can protect and uphold substantive rights. Found in international agreements, national constitutions, and laws, these procedural rights include: the right to obtain information; the ability to participate in projects, policy discussions, and in some cases legislation; and the right to seek redress when procedural or substantive rights have been violated.

This chapter focuses on the procedural rights enshrined in national constitutions that protect and guarantee the rights of individuals to have access to information, participate in decisions, and obtain access to justice in order to uphold their substantive rights. We briefly consider the right to a healthy environment and the right to life, substantive rights found in many constitutions, which may be strengthened through procedural rights. In this chapter, procedural rights are considered in the particular context of the environment, but in most cases these rights can also be extended to the social and economic pillars of sustainable development.

Different legal regimes vary in their interpretation and implementation of procedural rights. Historically, common law countries have been more aggressive in protecting individuals. The existence of an independent judiciary with the ability to review and pass judgement on acts by the executive and legislative branches allows a respect for individual rights. Civil law countries, on the other hand, have traditionally de-emphasized the judicial and citizen ability to enforce laws. Under civil law it is much more difficult for the judiciary and citizens to review and influence executive and legislative actions.

This chapter will analyze procedural constitutional provisions, focusing on experiences in Africa but also drawing upon the experiences of other regions. Therefore, while this chapter explores how African constitutional provisions in particular can be utilized to create real, enforceable rights, it also examines the broader implications of fundamental human rights to public involvement as they have been enshrined in national constitutions around the world.

Constitutional provisions offer broad and powerful tools for protecting the environment and ensuring people's voice in sustainable development. However, to date these tools have gone largely underutilized. Almost all African constitutions include substantive provisions that ensure either a right to a healthy environment or a right to life, the latter of which is often held to imply a right to a healthy environment in which to live that life. These substantive rights are enforceable through procedural rights—which include access to information, public participation, and access to justice. Procedural rights open up courts to citizens to enforce their constitutional rights, which strengthens the judiciary, empowers civil society, and fosters an atmosphere of environmental accountability in the legislative and executive branches.

This chapter highlights relevant provisions from the constitutions of 53 African countries (excluding the territories of the Canary Islands, the Madeira Islands, Reunion, and Western Sahara). In addition, given the ongoing and proposed constitutional reforms in various African countries, this chapter examines the opportunities that such provisions present for improving governance, addressing issues of participatory rights, and ensuring implementation and enforcement of these rights.

Section I of this chapter discusses general considerations, including the nature of constitutions and constitutional law, how the different legal traditions in Africa affect the interpretation and application of procedural rights, and the persuasive authority of cases from other jurisdictions in Africa and elsewhere in the world. Section II briefly summarizes the constitutional right to a healthy environment and the right to life. Section III examines various constitutional procedural rights, such as freedom of association, access to information, public participation, and access to justice. Section IV presents some final thoughts on realizing the promise of procedural rights and other constitutional provisions, and using these tools to effect economic, social, and environmental change to a more sustainable world.

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I. GENERAL CONSIDERATIONS IN GIVING FORCE TO CONSTITUTIONAL PROTECTIONS

As many nations around the world develop detailed laws, regulations, standards, and guidelines to govern environmental and human rights violations, it is worth considering what is gained by resorting to constitutional provisions to promote sustainable development and good governance. Many countries have issued broad statements or declarations of commitments to further access to information, public participation, and access to justice. However, these assertions are often undermined in practice. Procedural rights can be strengthened and broadened through constitutional provisions ensuring the free flow of information and timely access to courts. With the growing trend of constitutionalism, which emphasizes the constitution as a source of binding legal obligations and rights, courts increasingly give force to substantive constitutional provisions, thus ensuring citizens' rights.

A nation's constitution is more than an organic act establishing governmental authorities and competencies: the constitution also guarantees citizens basic fundamental human rights. These rights, such as the right to life, the right to redress, and increasingly the right to a clean and healthy environment, are often substantive in nature but are usually enforceable through procedural rights also recognized in the constitution.

Constitutional provisions that enumerate individual rights have not always been directly enforceable by citizens and even now do not always create an affirmative right. However, the consistent trend is toward giving force to these provisions. Constitutional provisions may be used both *defensively* to protect against actions that violate a citizen's constitutional rights (such as a government's unconstitutional interference with an organization or voluntary association); and *affirmatively* to compel the government to ensure certain constitutional rights (such as requiring an agency to provide information).

Procedural and substantive constitutional rights can be valuable for many reasons in environmental protection, sustainable development, and good governance. First, the frequently incomplete or imprecise nature of legislative and regulatory regimes governing sustainable development strengthens the relevance of procedural rights and constitutional principles and provisions. In these situations, constitutional provisions can provide a safety net for resolving problems that existing legislative and regulatory frameworks do not address.

Second, many environmental and procedural concerns are often viewed as secondary to other priorities, such as economic development. By referring to the environmental and procedural rights enshrined directly in the constitution, advocates can elevate environmental and sustainable development cases to the level of constitutional cases involving fundamental human rights.[1] Constitutional entrenchment of procedural rights also provides a firm basis for public involvement in environmental and sustainable development issues that is less susceptible to the political airs of the day. As a result, citizens' values are more likely to endure, as constitutional reform usually is time-consuming, complicated, and requires super-majority approval. Also, cases involving constitutional questions are often appealed to a higher authority, such as a country's constitutional court or supreme court.

Finally, procedural rights enable citizens to protect substantive constitutional rights, such as the right to a healthy environment, and to pursue their advocacy work more effectively. This chapter explores these procedural right provisions and how they have been applied in practice. Giving force to constitutional provisions that guarantee freedom of association, access to information, public participation, and access to justice (including legal standing), is particularly important in ensuring that peoples' substantive rights are protected. These procedural rights promote the transparency, participation, and accountability that form the cornerstones of good governance.

The effectiveness of procedural rights depends on a variety of factors. The presence or absence of a particular provision in a country's constitution is not in itself dispositive of the strength of the right. In some countries, express constitutional provisions may be honored more in their breach than in their adherence, while in countries lacking comparable constitutional provisions courts may imply constitutional rights, even in the absence of a textual provision. Nevertheless, constitutional environmental protections can be tools—and potentially powerful tools—for advocates seeking to strengthen environmental protection and promote sustainable development in a wide range of contexts and legal traditions.

A. Implications of Different Legal Traditions

African countries have different legal traditions: namely, common law, civil law, and Islamic law, as well as some hybrid systems. Nevertheless, these legal systems share many common underlying principles and values, particularly the fundamental human rights that are embodied in their respective constitutions.

The different legal traditions of African nations have influenced the development of constitutional provisions relating to procedural rights throughout the continent

[1] *See, e.g.*, Godber W. Tumushabe, *Environmental Governance, Political Change and Constitutional Development in Uganda*, *in* Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa 63, 78 (H.W.O. Okoth-Ogendo & Godber W. Tumushabe eds., 1999).

and will likely influence their implementation in each country. In Africa, approximately one-half of the nations have civil law traditions derived from European civil codes, one-third have common law traditions derived from British rule, and the remaining have primarily non-secular Islamic traditions.[2] In addition, legal systems based on the French civil law tradition differ from those of Spanish or Portuguese origin, and these civil law systems vary from country to country, just as common law or Islamic systems differ. Despite the differences, striking agreement exists among the different legal traditions on procedural rights and certain substantive rights (namely the right to life).

Many of the differences between common and civil law traditions can be traced to each nation's historical experience with judges.[3] In pre-Revolutionary France, judges tended to interpret the law in favor of the aristocracy; in England, the judges were comparatively more fair. Thus, when the new American and French constitutions were drafted in the 18th century, civil law and common law countries took different paths with respect to the powers of the judiciary.[4]

Civil law traditions, drawn from continental Europe and the Napoleonic Code in particular, disfavor judge-made law because judges, unlike the legislature, are not elected or accountable to the populace. Consequently, civil law systems generally eschew uncodified principles, such as nuisance, that have provided opportunities for judicial gap-filling in common law nations. In most civil law systems, only those actions or procedures explicitly provided for by law are allowed, so legislation is much more important and specific than in common law systems. Thus, civil law nations generally seek to enumerate all the rights and responsibilities in legal codes and constitutions.

In contrast, common law traditions, originally based on the British legal system, emphasize basic principles, which are then applied to the facts of a particular case. These basic principles may be derived from legislation but are often uncodified and manifest themselves through a body of case law interpreting and applying the principles. To ensure predictability and equal application of the law, judges are bound by earlier similar decisions (the doctrine of *stare decisis*), leading to a large body of judge-made law that complements the statutory and regulatory norms. This process stands in stark contrast to the traditional civil law perspective that judges should only apply the law, not interpret or create law.[5]

In modern times, civil and common law traditions have begun to merge in some respects. For instance, most scholars of civil law, as well as judges and legislators, recognize that it is impossible to write a code that will provide for all eventualities. Consequently, civil law advocates and judges increasingly look to previous judicial decisions (from their country and abroad) for persuasive authority when considering novel legal issues. Similarly, common law jurisdictions have been codifying a large volume of laws and regulations. Stacking all the books of the United States Code (the official compilation of U.S. laws) would yield a pile three meters tall, and the U.S. Code of Federal Regulations would top six meters, with probably more provisions than any civil law system, now or ever. Curiously, in Africa, environmental laws and regulations in common law countries are often longer and more detailed than comparable codes in civil law countries.

In contrast to both common law and civil law traditions, Islamic legal traditions draw their norms from the Qur'an and the *fiqh* (Islamic jurisprudence).[6] The *fiqh* refers to consensus of Muslim scholars (*ijma'a*), legal precedent (*qiyas*), custom, and other secondary sources. Islamic legal codes clarify and crystallize these traditions, and the courts enforce the codes rather than the traditions. In this respect, Islamic traditions resemble civil law traditions, with the emphasis on applying the codified law. However, in applying the provisions, Islamic courts will consider how other courts have interpreted the provisions, in a manner more akin to common law traditions. Further, in recent years, national statutes, including environmental laws, have supplemented the Islamic base. As a result, these countries now have a unique mixture of inherited colonial law, post-independence constitutional law, Islamic public and private law, and in some cases, a rich body of traditional laws and custom.

B. The Rise of Constitutionalism

Constitutionalism emphasizes the primacy of the constitution as a source of legal rights and obligations and empowers advocates and courts to look to the constitution as a positive source of law.[7] Most constitutions

[2] These numbers are approximate, since many countries have legal traditions that are mixtures of more than one of these, as well as pre-colonial traditions.

[3] For a good review contrasting civil and common law traditions, see John Henry Merryman, The Civil Law Tradition (2d ed. 1985).

[4] *Id.* at 15-16.

[5] Nevertheless, there remains a vibrant debate in common law nations about the degree to which judges should merely apply the law.

[6] *See* Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, *in* Human Rights Approaches to Environmental protection 285, 286 (Alan E. Boyle & Michael R. Anderson eds., 1998) (noting that approximately 500 verses of the Qur'an refer to the relationship between people and the environment). Although the environment has a significant role in the Qur'an, to date it has had a lower legal profile in Islamic jurisdictions.

[7] For a variety of African perspectives on constitutionalism, see State and Constitutionalism: An African Debate on Democracy (Issa G. Shivji ed. 1991) (particularly H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox* (ch. 1); Issa G. Shivji, *State and Constitutionalism: A New Democratic Perspective* (ch. 2); and Mahmood Mamdani, *Social Movements and Constitutionalism in the African Context* (ch. 16)).

include a set of fundamental rights, frequently termed the Bill of Rights, to be enjoyed by all citizens.[8] While these provisions appear to confer objective rights upon the population, courts often held that the rights were not self-executing and required implementing legislation to set the scope of the rights and the means for exercising them. With such interpretations, citizens were unable to realize their fundamental rights if the government failed to enact implementing legislation or enacted legislation that was very restrictive. With the rise of constitutionalism globally, courts increasingly view the constitution as an independent source of substantive law and rights, enforceable even (or particularly) in the absence of implementing legislation. In this process, courts have recognized that a constitution guarantees certain inalienable rights to each person, especially for those people in the minority (where legislation by the majority runs the risk of infringing on their rights).[9]

In common law systems, the constitution is the "fundamental and paramount law of the nation."[10] Looking to the constitution as a source of fundamental rights and obligations is well-established in most common law jurisdictions. However, some African common law countries have only recently incorporated binding rights into their constitutions. For example, before 1984, Tanzania's Constitution enumerated the rights in the preamble to the constitution, and as a result most commentators held that they had no legal force.

Traditionally, civil law systems maintain only three sources of law for a judge to apply: legislative statutes, administrative regulations, and custom. With the trend towards constitutionalism, however, the hierarchy of laws in most nations begins with the constitution and is followed by statutes, regulations, and custom.[11] Civil law countries have also developed mechanisms, including constitutional courts, for reviewing the constitutionality of legislative and administrative acts.

With the primacy of the constitution, judicial review of legislative acts (determining whether a particular legislative act is void because it conflicts with the constitution) starts to blur the line between judicial and legislative authority.[12] Professor Merryman observed:

> The power of judicial review of the constitutionality of legislative action has long existed in Mexico and most other Latin American [civil law] nations (though it is not always aggressively exercised). And since World War II, judicial review in one form or another, has appeared or reappeared in Austria, France, Germany, Italy, Yugoslavia, and Spain.[13]

In some African countries, however, judicial review, particularly of legislative acts, remains elusive. For example, Cameroon's Constitution provides that either the legislature or one-third of the members of parliament may refer a matter to a constitutional court, but citizens on their own are currently unable to vindicate their constitutional rights because the constitution does not explicitly empower them to appeal to the constitutional court. The trend of constitutionalism is changing this situation around Africa as civil law countries, such as Niger, increasingly allow citizens to invoke their constitutional rights in court.[14]

C. Applicability of Experiences from Other Jurisdictions

Despite the increase of constitutional norms in Africa, most nations have yet to interpret or apply such norms, due in part to how recently these provisions were incorporated into constitutions. In a few cases, countries such as Mozambique have invoked constitutional provisions to justify the promulgation of environmental laws. However, the significant absence of African court cases interpreting these provisions suggests that it could be productive to consider how courts in other countries implement constitutional protections.

When faced with a matter of first impression in its own country, a court will often look to cases from other countries. While such precedents are non-binding, they provide guidance, or persuasive precedent, for judges. For instance, when the Zambian Supreme Court held that a statute requiring permits for a peaceful assembly was unconstitutional, the court favorably cited decisions from England, Ghana, India, Nigeria, Tanzania, the United States, and Zimbabwe, as well as the European

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[8] *Cf.* Merryman, *supra* note 3, at 95-96.

[9] *See, e.g.*, Gary C. Bryner, *Constitutionalism and the Politics of Rights*, *in* Constitutionalism and Rights 7, 8 (Gary C. Bryner & Noel B. Reynolds eds., 1987) ("Constitutionalism has at its roots the idea of protecting minorities from majoritarian actions …."); Merryman, *supra* note 3, at 96.

[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[11] Merryman, *supra* note 3, at 24, 136 ("The movement toward constitutionalism in the civil law tradition can be seen as a logical reaction against the extremes of a secular, positivistic view of the state"); *see also* Victor LeVine, *The Fall and Rise of Constitutionalism in West Africa*, J. Mod. Afr. Stud. (June 1997).

[12] *See* Merryman, *supra* note 3, at 24.

[13] *Id.*

[14] *E.g.*, Arrêt No. 96-07/Ch. Cons. (July 21, 1996) (Constitutional Chamber decision allowing political parties to challenge the dissolution of the Independent National Electoral Commission and replacing it with another, but upholding the government's action on the basis of a 1960 decree); *see also* Syndicat National des Enseignants du Niger v. Préfet Président de la Comminauté Urbaine de Niamey, Ordonnance de Référé No. 005/Pt/ch/adm/CS (Dec. 10, 1998) (right to demonstrate).

Court of Human Rights.[15] Thus, when courts, particularly common law courts, first interpret constitutional rights that may be termed "fundamental" or "human" rights, they frequently consider how other jurisdictions have interpreted or applied similar provisions.

D. Additional Constitutional Considerations

Modern constitutions tend to be longer, as they frequently incorporate new provisions in addition to the various constitutional rights and obligations that other countries have enumerated. In this way, constitutional law borrows from and builds on the constitutions and experiences of other countries. Nonetheless, although longer, more detailed constitutions are increasingly likely to include explicit provisions that clarify the scope of the enumerated rights, most countries still rely on legislation to spell out the precise nature of the rights and obligations.

Within the existing framework of enforceable constitutional law, constitutions can provide an avenue for developing, implementing, and enforcing substantive principles implicitly or indirectly. First, in addition to providing substantive protections, such as a right of access to information, constitutions can explicitly elevate the status of international agreements and place them on a par with or above domestic law. The African Charter of Human and Peoples' Rights, which is binding on all Organisation of African Union (OAU) members, guarantees that "[e]very individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his/her fundamental rights …."[16] When implementing national legislation is lacking, environmental advocates could rely on constitutional provisions that incorporate guarantees such as this enshrined in the African Charter and other international agreements.

Second, constitutions can provide for unenumerated penumbral rights. Penumbral rights are rights that are not specifically mentioned in the constitution but that are consistent with its principles and existing rights. For example, Article 29 of Eritrea's Constitution provides that "[t]he rights enumerated in this Chapter shall not preclude other rights which ensue from the spirit of this Constitution and the principles of a society based on social justice, democracy and the rule of law."[17]

Penumbral rights can enable courts to incorporate emerging fundamental human rights without requiring the court to develop a tortured interpretation of an existing constitutional provision.[18] Thus, for example, the 1972 Stockholm Declaration,[19] the 1992 Rio Declaration,[20] and the impressive body of international environmental conventions and practice since the early 1970s argues strongly for a fundamental human right to a healthy environment and the incorporation of this right into constitutional jurisprudence.

II. SUMMARY: RIGHT TO A HEALTHY ENVIRONMENT AND RIGHT TO LIFE[21]

The right to a healthy environment and the right to life are the two substantive constitutional rights most frequently referred to in relation to environmental cases and issues. These rights or constitutional environmental provisions are generally one of three types: (1) fundamental rights and duties, (2) general constitutional rights and duties, or (3) vague rights and duties. Most African constitutions granting an environmental right to a healthy environment and imposing environmental duties do not place them in a constitutional section designated "fundamental," but the rights and duties nevertheless assume that status through their language and constitutional nature. Right to life clauses, on the other hand, are typically represented in constitutions as fundamental rights.

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[15] Christine Mulundika v. People, 1995/SCZ/245 (Nov. 21, 1995) (unreported), *available at* http://zamlii.zamnet.zm/courts/supreme/full/95scz25.htm (last visited June 24, 2002); *see also* Derrick Chitala v. The Attorney-General, 1995/SCZ/14 (unreported), *available at* zamlii.zamnet.zm/courts/supreme/full/95scz14.htm (last visited June 24, 2002) ("the Rules of the Supreme Court of England … apply to supply any casus omissus in our own rules of practice and procedure").

[16] African Charter on Human and Peoples' Rights, art. 7(1)(a), done on June 26, 1981, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 59 [hereinafter African Charter].

[17] Article 32 of Algeria's Constitution is more general, implying penumbral rights from unenumerated fundamental rights: "The fundamental liberties and the Rights of Man and of the citizen are guaranteed." Similarly, Article 1 of Gabon's Constitution provides that "[t]he Gabonese Republic recognizes and guarantees the inviolable and imprescriptible rights of Man, which obligatorily constrain public powers."

[18] For example, in the United States, the Ninth Amendment to the Constitution provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Courts have interpreted this provision to include a variety of unenumerated constitutionally protected rights, notably the right to reproductive choice. *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (establishing a "right of privacy," particularly regarding access to contraception for married couples); *see also id.* (Goldberg, J., concurring) (asserting that whether a putative right is a penumbral constitutional right is to be determined by "look[ing] to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] as to be ranked as fundamental.' "); Roe v. Wade, 410 U.S. 113 (1973) (establishing a penumbral right to choose an abortion within the penumbral privacy right). The right to a healthy environment, however, was never incorporated as a penumbral constitutional right in the United States.

[19] Declaration of the United Nations Conference on the Human Environment, done at Stockholm, Sweden on June 16, 1972, U.N. ESCOR, U.N. Doc. A/CONF.48/5, 11 I.L.M. 1416 (1972).

[20] Rio Declaration on Environment and Development, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1972).

The potential breadth of a generalized right to a healthy environment or right to life can be both a strength and a weakness. It should not be an impediment to application or enforcement, and may in fact be used to strengthen the tools available to the citizenry and courts seeking to apply these rights to protect the environment. The constitutional right to a healthy environment has been applied and interpreted in both common and civil law jurisdictions in Asia, Europe, and Latin America, and frequently implicates well-accepted environmental principles and mechanisms, such as environmental impact assessment, the precautionary principle, and the polluter-pays principle.

Often, the constitutional right to life is the sole basis for a court's decision to extend protection or prevent damage to an environmental resource. When a nation lacks both an express constitutional right to a healthy environment and comprehensive environmental statutory and regulatory systems, or alternatively lacks adequate remedies under those systems, the constitutional right to life becomes all the more important. The right to life has often been interpreted to imply a right to a healthy environment that sustains life or contributes to the quality of life. Accordingly, the right to life can protect the environment in which people live and the environmental resources upon which people depend.

Constitutional environmental provisions also impose duties to protect the environment, either through explicitly imposing a duty on the state and other parties or by implicitly granting a right to a healthy environment. Although the legal effect of such constitutionally provided duties is unclear, courts occasionally have relied upon the fundamental duties to interpret ambiguous statutes.[22] In countries with limited budgets and a priority on development, the courts' foresight and creativity are necessary to give meaning to these environmental protections.

In two cases, the Indian Supreme Court found that in order for the constitutional provision imposing a duty upon citizens to achieve real significance, the court needed to interpret the provision as extending correlative duties to the government, media, and educational system.[23] The court opined that imposing a constitutional duty on ordinary citizens to protect the environment is in vain if the citizens are not knowledgeable about the subject matter. African judiciaries will need to be at least as creative in order to give practical effect to their constitutional environmental provisions. Court decisions such as these have broad implications for the importance and effectiveness of public participation, access to information, and access to justice.

III. PROCEDURAL RIGHTS

In addition to providing substantive rights to life and a healthy environment, virtually all African constitutions provide procedural rights that can be indispensable in implementing and enforcing those substantive rights. These procedural rights provide civil society with the mechanisms for learning about actions that may affect them, participating in governmental decisionmaking processes, and holding the government accountable for its actions, as well as enabling civil society to come together to exercise these procedural rights for advocacy purposes.

The procedural rights discussed in this section fall generally into three categories: (1) public participation in decisionmaking (which includes freedom of association), (2) access to information, and (3) access to justice (including recognition of *locus standi* and explicit recognition of public interest litigation). Other rights, such as the freedoms of opinion, expression, and the press, can be relevant to advocacy and governance, and merit further investigation.

A. Public Participation in Decisionmaking

One emerging procedural right is the right of the public to participate in government decisions. Not only do regional and international agreements, such as the Rio Declaration, the Aarhus Convention, and the ISP, provide for public participation in decisionmaking processes,[24] but a small though increasing number of national constitutions have also incorporated similar provisions. The right of public participation can take many forms: the right to know about pending government decisions; public hearings; the opportunity to present written or oral comments and evidence; the requirement that government consider citizen comments; and the

[21] *See generally* Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 Colum. J. Envtl. L. 131, 146-58, 175 (2001).

[22] Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai, A.I.R. 1976 S.C. 1455, 1465 (India).

[23] M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 1115, 1126-27 (India); M.C. Mehta v. Union of India, S.C. of India Writ Petition (Civil) No. 860 of 1991.

[24] *See* Rio Declaration, *supra* note 20, prin. 10; UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, arts. 6, 7, 8, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention] (respectively relating to public participation in specific projects or activities; programs, plans, and policies; and general rules and regulations); Organization of American States Inter-American Council for Integral Development, Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, Policy Recommendations 2, 3, CIDEI/RES. 98 (V-O/oo), OEA/Ser.W/II.5,CIDI/doc.25/00 (Apr. 20, 2000), adopting Organization of American States, Unit for Sustainable Development and Environment, Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (1999) [hereinafter ISP].

opportunity to present petitions, complaints, or grievances to administrative authorities.

The constitutions of Cape Verde[25] and Gambia[26] allow citizens to petition "public authorities" or "the Executive" to protect their rights and, in the case of Cape Verde, to protest abuse of power. These provisions differ from the access to justice provisions discussed below in that they provide for an administrative process to register grievances. Eritrea has a similar right to petition, but also recognizes an explicit "right to be heard respectfully by the administrative officials concerned" and provides for "due administrative redress" for anyone "whose rights or interests are interfered with or threatened."[27]

Liberia and South Africa recognize broad rights of public participation. South Africa's constitution also provides for public access to and participation in the National Assembly,[28] the National Council,[29] and provincial legislatures.[30] Article 7 of Liberia's constitution requires "all government and private enterprises" to

> manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia as a whole.

While this sort of provision is very broad, it can provide an entry point for advancing public participation in environmental and humanitarian matters. In South Africa, land owners and environmental advocates opposing a coal mining license successfully argued that they had a constitutional right to be heard.[31] South Africa's Supreme Court of Appeals held that when an application for a mining license is made, "interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing. If necessary, a more formal procedure can then be initiated."[32] In reaching this decision, the court noted that "[o]ur constitution, by including environmental rights as fundamental, justifiable human rights, by necessary implication requires that environment considerations be accorded appropriate recognition and respect in the administrative processes in our country."[33]

One of the most powerful tools of public participation is the ability of the public to initiate or approve legislation. Many U.S. states have constitutional provisions that enable citizens to prepare draft legislation that the general public adopts or rejects through a popular referendum, and most states similarly require that the legislature refer proposed amendments to the state constitution to the ballot box for voter approval.[34] This ballot initiative/referendum process has been used to pass legislation protecting wetlands in Florida, prohibiting cyanide open pit mining in Montana, and empowering individuals to bring citizen suits that seek to enforce water pollution laws in California.[35]

In the Netherlands, courts have held that a substantive constitutional right to a healthy environment necessarily includes the procedural rights of access to information and participation in decisions that could affect the environment. As a result, courts have applied a strict standard of review for public participation in environmental cases.[36] For example, a Dutch court voided a license for a nuclear power plant, when there had been insufficient public participation in the decisionmaking process leading up to the issuance of the license.[37]

Similarly, the Constitutional Court of Slovenia invalidated a long-term development plan, which provided for quarrying operations near a village that would impact the quality of life. The government had presented the draft changes to the development plan at only one public hearing, and that was at the regional center; even then, not all the relevant material was made available. The court invalidated the long-term plan because the

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[25] CAPE VERDE CONST. art. 57 ("Every citizen shall have the right to present, in writing, individually or collectively, to the public authorities, petitions, complaints or claims for the protection of his rights or against illegalities or abuse of power in accordance with the law.").

[26] GAMBIA CONST. art. 25(f) (establishing the "freedom to petition the Executive for redress of grievances…").

[27] ERITREA CONST. art. 24.

[28] SOUTH AFRICA CONST. art. 69(d) ("The National Council of Provinces or any of its committees may … receive petitions, representations or submissions from any interested persons or institutions"). For a general review of ways to develop South African public participation in environmental decisionmaking, see ANGELA ANDREWS, PUBLIC PARTICIPATION AND THE LAW (1999).

[29] SOUTH AFRICA CONST. art. 72 ("The National Council of Provinces must: (a) facilitate public involvement in the legislature and other processes of the Council and its committees; and (b) conduct its business in an open manner, and hold its sittings and those of its committees, in public …").

[30] *Id.* art. 118 ("A provincial legislature must … facilitate public involvement in the legislative and other processes of the legislature and its committees …").

[31] Director: Mineral Development v. Save the Vaal Environment, Case No. 133.98 (Supreme Court of Appeal of South Africa, Mar. 12, 1999).

[32] *Id.* para. 20.

[33] *Id.*

[34] *See, e.g.*, DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989).

[35] *See, e.g.*, Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (West 1991 & Supp. 1999); *see also* DAVID D. SCHMIDT, GREEN POLITICS: ENVIRONMENTAL INITIATIVES ON STATE AND LOCAL BALLOTS IN 1990 15 (1990).

[36] Jonathan Verschuuren, The Constitutional Right to Environmental Protection, *available at* till.kub.nl/data/topic/envartcult.htm (last visited Aug. 1, 2002).

[37] Council of State (May 29, 1992), 1992 MILIEU EN RECHT 477 (*cited in* DAVID D. SCHMIDT, GREEN POLITICS: ENVIRONMENTAL INITIATIVES ON STATE AND LOCAL BALLOTS IN 1990, 15, n.13 (1990)).

government had violated the villagers' right to participate in a planning process that could affect their quality of life.[38]

In both of these cases the decisions rely on the constitutional right to a healthy environment. One of the few cases to interpret a constitutional right to participate is the Peruvian case *Sociedad Peruana de Derecho Ambiental v. Ministerio de Energía y Minas*,[39] which relied on the public's constitutional right to participate as well as the right of access to information. As these cases illustrate, the public right to participate in the legislative process, as well as the administrative processes of developing and applying regulations, is still emerging, and only subsequent practice will clarify the scope of these rights.

Freedom of association is a related right that is fundamental for advocacy work and an essential enabling tool of public participation. By forming and participating in nongovernmental organizations (NGOs), individuals can more effectively advocate for their cause.[40] With the support of an organization and corresponding notion of strength in numbers, fears of retaliation can be allayed and people are more likely to take an active role in matters that affect them. By joining with others in an association, citizens can have a stronger say in these matters, as many people speaking with a single, clear voice can be more effective. Similarly, association allows for economies of scale, as financial, technical, and labor costs are shared among the members, enabling them to participate collectively where it would be prohibitively expensive to participate individually. Finally, associations can focus on an issue and draw upon their members as needed, thereby enabling the members' interests to be advanced in ways that would be impossible for individuals to do on their own.

All African nations ensure the constitutional right of their citizens to associate to promote business, personal, or other interests. The provisions of a few countries' constitutions, such as Angola's,[41] suggest that this right might be limited to professional or trade unions, but this is distinctly a minority position.

The breadth and strength of a constitutional right of association may depend upon national laws that prescribe the terms for its exercise. Approximately one-half of the constitutional provisions grant the right subject to "conditions fixed by law," or a similar claw-back clause (so-named because it claws back some of the rights just granted in the provision), with the overwhelming number of claw-back clauses found in civil law constitutions. While a claw-back clause may diminish the strength of the freedom of association because it explicitly enables legislation to set limits on the right, in practice such limits may not be much more than the reasonable limitations implied in other kinds of provisions.[42]

Notwithstanding the recognized value of and need for the right of association, many African organizations operate with the fear that if they criticize the government they will be deregistered. For example, Zimbabwe had a Private Voluntary Organisations (PVO) Act, which granted the Minister of Public Service, Labour and Social Welfare the power to suspend the entire executive board of an NGO without providing a reason and then to appoint a new executive board until the next election. In 1995, the Minister suspended Sekai Holland, Chairperson of the Association of Women's Clubs, as well as eleven others. The executive board sued the Minister, claiming that the operative section of the PVO Act was unconstitutional and therefore *ultra vires* (outside of the law). Specifically, they alleged that the Act infringed their civil rights without affording them a fair hearing,[43] unconstitutionally infringed their freedom of expression,[44] and unconstitutionally infringed their right to assemble freely and associate with others.[45] Zimbabwe's Supreme Court agreed, holding Section 21 of the PVO Act unconstitutional and reinstating the NGO's executive board.[46]

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[38] *See* Milada Mirkovic & Andrej Klemenc, *Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe: Slovenia*, *available at* www.rec.org/REC/Publications/PPstatus/Slovenia.html (last visited Aug. 2, 2002).

[39] Sociedad Peruana de Derecho Ambiental contra Ministerio de Energia y Minas (Habeas Data), Expediente No. 1658-95, Dictamen Fiscal No 122-96 (Sala de Derecho Constitucional y Social, June 19, 1996). *See generally* Jorge Caillaux et al., *Environmental Public Participation the Americas*, in this volume; Marcos Orellana, *Unearthing Governance: Obstacles and Opportunities for Public Participation in Minerals Policy*, in this volume.

[40] *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association ….").

[41] ANGOLA CONST. art. 33 ("The People's power Assemblies are the highest organs of the State at each politico-administrative level in the country. The People's Power Assemblies are constituted by elected deputies who shall answer to the people in the exercise of their mandate.").

[42] *Cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 n.17 (1982) (suggesting that reasonable "limitations on the right of access [to information] that resemble [permitted] 'time, place, and manner' restrictions on protected speech" might be constitutional).

[43] ZIMBABWE CONST. art. 18(9) ("Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.").

[44] *Id. art.* 20(1) ("No person shall be hindered in the enjoyment of his freedom of expression ….").

[45] *Id.* art. 21(1) ("No person shall be hindered in his freedom of assembly and association ….").

[46] Reported in Simeon Mawanza, "Supreme Court Saves Zimbabwean NGOs," NETWORK OF SOUTHERN AFRICAN LEGAL AID & LEGAL ADVICE NGOS NEWSLETTER (May 1997).

In addition to explicit provisions, courts have implied the freedom of association from constitutional rights to freedom of speech and peaceable assembly. For instance, the First Amendment to the U.S. Constitution provides for unqualified freedoms of assembly, speech, press, and petition. Relying principally on the first two freedoms, the U.S. Supreme Court has held that the freedom of association is constitutionally protected. The Court has particularly emphasized these constitutional protections in cases where a group advances unpopular ideas and where government constraints could chill the exercise of the right of association. Thus, for instance, civil rights groups did not have to disclose their membership lists, where doing so would substantially restrain the members' exercise of their right to freedom of association.[47]

B. Access to Information

In order for the public to be effective advocates for its causes, access to relevant information is important: civil society needs to know of threats and trends and understand the origins and consequences of these factors. Although access to information is a relatively new norm, 21African countries already recognize this important right, with 15 explicitly granting citizens the right of access to information generally or specifically held by the state. At least another five countries incorporate access to information through reference to the Universal Declaration of Human Rights or the African Charter on Human and Peoples' Rights,[48] and some countries, such as Kenya, basically repeat or elaborate on the provisions of these conventions.[49]

Congo, South Africa, and Uganda have some of the stronger constitutional provisions on access to information. Section 32(1) of South Africa's 1996 Constitution (within its Bill of Rights) guarantees to all "the right of access to any information held by the state; and … held by another person and that is required for the exercise or protection of any rights." When read in conjunction with the constitutional rights to a healthy environment[50] and life,[51] Section 32(1) ensures the right to the information necessary for environmental advocacy.

Although South Africa has yet to develop jurisprudence interpreting this provision, it has been utilized. For instance, when the Legal Resources Centre (LRC), a South African NGO, sought technical information from the South African Ministry of Environmental Affairs regarding oil refinery processes and releases, the Ministry refused on the grounds that the information was a protected trade secret. The LRC prepared to sue the Ministry under Section 32, and the Ministry and refineries produced the requested information before the case could be filed.

Similar to South Africa's Constitution, Article 27 of the Constitution of Congo provides for access to information held by the government and by private parties:

> Freedom of the press and freedom of information shall be guaranteed … Access to sources of information shall be free. Every citizen shall have the right to information and communication. Activities relative to these domains shall be exercised in total independence, in respect of the law.

Uganda similarly provides for wide access to state-held information, "except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."[52] In addition, many constitutions specify that national legislation may define the parameters of access to information. As discussed in the context of the right of association, these implementing laws need to be reasonable so as to preserve the meaning of the right. For instance, Section 32(2) of South Africa's Constitution states "legislation … may provide for reasonable measures to alleviate the administrative and financial burden on the state."

In five countries (Kenya, Nigeria, Sierra Leone, Zambia, and Zimbabwe), citizens have the constitutional *freedom* to receive information free from government interference. A typical provision would guarantee citizens the right to "receive and impart ideas and information without interference."[53] In addition, Article 8 of Senegal's Constitution provides that "everyone has the right to be informed without hindrance from the sources accessible to all." Innovative advocacy may be able to draw out a *right* to receive information from this freedom, but until this theory is tested in court, the extent to which these provisions grant citizens a right to demand state-held information remains unclear.

The Indian Supreme Court has held that a constitutional right of access to information is implicit in the constitutional rights to free speech and expression, as well

[47] *E.g.*, NAACP v. Alabama *ex rel.* Patterson, *supra* note 40, at 462 (holding that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").

[48] *See* Universal Declaration of Human Rights, art. 9(1), G.A. Res. 217A, UN GAOR, 3d Sess., UN Doc. A/810 (1948) [hereinafter UDHR] ("Every individual shall have the right to receive information."); African Charter, *supra* note 16, art. 9.

[49] *See* Connie Ngondi-Houghton et al., The State of Freedom of Information in Kenya 12-14 (1999).

[50] South Africa Const. art. 23 ("Everyone has the right to an environment that is not harmful to their health or well-being …").

[51] *Id.* art. 11 ("Everyone has the right to life.").

[52] Uganda Const. art. 41(1).

[53] *E.g.*, Nigeria Const. art. 38(1).

as in the right to life.[54] In the 1982 landmark case of *S.P. Gupta v. President of India*, the Supreme Court asserted:

> This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistent with the requirement of public interests, bearing in mind all the time that disclosure also serves an important aspect of public interest.[55]

Subsequently, in 1988, the Supreme Court held that access to information, or the right-to-know, was a basic public right and essential to developing public participation and democracy.[56] The same year, the High Court of Rajasthan held that the privilege of secrecy only exists in matters of national integrity and defense.[57]

In the United States, access to information is generally governed by the Freedom of Information Act,[58] but the U.S. Supreme Court has also interpreted the constitutional freedoms of speech and the press to include a constitutional right of access to information because these protections all "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[59] While this right has generally focused on public access to criminal proceedings,[60] some justices have argued for a broader right to information.[61]

Civil law countries, particularly in Latin America but also Spain and Portugal, have applied and interpreted a constitutional right of access to information. These countries often have a process of *habeas data* that provides a mechanism for obtaining access to constitutionally guaranteed information. For example, a Peruvian environmental NGO used *habeas data* to obtain information that the government had previously refused to release. In 1993, an impoundment for mine tailings ruptured, killing eight workers, destroying natural and cultivated forests, and severely polluting a river. Representing a local community, the Peruvian Society for Environmental Defense (SPDA) requested information from the Ministry of Energy and Mines in order to determine who was responsible for the disaster. Specifically, SPDA sought technical documents associated with issuing the original concession, as well as a relevant Ministry report. The Ministry refused these requests, claiming that the documents were confidential. After exhausting the administrative and judicial remedies, SPDA filed a *habeas data* motion with the Supreme Court. The motion was granted and the Ministry was ordered to provide the requested documents.[62]

In addition to national precedents, the international community has increasingly recognized a right of access to environmental information. In dicta, the Inter-American Court of Human Rights has also promoted the "col-

[54] *See generally* Robert Martin & Estelle Feldman, Access to Information in Developing Countries, Transparency International Working Paper, ch. 8 (relating to India), *available at* www.transparency.org/working_papers/martin-feldman/ (last visited Aug. 2, 2002) (discussing the right of access to information which is rooted in the constitutional rights of free speech and expression).

[55] S.P. Gupta v. President of India, A.I.R. 1982 S.C. 149, 234 (India); *see also* Bombay Environmental Action Group v. Pune Cantonment Board, W.P.2733 of 1986 and Supreme Court Order re Special Leave Petition No. 1191 of 1986 (Bombay High Court, Oct. 7, 1986) (emphasizing access to information for bona fide activists).

[56] Reliance Petrochemicals v. Indian Express, (1988) S.C.C. 592.

[57] L.K. Koolwal v. Rajasthan, 1988 A.I.R. (Raj.) 2, 4.

[58] 5 U.S.C. § 552 (1994).

[59] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

[60] *See generally id.* at 581 (holding that "[a]bsent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public"); Globe Newspaper Co. v. Superior Court, *supra* note 42, 457 U.S. at 604, 607 (in voiding a state law that required the exclusion of the press and public from the courtroom during the testimony of a minor who was allegedly the victim of a sexual offense, the court noted that First Amendment rights seek to "'protect the free discussion of governmental affairs,'" and thereby "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"; the court held that access may only be denied if such a denial is "necessitated by a compelling governmental interest and is narrowly tailored to serve that interest") (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (holding that the press has the right of access to the transcripts of a preliminary hearing in a criminal case).

[61] *See, e.g.*, Richmond Newspapers, 448 U.S. at 582-83 (Stevens, J., concurring) (proclaiming this to be a "watershed case" and that "[t]oday, … for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press …."); *Id.* at 589 (Brennan, J., concurring) (laying out two principles useful in determining the scope of the right of access to information: "First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. (citation omitted) … Second, the value of access must be measured in specifics.").

[62] Sociedad Peruana de Derecho Ambiental v. Ministerio de Energía y Minas (Habeas Data), *supra* note 39.

lective right to receive any information whatsoever."[63] The increased international recognition of a right to environmental information further supports a liberal interpretation of constitutional rights to information.

C. Access to Justice

Constitutional rights are only meaningful if they are enforceable. Accordingly, the ability of citizens and NGOs to enforce their constitutional rights is critical in ensuring that these rights have practical effect. While the government has the primary responsibility for implementing and enforcing laws, including constitutional rights, the government is often unable or unwilling to act on its own. While the constitutional provisions generally empower citizens to seek recourse from the courts, this empowerment is particularly important when the government fails to protect constitutional rights. Access to justice includes both the power of courts to review government actions and omissions and the right of citizens to appeal to the courts for this review.

More than two-thirds of the African nations provide a constitutional right of access to justice. While most of these provisions are explicit, the constitutions of Benin, Burundi, and Côte d'Ivoire incorporate access to justice by reference to the African Charter of Human and Peoples' Human Rights, which provides that "[e]very individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his/her fundamental rights …."[64] Cameroon and Djibouti have similar references that supplement their explicit access to justice provisions.[65]

Many of the access to justice provisions are quite general, guaranteeing citizens the protection of the law.[66] Some constitutions include more explicit protections, occasionally extending to the appeal of any act of the administration.[67] The guaranteed processes and remedies also vary and may include generalized access to the specific rights; the right to present complaints, legal representation, and timeliness;[68] and the right to administrative and judicial review of the complained-of act.[69]

In addition, three countries, Seychelles, Uganda, and Zimbabwe, grant their citizens rights that could implicate access to justice. In their constitutions, Seychelles (in Article 27(1)) and Zimbabwe (in Article 18(1)) guarantee their citizens the right to equal protection under the law. Seychelles guarantees public judicial processes, and Uganda requires its citizens to "uphold and defend the Constitution." While these provisions do not explicitly guarantee access to justice, access may be implied since how can citizens "uphold and defend the Constitution" if they can not seek redress from the courts for constitutional violations?

1. Judicial Review

Of the many constitutional access to justice provisions in Africa, some, such as Section 33(3)(a) of South Africa's constitution, explicitly mention judicial review.[70] For those provisions that do not, they usually assert that the law should be accessible, and that citizens are guaranteed protection of their fundamental rights. In order for citizens to access the courts in order to protect their fundamental rights, a judicial review and remedy power is necessarily implied.

For countries without an explicit access to justice provision in their constitution, judicial review and standing, are often found to be inherent in the substantive constitutional rights to life and to a healthy environment. In general, constitutional provisions ensuring access to judicial or administrative redress for violations of constitutionally guaranteed rights expand upon the long-settled principle of jurisprudence that a right implies a remedy. In *Marbury v. Madison*, the seminal 1803 United States case clarifying the role and powers of the judiciary, Supreme Court Chief Justice John Marshall noted that "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury, its proper redress."[71]

This principle is also well-settled in Great Britain,[72] and various civil law jurisdictions have developed a vari-

[63] I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalists (American Convention on Human Rights, arts. 13, 29), Advisory Opinion OC-5/85 of Nov. 13, 1985. Series A No. 5, 100; *see also* Case 11.230, Inter-Am. C.H.R. 234, OEA/ser.L/V//II.95, doc. 7 rev. (1997); Martin & Feldman, *supra* note 54, ch. 3 (describing the 1995 Johannesburg Principles on access to environmental information).

[64] *See* African Charter, *supra* note 16, art. 7(1)(a).

[65] Cameroon Const. pmbl. ("every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances"); Djibouti Const. art. 10.

[66] *E.g.*, Botswana Const. art. 3(a).

[67] *E.g.*, Congo Const. art. 19 ("Any citizen subject to prejudice by an act of the administration shall have the right to judicial recourse.").

[68] Equitorial Guinea Const. art. 13(i) ("present complaints and petitions to the authorities").

[69] Eritrea Const. arts. 24(2), 28(2).

[70] South Africa Const. art. 33(3)(a) ("Everyone has the right to administrative action that is lawful, reasonable and procedurally fair … National legislation must be enacted to give effect to these rights, and must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.").

[71] Marbury v. Madison, *supra* note 10, 5 U.S. at 19-20; for an earlier use of the principle, see James Madison, *The Powers Conferred by the Constitution Further Considered*, The Federalist No. 43 (Jan. 23, 1788) (explaining the provisions of the draft U.S. Constitution).

[72] *See* Marbury v. Madison, *supra* note 10, 5 U.S. at 163 (*citing* Blackstone's Commentaries, vol. 3, 23, 109).

ety of legal tools, often dating back to Roman law, to enable citizens to vindicate constitutional and particularly environmental wrongs. Consequently, even if a nation lacks an explicit constitutional provision ensuring access to judicial review, courts can still review and redress violations of constitutional rights.

2. Standing

Most African countries guarantee citizens the right to seek legal redress from courts. The legal capacity to sue (*locus standi*) is critical to the effective implementation of environmental and human rights. Whether a person has standing determines whether they are able to go to court and seek to enforce or uphold a constitutional provision. Standing is based on the idea that only people with a legal interest in a matter should be allowed access to the courts. Historically, this ensured that a case would be litigated fairly, that courts would only consider real ("live") cases, and that courts would not be engaged in declaratory or prospective lawmaking. Often, standing to bring suit was limited to those who suffered a direct economic injury, preventing much public interest litigation. In the last three decades, many countries have taken a more expansive view of standing.[73] In many cases, such as in India, standing has effectively been eliminated; any citizen can bring suit to enforce the law, particularly to enforce constitutional protections. Due to the different views that the legal traditions afford courts and citizen-intervenors, common and civil law experiences with standing are discussed separately below.

a. Standing in Common Law Jurisdictions of Africa

In African common law countries, the doctrine of standing is frequently a mix of constitutional law and common law, borrowing from experiences in the United Kingdom and other common law countries. Generally, common law countries still require that litigants meet the standing requirements, but these requirements have been significantly liberalized. For instance, when constitutions explicitly provide for standing, courts have broadly interpreted the standing requirements to allow standing for citizens and NGOs seeking to protect the environment. Courts have recognized legal interests in aesthetics, recreation, and research, thus enabling public interest advocates to enforce environmental rights in many contexts.

Section 38 of South African's 1997 post-Apartheid Constitution grants standing to a wide range of parties where a right listed in the Bill of Rights has been or is in danger of being infringed. As a result, citizens can bring suit "in their own interest," "on behalf of another person who cannot act in their own name," "as a member of a group or class of persons," or "acting in the public interest," and associations can bring suit to protect the constitutional rights of their members.

In practice, South African courts are beginning to recognize standing for public interest litigants.[74] In *Wildlife Society of Southern Africa v. Minister of Environmental Affairs & Tourism*, the Supreme Court of Transkei, South Africa upheld standing for a nonprofit environmental organization and citizens who sought to restore a coastal conservation zone that was being degraded by illegal settlers.[75] While acknowledging the concern of some that relaxing standing requirements might open the floodgates to vexatious litigation by "cranks and busybodies," the court reasoned that the "exorbitant costs of Supreme Court litigation" would be an impediment to abuse and that there was always the remedy of "an appropriate order of costs."[76] The court concluded that even when an explicit constitutional grant of standing does not apply, but a statute requires the state take actions to protect the environment and the public interest, public interest organizations dedicated to environmental protection should have standing at common law to seek an order from the court compelling the state to comply with the law.

In East Africa, Tanzania has led the way in granting citizens access to the courts to protect the environment. In the case of *Christopher Mtikila v. Attorney General*, the High Court at Dodoma issued a strong opinion in favor of broad standing.[77] The defendant argued that the petitioner needed to "demonstrate a greater personal interest than that of the general public" in order to have standing to challenge various laws relating to assembly and expression.[78] In granting standing, the court considered decisions from Canada, India, Nigeria, Pakistan, and the United Kingdom before concluding that a broad view of standing was "already … in our own Constitution."[79]

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[73] For a thorough review of standing, see John E. Bonine, Standing to Sue: The First Step in Access to Justice (1999), *available at* www.law.mercer.edu/elaw/standingtalk.html (last visited Aug. 2, 2002).

[74] *See generally* Elmene Bray, *Locus Standi: Its Development in South African Environmental Law*, *in* GOVERNING THE ENVIRONMENT: POLITICAL CHANGE AND NATURAL RESOURCES MANAGEMENT IN EASTERN AND SOUTHERN AFRICA (H.W.O. Okoth-Ogendo & Godber W. Tumushabe eds., 1999).

[75] Wildlife Society of Southern Africa v. Minister of Environmental Affairs & Tourism, Case No. 1672/95 (Transkei Supreme Court, June 27, 1996), *reprinted in* 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 91 (1998).

[76] *Id.* at 92.

[77] Christopher Mtikila v. Attorney General, Civ. Case. No. 5 of 1993 (High Court, Dodoma, 1993). Another significant environmental standing case is Festo Balegele et al. v. Dar es Salaam City Council, Misc. Civil Cause No. 90 (High Court of Tanzania at Dar es Salaam, 1991) (granting standing to 795 plaintiffs seeking to enjoin a city council and others from disposing of municipal waste in a residential area).

[78] *Id.* at 3.

[79] *Id.* at 13.

In light of Tanzania's socio-economic conditions, including illiteracy and poverty, and history of disempowerment, the court declared that

> if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing.[80]

Consequently, the court granted standing to the petitioner, holding that "standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy."[81]

Kenya has had mixed experiences in the area of standing in public interest cases. In *Maina Kamanda v. Nairobi City Council*, a Kenyan High Court recognized standing of two citizens who brought a ratepayer suit alleging the misuse of government funds.[82] However, in *Wangari Maathai v. Kenya Times Media Trust Ltd.* and *Wangari Maathai v. City Council of Nairobi*, Kenyan courts held that environmental plaintiffs did not have standing when they could not prove an injury distinct from that held by the public at large.[83] These cases relied in part on British cases that took a narrow view of standing in public interest cases. These decisions have been widely criticized by Kenyan commentators, and it is likely that Kenyan courts will recognize broader standing in environmental cases. Kenya's 1999 Environmental Management and Co-ordination Act specifically broadens standing in environmental cases.[84] Additionally, there is increasing recognition of public interest environmental standing in common law African countries, particularly in Tanzania and Uganda. Moreover, recent developments in the United Kingdom, discussed below, provide another body of persuasive precedent for recognizing standing in public interest litigation.

Environmental advocates might find it useful to look to precedents for standing provided by cases in areas other than environmental law. For example, in *Attorney General v. Unity Dow*, the Appeals Court of Botswana took a broad view on standing in a case in which a woman sought to invalidate the Citizenship Act of 1984 which denied citizenship to children of a foreign father but granted citizenship to children of a foreign mother.[85] The Attorney General challenged her standing, asserting that Botswana's Roman-Dutch common law did not incorporate the Roman doctrine of *actio popularis* empowering citizens to sue in the public interest. Relying on Section 18(1) of Botswana's Constitution,[86] the court held she had standing and invalidated the Act.

The court noted that Section 18(1) "gives broad standing rights and should not be whittled down by principles derived from the common law, whether Roman-Dutch, English, or Botswana," and held that a person who has standing due to individualized injury can also "protect the rights of the public."[87]

Similarly, in Zimbabwe, the Supreme Court recognized standing of a human rights organization to challenge the constitutionality of death sentences. The court recognized that the

> avowed objects [of the organization] are to uphold basic human rights, including the most fundamental right of all, the right to life. It is intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution … It would be wrong, therefore, for this Court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves.[88]

The court's decision reflects the trend in African jurisprudence, particularly where fundamental rights are at issue, toward ensuring broad access to courts.

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[80] *Id.* at 12.

[81] *Id.* at 15.

[82] Maina Kamanda v. Nairobi City Council, Civ. Case No. 6153 of 1992 (High Court, Nairobi, Dec. 8, 1992), *reprinted in* 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 78 (1998).

[83] Wangari Maathai v. Kenya Times Media Trust Ltd., Civil Case No. 5403 of 1989 (High Court of Kenya at Nairobi, Dec. 1, 1989) (denying standing to public interest plaintiffs seeking a temporary injunction restraining construction in a municipal park); Wangari Maathai v. City Council of Nairobi, Civil Case No. 72 of 1994 (High Court of Kenya at Nairobi, Mar. 17, 1994) (denying standing to public interest plaintiffs seeking to challenge the transfer of development of municipal land).

[84] Environmental Management and Co-ordination Act, 1999, sec. 3(3), (4).

[85] Attorney General v. Unity Dow, 1992 L.R.C. (Cons.) 623 (July 2, 1992), *cited in* Bonine, *supra* note 73. In a poetic twist of fate, Unity Dow later became the first woman to sit on Botswana's High Court.

[86] Section 18(1) provides that "if any person [who] alleges that any of the provisions of sections 3 to 16 of this Constitution, ["Protection of Fundamental Rights and Freedoms of the Individual," [include] the rights to life and association,] has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

[87] *See* Bonine, *supra* note 73, at n.23, *citing* Michael P. Seng, *In a Conflict Between Equal Rights for Women and Customary Law, the Botswana Court of Appeal Chooses Equality*, 24 U. TOL. L. REV. 578, 658 (1993).

[88] Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, 1993(4) S.A. (Z.S.) 239 (Zimbabwe Supreme Court, June 24, 1993).

b. Standing in Common Law Jurisdictions Worldwide

Outside of Africa, standing is usually granted to public interest advocates seeking to protect the environment even where there is no explicit constitutional grant of standing. In the United Kingdom, the 1997 case of *Regina v. Somerset County Council and ARC Southern Limited ex parte Dixon* represents the continuing British trend toward expansive standing in public interest litigation.[89] In this case, the plaintiff challenged the extension of a quarrying operation, and the county council alleged he lacked standing since he owned no land nor had any other pecuniary interest in the vicinity. Before recognizing standing, the court described the elements of standing for public interest cases:

> a "very fair case" on the merits; "the public advantage that the law should be declared" in order to vindicate the rule of law; "purely public grounds" making it unlikely that any peculiarly interested challenger will emerge; a "stranger to the suit … without any private interest to serve" being properly placed to advance the challenge; and so forth.[90]

The court noted that the nature of public interest litigation requires a liberal interpretation of standing because a person may be well placed to call the attention of the court to an apparent misuse of public power.[91] The court held that the plaintiff was "perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment."[92]

In the United States, standing is a combination of constitutional and prudential requirements, supplemented by statutory provisions that facilitate access to the courts.[93] In a series of decisions concluding with the decision in *Lujan v. Defenders of Wildlife*, the Supreme Court held that the U.S. Constitution requires plaintiffs to prove: (1) the plaintiff suffered an actual or imminent injury that was concrete and particularized; (2) the injury is traceable to an act or omission by the defendant; and (3) the injury is redressable by court action.[94] Additionally, the court has applied a prudential test of whether the plaintiff's asserted interest falls within the "zone of interests" that the statute sought to protect.[95] Finally, most environmental statutes provide an explicit grant of standing to citizens to enforce the statutory provisions.[96]

In the landmark decision *Sierra Club v. Morton*, the Supreme Court recognized the legal interest in recreation, conservation, and aesthetics, thereby establishing the basis for environmental standing.[97] The Court held that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[98] A short time later, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Supreme Court granted expansive standing to a group of law students challenging railroad freight rates that could undermine the market for recycled materials.[99] The Court observed that the students' use of "the forests, streams, mountains and other resources … for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the non-use of recyclable goods brought about by a rate increase on these commodities," and ultimately held that the students established an "attenuated line of causation" sufficient to satisfy the standing requirements.[100] As a general matter, most environmental plaintiffs have met the standing requirements. However, until recently a conservative

[89] Regina v. Somerset County Council and ARC Southern Ltd. ex parte Dixon, 75 P & CR 175, [1997] JPL 1030 (Apr. 18, 1997); *see also* Regina v. Inspectorate of Pollution, ex parte Greenpeace Ltd. (No. 2), 4 ALL E.R. (Q.B.) 329, 350h (1994) (upholding standing of Greeanpeace, "who, with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well-argued challenge").

[90] Regina v. Somerset County Council and ARC Southern Ltd. ex parte Dixon, 75 P & CR 175, [1997] JPL 1030 (Apr. 18, 1997).

[91] *Id.*

[92] *Id.*

[93] *See, e.g.*, Robert B. June, *Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 768 (1994).

[94] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

[95] Allen v. Wright, 468 U.S. 737, 750-51 (1983).

[96] *See* Carl E. Bruch, *Where the Twain Shall Meet: Standing and Remedy in* Alaska Center for the Environment v. Browner, 6 DUKE ENVTL. L. & POL'Y F. 157, 171 n.71 (1996); *see also* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994) (especially 16 U.S.C. § 1540(g)).

[97] 405 U.S. 727 (1972).

[98] *Id.* at 734. Initially, the Court held that the Sierra Club did not have standing in this case because they had not pleaded any injury. The Sierra Club subsequently modified their pleadings to aver recreational and aesthetic injury to their members, and the case proceeded until the developer decided not to construct a ski resort in the national park. Often cited for his dissent in this case, Justice Douglas opined that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Id.* at 741-42 (Douglas, J., dissenting) *(*citing Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

[99] 412 U.S. 669 (1973).

[100] *Id.* at 685, 688.

Supreme Court had steadily made it more difficult for environmental plaintiffs to bring suit.[101]

India, Pakistan, and Nepal all share liberal rules with regard to standing, and aggrieved citizens or those claiming to represent their interests may bring suit directly in those countries' high courts and Supreme Courts. The courts in these nations recognize the special nature of public interest litigation, in which the rights of large numbers of people may be at stake. In such cases, the courts do not impose high barriers to standing. Indeed, the courts themselves, *sua sponte*, occasionally initiate actions to protect fundamental rights.[102]

The courts of India are at the forefront in recognizing standing to vindicate constitutional rights. Moreover, the persuasive influence of Indian cases has been felt throughout South Asia as well as common law countries in Africa. The Indian Supreme Court has paid special attention to advocates seeking to protect the public interest, granting broad standing in these cases.[103] After deciding that access to the legal system should no longer be limited to "men with long purses,"[104] the Court has been receptive to a wide range of environmental cases involving, for example, efforts to cease harmful pollution of the Ganges River, to prevent air pollution harming the Taj Mahal, and to obtain redress for a chlorine gas leak.[105] Indian decisions have also recognized "epistolary standing," construing a citizen's letter or postcard to the court as a formal complaint, and "journalistic standing," granting standing to journalists suing to redress violations that they investigate.[106]

In Southeast Asia, the Philippines has been at the vanguard in recognizing standing in public interest environmental cases, with the decision in *Juan Antonio Oposa v. Fulgencio S. Factoran, Jr* as well as other cases.[107] In *Oposa*, the Philippine Supreme Court granted standing to Philippine children to represent themselves and future generations in a class action suit to challenge timber license agreements that were destroying the country's natural forests. The court held that the plaintiffs had the right to sue on behalf of future generations because "every generation has a responsibility to the next to preserve [the] rhythm and harmony for the full enjoyment of a balanced and healthful ecology" of future generations.[108]

In Bangladesh, courts have broadly interpreted the traditional common law requirement that a plaintiff have a "sufficient interest" in a matter. In *Mohiuddin Farooque v. Bangladesh*, the Supreme Court stated:

> Any person other than an officious intervenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of

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[101] For a good critique of the constitutional problems with the restrictive trend that the Supreme Court had taken with regards to standing, see Bonine, *supra* note 73; *see also* John D. Echeverria & Jon T. Zeidler, *Barely Standing*, ENVTL. F. 21 (July/Aug. 1999) (but also expressing hope that this trend may be about to change).

In the last two years, the Court has retreated from the narrow view of standing held by Justice Scalia. *See, e.g.*, Friends of the Earth v. Laidlaw Envtl. Serv., 145 L. Ed. 2d, No.5 610 (2000) (recognizing the deterrent effect that penalties have on polluters, and thereby holding that an injury is redressable when the only remedy available to citizen plaintiffs under an environmental statute is a monetary penalty that is paid to the government).

Courts in Australia and Canada, in contrast, have been much more liberal in granting standing to citizen groups challenging private and governmental actions that can harm the environment. *See* Yves Corriveau, *Citizen Rights and Litigation in Environmental Law NGOs as Litigants: Past Experiences and Litigation in Canada*, *in* ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 117 (Sven Deimann & Bernard Dyssli eds., 1995); Paul L. Stein, *Citizen Rights and Litigation in Environmental Law: An Antipodean Perspective on Environmental Rights*, *in* ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 271, 275-76 (Sven Deimann & Bernard Dyssli eds., 1995) (liberalization of environmental standing in Australia); *see also* Australian Conservation Foundation v. Minister for Resources, 19 A.L.D. 70 (1989) (upholding ACF's standing to challenge licenses for woodchip export, where the organization had a strong concern for forests and had received financial support from the government); Truth About Motorways Pty Ltd. V. Macquarie Infrastructure Management Ltd. [2000] HCA 11 (Mar. 9, 2000) (unanimously upholding judicial enforcement by "any person").

[102] *E.g.*, Gen. Sec'y, W. Pak. Salt Miners Labour Union (CBA) Khewral, Jhelum v. Dir., Indus. and Mineral Dev., Punjab, Lahore, Human Rights Case. No. 120 of 1993, 1994 P.S.C. 1446, 1452-53.

[103] *E.g.*, S.P. Gupta v. Union of India, 1982 A.I.R. (S.C.) 149, 188 (1982) ("If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though they may not be directly injured in their own rights."); *see also* Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57 (1994).

[104] S.P. Gupta v. Union of India (the *Judges' Transfer Case*), 1982 A.I.R. (S.C.) 149 (1982), *discussed in* Bonine, *supra* note 73.

[105] M.C. Mehta v. Union of India, 4 S.C.C. 463 (1987); 1988 A.I.R. (S.C.) 1037; 1988 A.I.R. (S.C.) 1115 (pollution of the Ganges); M.C. Mehta v. Union of India, 2 S.C.C. 176 (1986); 2 S.C.C. 325 (1986); 1 S.C.C. 395 (1987); M.C. Mehta v. Union of India (Oleum Gas Leak Case), 1987 A.I.R. (S.C.) 965 (1987); 1987 A.I.R. (S.C.) 1086 (1987).

[106] Hussainara Khatoon Cases, 1979 A.I.R. (S.C.) 1360 (1979); 1979 A.I.R. (S.C.) 1369 (1979); 1979 A.I.R. (S.C.) 1819 (1979); 1 S.C.C. 91 (1980); 1 S.C.C. 93 (1980); Fertilizer Corp. Kamgar Union v. Union of India, 1 S.C.C. 568 (1988); *see also* Mahesh R. Desai v. Union of India, writ petition No. 989 of 1988.

[107] Juan Antonio Oposa v. Fulgencio S. Factoran, Jr., G.R. No. 101083 (Sup. Ct. of the Phil. 1993); *see also*, Antonio G.M. LaViña, *The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case*, 3 REV. EUR. COMMUNITY & INT'L ENVTL. L. 246 (1994).

[108] Oposa, *supra* note 107.

> the Constitution or the law and seek enforcement of such public duty ….[109]

The court held that organizations that "have studied and made research" on the disputed issue are "regarded as a person aggrieved to maintain the writ petition."[110]

The cases just reviewed illustrate a strong trend of common law countries toward liberalized standing requirements in public interest litigation, particularly in the area of environmental protection. To be certain, some courts still adhere to a restrictive interpretation. However, the clear modern trend is toward broad access to justice.

c. Standing in Civil Law Jurisdictions

Standing in Latin American countries has in recent years focused more on the rights of individuals to bring suit to protect common interests. Civil law nations in Latin America have developed innovative legal tools that enable practically any citizen to protect the environment. Popular, or diffuse, actions date back to Roman law, when citizens could act in their legal capacity as owners of the public domain. In Argentina, for instance, environmental advocates developed *acciones difusas* ("diffuse actions") to enable citizens to protect the environment. Argentine advocates have used this principle to protect penguins and dolphins and to ban dangerous pesticides.[111]

Similarly, in Colombia, environmental advocates have developed and used *acciones populares* ("popular actions") to protect the environment, as well as other common rights.[112] Environmental groups have used these popular actions to redress illegal tannery operations, to require certain waste be used as fuel in a biomass energy-generating facility, and to remove an unsanitary solid waste dump.[113] In Brazil, citizens have used popular actions (*acão popular*) to nullify governmental actions that could harm the environment or cultural patrimony, as well as civil environmental actions (*intereses difusos*) to prevent or repair environmental damage.[114]

Other civil law cases, such as the Costa Rican *Chacón*[115] case, have relied on more individualized facts, such as when a complained-of action threatens the plaintiff's ability to live or make a living.[116] In *Chacón*, the court granted standing based on *intereses difusos* and allowed a child to protect individual and societal rights, and went on to suggest that future generations may have standing to sue. In Chile, the Supreme Court found that the constitutional right to a healthy environment overcame standing limitations that originated in the Napoleonic Code, and granted standing to the environmental group CODEF (National Committee for the Defense of the Fauna and Flora) to protect an remote Andean lake.[117] Since then, other Chilean groups have similarly established standing in environmental cases. Similarly, in Guatemala, courts have allowed NGOs to sue under the constitutional right to a healthy environment without showing any personal injury.[118]

European commentators have made similar arguments for broad access to the courts in environmental matters, based on the Roman law doctrine of *actio popularis*.[119] In addition, in a Slovenian case challenging a community development plan, the Supreme Court held that people had standing to bring suit based on their constitutional right to life.[120] Article 72 of the Slovenian

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[109] Farooque v. Bangladesh, Civil Appeal No. 24 of 1995, at 37.

[110] *Id.*; *see also* Flood Action Plan, Writ Petition No. 998 of 1994 (High Court of Bangladesh) (granting standing to the Bangladesh Environmental Lawyers Association (BELA) to seek compensation to people affected by a flood action plan, as BELA was established environmental advocacy organization).

[111] *See, e.g.*, GERMÁN SARMIENTO PALACIO, LAS ACCIONES POPULARES EN EL DERECHO PRIVADO COLOMBIANO 30-31 (1988); Kattan v. Federal State (Secretary of Agriculture) (1983), *cited in* Bonine, *supra* note 73 (granting standing to challenge a permit to capture endangered dolphins to an environmental advocate who had never seen the dolphins; invalidating the permit); Kattan v. Federal State (Secretary of Agriculture) (2,4,5-T Herbicide Case) (1983) (granting standing to an advocate seeking to ban importation of 2,4,5-T; granting the ban); *see also* Victor Hugo Morales v. Province of Mendoza (Civil Trial Court No. 4, Mendoza, Oct. 2, 1986).

[112] *See, e.g.*, SARMIENTO PALACIO, *supra* note 111, at 29-32. After exploring the Roman basis for the popular action, Sarmiento discussed similar mechanisms in the civil law countries of Argentina, Brazil, France, Italy, and Spain.

[113] *See* www.fundepublico.org.co/htm/logros.htm (last visited Oct. 31, 1999) (documents on file with authors).

[114] *See generally* Antonio H.V. Benjamin, *A Proteção do Meio Ambente Nos Países Menos Desenvolvidos: O Caso da América Latina*, 0 REVISTA DE DIREITO AMBIENTAL 83 (1995); Edesio Fernandes, *Constitutional Environmental Rights in Brazil*, *in* Boyle & Anderson, *supra* note 6, at 265. The *Revista* also includes a number of court cases that utilize these different legal tools.

[115] Carlos Roberto Mejia Chacon contra el Ministerio de Salud y la Municipalidad de Santa Ana, Sentencia No. 3705-93 (Sala Constitucional de la Corte Suprema de Justicia, San Jose, Costa Rica, July 20, 1993).

[116] Regarding standing in Costa Rica, see generally Robert S. Barker, *Constitutional Adjudication in Costa Rica:A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249 (1986).

[117] Personal communication from Fernando Dougnac to ELI (1997), regarding the Lake Chungara Case (Supreme Court of Chile).

[118] *E.g.*, Fundación Defensores de la Naturaleza v. Particular.

[119] *See* Verschuuren, *supra* note 36, at n.22 and accompanying text (*citing* B. Jadot, *Les Procedures Garantissant le Droit à l'Environnement*, *in* THE RIGHT TO A HEALTHY ENVIRONMENT 149 (Amedeo Postiglione ed., 1986)); P.C.E. van Wijmen, *De Natuurbeschermingswet*, VMR 1988-4, Zwolle 1989, at 166; Martin Fuhr et. al., *Access to Justice: Legal Standing for Environmental Associations in the European Union*, *in* PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW (David Robinson & John Dunkley eds. 1995).

[120] Drustvo Ekologov Slovenije, Case No. U-I-30/95 (Constitutional Court of Slovenia, Jan. 15, 1996).

Constitution states "[e]ach person shall have the right in accordance with statute to a healthy environment in which to live."

4. Financial Issues

Attorneys' fees and other litigation costs frequently present a practical impediment to bringing public interest cases. The people most affected by environmental degradation tend to be the poorest and most marginalized. They usually do not have, either individually or collectively, the financial resources to challenge a large corporation or their government, particularly in a potentially long, complicated, and expensive case. In addition, in many jurisdictions there is the real risk that if the suit is unsuccessful, the plaintiffs could be required to pay the fees incurred by the defendant.[121]

A number of African constitutions have sought to address the potential financial barriers to realizing practical access to justice. Typical provisions guarantee that:

- "justice may not be denied for reasons of insufficient financial means,"[122]
- "The law assures to all the right to justice and the insufficiency of resources shall not be an obstacle to it …,"[123] and
- "The State shall make provision to ensure that justice is not denied for lack of resources."[124]

In a similar vein, Malawi[125] and Namibia[126] have constitutional provisions for an ombudsman to provide legal assistance, potentially including legal representation, for people whose fundamental rights or freedoms have been infringed.

A few jurisdictions have statutory provisions allowing successful public interest plaintiffs to recover attorneys' fees and other court costs from the defendant in environmental cases or a percentage "bounty" from the government in *qui tam* actions.[127] The United States, in particular, enforces these provisions for suits brought to protect the environment or recover money wrongfully taken from the government.[128] In addition, some U.S. state courts have adopted the common law Private Attorney General Doctrine to award reasonable attorneys' fees and costs in public interest cases. For example, in *Serrano v. Priest*, the California Supreme Court established a three-part inquiry in determining whether to award fees and costs:

> (1) the strength or societal importance of the public policy vindicated by the litigation;
> (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; [and]
> (3) the number of people standing to benefit from the decision.[129]

In this case, the Court upheld the district court's award of attorneys' fees to two public interest law firms who successfully challenged a public school financing system that violated the state constitutional provisions ensuring equal protection of the law.

In some African jurisdictions, the courts have similarly afforded special consideration to plaintiffs who raise important matters of public interest.[130] While the need for creative mechanisms for compensating advocates who bring cases in the public interest remains great, many governments will likely remain cautious about encouraging litigation, particularly since much of the litigation is directed at the government.

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[121] *E.g.*, Wangari Maathai v. City Council of Nairobi, Civ. Case No. 72 of 1994 (High Court of Kenya, Nairobi, Mar. 17, 1994) (ordering the plaintiffs to pay the court costs of the defendants, where the court denied standing to plaintiffs seeking to protect a green space).

[122] GUINEA-BISSAU CONST. art. 30.

[123] MADAGASCAR CONST. art. 13.

[124] MOZAMBIQUE CONST. art. 100(2).

[125] MALAWI CONST. art. 46(2) ("Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled … to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require").

[126] NAMIBIA CONST. art 25(2) ("Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened … may approach the Ombudsman to provide them with such legal assistance or advise as they require …").

[127] Qui tam cases, which are more commonly referred to as whistleblower cases, allow citizens to serve as private attorneys general, and are used to prosecute government fraud. *See* www.quitam.com/quitam1.html (last visited Aug. 1, 2002).

[128] *E.g.*, Clean Water Act, 33 U.S.C. § 1365(d) (1994) (providing litigation costs to "any prevailing or substantially prevailing party" that brings a citizen suit to enforce the Clean Water Act). Dating back to 13th century England, *qui tam* ("who sues on behalf of the king as well as for himself") actions constitute a narrower common law version of the citizen suit that includes a bounty to successful plaintiffs. *E.g.*, JAMES T. BLANCH ET AL., CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY (1996).

[129] Serrano v. Priest, 569 P.2d 1303, 1314 (Cal. 1977); *see also* Miotke v. City of Spokane, 678 P.2d 803 (Wash. 1984) (adopting the private attorney general doctrine for awarding attorney fees); Arnold v. Arizona Dept. of Health Services, 775 P.2d 521 (Ariz. 1989) (same); Montanans for the Responsible Use of the School Trust v. Montana, 989 P.2d. 800 (1999) (adopting the *Serrano* test to find that the District Court abused its discretion in denying attorneys' fees to a public interest litigant protecting school trust lands).

[130] *E.g.*, D. Derrick Chitala v. The Attorney-General, 1995/SCZ/14 (unreported) Zambia (holding that although the appeal against a High Court judge who refused to grant leave to bring judicial review proceedings failed, each side should bear its own costs "since [the appeal] raised for the first time a matter of general public importance of this nature").

5. Other Procedural Rights

Access to justice entails a variety of other guarantees, in addition to judicial review, standing, and removing financial barriers. The judicial procedures and the court need to be fair and equitable, frequently a general constitutional guarantee. An opportunity for timely redress of the injury must be available. The decisions of the court should be in writing and publicly accessible. In addition, administrative and legal barriers to access to justice should be removed. Article 9 of the Aarhus Convention and other regional instruments incorporate these various elements into their access to justice provisions, while taking a liberal approach to judicial review and standing. Although these international initiatives are not binding on any African nations, they are illustrative of emerging international legal norms and practice in the area. As a result, African and other courts may look to them when interpreting and applying the often broad and vague constitutional guarantees of access to justice.

IV. THE WAY FORWARD

Procedural rights are an essential element of good governance, effective advocacy, and sustainable development. The cases discussed in this chapter demonstrate that there are many ways to exercise constitutional rights of public participation, access to information, and access to justice. In many respects, the norms surrounding the implementation of constitutional procedural rights are currently being developed in courts around the world. As the cases in this chapter demonstrate, there is great variation in how procedural rights are invoked and in what contexts they have been most successful.

Many of the examples of implementation of procedural rights cited in this chapter reflect the experiences of African nations. The African experiences, despite (or perhaps because due to) their geographical and cultural contexts, can inform other nations around the world as to what approaches have been effective. In some situations, cases from one country can set an important precedent in another country that might be thousands of miles away. Frequently, the same is true with case examples in this chapter that are environmental in scope.

Different legal traditions create varying conditions for implementing and enforcing procedural rights, but it is interesting to note that in Africa, the common law, civil law, and Islamic law systems all recognize, to some degree, access to information, public participation, and access to justice. This example of commonalties across a continent that is as culturally and politically diverse as Africa indicate that procedural rights have the potential to be successfully integrated into legal regimes around the world.

Some constitutions have particularly strong provisions for certain procedural rights—such as the constitutional commitment of Congo, South Africa, and Uganda to access to information. Such firmly grounded procedural rights can be read in conjunction with other constitutional provisions (e.g., environmental and human rights) to allow particular areas of advocacy to be strengthened significantly.

In giving force to constitutional environmental protections, particularly in cases of first impression, the facts are likely to be critical. Many of the most effective cases emphasize the direct human impacts, as well as the severity of environmental destruction. Thus, where mining operations have directly harmed human health or proposed dumping of radioactive waste could harm human health, courts have readily granted relief.

The trend toward constitutionalism has been critical. Constitutional rights are powerful tools and, once established, they can make courts more willing to uphold protections without necessarily requiring explicit links to constitutional provisions directly related to the matter at hand. For example, in India, initial court cases emphasized the impacts of pollution on human health, then on cultural icons such as the Taj Mahal. More recently, the Indian Supreme Court has extended the right to a healthy environment to require environmental education in schools, as well as environmental public service announcements in cinemas and on the radio. Recognizing these fundamental human rights of access to information, public participation, and access to justices is neither radical nor unprecedented. It is simply a matter of enforcing the highest law of the land, the constitution.

RIGHTING PUBLIC WRONGS AND ENFORCING PRIVATE RIGHTS: PUBLIC INVOLVEMENT IN ISLAMIC LAW

Ali Ahmad [*]

Public involvement is a tradition that is fundamentally rooted in the law and practice of Islam. It is important to understand the concept of public involvement under Islamic law if current efforts at entrenching the concept in Muslim countries are to resonate with the people. In Muslim countries, it is traditional Islamic law that directly or indirectly infuses legitimacy into what emerges as law, and as such determines people's compliance with it on the ground. Examining the Islamic law dimension of public involvement is more important than simply finding traditional sources or functional equivalents to form a foreign-fashioned principle unknown to Islam. Public involvement leads to more effective decisionmaking by improving the information that is available and by building public support and credibility. Public involvement also improves effective management of natural resources and protection of the environment. Moreover, examination of the Islamic law and practice of public involvement promises to enrich the discourse and contribute to the convergence of efforts in different societies around the world.

This chapter examines the Islamic law insight on improving sustainable development through public involvement. It pays particular attention to examining ways to improve natural resources management and environmental protection in Muslim communities and how Islamic ideas enrich the global discourse on public involvement.

Section I identifies norms, mechanisms, and practices under which the public has participated in governance in Muslim communities. Specifically, it evaluates principles, such as consultation, mutual oath of allegiance between the ruler and the people, venues and avenues for making information available, and the availability of access to justice. Section II explores the wide range of natural resources for which Islamic law guarantees a voice to Muslim communities in their management. Section III considers the contemporary relevance of Islamic law in promoting public access to information, participation, and justice, as well as insight that may be gained from experiences in other secular countries in developing and implementing specific mechanisms to ensure public involvement. Section IV underscores the need to empower or, more appropriately, reempower communities in modern Muslim countries as envisaged under traditional Islamic legal norms.

I. AN OVERVIEW OF ISLAMIC LAW ON PUBLIC INVOLVEMENT

Before delving into issues of public involvement, it is necessary to examine briefly the continuing role of Islamic law in Muslim countries. Despite the fact that most Muslim countries have adopted some form of constitutional government with national laws embodied in statutes and ordinances and despite the fact that most of these laws reflect imprints of colonial law, Islamic law still serves in varying degrees as one of the bona fide sources of norms and legitimacy.

The fundamental basis of the Islamic law tradition is that the will of God is the source of law, and no human being may demand obedience or compliance from another human except in accordance with the command of God. Islamic legal theory asserts that what is absolutely beautiful and moral and what is absolutely ugly can only be determined for certain by God.[1] Therefore, divine law shows humankind the right path (Shari'ah) to be traveled in order to achieve salvation.[2] The Qur'an

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[1] JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 (1991).

[2] NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 85 (1995) (noting that "Law, therefore, does not grow out of, and is not moulded by, society as is the case with Western systems. Human thought, unaided, cannot discern the true values and standards of conduct ... In the Islamic concept, law precedes and moulds society; to its eternally valid dictates the structure of State and Society must, ideally, conform.").

is supposed to regulate the whole of a Muslim's life, and Muslims privately or publicly strive to ensure that their behaviors conform to the injunctions of the Qur'an, which carries an individual mandate that is not just corporal or secular, but also immortal, spiritual, and ethical. To Muslims, the Shari'ah is not just a legal system with a religious basis, but it also has a significant component of salvation. The principal objective of Islamic law is the approval of God, thus, seeking harmony between the temporal and the spiritual.

The Islamic law tradition is woven around a hierarchy of sources, and the level of authority and universality of a norm often depends on its position within that hierarchy. The Qur'an is the highest in the hierarchy, and its authority is binding.[3] Each text of the Qur'an contains levels of meaning, which only learning and devotion can reveal.[4] Thus, the Sunnah—or tradition of the Prophet Muhammad (peace be upon him)—offers valuable assistance in clarifying and illustrating those meanings and applying them in practice. Both the Qur'an and the Sunnah constitute primary sources of Islamic law. The secondary sources involve the techniques for discerning and discovering the law embedded in the primary sources. The secondary sources are comprised of *ijma'* (consensus) and *ijtihad* (juristic reasoning). Various modes of exercising *ijtihad* include *qiyas* (analogy), *'istislah* (public interest), and *'urf* (local custom). Taken together, this methodology produces identifiable positive Islamic law. This chapter analyzes issues of public involvement under Islamic law by examining these primary and secondary sources.

Although the premise of community participation in traditional Islam is widespread, this premise is not included in the modern nation-state system, which is structured on defined national borders with extensive powers within those borders and with the sole authority to represent all communities within those borders. This structure has caused tremendous erosion of the power of the community in a number of important situations. Therefore, a reconstructed discourse in Islam is needed to reposition public involvement in governance, taking into consideration the internal and external dimensions of state operations.

In Islam, the underlying consideration for public involvement, particularly the requirements of transparency and accountability, is to reduce the burden of governance on the rulers, who are deemed to be trustees for the people.[5] By involving the public, those in authority share this burden with the people and will be obliged to maintain the unity that is required of a community.[6] Apart from mandating public involvement in government generally, Islamic law becomes even more specific in involving the public in matters of natural resources.

The public is the centerpiece of all natural endowments, and communal sharing of all benefits accruing from utilization of those resources is the norm.[7] Communal sharing of benefits ensures that the interest of the society as a whole will be a significant factor in any decision regarding exploitation and conservation of those resources. An expression of that interest is found in *hima*, Islam's concept of a protected area. A *hima* may be established for various communal purposes. Centuries of practice of *hima* has culminated in the rule that providing for the needs of the poor constitutes a community interest for which a *hima* may be declared, but no *hima* may be established solely for the benefit of the rich.[8]

As concrete norms of international law on public involvement emerge, it is envisaged that Islamic law, which still needs to reclaim and refine its own scheme for public involvement, can provide an avenue for sup-

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[3] CHRISTOPHER G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE 85 (1988).

[4] *Id.* at 34.

[5] MUSLIM IBN AL-HAJJAJ, 12 SAHIH MUSLIM BI SHARH AL-NAWAWI 179 (Yahya S. al-Nawawi, 1990) (quoting the Prophet Muhammad, upon whom be peace, as saying: "Beware! Every one of you is a Shepard and every one is answerable with regard to his flock. The Caliph is a shepherd over the people and shall be questioned about his subjects (as how he conducted their affairs)."). In advice to Yakubu, the first Emir of Bauchi, Sultan Bello of the Sokoto Caliphate in Northern Nigeria maintained that "[t]he most important condition for a governor is that he should appoint for the care of state affairs such persons who are purposeful, truthful and honest." A. Yahya Aliyu, *A Note on Wilayat al-Mazalim: The Institution of Public Complaints in Islam and the Draft Constitution, in* CONSTITUTIONALISM IN ISLAMIC LAW 1, 7 (A. Rahman I. Doi ed., 1977) (quoting Sultan Muhammad Bello). Also writing in the 19th Century about governance in Northern Nigeria, one of the architects of the Sokoto Caliphate, Abdullahi ibn Fodio, emphasized that the ruler or emir should seek information about the caliber of potential public officers and that the authorities should "count their wealth before appointment." *Id.* at 6.

[6] Roy Mottahedeh, *Constitution and the Political Process in the Islamic Middle East of the 9th, 10th, and 11th Centuries, in* ISLAM AND PUBLIC LAW 19, 24 (Chibli Mallat ed., 1993).

[7] *See infra* secs. II.A, B.

[8] UTHMAN IBN FUDI, BAYAN WUJUB AL-HIJRA ALA AL-IBAD, 70 (F. H. El Misri trans., 1978).

porting and strengthening those international norms.[9] Many areas of congruence are discussed under the norms of internal law and Islamic law, albeit under a different conceptual framework and terminology. The benefits of public participation in a nation-state are numerous. For example, it has been noted that the nation-state system has failed to take account of long-term interests of transboundary ecosystems to which the lives of local communities (particularly those living along national borders) are intricately connected. Public participation is needed to build public awareness of issues, to give the public opportunity to express its concerns, and to enable authorities to take due account of such concerns.[10]

There are layers of public involvement under Islam, which are, in order of preference: active, partial, and passive. These classifications are derived from the statement of the Prophet Muhammad: "Whosoever of you sees an evil action let him change it with his hand; and if he is not able to do so, then with his tongue; and if he is not able to do so, then with his heart and that is the weakest of faith."[11] Therefore, participation by the public in order to put things right—that is, to maintain good governance—is an obligation on all Muslims.[12]

The most commendable participation is active participation, which is signified by the hand and is the ultimate instrument of change. In fact, active participation is required for the legitimacy of an emergent political leader and is expressed in terms of *mubaya'ah*, or lending a hand (discussed in section I.A, below).[13] The second level of participation is to seek an intermediary in the involvement by urging others to lend their hands. In certain situations, active participation may be impossible as where change may be effected only by designated people in authority. In that circumstance, people need to participate by voicing their concerns to shape a desired outcome.[14] The third and disfavored level of participation is participation confined only to the heart. It is disfavored because it is the weakest of all responses that can bring about a positive change.

These levels are still relevant both to the manner in which the government guarantees a process of participation, as well as the manner in which people respond.[15] The current trend toward guaranteeing public involvement in nation-states is to provide avenues in decisionmaking processes, as well as public access to information and to justice. Together, these avenues constitute practical mechanisms for implementing the higher, more preferred levels of involvement under Islamic law.

A. Lending a Hand: Public Participation in Governance

The primary avenue in Islamic law for the public to actively participate in governance is through *shura*, or consultation. In accordance with the principle of *shura*, when interests of members of the public are to be affected, the public must be consulted and their opinions weighed.[16] Historically, consultation was never structured formally between levels of government or between the government and the people,[17] although it was widely practiced in various forms. Early Muslim rulers followed the injunction of consultation as they deemed fit without devising a firm structure or process for that purpose. Accordingly, the early practice of *shura* is so amorphous that it may in a modern setting serve as the executive council of a government, the legislature, or indeed a people's forum, where government weighs responses of the public on certain policies.

In various decisions that impacted the public, the Prophet Muhammad seldom made a decision or took an action without engaging those who would be affected. As a result, the opinion of people with special knowledge in any given issue carried weight but was not al-

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[9] Public involvement in regional and international instruments is being shaped by Principle 10 of the Rio Declaration on Environment and Development, done at Rio de Janeiro, June 14, 1992, 31 I.L.M. 874 (1992), which states:

> Environmental issues are best handled with 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 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.

The instrument for implementing the Rio Declaration, Agenda 21, provides for public involvement in developing, implementing, and enforcing environmental laws and policies by guaranteeing transparency, participation, and accountability in environmental management. U.N. Doc. A/CONF.151/4 (1992). *See especially id.* chs. 12, 18, 19, 27, 36, 37, 40.

[10] For an articulation of benefits of public participation in environmental matters, see Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 Envtl. L. Rep. 11389, 11390-91 (2001).

[11] al-Hallaj, *supra* note 5, vol. 2, at 19.

[12] *See infra* notes 36-38 and accompanying text.

[13] *See infra* notes 21-22 and accompanying text.

[14] Commenting on the prophetic tradition on change, Judge Iyad said that it establishes the basis of seeking change, and that a person seeking change should use whatever means available to him in deeds or words. al-Hallaj, *supra* note 5, vol. 2, at 19.

[15] For instance, when a public officer of treasury was asked to render his account and was found to have abused his office by keeping part of the money as a gift, the Prophet took it upon himself to take action directly in condemning the abuse. He told the officer publicly: "You should have remained in the house of your father and your mother, until your gift came to you if you spoke the truth." *Id.* at 183-84.

[16] Qur'an 3:159 ("[A]nd consult them in affairs.").

[17] Mottahedeh, supra note 6, at 21.

ways decisive. Abu Huraira, one of the great companions of the Prophet, noted that: "I have never seen anyone who consults with his companions more than the Prophet, upon whom be peace."[18] To underscore the importance of consultation, the Qur'an contains an entire chapter on consultation—the 42nd chapter. It offers consultation even for nonreligious matters as an exemplary attribute to which Muslims should endeavor to imbibe. They are urged to emulate those "who [conduct] their affairs by mutual consultation."[19] A more direct injunction establishing widespread consultation with the public as a standard norm is contained in the verse: "and consult them in affairs."[20]

Shura is an important mechanism through which public participation is guaranteed. The law imposes a duty upon every person who engages in directing the affairs of the people, from the highest to the lowest levels, to engage in consultation with the people who may be impacted by a proposed decision. Indeed, the authority of a ruler to govern in Islam was secured through *mubaya'ah*, or a double oath of allegiance binding the public to comply with orders and the ruler to guarantee public participation. As Professor An-na'im observed, "[t]his contract [*mubaya'ah*] imposed a duty of obedience on the subjects and an obligation on the imam to rule in accordance with justice and the dictates of Shari'a, including a duty to consult his subjects."[21] This double allegiance entitles a citizen to withdraw his allegiance to a ruler when the ruler does not fulfill his own portion of the obligation.[22]

The obligation to consult is not dependent on the type of decision so long as the putative decision will have a direct impact on the subjects. The rationale for participation in consultation, it seems then, is to maintain the required unity of a community and to reduce the possibility of friction that may result from a non-representative decisionmaking process. Closely related to the latter point is a fundamental recognition that people must have an opportunity to have a voice in decisions that could affect them; even if they do not make the ultimate decision, they must be consulted.

The Prophet Muhammad and his companions consulted with the public on a wide array of issues, from military expeditions to purely religious matters. There were occasions when the peoples' voices trumped that of the Prophet, even on religious matters, as for example, on the issue of determining the mode of calling Muslims for prayers and writing down of the Qur'an.[23] The practice of the Prophet was to listen to the voices of the people, both high and low, before a decision was made and to discourage any arguments on the matter once the decision was made.

The only noted modes of consultation, as practiced during the early period of Islam, are *ammah* (involving the general public) or *khasah* (involving a select group of high-ranking leaders). It is not easy to classify which issues were deliberated by which process. Many issues available on consultation with select groups seem to be more common,[24] but the *ammah* consultation was also favored. For instance, "[Caliph] Umar used to call people to the mosque…and then he would present to them various issues upon which he wanted them to deliberate."[25] On one occasion, Caliph Umar consulted with the public regarding whether he should personally go to Iraq or send an emissary when one of his officials, Abu 'Ubaid, was assassinated there.[26] He also chose the *ammah* consultation for determining whether to continue or turn back from a trip to Syria when he was informed the region was beset with plague.[27] Many commentators have noted that policy execution during the period of Caliph Umar was smooth because of his optimal utilization of the *shura* scheme in which the general public at large had opportunity to participate.[28] Thus, the early practice of Muslim leaders does not indicate a permanent adoption of one mode of consultation over the other.[29]

However, practices of Muslim leaders in both government and civil organizations since the 8th century have tended to limit the principle of consultation to scholars, experts, community leaders, or ad hoc or per-

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[18] Muhammad Husayn Haykal, 2 Umar Al-Faruk 277 (1964).
[19] Qur'an 42:38.
[20] Qur'an 3:159.
[21] Abdullahi Ahmed An-Na'im, Toward An Islamic Reformation: Civil Liberties, Human Rights, And International Law 37 (1996).
[22] Islam demands obedience to the ruler so long as he is upright. al-Hajj, *supra* note 5, at 191. A particular incident sheds more light on this obligation. Once, in the 7th century, there was a consignment of garments from Yemen, and Caliph Umar decided to distribute them among all, with each person, including the Caliph, receiving one piece. Shortly thereafter, Umar was sighted on the pulpit with two pieces of the garments as he sought to enlist the people to participate in an emerging war. One person rose and said he would neither pay attention nor obey the Caliph until he explained to the people how he came about two pieces of garments. Then the son of the Caliph rose up and said that he gave his own share to his father, because of the father's height and because one piece would not be sufficient for his need. Then the man said: "Now I will pay attention and obey your orders." Haykal, *supra* note 18, at 215.

[23] Haykal, *supra* note 18, at 277.
[24] Mottahedeh, *supra* note 6, at 23.
[25] *Id.* at 209.
[26] *Id.*
[27] *Id.*
[28] Haykal, *supra* note 18, at 292 (quoting from Hujjat Allah al-Baligah) (noting that "Umar consulted with the people … such that most of his decisions and decrees were followed from the east to the west of the territory.").
[29] *Id.* at 209-10, 292.

manent bodies usually referred to as a "shura committee or council."[30] The reason for permanently excluding the general public seems to be due more to difficulties in assembling the general public because of the rapid rise in the Muslim population rather than to a legal or policy restriction on public entitlement—the Qur'an never did suggest such a limitation on public involvement. Despite the size of the Muslim population, where technology has made it possible for the entire public to participate without assembly, either through use of mass communication components and mass media or through representative participation, nothing should operate to permanently deny the public this opportunity to participate. Although the general mode of consultation later diminished in Muslim communities, this does not affect the sanctity of this entitlement as envisaged by the Qur'an and exemplified by early practice.

Shura is not the only principle upon which public participation may be grounded under Islamic law. *Ijma'*, or consensus of opinion is the third of four major sources from which the principles of Islamic law are derived.[31] On any matter for which there is consensus of opinion of the people, or of scholars according to other views, such opinion becomes a rule of law binding on all.[32] To underscore the force of *ijma'*, it has been observed that "only those men and writings are regarded as authoritative whom the consensus of the community has acknowledged as such, not in synods or councils, but through a nearly subconscious voice of the people which in its universality was regarded as not being subject to error."[33]

People's way of life, or *'urf*, is another avenue through which the public may direct the course of laws under Islam. Customs or traditions of a particular community, within certain limits, provide subsidiary norms in the Maliki and Hanafi schools.[34] As a subsidiary source of law, people's customs can be particularly relevant in any discussion involving the public managing resources upon which their lives depend. Indeed, local customary practice has been identified in shaping the distinctiveness and character of different Muslim cities.[35]

Avenues for public participation are not limited to issues of direct governance as the previous discussion might suggest. People have opportunities to participate outside of formal government authority by contributing to the public good. *Amr bi al-ma'ruf wa nahy 'an al-munkar*, or advancing good and hindering evil, is a broad principle of public policy under Islamic law. Members of the general public, individually and jointly, are required to participate under this principle.[36] The norm of *amr bil ma'ruf* is not a moral suasion but a duty imposed on a community. This duty which may also be satisfied if it is carried out by an individual rather than the community as a whole. However, members of a community are jointly accountable if at any given time there is not an individual or a group that fulfills this obligation.

Whereas *shura* is a consultative mechanism that is relevant prior to the taking of an action, *amr bi al-ma'ruf* always involves a response action directed against averting things that are injurious to the public. For instance, where there is an order from an emir advancing a public good, such as affirmatively outlawing any killing of tigers (an order which is clearly justified under Islamic law)[37] every Muslim is expected to not only carry out the order personally but also to discourage others from committing the act. The public is required to find a way of stopping all illegal killing of tigers, either by requiring an intending culprit to desist or by notifying the relevant authority in order to take action.

In practice, Muslim countries have traditionally implemented this public policy through the establishment of *hisbah* institutions to ensure that public health and environmental norms are followed, and that projects are developed and executed in accordance with formulated principles. *Hisbah* is a watch-dog administrative institution that ensures compliance with public interest regulations. However, the existence of a government *hisbah* institution does not preclude private citizens from engaging in similar activities to achieve compliance with public laws.[38]

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[30] In Muslim countries, as well as non-Muslim countries in which Muslims may live in a distinct community, there is always a *shura* council or committee, with differing roles and membership criteria. Almost all mosques and Muslim student associations in the United States have a *shura* committee. In political settings, such a committee could be the higher legislative chamber as in Egypt, or lower than the Council of Ministers as in Saudi Arabia. In Saudi Arabia, members of the Shura Council are chosen by the King, and the Council discusses economic and social developments as well as treaties. *See* Consultative Council Establishment Act, arts. 3,15 (1992), *available at* www.shura.gov.sa/EnglishSite/Elaw1/law1.htm (last visited June 18, 2002). In contrast to Saudi Arabia, the members of Bahrain's Shura Council are elected. *See* Neil MacFarquhar, *In Bahrain, Women Run, Women Vote, Women Lose,* N.Y. TIMES, May 22, 2002, at A3.

[31] There are four major sources from which rules of Islamic law are derived: the Qur'an, the Prophetic traditions, ijma' or consensus of opinion, and analogous deduction. *See supra* notes 3-4 and accompanying text.

[32] FAZLUR RAHMAN, ISLAM 60-1 (1979); *see also* Qur'an 4:115.

[33] HERBERT LIEBESNY, THE LAW OF THE NEAR AND MIDDLE EAST 17 (1975) (translating and quoting Ignaz Goldziher).

[34] ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 22 (1999).

[35] Besim S. Hakim, *The Role of Urf in shaping the Traditional Islamic City, in* ISLAM AND PUBLIC LAW, *supra* note 6, at 141-55.

[36] Qur'an 3:104 ("Let there arise out of you a group of people inviting to all that is good, enjoining what is good and forbidding what is bad.").

[37] Ali Ahmad & Carl Bruch, *Maintaining Mizan: Protecting Biodiversity in Muslim Communities,* 32 ENVTL. L. REP. 10020, 10030 (2002).

[38] Indeed, Al-Ghazzali in his authoritative treatise preferred private citizens forming what would look like modern nongovernmental organizations. ABU HAMID AL-GHAZZALI, 14 IHYA' 'ULUM AL-DIN 343 (1957).

B. Access to Information

As part of the process of enlightenment—a primary goal of Islam—people need information. Accordingly, under Islamic law, access to information is central to building the knowledge of Muslim citizens, and concealing information is highly discouraged.[39] In many instances, Muslims are discouraged from engaging in an act or making a decision without having full and reliable information. Acting with ignorance or lack of full and reliable information is abhorred.[40] One is enjoined to seek information and knowledge about a given subject before engaging in it:

> O ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterwards become full of repentance for what ye have done.[41]

Jurists are tasked with institutionalizing the ethics of informed decisionmaking into a legal framework that sets forth the rights and obligations of parties with respect to information in social or commercial transactions. With respect to contracts, for instance, the law stipulates that transactions must be devoid of uncertainty and speculation (*gharar*), and parties must have complete information about all aspects of the contract, otherwise it is unenforceable.[42] More broadly, the government is obligated to provide access to the information that it possesses which will benefit members of the public and to assist them in reaching better judgment devoid of speculation or ignorance. The public needs to make an informed judgment before embarking on activities, whether of righting public wrongs or enforcing private rights. This obligation to provide public access to information derives from the prohibition on concealing beneficial information. Unless the government provides access to information, the positive duty of ascertaining and verifying the truth before acting upon information will be defeated. Although the need to ascertain the truth is obligatory, it is hard to see how such a determination can be achieved without imposing an obligation on local and national governments to obtain certain information for use by the public.

The quest for information is not confined to a particular political boundary, and Muslims have been encouraged to seek information from as far as China; nor is it confined to subject-matter, as it may involve issues such as genealogy.[43]

The flipside of the mandate to seek knowledge and information is that one in possession of such information is not to withhold or conceal it: "He who is asked something, he knows it and conceals it, it will have a bridle of fire put on him on the Day of Resurrection."[44] From this authority, it is clear that the public should have access to the information that government authorities or other individuals possess. The penalty for nondisclosure—an eternal bridle of fire—is dire. Moreover, this provision focuses on the obligations of the person possessing information and not on the person who requests it. Thus, any member of the public, regardless of his status or religious beliefs, may seek information from a government official, who is then compelled to release the information under penalty of immortal pain.[45] At the same time, the government does not appear to have an obligation under Islamic law to provide information without being asked, except when it relates directly to religious enlightenment.

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[39] Disseminating information was referred to as knowledge: "When you were propagating with your tongues, and uttering with your mouth that whereof you had no knowledge, you counted it a little thing, while with Allah it was very great." Qur'an 24:15. Knowledge could be religious information: "Verily, those who believe not in the Hereafter, name the angels with female names. But they have no knowledge thereof. They follow but a guess, and verily, guess is no substitution for the truth." Qur'an 53:27-28. But religious knowledge cannot be concealed: "O Apostle! proclaim the (message) which hath been sent to thee from thy Lord." Qur'an 5:67. Knowledge could be any other form of information as well: "And follow not that of which you have no knowledge." Qur'an 17:36.
But the difference between religious and nonreligious information in the modern world disappears when one considers not the information in itself, but the endless uses to which it may be put. For instance, information about the quality or fishable status of a local stream (public health and environmental information) may be used to determine whether the natural condition of the stream has been altered significantly as to limit its use for ritual washing (religious information).

[40] Qur'an 6:140 ("Indeed lost are they who have killed their children, foolishly, without knowledge."); *id.* 17:36 ("And commit not an action upon that of which you have no knowledge.").

[41] *Id.* 49:6.

[42] Nabil A. Saleh, Unlawful Gain And Legitimate Profit In Islamic Law 49 (1986) (observing that complete and present information about all aspects of the subject matter of a contract is central to the validity of a contract under Islam).

[43] Abu Musa reported that the Prophet Muhammad was asked such things which he disapproved and when they persisted on asking him he felt enraged and then said to the people: "Ask me what you wish to ask." Thereupon a person said: "Who is my father?" He said: "Your father is Hudhafa." Then another person stood up and said: "Allah's Messenger, who is my father?" He said: "Your father is Salim, the freed slave of Shaiba." When Umar saw the signs of anger upon the face of Allah's Apostle (may peace be upon him), he said: "Allah's Messenger, we ask repentance from Allah." al-Hajjaj, *supra* note 5, ch. 4, sec. 5829.

[44] Sulayman Abu Dawud, *Kitab al-Ilm*, *in* Sunan Abi Dawud, sec. 3650; *see also* Qur'an 3:187 ("And remember Allah took a covenant from the People of the Book, to make it known and clear to mankind, and not to hide it.").

[45] The eighteenth chapter of the Qur'an contains a story about information sought by some Jews. Also, the Prophet Muhammad approved of "relating traditions from the children of Israel." Dawud, *supra* note 44, sec. 3654.

There is little authority on the issues surrounding disclosure, but a possible exception to the obligation to disclose may exist for the withholding of proprietary information. Information, like water or wildlife, is to be made accessible to all, but where an individual has expended private effort or material wealth on a small part of any of these permissible items, he may exercise a right of ownership on that part.[46] By similar reasoning, then, intellectual property could be exempted from disclosure. A less evident exception is for privately held information that may be used by other members of the public to achieve pecuniary or other related interests.

A corollary of asserting this right is that the public need not pay for the actual information, although it may be charged the cost of providing access or maintaining the body of information for subsequent users. In fact, the Qur'an in several places discourages any form of commercializing information or enlightenment that is beneficial to the society.[47] Thus, those with information that is useful to the public should be forthcoming in providing access to enable the public to discharge its responsibilities. Fees should not prevent meaningful access. Apart from information that is protected for proprietary reasons or that may expose an individual to harm, there appear to be few—if any—circumstances that would permit public authorities to deny access to information under Islamic law.[48] The practice of early Muslim political leaders was to provide all information about everything pertaining to their service.[49] In appropriate circumstances, they document such information to ensure transparency.

The history of *diwan* (public record) dates back to the early period of Islamic history. Although there is no certainty about the antecedents that led to its adoption in Islam, it is agreed that it was Caliph Umar who first introduced the practice.[50] Initially, he saw the need to document the names of all the warriors, including their specific annual salaries, in a dossier. When the state expanded and its income rose rapidly, he expanded the record to include everyone who derived income from the state, including himself.[51] The record, which contained names, addresses, and differing incomes of public officers, was entered and constantly updated by trusted individuals and kept in a public building. Subsequently, recordkeeping expanded beyond the financial realm and became classified according to subject matter of public concern or according to locality.[52] This practice, which apparently has been substituted by modern bookkeeping, continued throughout the Muslim world, and the public had full and free access to the complete record in the presence of the recordkeeper, who was there only to ensure its integrity and safety.[53] Unfortunately, public access was lost in the modern process.

In addition to ensuring passive access to information by requiring information to be released upon request, Islamic law mandates broad dissemination of specified information. Historically, the mosque environment has been the center for disseminating information about public governance. Information with the highest religious, social, and political significance—such as keeping faith in the Almighty, urging prayer for rain to combat famine, or urging people to uphold public trust in an era of endemic corruption—is sought and conveyed from the pulpit of the mosque. Information that is less religiously significant, such as the manner of addressing neighbors or elders, is made available around the vicinity of the mosque through interactive sessions. In short, the mosque served as the center of information in the long history of Muslims. To this day, mosques remain a useful avenue for sharing information among a significant number of Muslims, although they are somewhat circumscribed by civil political authorities. In addition to mosques, places that attract large number of people (such as the palaces of governments and residences of scholars) provide another means for disseminating information to the broader public in Muslim communities.

C. Access to Justice

The variety and structure of avenues for filing complaints under Islam are essentially similar to other traditions. The point of departure is that the judicial process, which is the formal dispute resolution mechanism, may be initiated against anybody, including the head of the executive arm. There is no doctrine of sovereign immunity. In fact, numerous cases were reported dur-

[46] Private property is protected under Islamic law, and one may acquire proprietary interest, ownership, or title, through creative endeavor. Unowned goods, such as timber or wild grasses, may be reduced to ownership by cultivation and possession. Majallah, The Mejelle, arts. 2164-69 (C.R.Tyser et. al. trans., 1967).

[47] *See, e.g.,* Qur'an 11:29, 51.

[48] Sharing of wealth includes sharing information. Information must be made available for the enlightenment of others unless where, in limited circumstances, proprietary interest has attached to the information. *Cf.* Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law,* 21 Cap. U. L. Rev. 1079, 1093 (1992).

[49] al-Hajj, *supra note 5, at 186 (quoting t*he Prophet Muhammad as saying: "Whoso from you is appointed by us to a position of authority and he conceals from us a needle or something smaller than that, it would be misappropriation and he will have to produce it on the Day of Judgment.")*.*

[50] Haykal, *supra* note 18, at 228.

[51] *Id.* at 231.

[52] *Id.*

[53] *Id.*

ing the early periods of Islam in which ordinary individuals filed judicial complaints against Caliphs.[54]

Equality before the law means that parties must not be given preferential treatment in any aspect of a proceeding.[55] The Qur'an requires judges to be fair and impartial even if one of the parties belongs to an enemy nation.[56] The judicial function is guided by the injunction: "If thou judge, judge in equity between them."[57] This emphasis on impartiality reflects attempts by early Muslims to avoid the danger of a corrupt judicial system, which was prevalent in previous civilizations.[58]

The traditional judicial system of Islam is not adversarial. It is affordable, simplified, and largely devoid of complex technicalities.[59] Access to the judicial process is not hindered by the requirement of standing, and any plaintiff may institute a claim as long as he asserts an interest or injury in the subject matter of the proceeding, even if his injury is no greater than that suffered by other members of the public.

The concept of *amr bil ma'ruf*, active pursuit of good governance, is vested in the public and dispenses entirely with the judicial principle of standing that civil and common law systems often impose on litigants pursuing matters of public interest. Activities that affect the public at large implicate *huquq Allah*, or rights of Allah, which rests with every member of the society.[60] While *huqu al-ibad*, or rights of individuals, may be compromised or overlooked by the individuals concerned, norms of public interest and policy (*huquq Allah*) merit the fullest implementation. Accordingly, when there is a wrongdoing or infraction of public policy or directive, the obligation to reverse the wrongdoing falls on the public, and this obligation is not discharged until an individual or public group obtains that redress. As long as a norm relates to a public law or policy, and thus affects the broader public, including natural resources management,[61] an individual need not show any specialized harm to seek redress. Redress may be sought administratively, magisterially, or judicially.

Once a matter affecting the public is involved, the principle of standing is inoperative. Public suits may further be developed along the line of the American procedure of citizens' suits in the enforcement of environmental standards but without the imposed restrictions of the procedures.[62] Citizens' suits have expanded in some form to many countries. Of the various incarnations, the model with the least procedural restrictions on citizen access is likely to be the most consonant with Islamic law.

The most important nonjudicial mechanism for public complaint is *wilayat al-mazalim*, a bureau for complaint against public officers. The institution of *mazalim* is important in public governance because all public officials are considered to be representatives of the ruler, who is accountable for all their deeds. Caliph Umar said: "If the report reaches me of any public officer who has wronged anybody and I do not redress the wrong, I am deemed to be the wrongdoer."[63] *Mazalim* seeks to ensure accountability by public officials. Although nothing restricts the operation of *hisbah* or *mazalim*, in practice *hisbah* has been deployed mainly to address complaints against private citizens while *mazalim* has been especially effective in dealing with public officials. The subject matter of *mazalim* has included executive lawlessness, corruption by public officials, impropriety by officers of *diwan* (or treasury), and

[54] For instance, when a Jewish citizen of Madina filed a complaint against the person who would be the Fourth Caliph in Islam, Caliph Ali, the judge asked Ali to sit by the side of the complainant to exemplify equality before the law. HAYKAL, *supra* note 18, at 294.

[55] Impartial treatment of litigants is a cardinal principle, and Caliph Umar specifically mentioned this in letters accompanying appointments of renown judges, such as Abu Musa al-Ash'ari: "Use your own understanding and judgment when disputes are placed before you ... Let all men be equal in your sight, in your court and in your judgment so that the strong may not hope to swerve you into injustice nor is the weak led to despair in your justice." Mohammad Hashim Kamali, *Appellate Review and Judicial Independence in Islamic Law, in* ISLAM AND PUBLIC LAW, *supra* note 6, at 66.

[56] Qur'an 5:8 ("Oh ye who believe! Stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety."). Many cases have been reported in which non-Muslims succeeded against Muslims in judicial proceedings. *See* ABDUR RAHMAN I. DOI, NON-MUSLIMS UNDER SHARI'AH (ISLAMIC LAW) 36-37, 43-44 (1981).

[57] Qur'an 5:42. Although judicial doctrine envisages independence of the judiciary and Muslim judges enjoy considerable freedom and independence, the relationship between judiciary and executive sometimes made judicial independence impossible. Kamali, *supra* note 55, at 56.

[58] The Prophet Muhammad was reported to have stated that previous traditions were corrupted because if a poor person broke the law, he was punished whereas if the powerful did the same thing, he was spared. DOI, *supra* note 56, at 36.

[59] Early European visitors to pre-colonial northern Nigeria were, in their account, impressed by how the Emir of Bauchi attended to people at a regularly appointed day of the week without intervention of counsel. Aliyu, *supra* note 5, at 9.

[60] ABUL HASSAN 'ALI IBN AL-MAWARDI, AL- AHKAM AL-SULTANIYYAH WA'L WILAYAT AL-DINIYYAH 273 (1978).

[61] Ali Ahmad, *Islamic Water Law as an Antidote for Maintaining Water Quality*, 2 U. DENV. WATER L. REV. 169, 183 (1999).

[62] In the Unites States, most environmental laws guarantee that any person may commence a civil action on his own behalf or behalf of a community against any person, including the government, who is alleged to be violating or to have repeatedly violated the statute. *E.g.*, 42 U.S.C. sec. 7604(a). In practice, depending on the statute involved, strict procedural requirements and substantive limitations have mounted against people who sought to sue on behalf of the community at large. *See* Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 41 (1995).

[63] HAYKAL, *supra* note 18, at 219.

execution of judgment against influential and recalcitrant persons.[64]

The administrator of *mazalim* is given greater power and authority and has wider discretion in granting a remedy than a judge or other administrative officers, such as *hisbah*. For instance, corrupt public officials who have been dismissed, and embezzled funds, where traceable, were returned back to the treasury.[65]

II. ENTRENCHING PUBLIC PARTICIPATION THROUGH COMMUNITY PARTICIPATION IN NATURAL RESOURCES MANAGEMENT

Management of natural resources is one area in which public participation has crystallized in Islam. Members of the public participate through their community, whose size is largely determined by adjoining regions. In general, natural resources are deemed to belong to the community in whose area the corpus of the resource lies, implying that the benefit (and burden) accruing from the communal administration of such resources are shared by the community. Whether a particular resource is subject to nonexclusive use by members of the community or whether it may be appropriated on the basis of first-come, first-served depends on where it is found: on land, at sea, or buried under the ground. This section explores how the Islamic norms, practices, and institutions of public participation in managing natural resources may constitute possible models for developing and institutionalizing public participation in other aspects of Muslim societies.

A. Terrestrial Resources

The legal treatment of natural resources by jurists holds that all resources not located in the oceans are regarded as terrestrial.[66] These terrestrial resources include mineral resources as well as nonmineral resources, such as land, rainwater, inland water, air, and wildlife.

1. Mineral Resources

There is an extensive and complex corpus of Islamic legal scholarship regarding the acquisition and use of mineral resources.[67] For the purposes of this chapter, it is sufficient to note that the Maliki school of Islamic scholarship holds underground minerals to be common property of a community, and an individual who discovers them cannot establish a proprietary claim on them since they belong to the community as a whole.[68] The Maliki ruling has been universally adopted in the Muslim world.[69] It is immaterial whether the minerals are solid or liquid, or whether they are discovered on occupied or virgin land.[70] According to the Maliki school, since minerals are objects of non-appropriation by individual members of the community that own them, they are subject to communal administration and, most importantly, sharing of the benefits. The ruler or head of the community is considered a trustee, and he automatically becomes the overall trustee for mining, maintenance, and administration of the resources.[71]

Traditionally, the imam delegates a person or committee, usually among the local people, to represent him in administering the trust. According to Professor Zubair, in deciding on the mining of a resource and sharing the benefits among the community, the imam or his representative "may use direct labour or give it to a company as a trust *for the benefit of the whole community*."[72] With regards to minerals that are not completely buried, such as salt, coal, and tar, the rules that apply are similar to water resources and are discussed under the next heading.

Although public participation in decisionmaking regarding the manner of extraction and benefit sharing of mineral resources is established in Islamic law, it is

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[64] Al-Mawardi, *supra* note 60, at 80-3.

[65] Haykal, *supra* note 18, at 223.

[66] Hassan S. Khalilieh, Islamic Maritime Law: An Introduction 133 (1998) ("A general survey of historical accounts, jurisprudential queries, Geniza documents, and commercial treaties concluded between Muslim and non-Muslim governments proves that Islamic law distinguished among (a) the high seas beyond the reach of any caliph or provincial governor, (b) maritime belts and zones outside these waters in which the governor had certain rights, and (c) inland waters (rivers and harbors) which fall directly under the supervision of the state.").

[67] Mineral resources are referred to as *ma'adin*, plural of *ma'dan*, and comprise all minerals that are grounded in the earth by the will of Allah without any act of humankind. This excludes *kanz*, or treasure, i.e., resources that belonged to individuals but became buried under the earth by their own act or due to natural phenomena such as earthquakes. It also excludes resources that strayed from their lawful owners. Abdul Karim Zaydan, Al-Madkhal Li Dirasah Al-Shari'ah Al-Islamiyyah 254 *et seq.* (1981); Walied M.H. El-Malik, Minerals Investment Under The Shari'a Law 55 *et seq.* (1993).
The definition of the Qur'anic term of *ard* or "earth" varied and had an effect on what each school included or excluded in its description of mineral resources. For a concise treatment of the nature of consistency of early jurists in their definition of *ard* and the consequences of such definition on the treatment of mineral resources, see Abdul-Qadir Zubair, Islamic Legal Doctrine And Interests In Land 44-47, 107-12 (1996).

[68] Zaydan, *supra* note 67, at 254. A. Al-Khafif, Ahkam Al-Mu'Amalat Al-Shar'Iyyah 105-106 (1947). The Maliki ruling has been universally adopted. Walied El Malik, *State Ownership of Minerals Under Islamic Law*, 14 J. Energy Nat. Resources & Envtl. L. 310, 315 (1996).

[69] For the rulings of other schools, see Zubair, *supra* note 67, at 107-12.

[70] El-Malik, *supra* note 67, at 55.

[71] Zaydan, *supra* note 67, at 255.

[72] Zubair, *supra* note 67, at 106 (emphasis added).

seldom put to full practice with respect to certain resources that have assumed extreme economic importance. In all other cases, though, the public is largely involved in all aspects of managing or extracting natural resources, with some minor local variations. The fact that Islamic law stipulates public involvement as a threshold mechanism for managing most aspects of natural resources provides an opportunity to develop and apply public participation to enhance transparency and ensure accountability more broadly in modern Muslim communities.

2. Fresh Water Resources

Similar to underground resources, water is to be managed by the community. Unlike those resources, however, where the imam may be the administering representative of the community, direct communal administration applies to water resources. In its natural state, water—however acquired—cannot be the subject of private proprietorship.[73] Due to the public nature of water, the proprietor of a property upon which water runs or lies will be liable if he pollutes it or exhausts its source to the detriment of others.[74]

The purpose of the law is to ensure that water is made available to the whole of the community. Since there is little proprietary right attached to water resources, the ruler cannot convey or license any use to anybody in such a way that would exclude the community. Also, since everybody has access to water, water may not be monetized and sold.[75] Although a person may acquire or own the land on which water is located, jurists have unanimously ruled that acquiring water rights confers a right of priority use, but not exclusive use.[76] The primary norms for managing water nevertheless ensure that the community not only benefits from the water resources but is also responsible for the routine administration of the water.

Even in modern Muslim nations, the law has regulated water use to maintain the traditional communal care and administration, leaving certain areas of water policy for the central government.[77] Jurists have addressed in great detail the priority of water use in various circumstances, such as for drinking, domestic use, agricultural use for those nearest to and farthest from the river, and for industrial use, but no one can refuse surplus water.[78]

When water is involved, the term "community" is defined broadly to even include animals. For example, jurists have ruled that animals have a right of quenching thirst (*haqq al-shirb*) against a proprietor of water body.[79] The broadened communal administration of water resources is clear from the Prophet's declaration that: "People are equal partners in three things: water, fire, and pasture."[80]

As mentioned earlier, the water regime applies to minerals that are not completely buried in the ground, indicating that there is also a nonexclusive right of use and direct communal management. The Prophet Muhammad said that this class of minerals "is like a lake; whoever comes to it takes out of it."[81]

The water regime applies also to fire and pasture. The purpose of the law is to ensure that where these resources are available naturally without the input of humans: access to them cannot be denied. Closely related to pasture is another community-oriented mechanism of *hima*, or protected area, discussed above. The condition for validity of a hima is that it must meet the needs of the community that establishes it, and "[e]ach community is to determine the number and size of its *hima*, given the purposes sought to be achieved."[82]

3. Other Natural Resources

Slightly different rules apply to other remaining terrestrial resources, such as inland wildlife, biodiversity resources, and *mawat* or virgin land (that is, land that has never been developed). These are all considered *amwal al-mubahat*, or common property that belongs

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[73] DANTE A. CAPONERA PRINCIPLES OF WATER LAW AND ADMINISTRATION: NATIONAL AND INTERNATIONAL 71-72 (1992). "Legally, inland waters, *i.e.*, rivers and ports, were recognized as being under state jurisdiction; they were considered property of the state." KHALILIEH, *supra* note 66, at 141.

[74] Ahmad, *supra* note 61, at 180.

[75] CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 73.

[76] ISMA'IL AL-AMIR, 3 SUBUL AL-SALAM SHARH BULUG AL-MARAM 166 (1998); CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 73; MAJALLAH, *supra* note 46, art. 1263.

[77] CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 75 (noting that "It appears that in Moslem countries modern codifications of water law aim at institutionalizing, in one form or another, the concept of community of interest in water resources which constitutes the traditional basis of Moslem customary water laws.").

[78] DANTE A. CAPONERA, WATER LAWS IN MOSLEM COUNTRIES 38 *et seq.* (1973).

[79] Qur'an 54:28 ("And tell them that the water is to be divided between them [the wealthy, the poor, and the animals]: each one's right to drink being brought forward (by suitable turns).").The principle of *haqq al-shirb* extends the legal category of water rights to animals. *See generally* B.A. MASRI, ISLAMIC CONCERN FOR ANIMALS (1987); James Wescoat, Jr., *The "Right of Thirst" for Animals in Islamic Law: A Comparative Approach,* 13 ENV'T & PLAN. DIG.: SOC'Y & SPACE 637 (1995).

[80] AL-AMIR, *supra* note 76, at 165.

[81] AL-MAWARDI, *supra* note 60, at 197.

[82] Ahmad & Bruch, *supra* note 37, at 10028.

to no one,[83] and exclusive ownership may be attained on the basis of first-come, first-served.[84] "He who develops a virgin land," the Prophet Muhammad said, "owns it."[85] The ruler also has a joint right with the community to make a grant of land (*iqta*') to any other person. Wildlife also belongs to the community as a whole, with the individual having a right only over the fruit of his labor. While this concept could facilitate over-hunting, the legal limitations on the types of wildlife that can be hunted and the mode of killing that can be used, could work to limit this tendency.[86]

B. Marine Resources

Early Muslim jurists viewed the oceans as beyond the reach of the state and of any particular community.[87] Consequently, they asserted that these resources belonged to nobody, and that nobody had a proprietary right in them. Thus, the minerals and everything in the ocean are considered to belong to the person whose efforts yield the discovery or catch.[88] Like the *res nullius* under the Roman law, ocean resources are subject to acquisition by anybody who is able to acquire them.[89]

Public participation has the potential to bring about meaningful changes and creative ways to manage marine resources. Undertaking education and outreach programs in a community can sometimes make a difference, particularly where local knowledge is applied. For example, the Misali Ethics Project was undertaken in a fishing community with an overwhelming Muslim population in Tanzania. The Misali area is renowned for its coral and sea turtles, and the community used various unsustainable methods, including dynamiting, to increase its catch. After conducting a series of workshops using Islamic sources and resource persons, the unsustainable fishing practices of the communities changed, resulting in an increase in their fishing reserves.[90] It is particularly worth noting that this is occurring despite the fact that in traditional Muslim communities, marine resources are particularly vulnerable to overexploitation. The project was so successful that the World Wildlife Foundation International accepted it as a Gift of Islam, part of its global Sacred Gifts of Nature Program, at an international gathering in Khatmandu, Nepal in November 2000.[91] This was the only gift to emerge from the African continent. The Misali method is being extended gradually in other Muslim communities.[92]

C. The Promise of Community-Based Resource Management for Advancing Public Participation in Muslim Societies

"Surely the earth is Allah's."[93] These words of the Qur'an have been the center of community-based resource management in Islam communities. Except for occupied land (where Islamic law entitles the individual to assert exclusive property rights), communities possess a modicum of right in all other natural resources on land for which where there are no mineral resources or public water rights. Furthermore, there is a class of resources whose characteristics render them communitarian according to the consensus of jurists. These are water, beneficial fire (e.g., for heating or cooling), and pasture. Where any resource in this class is found in its natural state, even on private property, the right of the individual is exercised subject to the community interest in the resource. Thus, a landowner could not prevent a canal from passing through his property when that was the only way of getting through to water, in which the interest of the community was overriding.[94] Ultimately, a fundamental tenet of natural resource management in Islamic law is that the community (including the individuals in the community) must have

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[83] Al-Amir, *supra* note 76, at 158 (noting that land belongs to a developer where it previously belonged to no one).

[84] It is only the Hanafi school that makes ownership of virgin land conditional on the permission of the imam or ruler. Al-Mawardi, *supra* note 60, at 177. On biodiversity resources, see Ahmad & Bruch, *supra* note 37, at 10029-32.

[85] Al-Amir, *supra* note 76, at 158. Developing or reviving a virgin land depends on the intended purpose but it is usually by irrigation, planting of trees or uprooting them for some purpose, or erecting of a structure. Al-Mawardi, *supra* note 60, at 177. In some instances, unless these signs of development are consummated, the land may revert back to the imam who may allocate it to another person.

[86] However, this legal limitation is largely inapplicable to marine wildlife. Ahmad & Bruch, *supra* note 37, at 10030.

[87] Khalilieh, *supra* note 66, at 133.

[88] Yakub Abu Yusuf, Kitab Al-kharaj 70 (1962).

[89] In Roman law, property was thought to exist in various forms. Objects that belong to nobody (like whales and stray cats) are *res nullius* and are subject to private acquisition. *See* Susan J. Buck, The Global Commons: An Introduction 4 (1998).

[90] Fazlun Khalid, Misali Islamic Ethics (2000) (unpublished Consultant's Report for Islamic Foundation for Ecology and Environmental Science) (on file with author). The World Bank is funding a similar project in Indonesia. Personal communication, Fazlun Khalid, Director Misali Ethics Project to Ali Ahmad (Nov. 2001).

[91] Janet M. Chernela et al., *Innovative Governance of Fisheries and Ecotourism in Community-Based Protected Areas*, xx Parks J. xxx (2002 forthcoming).

[92] Multilateral financial agencies are financing projects with a similar methodology to the Misali project in Malaysia. Personal communication, Fazlun Khalid, Director Misali Ethics Project to Ali Ahmad (Nov. 2001).

[93] Qur'an 4:131.

[94] Malik Ibn Anas, Al-Muwatta, sec. 36.26.33 (Abdel-Magid Turki ed., 1994). The same rule applies in other resources where the water regime applies. Thus, where a person who discovers a salt deposit tries to bar access to the deposit, he is regarded as a trespasser. Zubair, *supra* note 67, at 118.

the opportunity to participate, and it is an even more fundamental requirement that the benefits of the natural resource flow to the community at large.

Although the concept of communal sharing of benefits from natural resources still underlies many institutional arrangements of modern Muslim states, the role of the community in participating in the management has dwindled from that envisaged by traditional Islamic law.[95] In many of these countries, a local authority, such as the provincial imam or government, holds title to the land in trust for the community, while mineral resources including oil and gas belong to the state to be exploited for the benefit of all citizens.[96]

Since the emergence of the nation-state, the quality and quantity of benefits from natural resource management that return to the community has been affected.[97] These states have extended their discretion in managing resources to reach into the area of communal benefit sharing, which is not subject to discretion. As noted above, if management of resources is delegable to the imam or a representative of the community, benefit sharing of such management must accrue to the community as a whole and not merely to the representative.

Public participation in natural resource management can serve as a foundation upon which to construct a modern vision for public involvement in Muslim communities, a framework that extends beyond natural resource management. As the next section will show, public involvement could initially take the shape of communal participation, where everyone jointly participates in the decisionmaking process. Communities may collectively participate in the process or appoint some of their members to do so on their behalf. A dissenting individual or minority may nonetheless represent himself. Alternatively, any member that is sufficiently interested may take it upon himself to represent his community—or just himself.

III. RELEVANCE OF SECULAR EXPERIENCES IN ADVANCING ISLAMIC PARTICIPATION NORMS

This chapter has reviewed a range of norms and practices in Islamic law through which public involvement may be advanced in contemporary Muslim communities and nations. These norms apply both generally and to different specific contexts, and they highlight the historical and continuing need for public involvement. The current challenge is to combine, within a consistent framework of public involvement, the scattered provisions under which requirements for public access to information, participation, and justice have been articulated. Since community participation in natural resources, especially nonmineral resources, has deep textual roots within Islamic law and is vaguely practiced to some extent in Muslim communities to this day, it provides a practical context in which to frame and develop modern Islamic norms and practices of public involvement.

In developing a modern Islamic framework for public involvement, modern principles that have emerged domestically or in multilateral agreements around the world also can provide guidance for internalization and operationalization of those principles in Muslim countries.[98] Approaches adopted by various states that institutionalize the collection of information on environmental conditions, make the information publicly avail-

[95] CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 75.

[96] EL-MALIK, *supra* note 67, at 315-17.

[97] This fact is evident from the centralized nature of the authority to allocate, appropriate, and manage natural resources. It is now the central government that has virtually everything to do with all aspects of mineral resources.

[98] Pursuant to Principle 10 of Rio Declaration, *supra* note 9, regional instruments have emerged seeking to implement the principle. Notable among them is the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention]. Although regional in scope (comprising Europe, the independent states of the former Soviet Union, Canada, and the United States), the importance of the Aarhus Convention is global. The Aarhus Convention links human rights, the environment, and government accountability in a democratic context. By acknowledging that humans owe an obligation to future generations, it establishes that sustainable development can be achieved only through the involvement of all stakeholders. It is forging a new process for public participation in the negotiation and implementation of international agreements. Particularly, it grants the public rights and imposes on public authorities obligations regarding access to information, public participation, and access to justice. For a review of the Aarhus Convention, see Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume; Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428, 10431-36 (2002).

Although not as binding on the parties as the Aarhus Convention, other notable regional instruments that seek to involve the public include the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (2000) (an initiative of the Organization of American States); the Draft ASEM Document on Towards Good Practices for Public Involvement in Environmental Policies (an Asia-Europe initiative); and the Protocol on Shared Watercourse Systems in the Southern Africa Development Community (SADC) Region (1995, entered into force Sept. 1998) (between Southern African countries). *See* Jorge Caillaux, Manuel Ruiz, and Isabel Lapena, *Environmental Public Participation in the Americas*, in this volume; Mikael Hildén and Eeva Furman, *Towards Good Practices for Public Participation in the Asia-Europe Meeting Process*, in this volume; Collins Odote and Maurice O. Makoloo, *African Initiatives for Public Participation in Environmental Governance*, in this volume.

able, promote public participation, and ensure access to justice that can strengthen emerging Islamic mechanisms.

The current practice of Muslim states supports this analysis. Modern legal schemes governing natural resources in most Muslim countries are rooted in communal objectives, albeit with differing interpretations of the term "community."[99] For water and resources that are clustered with it, review has shown that "in Moslem countries modern codifications of water law aim at institutionalizing, in one form or another, the concept of community of interest in water resources which constitutes the traditional basis of Moslem customary water law."[100] Furthermore, in Mali, which has an overwhelming Muslim population, the forestry laws assign responsibilities for forest management to local governments.[101]

Similarly, a provincial law, the Land Tenure Law of Muslim northern Nigeria, which placed land administration in the hands of local government, was substantially extended to the whole country under a national law with state governors now holding lands in trust for their subjects and, to a lesser degree, devolving some of the significant decisions to local governments.[102] Similar situations have been reported in other Muslim communities of Senegal and Niger, where local chiefs preside over village councils characterized by local structures of participation, which include youth associations, professional groups, Islamic associations, and imams.[103] Although these arrangements may have been structured by the various governments as a means of managing rural communities, the arrangements would not have succeeded without the prevailing notion of communal participation. Current efforts at further empowering the community and encouraging public involvement must therefore build on this initiative as well.

Even with mineral resources, which have assumed national and international economic significance, Muslim countries have maintained legal regimes with some communal basis, at least with respect to communal participation in benefits. For example, the ruling of the Maliki school, which governs the management of oil and natural gas in all countries, provides that oil belongs to the community or, in effect, the state, and that the net benefit should be enjoyed by all.[104] Despite upholding the inviolability of private property, the view of Islamic law regarding minerals was restated in the wake of nationalization of industry in Africa and the Middle East: "Under Islamic law, particularly in the Maliki School, mines and underground resources are the property of the Sultan (the State)."[105] Thus, a corporation that has concession on an oil field cannot claim exclusive ownership of the community property under Islamic law, although it is entitled to compensation for its losses due to nationalization.

The re-empowerment of Muslim communities and citizens may take many forms. For example, the Saudi National Commission for Wildlife Conservation and Development provides one model for making information available at the national level. The Commission's information center is mandated to gather relevant information and establish an information bank accessible to the public. The center is empowered to stipulate its rules of publication and to provide access to the available information.[106] In the United Arab Emirates, the Environmental Research and Wildlife Development Agency has a mandate "to develop techniques to collect information about the natural constituents of the environment and wildlife" and "to provide the public and private sector with information related" thereto.[107] The agency is also charged with cooperating and exchanging information with local, regional, and international organizations.[108]

Islamic law could be helpful in furthering public involvement in Muslim countries because the law is not an impediment and does not need to be negotiated. Comparative analysis of Islamic law and principles that are emerging under international efforts are compatible and could be mutually enforcing. Therefore, the ultimate guarantee of public involvement seems to rest on political, rather than legal, mediation. The most effi-

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[99] *See generally* FARHAT J. ZIADEH, PROPERTY LAW IN THE ARAB WORLD: REAL RIGHTS IN EGYPT, IRAQ, JORDAN, LEBANON, LIBYA, SYRIA, SAUDI ARABIA, AND THE GULF STATES 26 *et seq.* (1979).

[100] CAPONERA, PRINCIPLES OF WATER LAW, *supra* note 73, at 75.

[101] Jesse C. Ribot, *Representation and Accountability in Decentralized Sahelian Forestry: Legal Instruments of Political-Administrative Control,* 12 GEO. INT'L ENVTL. L. REV. 447, 474 (2000). "Indeed, Mali has given local populations greater decisionmaking powers over local natural resources than has any other Sahelian country." *Id.* at 475.

[102] 1978 Land Use Act (Nigeria) Cap. 202 L. Fed. Nig. sec. 1 (1990) ("Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act."). The law also recognizes the power of local governments to make grant of lands that are not in urban areas. *Id.* sec. 6.

[103] Ribot, *supra* note 101, at 463.

[104] EL-MALIK, *supra* note 67, at 310, 315. Current practice has shown that minerals such as oil and gas have acquired national and international economic importance beyond what nation-states can concede to local communities. In effect, Muslim countries might have widened the meaning of "community," at least with regard to oil and gas, to include a nation as a whole.

[105] Libyan American Oil Company (LIAMCO) v. Libya, 20 I.L.M. 1, 91 (1981) (Subhi Mahmassani, Arb.).

[106] MUHAMMAD SULAIMAN AL-TARIF, ANZIMAH AL-MUHAFAZAH ALA AL-HAYAH AL-FITRIYYAH WA AL-MAWATIN AL-TABI'IYYAH FI AL-MAMLAKAH AL-ARABIYYAH AL-SA'UDIYYAH 31-32 (1996).

[107] Law Establishing the Environmental Research and Wildlife Development Agency, art. 3, secs. 18, 21, Law No. 4 of 1996, *available at* www.erwda.gov.ae/englaw.asp (last visited June 17, 2002).

[108] *Id.* art. 8, sec. 9.

[109] Consultative Council Establishment Act, *supra* note 30, at art. 15(b).

cient manner to increase public involvement in Muslim countries is to encourage the people to demand that their political leaders restore traditional Islamic guarantees for public (including community) involvement.

Through a process of articulating Islamic norms and practices of public participation, Muslims can identify common steps and set priorities for achieving practical access to information, participation, and justice in environmental and other matters. For instance, environmental impact assessment or administrative hearings could be mandated under modern Islamic law for new projects that are likely to affect the environment. Moreover, nothing could be more in compliance with the *shura* principle, with respect to modern treaty negotiations, than allowing the public to participate in voicing their concerns on treaties that directly touch upon their interests, as do environmental treaties. Incidentally, the Saudi Shura Council is empowered to "study laws and by-laws, international treaties and agreements, concessions, and make whatever suggestions it deems appropriate."[109] Although treaty negotiations seem remote for most ordinary Muslims who are concerned about local activities that affect their well-being, *shura*, properly practiced, envisions mutuality in consultation at the local as well as international levels. This mutuality presumes initiation or feedback from either the people or the government.

IV. CONCLUSION

Unsuspecting analysts may doubt that the public has any voice under Islamic law, which demands public allegiance to the ruler so long as he implements Qur'anic norms. However, a ruler does not implement those norms, nor can he claim to be a leader, when he scuttles public involvement. This chapter has identified four separate categories of situations under which Islam seeks to give people a voice. The first is in having a voice or, in Islamic terms, a hand in the political governance of the state. As we have seen, the continued legitimacy of political leadership depends on consultation (or *shura*) with the people. The second category is the ability of the people to contribute to legal development through continuous recognition of their customs and way of life. This is done through *'urf* and *ijma'*. The third mechanism for public involvement—particularly in ensuring rule of law, accountability, and public access to justice—is through one of the most fundamental public policies in Islam, *amr bil ma'ruf*, which requires communal engagement in the ordering of good governance in the society. Finally and more specifically, Islam places the community (which sometimes is interpreted narrowly to mean a local populace, or the population of a country, or even more widely to include animals) as the focus of its scheme in managing all natural resources. Under this heading, the community's participation has been greatest in both decisional and beneficial entitlements to nonmineral resources. Access to information is guaranteed by the affirmative duty of disclosure and nonconcealment.

As a practical matter, while Muslim communities still retain some entitlements in the management of natural resources under the nation-state, these are often placed at the discretion of the central government, negating their immediate utility to communities. In most cases, the decisions on most aspects of management and even on the more fundamental issue of sharing benefits are not made by the communities or their representatives. It is therefore necessary to re-empower communities in natural resources matters under the modern nation-state arrangement, as envisaged by Islamic law, to provide guarantees that can effectively ensure qualitative involvement by members of the public.

Experience has demonstrated that one effective way public involvement can be advanced is to ensure transparency of government actions and accountability of government officers to the people. Thus, even if the public is not in a position to act or decide directly on the management of the resources, it will be informed on why and how a decision was made on its behalf. On the one hand, this will empower the community to determine the veracity of a statement and determine if further action is needed (in Islamic terms, by hand, voice, or heart), and on the other hand, it will promote accuracy and prudence by the government about its statements.

As this book highlights, principles are emerging around the world to ensure access to information, public participation in decisionmaking processes, and access to judicial and administrative redress. With a rich tradition of public involvement in governance and management of natural resources, Muslim nations and peoples should be actively engaged in, if not at the forefront of, the dialogue on developing norms, practices, and institutions to promote and ensure public involvement at the local, national, and global levels. Muslim countries cannot otherwise fulfill their obligation to empower the public.

THE STAKEHOLDER CONVERGENCE: PUBLIC PARTICIPATION AND SUSTAINABLE BUSINESS PRACTICES

*Ira Feldman**

People's right to know about and participate in decisions that could affect their quality of life is increasingly recognized as a critical element of sustainable development.[1] In this context, the environmental matters have been a "wedge issue," allowing advocates to open up government processes and make them more accountable.[2] Natural resources and the environment play a fundamental role in ensuring a safe, healthy, and productive life, thus people are more likely to demand opportunities to be involved in decisions that affect these natural resources.[3]

Why is opening up government processes important to business? Where is the business value of stakeholder engagement? Public and consumer pressure play an important role in providing market incentives to motivate and reward corporate change. The assumption has been that improving public participation in environmental decisionmaking could provide benefits to business in terms of increased public acceptance, and there has been grudging acceptance that better solutions and outcomes are possible through multi-stakeholder dialogues. However, active engagement with stakeholders and documented good performance can protect licenses to operate, drive product and service innovation, reduce legal liabilities, and improve business strategy:

> Rising public involvement in government and business affairs is seen in the growth and activism of non-governmental organizations, and in pressures to disclose environmental and social performance to investors. Civil society creates pressures for business to be more open and transparent in the way it deals with the public, government, other businesses, and local communities. International NGOs ensure that corporate activities anywhere in the world are under stakeholder and shareholder scrutiny. Failure to perform responsibly in a distant market or along the supply chain or in the launch of new products may erode corporate reputation and harm competitive position in core markets and in equity markets.[4]

Civil society is demanding greater accountability and transparency from both government and business.[5] The public participation dialogue—which has resulted in the general acceptance of its three pillars: access to information, access to decisionmaking processes, and access to justice—has focused primarily on governmental decisionmaking, with limited input from the business community. Regional efforts, such as the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) and the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (the ISP), have translated the pillars into frameworks for implementation.[6]

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[1] Rio Declaration on Environment and Development, prin. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

[2] *See* Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428 (2002).

[3] *Id.* at 10428-29.

[4] WORLD RESOURCES INSTITUTE ET AL., TOMORROW'S MARKETS: GLOBAL TRENDS AND THEIR IMPLICATIONS FOR BUSINESS 53 (2002) [hereinafter TOMORROW'S MARKETS].

[5] UNEP, 10 YEARS AFTER RIO: THE UNEP ASSESSMENT 43 (May 2002) (summary report from UNEP's Industry as a Partner for Sustainable Development initiative) [hereinafter UNEP ASSESSMENT], *available at* www.uneptie.org/outreach/wssd/global/pub_global.htm (last visited July 26, 2002).

[6] *See* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume; Jorge Caillaux et al., *Environmental Public Participation in the Americas*, in this volume.

In the private sector, the "beyond compliance" theme has evolved into discussions of strategic environmental management, sustainable business practices, and triple bottom line thinking.[7] Separate, but closely related, is the current focus on corporate governance, corporate accountability, and corporate responsibility, which has received increased attention in the wake of high-profile financial and accounting scandals at Enron, WorldCom, and other companies. The consideration of the parameters of corporate social responsibility (CSR) has drawn varied players, from the European Commission[8] to the International Organization for Standardization (ISO),[9] into the dialogue, and the United Nations has launched its "Global Compact" in partnership with business and industry.[10]

This chapter posits that there are common links among all these initiatives in the spheres of public involvement and corporate governance, and that progress in both areas will require the development of enhanced mechanisms for stakeholder engagement. Some view sustainability and governance as the twin pillars of corporate responsibility.[11] A blurring of lines between public decisionmaking and private decisionmaking on environmental and sustainability issues, as well as emerging notions of collaborative governance, is driving what is described in this chapter as "the stakeholder convergence." From the private sector perspective, voluntary initiatives and partnerships have defined the position of business and industry in the preparations for the World Summit on Sustainable Development (WSSD); this chapter illustrates how these efforts are congruent with enhanced stakeholder engagement.

This chapter explores this rapidly changing field, drawing primarily on the U.S. experience. One needs to traverse a broad terrain in order to fully understand the stakeholder convergence. Some of the pieces of the puzzle remain to be linked through multi-disciplinary research, pilot implementation projects, and perhaps the emergence of new mechanisms for public involvement and institutions to support them. The first section recaps advances in public involvement and stakeholder engagement over the last decade. The section also discusses the traditional mechanisms for public participation, which until recently meant public input to governmental decisionmaking through notice and comment procedures and public hearings. The perceived shortcomings of these traditional approaches illustrate the need for models of enhanced public publication. The second section considers the appropriate role of business and industry in the sustainability dialogue, especially with respect to voluntary initiatives, partnerships, and so-called "Type II" partnerships. The third section begins with a short discussion of traditional mechanisms for engaging the public in environmental decisionmaking, and then discusses mechanisms for enhanced public participation. These include options within the U.S. statutory framework, voluntary excellence programs, industry code initiatives, good neighbor programs, and sustainable community efforts. The fourth section considers the leading academic work with implications for improving stakeholder engagement by the private sector, especially efforts to measure the business value of stakeholder engagement. Research activities are occurring across various disciplines, and the results promise to alter our view of stakeholder-industry partnerships and collaborative governance. A concluding section considers future prospects in light of the WSSD and beyond.

I. PUBLIC INVOLVEMENT FROM RIO TO JOHANNESBURG

The last decade has seen dramatic developments in the articulation and implementation of public involvement. Starting with Principle 10 of the Rio Declaration on the Environment and Development,[12] formal and informal efforts from the local to the global have started to ensure that public involvement. Bruch and Czebiniak summarized the experiences over the past decade:

> The 1992 Earth Summit seized an opportunity to recognize and affirm the importance of access to information, public participation, and access

[7] *See* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1997); *see also* MATTHEW ARNOLD AND ROBERT DAY, THE NEXT BOTTOM LINE: MAKING SUSTAINABLE DEVELOPMENT TANGIBLE (1998). Elkington introduced the term "triple bottom line" to summarize his idealized corporate sustainability agenda: the balancing of economic prosperity, environmental quality, and social justice, i.e. achieving sustainability is more complex than simply harmonizing the traditional financial bottom line with emerging thinking about the environmental bottom line.

[8] *See* COMMISSION OF EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION CONCERNING CORPORATE SOCIAL RESPONSIBILITY: A BUSINESS CONTRIBUTION TO SUSTAINABLE DEVELOPMENT. (2002) 347 (July 2, 2002).

[9] *See* ISO CONSUMER POLICY COMMITTEE (COPOLCO), THE DESIRABILITY AND FEASIBILITY OF ISO CORPORATE SOCIAL RESPONSIBILITY STANDARDS, final report presented at ISO COPOLCO meeting, in Port of Spain, Trinidad and Tobago, on June 10, 2002.

[10] The gateway webpage for the UN Global Compact is found at 65.214.34.30/un/gc/unweb.nsf/ (last visited August 3, 2002).

[11] *See, e.g.,* Ernst A. Brugger, Remarks at 2002 Conference Board Business and Sustainability Conference, "Getting There From Here: Aligning Environmental Economic and Social Objectives with Corporate Strategy," New York (June 26, 2002) [hereinafter Brugger Comments].

[12] Rio Declaration on Environment and Development, prin. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

> to justice in Rio Principle 10. Subsequent regional initiatives have put flesh on the skeleton of Principle 10 by establishing specific mechanisms, legal requirements and practices to ensure good environmental governance. Through binding and non-binding regional initiatives, more than 80 countries have publicly committed to taking specific measures to ensure public access to information, participation and justice. In some cases these initiatives continue to advance apace; in others a renewed commitment is necessary. In many instances, a more complete set of specific environmental governance approaches and mechanisms are necessary to assist local and national authorities and international institutions in operationalizing public involvement.[13]

As articulated in Principle 10 and elaborated elsewhere in this volume, the core components of public involvement are transparency and access to information, public participation in decisionmaking, and accountability and access to justice.[14] However, as discussed below, mechanisms for promoting access to information and public participation have received more attention than access to justice.

A. Minimal Business Involvement in Articulation of Regional and Global Norms

Most of the regional and international initiatives described in this volumn included the active participation of governments, nongovernmental organizations, and, as appropriate, international institutions. In most instances, business has not been well-integrated or involved in the process. For example, while some business interests were engaged in discussions regarding the ISP, generally speaking they have not had a significant role in its conception, development, or follow-up.[15] Similarly, the Aarhus Convention has been a largely NGO-driven initiative that has engaged governments in a regional framework.

As implementation of the various regional initiatives, and to a lesser extent international developments, proceeds, industry is starting to take notice. Indeed, in the United Kingdom, expanded public rights of access will take effect in April 2003, sooner than expected, catching industry somewhat off guard.[16]

Substantial progress has been made in environmental impact assessment (EIA), ensuring that people know about the potential impacts of proposed projects that could affect them and giving them a chance to participate in the decisionmaking process. The experiences with EIA at the regional and international levels are discussed throughout this volume.

Pollutant Release and Transfer Register (PRTR) systems are emerging as another key mechanism to ensure public access to information about pollution to which they may be exposed. A PRTR system is a database or inventory of releases of potentially harmful chemicals to the air, water, and soil, as well as wastes transported off-site for treatment and disposal. Unlike other environmental databases, a PRTR system provides individual facility-level pollutant data, which can be periodically produced and made publicly available in an easily accessible way.[17] The Organisation for Economic Co-operation and Development (OECD) has been promoting the development of PRTR systems, and many countries in transition have begun to establish PRTR systems, often with the help of international organizations.[18]

In the United States, the Toxic Release Inventory (TRI) requires industrial facilities in certain sectors to publicly report quantities of toxic chemicals annually released into the air, water, and land. In the wake of an accident at a Union-Carbide facility in Bhopal, India that killed thousands of people living nearby, Congress passed the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). EPCRA established the TRI and required manufacturing facilities to calculate and report releases to air, land, and water of more than 300 chemicals listed as toxic by the government. The law also required EPA to compile the manufacturers' reports in a publicly accessible database. In the years

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[13] Bruch & Czebiniak, *supra* note 2, at 10453.

[14] *See generally* Carl Bruch & Meg Filbey, *Emerging Global Norms of Public Involvement*, in this volume.

[15] Personal communication, Zoila Giron, Organization of American States, July 9, 2002.

[16] *See* Jean Eaglesham & John Mason, *Fears over Access to Companies' Environment Information*, Fin. Times, May 21, 2002, at 2. Eaglesham and Mason report that:

> The government has decided to give the public rights of access to environmental information from April, opening companies to an unprecedented degree of public scrutiny two years earlier than expected. The move, due to be announced by the Department for the Environment, Food and Rural Affairs this summer, will shock industry. Business did not expect access rights to public sector information to kick in until January 2005, when the Freedom of Information Act comes into force … The rules, which implement the Aarhus Convention, an international agreement, will have added bite since the information commissioner is to be given an enforcement role.

Id.

[17] *Public Participation in Environmental Decision-making*, *in* EBRD Transition Report 40 (2001).

[18] *Id.*

since the law took effect, the number of chemicals reportable under the TRI has grown to more than 650. The number of manufacturing companies required to report also has grown significantly.[19]

In its early years, the TRI contributed to many emissions reductions, saving facilities money and reducing the environmental burden.[20] The TRI has been popular with citizens and government:

> In a sense, [TRI] is democracy in its purest form. Give everyone open access to information they consider important, and then let society sort out its preferences without relying on government intervention. TRI has performed pretty much as its drafters expected it would. It was intended to bring about behavioral changes and create a new way to think about improving environmental performance. TRI has proven popular and powerful because it involves information that many people care about, and it serves a deeply felt social value related to public safety and environmental stewardship.[21]

However, industry has become less enamored of the TRI, particularly as the emissions reductions have become more difficult.[22] Industry and some commentators have also expressed concerns that the TRI does not account for the entire "environmental footprint" of a facility or industrial sector, that comparison of TRI data across sectors or facilities is problematic, and that the TRI does not necessarily reflect exposure risks.[23]

After the terrorist attacks of September 11, 2001, federal agencies began to rethink what information should be made available to the public. Many government websites had documents removed or were shut down entirely.[24] Considering the growing concern about access to information and the significant strides that have been made already, pressure will continue to mount for greater stakeholder inclusion through enhanced mechanisms such as those explored in this chapter.

B. Shortcomings of Traditional Mechanisms for Public Involvement

Whether in the context of "notice and comment" rulemakings or public hearings relating to permitting or environmental impact assessment, public participation has become an accepted part of the process. Nonetheless, there has been a great deal of concern expressed by interested parties that their opinions in such processes amount to merely pro forma exercises. Within the academic community, considerable doubt has been raised about the level and effectiveness of stakeholder engagement under the traditional mechanisms, and skepticism about the applicability and effectiveness of newer hybrid approaches. Thus, the path forward is leading to the development of new mechanisms and institutions for enhanced stakeholder engagement.

In framing the current state of affairs in public participation, Susskind underscores the distinction between access to information and participation in the decisionmaking process: "While exposing the decisionmaking process to public scrutiny, access to information by itself does little to include the public in the pro-

[19] *See* Mary Graham & Catherine Miller, *Disclosure of Toxic Releases in the United States*, 43(8) Env't 8 (2001). *See also Reading Pollution Report is Tricky; EPA Offers Two Ways to Interpret Data, Producing Contradictory Conclusions*, Chattanooga Times/Chattanooga Free Press, July 29, 2002, at A1. The last round of reporting included data from approximately 23,500 facilities. *Whitman Announces Availability of Latest Toxic Release Inventory; Includes New "PBT" Data*, U.S. Newswire, May 23, 2002.

[20] Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy 624-26 (1992); *see also* Kenneth J. Warren, *New Approaches Needed in Pollution Control; Dealing with Shortcomings*, 226(75) Legal Intelligencer, Apr. 18, 2002, at 5 (reporting that "The TRI also provided an additional incentive for companies to achieve source reduction: Companies devoted resources and ingenuity to reduce generation and emission of TRI chemicals to avoid the adverse publicity associated with disclosing significant emissions of toxic chemicals.").

[21] Ron Outen, *TRI: A First Step*, 43(9) Env't 34 (2001). While terming the TRI "something of a blunt instrument," Outen also noted that "it has been enormously valuable not only in terms of reductions … but also by creating the opportunity for a detailed discussion of emissions and recycling trends." *Id.*

[22] The TRI statistics show chemical facilities slicing their releases by more than half between 1988 and 1997. However reductions have been difficult since then. Bill Schmitt, *Public Disclosure, Warts and All*, Chemical Week, July 5-12, 2000, at 43 ("But if you look at the last three or four years, we are flattening out. Most people would admit that in the early years we got the low-hanging fruit. Now it's becoming more and more difficult to reduce those emissions."). *See also Chemical Industry Sees Benefits in Reporting Pollutant Emissions*, Trio, Spring 2001, at 9.

[23] Outen, *supra* note 21, at 34; *cf. Whitman Announces Availability of Latest Toxic Release Inventory; Includes New "PBT" Data*, U.S. Newswire, May 23, 2002 (acknowledging industry concerns that "TRI annual reports reflect releases and other waste management activities of chemicals, not exposures of the public to those chemicals. The release estimates alone are not sufficient to determine exposure or to calculate potential adverse effects on human health and the environment.").

[24] For a description of information taken off-line after September 11, see www.ombwatch.org/article/articleview/213/1/104/ (last visited Aug. 2, 2002); Laura Gordon-Murnane, *Access to Government Information in a Post 9/11 World*, 6(10) Searcher, June 1, 2002; Environmental Protection Agency, Chemical Emergency Preparedness and Prevention Office (CEPP), "*RMP" Info Temporarily Unavailable* (Oct. 21, 2001), *available at* epa.gov/ceppo/rmp_unavailable.htm (last visited Aug. 2, 2002).

cess, since people usually see the information only after a decision is made, and often it is in an incomprehensible form."[25] Review-and-comment, the predominant form of rulemaking in the United States, reflects what Susskind calls a "paternalistic" model of public participation, in which the governmental experts are expected to make decisions based on their objective vision of the public interest. The enhanced form of review-and-comment ("hybrid" rulemaking) involves participation by public interest groups as surrogates for the general public. Another variant, regulatory negotiation (Reg Neg), developed in response to growing interest in alternative dispute resolution and to what some decried as an"ossified" review-and-comment process.[26]

Applegate views the review-and-comment paradigm as "clearly capable of providing a quantitatively high degree of public participation in governmental decisions, and it is certainly flexible enough to permit a free-flowing dialogue among citizens and government…[but] in practice the three steps often amount to 'decide, announce, and defend.'"[27] He concludes that "if decide-announce-defend is the trap that review-and-comment procedures fall into, then the most important remedy is earlier public involvement in the decisionmaking process." But Freeman warns that merely convening a multi-stakeholder forum may not achieve meaningful participation, even if it creates an opportunity for dialogue:

> The administrative law landscape is littered with process reforms that have failed to provide meaningful participation, particularly in environmental decision making, because the responsible agency has reacted defensively to them or because public input has had little discernible impact on the way in which problems and solutions are conceived … Whether participation is meaningful depends in part, then, on the nature of the engagement among parties, as well as on the kinds of regulatory solutions they choose. Those solutions that foster continued engagement and require joint responsibility for implementation, monitoring, and revision are preferable to those that deny parties responsibility and encourage them to disengage after a single interaction.[28]

Fiorino refers to citizen participation as the "concept that lost its way," attributing some of the barriers facing enhanced stakeholder engagement to a confusing and inconsistent lexicon.[29] We should not be surprised that "citizens in a democratic society will eventually interfere with decisions in which they do not feel represented," notes Fiorino, highlighting the disconnect perceived by individual citizens.[30]

> Often participation is equated with opposition. The public is placed in a reactive posture: comments are noted, views are heard, opportunities are presented. But we rarely see a sharing of power or the codetermination of policy. The process concedes a marginal role to the individual citizen. Genuine influence is granted reluctantly, minimally, and to interests with the capacity to obstruct decisions later. Participation is biased, because it draws upon groups with the needed information, competence, and resources. It is skewed in the way that it solicits the participation of those with the most to lose or the greatest intensity of feeling on an issue.[31]

Fiorino also recognizes the link between public participation and democratic values. "Participation is just one element in the complex relationship between citizens and their political institutions … Its ethical basis should reflect democratic values and the intellectual contributions of democratic theory, not just the need to satisfy opposition demands as they arise."[32] He suggests that mechanisms for enhancing stakeholder engagement will require a new vision of participation theory that moves "beyond the interest group, adversarial, pluralistic conception and for stimulating institutional innovation and experimentation."[33]

Many commentators emphasize the qualitative difference in useful information that the general public can bring to the table. "Moreover, lay people tend to have a

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[25] Lawrence Susskind, *Overview of Developments in Public Participation*, *in* PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING 2 (ABA Standing Committee on Environmental Law ed., 1994).

[26] John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 ILL. L. REV. 1 (1997) (citing Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992)).

[27] Applegate, *supra* note 26, at 2 (citing Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1292 (1994)).

[28] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 27-28 (1997).

[29] "The term 'citizen participation' conjures up diverse images. To some people, it is synonymous with computer mailing lists, outreach meetings, well-publicized hearings, and slickly-packaged informational brochures. To others, the term evokes images of raucous public meetings, rising costs, lawsuits and delay. To still others, the term is a symbol for rallying opposition to government and corporate insensitivities, or a strategy for mobilizing otherwise disinterested publics. To the government administrator, participation can mean a nuisance or a strategy, to the public affairs staff an opportunity, to the public interest group a tactic, and to newly-organized groups a symbol. Few terms in our contemporary political lexicon have been used with so little semantic precision." Daniel Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 523-24 (1989).

[30] *Id.* at 504 (citing B. Fischhoff, ACCEPTABLE RISK 148 (1981)).

[31] *Id.* at 529.

[32] *Id.* at 546-47.

[33] *Id.*

richer, more complex, and value-sensitive understanding of risk than the risk metrics that experts typically use."[34] Of course, a participatory process is important in itself in a society where governmental decisionmakers are ultimately accountable to the public.

II. THE ROLE OF BUSINESS AND INDUSTRY

Sir Mark Moody-Stuart, the former chairman of Royal Dutch/Shell, and now chairman of Business Action for Sustainable Development (BASD), has stated, "you can't have sustainable development without business; it's just not practical."[35] The member companies of the International Chamber of Commerce (ICC) and the World Business Council for Sustainable Development (WBCSD) companies encourage good corporate practice and responsible business conduct through principles developed by individual companies, as well as through their participation in the Global Compact, their contributions to the revision of the OECD Guidelines for Multinational Enterprises, and various other initiatives, such as the Global Sullivan Principles.[36] This section focuses on the growing recognition in industry circles that stakeholder engagement is an important aspect of any voluntary initiatives, partnerships, or self-regulatory programs and will help lead the private sector towards sustainable business practices.

A. From Dialogue to Partnerships

The WBCSD recognizes that stakeholder engagement is a critical vehicle for its organization's aspirational goals relating to sustainability.[37] According to WBCSD, business has much experience with stakeholder dialogue, but still too little with the next step: practical partnerships composed of players in different sectors. The United Nations Environment Program (UNEP), in its ten-year assessment, suggests that the time is right to move to that next level:

> Multi-stakeholder dialogue is increasingly gaining acceptance as a tool for business understanding of societal expectations, for avoiding problems, and for providing sustainable solutions. … Environmental and sustainability reporting by companies and associations is becoming increasingly valued as a tool for measuring and communicating corporate and industry performance. A key achievement has been the development of broad based stakeholder consensus on basic sustainability reporting indicators as developed by the Global Reporting Initiative (GRI).[38]

Some business leaders are already thinking ahead and innovatively. Brugger has articulated "A Sustainable Approach to Business", which shifts the corporate-stakeholder relationship from one of "islands of roles and responsibilities" to a framework of "seas of competencies and obligations." Brugger has concluded that such core business topics as issue management, risk management, and knowledge management all depend on stakeholder relations, and he is presenting sustainability and governance as "the twin pillars of corporate responsibility."[39] Davis has outlined a very similar vision of the changing playing field for business and industry, marking a shift to what he calls "A Civil Economy." Davis suggests that we are entering a "new era of capital markets" where "stakeholder issues *are* core business issues." He concludes that business will participate in institutions that will sustain a civil economy.[40]

B. Stakeholder Engagement and Business in the Run-up to Johannesburg

Pressure continues to build on the international business community to expand its commitment to corporate citizenship and sustainable development. Two principal routes have been established for business and industry inputs to the WSSD planning process. First,

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[34] *See, e.g.*, Freeman, *supra* note 28, at 63 (observing that local stakeholders were interested in issues that the company and EPA "had never considered"); *cf.* Michael J. Sandel, Democracy's Discontent 4-6 (1996).

[35] Jodie Ginsberg, *Business Role Crucial at Global Summit, Leader Says*, Reuters, July 5, 2002, *available at* enn.com/news/wire-stories/2002/07/07052002/reu_47739.asp (last visited July 19, 2002).

[36] Multi-Stakeholder Dialogue background paper submitted by the International Chamber of Commerce (ICC) and World Business Council for Sustainable Development (WBCSD), United Nations Commission on Sustainable Development (CSD), 10th Sess., WSSD Preparatory Committee II, held in New York on Jan. 28 - Feb. 8, 2002, *available at* www.basd-action.net/docs/documents/prepcom2-paper-business.doc (last visited July 26, 2002). The Global Compact, *supra* note 10; OECD Guidelines for Multinational Enterprises, *available at* www.oecd.org/EN/document/0,,EN-document-93-3-no-21-181096-0,00.html (last visited June 6, 2002); Global Sullivan Principles, *available at* www.globalsullivanprinciples.org (last visited July 26, 2002).

[37] WBCSD, The Business Case for Sustainable Development: Making a Difference Toward the Johannesburg Summit 2002 and Beyond 8 (Sept. 2001) ("Corporate stakeholders range through employees, shareholders, communities, NGOs, consumers, partners, suppliers, governments and society at large. Dialogue with these allows us to learn and to spread that learning throughout the company. This learning decreases uncertainty, misunderstanding, risk, and liability; increases public acceptance of corporate activity; and increases predictability of regulators.").

[38] UNEP Assessment, *supra* note 5, at 7.

[39] Brugger Comments, *supra* note 11.

[40] Stephen M. Davis, Remarks at 2002 CERES Conference on "The Future of Wealth on Earth: Opportunities and Risks for Investors, Corporations, and Activists in a Changing Global Climate," held in Washington, DC on Apr. 17, 2002.

the WBCSD and the ICC have created Business Action for Sustainable Development (BASD) to develop a business position for the Summit. Through the BASD, business seeks to "fully participate in the dialogue with governments and other stakeholders."[41] Second, UNEP has conducted regional stakeholder dialogues with business worldwide and developed a summary of key issues for each region.

The Taskgroup on Business and Industry (ToBI), which since 1997 has focused on voluntary industry initiatives and corporate accountability issues, has significant implications for the private sector and engagement with civil society.[42]

UNEP has coordinated its Industry as Partner for Sustainable Development initiative as a multi-stakeholder process. Twenty-two sectors prepared global reports under a common format developed by UNEP. The UNEP process brought labor and nongovernmental organization (NGO) stakeholder interests into the sector report drafting process on an advisory basis.[43] Each sector report outlines achievements and unfinished business, as reported by the participating sector, while noting the perspectives and concerns of NGO and labor organizations. The result has been a formidable collection of informative reports intended as a basis for the WSSD dialogue.

Of the 22 sector reports, two are of particular interest for their comments on the importance of stakeholder engagement. The Chemicals sector found that input from stakeholders was important for the preparation of their UNEP report. Looking ahead, the trade association ICCA "wants to build on this involvement to more effectively implement the propositions and reach the goals here presented."[44] The Finance and Insurance sector report is perhaps the most sophisticated in its treatment of stakeholder issues, stating that "the lending sector must continue to come up with innovative financing solutions…that integrate divergent stakeholder expectations."[45]

UNEP itself has prepared an overview ten-year assessment report as part of the Industry As Partner in Sustainable Development initiative. The UNEP report summarizes the numerous efforts developed by industries in reducing their environmental footprint, while noting concern over the widening gap between those efforts and a worsening global environmental situation.[46] The UNEP report is structured with recommendations directed not only at business and industry, but also to governments, civil society groups, and international organizations. With regard to public participation and stakeholder engagement, UNEP identified certain gaps and stakeholder concerns related to: imple-

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[41] www.basd-action.net/docs/documents/prepcom2-paper-business.doc (last visited Aug. 5, 2002).

[42] ToBI successfully pressed for a multi-stakeholder review of voluntary initiatives in the CSD process. The review was ultimately undertaken by ToBI with the ICC and the International Confederation of Free Trade Unions (ICFTU). Within ToBI's agenda, known as "Seven Steps Towards Corporate Accountability," public participation has been a constant theme. For example, the following specific goals were articulated:

> 5(b) encourage "good neighbor" practices, in which companies, especially foreign companies and national chains (1) establish meaningful dialogues and negotiations with the communities in which they locate; (2) make adequate information and independent technical expertise available on those processes and practices which may have negative environmental or social impacts; and (3) provide mechanisms for meaningful public participation in company decisions that could impact the community's health and well-being;
>
> (c) support and help create mechanisms by which the public can more actively participate in decision-making processes which may affect them and their communities; one set of recommendations is in the UNECE Convention on Public Participation;
>
> (d) promote national dialogues with local authorities and citizen organizations on economic strategies to promote sustainable community development and local self-reliance. Special attention should be given to the value of local consumption of locally produced goods and services; and
>
> (e) provide support to local authorities and citizen organizations in developing community-based criteria and indicators for sustainable community development, including full-cost measures of local consumption, production and investment.
>
> …
>
> 6(e) provide sufficient funding and support to government agencies and community-based monitoring efforts to properly check and enforce progress in meeting pollution, toxics, and energy reduction targets; and
>
> f) require annual, independently verified reports from all companies regarding their progress towards clean production goals. These reports should include community impact statements or environmental and social audits, not only for each location in which a company has factories or production operations but also regarding the impacts of the products and the extraction of raw materials used in making these products.

For more information on ToBI activities, see JEFFREY BARBER, MINDING OUR BUSINESS (1997); TOBI, CAN CORPORATIONS BE TRUSTED? (1999).

[43] *See* UNEP ASSESSMENT, *supra* note 5.

[44] INTERNATIONAL COUNCIL OF CHEMICAL ASSOCIATIONS (ICCA) AND UNEP, INDUSTRY AS A PARTNER FOR SUSTAINABLE DEVELOPMENT– CHEMICALS 9 (2002), *available at* www.uneptie.org/outreach/wssd/sectors/chemicals/chemicals.htm (last visited July 26, 2002) [hereinafter CHEMICALS SECTOR REPORT].

[45] UNEP FINANCE INDUSTRY INITIATIVES, INDUSTRY AS A PARTNER FOR SUSTAINABLE DEVELOPMENT – FINANCE AND INSURANCE 29 (2002), *available at* www.uneptie.org/outreach/wssd/sectors/finance-insurance/finance-insurance.htm (last visited July 26, 2002) [hereinafter FINANCE AND INSURANCE SECTOR REPORT].

[46] UNEP's priority areas with respect to business and industry are identified as: mainstream decisionmaking; improve voluntary initiatives; reporting (defined as "help ensure transparency, assess performance improvements and spread environmental and sustainability reporting practices beyond the pioneering companies to the silent majority"); integration of social, environmental, and economic issues; and global responsibilities and opportunities.

mentation and verification; linkage with public policy framework; and stakeholder consultation.

Recognizing that voluntary initiatives cannot provide a substitute for an effective regulatory framework, UNEP calls for government and business interests to collaborate to find the right balance of regulations, economic measures, and voluntary initiatives, appropriate to specific socio-economic and cultural contexts. UNEP observes that most voluntary initiatives are still characterized by problems of effective implementation, monitoring, transparency, and free riders; many voluntary initiatives are still being developed with little real consultation of those outside the industry. UNEP suggests that the sector reports prepared under its auspices have helped "to move one step further in providing greater transparency needed for multi-stakeholder discussions and better mutual understanding."[47]

C. Type II Partnerships

In addition to the traditional, consensus-based negotiated outcomes (termed "Type I"), the WSSD will see the conclusion of a set of "Type II" partnerships and initiatives. These Type II documents will not be negotiated by all present but instead by those partners—governments, intergovernmental bodies, businesses, and other stakeholders—committed to implementation of the specific initiative. These partnerships will focus on concrete and specific initiatives to strengthen the implementation of Agenda 21. Any such agreements entered into at the WSSD, especially those with private sector partners, have the potential to create new mechanisms of stakeholder engagement and new institutions to support multi-stakeholder activities. These proposals have been solicited during the run-up to WSSD to be announced at the Summit.[48]

The idea is to "enable all stakeholders to make concrete contribution to the outcome of the Summit by launching implementation initiatives," and to use partnerships as the vehicle "to improve the quality of implementation by involving those stakeholders whose activities have direct impact on sustainable development."[49] While business and industry have favored the partnerships approach, NGO support has been mixed.

Currently, there are no strictly defined criteria for selection, review, or assessment of Type II outcomes, nor is there a formal selection process. Rather, there are basic requirements and guidance from the WSSD Chair and Vice-Chairs. These include that partnerships should be regional or international in scope; that they should have clearly defined targets, expected results, and a time frame; and that arrangements for funding, monitoring, and implementation should be set forth.[50]

At the Preparatory Committee meetings (PrepComs) for the WSSD, NGOs and some governmental representatives voiced significant concern that the potential links between the Type I documents and the Type II partnerships were ill-understood. Some felt the linkage was inadequate, either because the Type I's lack structure or detailed commitments, or because too many Type II's of limited relevance might be accepted. As one NGO observer noted, "There is also a danger that the development of the Type II [partnerships] drains the negotiating process of its energy and thus weakens the multi-lateral attempt to arrive at a strong and concrete global consensus. But there is also a chance that the development of the Type II [partnerships] will have a positive impact on the negotiations, demonstrating how the sustainable development agreements can be implemented."[51] Lord Holme, the Vice Chairman of BASD, has offered strong support for the Type II mechanism as consistent with the ICC and WBCSD interest in encouraging partnerships.[52] In particular, the BASD has noted that its position is that, "the partnerships cannot work properly if they are not transparent in their aims and activities, and mutually accountable between parties."[53]

III. MECHANISMS FOR "ENHANCED" PUBLIC PARTICIPATION

If the traditional mechanisms for engaging the public in environmental decisionmaking are falling short of the goal of meaningful involvement, then where can we find templates for enhanced mechanisms for public participation in environmental policymaking and corporate decisionmaking? As discussed above, the involvement of the general public adds value to both public sector and private sector decisions, especially decisions that involve technical and complex questions of human health, the cost of available technologies, and assessment of socio-economic conditions. The following section explores five mechanisms for enhanced public participation, beginning with enhancements to media-specific statutory programs and then considering more in-

[47] UNEP Assessment, *supra* note 5, at 45.

[48] *See* Proposals for Partnerships/Initiatives to Strengthen the Implementation of Agenda 21, *available at* www.johannesburgsummit.org/html/documents/prepcom2.html (last visited July 26, 2002).

[49] United Nations, Division for Sustainable Development, Type II Frequently Asked Questions (FAQ), *available at* johannesburgsummit.org/ (last visited July 26, 2002).

[50] Minu Hemmati, *Type 2s Explained*, 3(2) Stakeholder-Forum 7 (July 2002). The Stakeholder-Forum electronic newsletter can be viewed at www.earthsummit2002.org.

[51] *Id.*

[52] Lord Holme, *Stakeholder Responses to Bali Prep. Comm.*, 3(3) Stakeholder-Forum 4 (July 2002) (transcription of comments).

[53] *Id.* (but also expressing concern about establishing a mechanism to monitor the type II agreements).

novative approaches to stakeholder engagement. Each mechanism offers business and industry a potential vehicle for improving environmental decisionmaking and moving towards sustainable business practices.

A. Statutory Programs

The vast majority of U.S. federal—and many state—environmental laws rely heavily on public access to information, participation, and accountability mechanisms.[54] These mechanisms include monitoring and reporting, public hearings and consultations, and citizen suits.

For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which is the Superfund hazardous waste site cleanup program, has evolved to better recognize the need for stakeholder engagement. The Environmental Protection Agency (EPA) has found that the public needs to be involved:

> In the original 1980 version of CERCLA, Congress made a deliberate choice to focus clean-up decisions on technical issues and limit delay in implementation by limiting public participation. As a result, CERCLA practically mandated the decide-announce-defend version of the review-and-comment model by placing public participation in a narrow time frame after the remedial decision was made. Subsequent EPA policy directives and amendments to CERCLA increased opportunities for public participation along the lines of hybrid rulemaking.[55]

Now, public access to information and participation are anticipated at a wide range of decision points under CERCLA.[56] Despite the programmatic evolution, CERCLA remedy selection often remains a "decide-announce-defend" process.

> In sum, the review-and-comment models, as exemplified by CERCLA, provide an opportunity for public reaction to agency proposals, but they do not draw the public into the decision-making process at a point at which they can be influential…[S]uch narrow participation can be counterproductive in that it further alienates the public by considering only agency-defined problems and solutions. This satisfies neither outsiders who want a seat at the table, nor insiders who are regularly faced with rejectionist posturing.[57]

This limited regulatory mandate for stakeholder engagement in hazardous waste remediation is particularly inadequate when placed in the context of urban brownfields revitalization or when environmental justice concerns are raised.[58] Some efforts have been made to address these deficiencies outside of the regulatory box, for example, through the National Environmental Justice Advisory Council (NEJAC), which has developed a model plan for public participation.[59] From a business perspective, public participation in this could improve the remedial approach itself and minimize the chances of protracted litigation.

The Clean Air Act (CAA) offers an example of how command and control provisions may work with the flexibility of facility-level environmental management systems and private sector accountability mechanisms, such as third-party certification. The Clean Air Act amendments of 1990 authorized the EPA to require owners or operators of any facilities handling a regulated substance that exceeded a threshold quantity, to prepare a risk management plan (RMP). Section 112(r) of the Clean Air Act establishes a system of risk management for specific substances.[60] Under a RMP, the EPA must audit selected sources for adequacy. Audit sites are determined by the facility's accident history, hazards identified in the plan, and other factors. It has been observed that an ISO 14001 environmental management system could provide a useful framework for meeting their obligations under RMP, or the similar requirements which have been promulgated under the European Union's Seveso II Directive.[61] Under a proposed pilot study, a firm could obtain automatic approval of an RMP and low priority in regard to compliance inspections if the firm agreed to certain steps, including making environmental audit results publicly available and holding public meetings to discuss the audit and surveillance reports.[62]

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[54] *See, e.g.*, Conservation Foundation, Toward Clean Water: A Guide to Citizen Action (1976).

[55] Applegate, *supra* note 26, at 3.

[56] *E.g.*, 42 U.S.C. § 9617; 40 C.F.R. § 300.430(c).

[57] Applegate, *supra* note 26, at 3.

[58] Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 Fordham Urb. L.J. 671 (1994).

[59] National Environmental Justice Advisory Council (NEJAC), Model Plan for Public Participation (Nov. 1996), *available at* www.epa.gov/projectxl/nejac.htm (last visited July 19, 2002).

[60] *Industry Network Helps Companies Prepare For CAA Risk Management Rule Compliance*, Daily Env't Rep. (BNA), June 4, 1997, at A2; *see also*, Chemical Manufacturers Association (CMA) and American Petroleum Institute (API), Compliance Guideline for EPA's Risk Management Program Rule (1997).

[61] *See* William L. Thomas, *Use ISO 14001 as a Manager for Process Risks*, 11(76) Hydrocarbon Processing 109 (Nov. 1997).

[62] *Id.* at 112 (citing Isadore Rosenthal & Donald Theiler, *Use of ISO 14000 As an Option in Implementing EPA's Rule on Risk Management Programs for Chemical Accidental Release Prevention*, Wharton Risk Management and Decision Processes Center, Working Paper No. 96-11-25).

As more firms elect to be inspected through their insurance companies, those not participating increase their likelihood of being inspected by the EPA. Rather than facing potential government scrutiny, it is expected that this option will create a virtuous cycle.[63] This proposal is presented as a "win-win" for regulatory agencies and the public. The initiative would allow regulators to target resources on those facilities most likely to be out of compliance. Since it provides better information and a more meaningful opportunity for local community input, the pilot would give concerned citizens greater confidence in the company's RMP exercise. "In many communities, RMP roll-out sessions have provided a vehicle for public discussion of the issues between industry and community stakeholders. The results have been confrontational at times, but in most cases the dialogue has been a very constructive exchange of information."[64]

B. Voluntary Excellence Programs

Project XL[65] may be the most vilified—and certainly the most misunderstood—initiative in the relatively short history of the EPA. Project XL was envisioned as a series of 50 experiments to test innovative approaches to environmental management. Offering regulatory flexibility in exchange for accountability and collaborative decisionmaking, Project XL's experiments —if successful results emerged—would be integrated into the regulatory system. During the Clinton-Gore administration, Project XL was EPA's flagship program for introducing systemic change and "reinventing" how EPA protects the environment.[66]

Project XL has had its share of successes and failures; XL's future is not entirely clear given the emergence of EPA's Performance Track program.[67] However, Project XL produced much fodder for further discussion and analysis, and from a process perspective perhaps the most valuable outcome from Project XL's successes and failures has been its contribution towards a better understanding of stakeholder dynamics.

Project XL did not get off to a good start. In retrospect, EPA officials recognized that the early problems stemmed from several sources: political ties created in the program's initial announcement; EPA's decision to provide no predetermined program structure or policy in the initial stages; and minimal stakeholder input in the original program design.[68] Some praised EPA for allowing industry to generate creative, innovative proposals with limited bureaucracy, but others criticized EPA for lack of clarity and structure and for creating "a regulatory free for all."[69] As project applications were received and negotiations were begun, the problems encountered included:

- Widely differing expectations from within EPA and among stakeholders,
- Lack of early public input,
- Lack of clear legal authority and protection of project sponsors,
- Lack of clarity on what constitutes superior environmental performance,
- Difficulty in achieving meaningful stakeholder involvement,
- Lack of understanding of EPA's ability to offer flexibility, and
- High transaction costs.[70]

After publishing two notices, Project XL struggled to work through the first proposals and reach negotiated agreements. At the time there was genuine fear that the XL program might collapse of its own weight. Indeed, many projects proposals were withdrawn. Stakeholders craved a clear structure and specific objectives for the process. EPA responded with a further notice in April 1997[71] and initiated a reengineering exercise that

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[63] Howard Kunreuther et al., *Third Party Inspections as an Alternative to Command and Control Regulation*, *in* Environmental Contracts (K. Deketelaere & E.W. Orsteds eds., 2001).

[64] *Risk Management Plans Due*, The Advocate (Baton Rouge, LA), June 15, 1999, at 6-B.

[65] For an excellent, authoritative insider review of Project XL, see Lisa Lund, *Project XL: Good for the Environment, Good for Business, Good for Communities,* 30 Envtl. L. Rep. 10140-10153. *See also* Lisa Lund & Helga Butler, *Project XL: Cleaner, Cheaper, and Smarter Ways to Protect the Environment*, Envtl. Quality Mgmt. 75-89 (Spring 2000). For legal and regulatory perspectives, see Dennis Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*, 26 Colum. J. Envtl. L. 219-257 (2001); and Dennis Hirsch, *Bill and Al's XL-ent Adventure: An Analysis of EPA's Legal Authority to Implement the Clinton Administration's Project XL*, 1998 Ill. L. Rev. 129-172.

[66] *See* US EPA, Innovation at the Environmental Protection Agency: A Decade of Progress (Apr. 2000) at 22-23; and US EPA, Project XL: Encouraging Innovation, Delivering Results (Sept. 2000). Generally, XL projects were designed to achieve better environmental outcomes, create operational flexibility and other benefits, and generate greater involvement and support among stakeholders. Project XL sought targeted changes by using site-specific experiments to test innovative solutions while building upon and enhancing protections of the past.

[67] US EPA, Innovating for Better Environmental Results: A Strategy Guide to the Next Generation of Innovation at EPA (Apr. 2002) at 18. *See also*, EPA's Performance Track website at www.epa.gov/performancetrack/program/report.htm (last visited Aug. 4, 2002).

[68] Lund, *supra* note 65, at 10142.

[69] *See, e.g.*, Timothy Mohin, *The Alternative Compliance Model: A Bridge to the Future of Environmental Management*, 27 Envtl. L. Rep. 10345, 10347 (1997); Rena Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 Envtl. L. Rep. 10527, 10529 (1996).

[70] Lund, *supra* note 65, at 10142.

[71] Regulatory Reinvention (XL) Pilot Projects, Notice of Modification to Project XL, 62 Fed. Reg. 19872-82 (Apr. 23, 1997) [hereinafter April Notice].

spurred basic changes in the negotiating process and generated a set of tools, including guidance on involving stakeholders.[72] The next round of solicitations announced a new operating policy guidance,[73] which clarified that the notice should invite stakeholders to be co-sponsors of proposals, an idea put forth by environmental groups during outreach sessions. This notice also defined different tiers of public participation in Project XL:

- "Direct participants" are involved in the day to-day aspects of project negotiations. They influence the design and development of projects, and their views strongly influence both the details of the agreement and EPA's ultimate decision to approve or reject the project. They can be local or national stakeholders.
- "Commentors" are stakeholders who have an interest in the project but do not participate in day-to-day negotiations and project develop ment. EPA requires sponsors to provide information to potential commentors and create periodic forums in which they can express their comments.
- The "general public" is involved by having clear access to information on the development and environmental results of the project.[74]

Public participation was one of the most challenging components of the XL program from the outset. Lisa Lund, the former XL program director, is quite candid in assessing the stakeholder engagement lapses in the early going: "Though public involvement was described as a cornerstone of Project XL, very little input was sought from stakeholders before the announcement. In fact, it took more than six months before EPA was ready to talk with stakeholders about how it intended to run the program. By that time the first projects were already in trouble and EPA's credibility had already been damaged. Though EPA has increased discussions with stakeholders over time, it has been difficult to overcome this initial lapse."[75]

EPA commissioned a review of the stakeholder issues,[76] and the results of that study, performed by the not-for-profit RESOLVE, are illuminating. The RESOLVE study analyzed stakeholder involvement in four projects: HADCO, Merck, Intel, and Weyerhaeuser.[77] The RESOLVE study reported that many XL project sponsors said stakeholder involvement had helped increase mutual understanding and networking. Some XL project sponsors who had little or no prior experience in working with stakeholder groups were able to build new relationships. Others more familiar with outreach efforts, such as Intel, Weyerhaeuser, and Merck, used XL to develop more meaningful community involvement in the development and issuance of permits and in redesigning reporting mechanisms to suit community needs.[78]

EPA also gained some insight on stakeholder-to-stakeholder interactions. In several XL projects, local stakeholders have given the national environmental groups high praise for assisting local citizens and bringing substantive expertise to the table that local citizens themselves may lack. In other projects, however, especially when they have come late to the negotiations, the locals described the national groups as "inconsistent," "interventionist," and "disconnected from local citizen involvement."[79]

Former Administrator Christine Todd Whitman recognizes the continuing potential of Project XL. "The ground has shifted. We are ready for a new approach, finding common ground to achieve shared goals. Project XL:

- Is a model of how EPA should work with all environmental stakeholders;
- Focuses on results and builds partnerships that help achieve those results;
- Provides positive incentives and produces posi tive results; and,
- Proves EPA is ready to move from command and control to cooperation and accomplishment."[80]

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[72] Project XL Stakeholder Involvement: A Guide for Sponsors and Stakeholders (Mar. 1999), *available at* www.epa.gov/projectxl/032599.pdf (last visited July 26, 2002). "In EPA's stakeholder guide it is strongly suggested that newly-formed stakeholder groups perform a needs assessment to determine whether they require training or technical assistance. The project sponsor, state or federal government, a national environmental organization, or an academic institution might provide technical information or assistance to local stakeholders. When these means are not available, EPA has set up a mechanism to provide task-specific technical assistance to XL stakeholders. The Institute for Conservation Leadership manages this service under a cooperative agreement with EPA. Assistance is available to "direct participant" stakeholder groups up top $25,000 per project." Lund, *supra* note 65, at 10148.

[73] April Notice, *supra* note 71. *See also* XL Guidance Documents, *available at* www.epa.gov/projectxl/guidexl.htm#3 (last visited Aug. 4, 2002).

[74] *Id.* at 19877.

[75] Lund, *supra* note 65, at 10143.

[76] US EPA, Office of the Administrator, Evaluation of Project XL Stakeholder Processes (Sept. 1998) at 23-24 [hereinafter Stakeholder Evaluation]; *see also* Lund, *supra* note 65, at 10147.

[77] Summaries of all XL projects can be found on the EPA XL website, *available at* www.epa.gov/projectxl/ (last visited Aug. 5, 2002).

[78] Lund, *supra* note 65, at 10150.

[79] Stakeholder Evaluation, *supra* note 76, at 23-24; *see also* Lund, *supra* note 65, at 10147.

[80] Christine Whitman, Remarks at the National Environmental Policy Institute Conference, held in Washington, DC on Oct. 2001, *available at* www.epa.gov/projectxl (last visited July 19, 2002).

C. Industry Code Programs

The American Chemistry Council (ACC), formerly the Chemical Manufacturers Association (CMA), has developed the Responsible Care program, a set of voluntary environmental management commitments. ACC bylaws obligate its member companies and partners to participate in Responsible Care as defined by the ACC Board. This includes ascribing to the Guiding Principles, participating in the development of the initiative, and making good faith efforts to implement the program elements of the Responsible Care initiative.

According to the ACC, the heart of the Responsible Care initiative are six Codes of Management Practices: the Community Awareness and Emergency Response (CAER) Code, the Pollution Prevention Code, the Process Safety Code, the Distribution Code, the Employee Health and Safety Code, and the Product Stewardship Code. These Codes of Management Practices provide a series of practices which generally include personnel qualifications; hazard identification, evaluation, prevention, and control; communication requirements; requirements for reporting data to the ACC; product risk management; and a requirement of self-evaluation.[81]

Some ACC member companies have established community or citizen advisory panels (CAPs) to address environmental or safety concerns and have advanced them as a model for involving the public or the work force in key environmental decisions. "Citizens advisory boards are an outgrowth of regulatory negotiation, which move away from rigid, expensive, adversarial resolution of environmental issues. They also respond to regulatory negotiation by expanding participation beyond a small group of insiders."[82] The ACC encourages member companies to establish community advisory panels.[83] Over 240 CAPs have been established in the U.S. under the Responsible Care banner. Some of these community advisory panels "have taken on lives of their own, bringing Responsible Care to neighborhoods around the country in new and evolving ways."[84] Typically, however, CAPs focus on the causes and effects of recent facility accidents, health and safety effects from products, and preparedness strategies. Many CAPs find plant tours and open houses to be most effective in reaching the community, while others engage in community service activities outside the fenceline.[85]

The 25-member CAP in Houston is one of several that groups together several facilities owned by different companies. The Houston CAP was formed in 1995 and now includes the participation of ExxonMobil Chemical, Lyondell-Citgo, Goodyear, Kemiron-Gulf, Rhodia, Texas Petrochemicals, and Valero. Monthly meetings of this CAP focus on quality of life issues in Southeast Houston. Almost half of the members of the Houston CAP are employees of the local facilities, and the immediate goal is to increase community involvement, ideally three to four citizens to every plant representative. The industry goal for the CAP is to operate with minimal nuisances and disruptions to the local residents. To that end, the plants provide monthly updates on environmental and safety incidents to the CAPs. From the community perspective, the CAP process has been positive, but some would like the participating companies to use the CAP framework to lead to more involvement in the community.

Several of the more sophisticated CAP programs begin to resemble sustainable community projects. The ACC acknowledges that it views the CAP program as a potential springboard towards sustainability activities.[86] The Canadian chemical industry has already charted out how an expanded Responsible Care program might embrace sustainability concepts.[87]

Some suggest, however, that the CAP concept as implemented by ACC members is flawed, arguing that most of the panels' members are handpicked by the corporation or its consultants, agendas are often set by the company, and critics are kept out or outnumbered. Moreover, "[t]he panels also generally are not provided with the independent technical support needed to evaluate corporate performance. Thus, the role of these panels in serving as an accountability mechanism has been less than one might expect."[88]

D. Good Neighbor Programs

Good Neighbor Agreements involve organizing local community residents and factory workers to negotiate directly with the companies for toxic use reduction, job security, and community economic and physical health.[89] As Sanford Lewis, the intellectual progenitor

[81] American Chemistry Council, Guide to Community Advisory Panels (Jan. 2001) [hereinafter CAP Guide]. Personal communication with Dan Roczniak, American Chemistry Council (July 9, 2002).

[82] Applegate, *supra* note 26, at 1.

[83] *See* CAP Guide, *supra* note 80.

[84] *The Grass Roots: CAPs Take on a Life of Their Own,* Chemical Week, July 3-10, 2002, at 47- 57.

[85] *Id.* at 47.

[86] Personal communication with Dan Roczniak, American Chemistry Council (July 9, 2002).

[87] Canadian Chemical Producers' Association, A Primer on Responsible Care and Sustainable Development (Dec. 1994).

[88] Sanford Lewis et al., The Good Neighbor Handbook: A Community-Based Strategy for Sustainable Industry 256 (1992); *Industry's Critics Make Respect an Elusive Goal*, Chemical Week, July 3-10, 2002, at 42.

[89] Sanford Lewis & Diane Henkels, *Good Neighbor Agreements: A Tool for Environmental and Social Justice*, 23(4) Social Justice 134 (1997), *available at* www.cpn.org/sections/topics/environment/stories-studies/lewis_henkel.html (last visited Aug. 3, 2002); *see also* Sanford Lewis, Precedents for Corporate-Community Compacts and Good Neighbor Agreements (1996); Michael K. Heiman, *Community Attempts at Sustainable Development through Corporate Accountability*, 40 J. Envtl. Planning & Mgt. 631-43 (1997).

and champion of good neighbor agreements, explained, these agreements rely on a contractual relationship:

> Contract law provides a possible tool for problem solving and legal resource for community groups. The law provides a remedy for the breach of contract, or set of promises, the performance of which the law may recognize as a duty. The private nature of contractual agreements provides an avenue for legal enforcement that can be as flexible and creative as the parties intend, but that remains legally binding.[90]

These contracts have a range of material provisions to be negotiated, including:

> the formation of stakeholder alliances between labour, community and company management to find common ground in sustainable manufacturing; the maximum use of existing legal rights to unionize, to access information under Right-to-Know legislation, and to protect corporate whistleblowers; full product information labelling; access by labour and community interests to an independent outside technical review paid for by the implicated industry; the right to inspect company operations; workers' right of first refusal to purchase a plant when closure or sale is intended; and a host of similar reforms designed to hold companies accountable to the communities in which they operate, the workers they employ, and the consumers they provide for.[91]

The first such agreement was signed in 1978 in Worcester, Massachusetts. Since then, numerous agreements have been negotiated that provide a vehicle for community organizations and a corporation to recognize and formalize their respective roles within a locality.

Typically, the Good Neighbor Agreements arise from contentious permitting and land use disputes that place a company and community at odds. These instruments have been used to best effect in reaching agreements with petroleum refineries, chemical processing plants, and mining operations. Although there have been some striking successes, Good Neighbor Agreements are far from routine as numerous communities have unsuccessfully sought such agreements with corporations. Though several agreements have arisen following industrial accidents, others are negotiated before such a crisis has occurred or in response to chronic issues such as pollution or job concerns. In some instances, the emphasis is on environmental concerns, while in others it is on employment and economic concerns.

As conceived by Lewis and his Good Neighbor Project, these agreements specifically promote sustainability by linking environmental and economic concerns.[92] The Good Neighbor Project defines "sustainable" industry as having operations that are "clean, stable, and fair." In this context, "fairness" means that "human health, environment, labor resources, and the capital resources and materials within local communities [are] treated in a manner to ensure their continued viability for the long term."[93] The philosophy common to all Good Neighbor Agreements is the industry's and community organization's mutual acknowledgement of the need to build relationships responsive to community and industry needs.

Most firms are more likely to engage in Good Neighbor negotiations during periods critical to operations, such as during contract negotiations, at times of license renewal, after an accident or an emergency condition, or under the specter of additional regulation or threatened product liability suits.[94] Good Neighbor Agreements can be difficult to secure when the firm is not subject to collective bargaining agreements, permit violations, or to negative publicity.[95] Indeed, Lewis notes that "after 10 years of grass-roots experimentation with this strategy, it is apparent that no corporation has signed a binding agreement unless the community or work force had established a bottom-line reason why the management needed to do so-for example, because it could alleviate some costs of delay brought on by community resistance to specific permits."[96] Some companies, such as Unocal (discussed below), have also interpreted certain agreed-upon obligations in the narrowest possible manner and have delayed implementation of other clauses. Lewis concedes that even a binding agreement does not necessarily mean that the firm will in reality be a "good neighbor." Informed by such experiences, he suggests that a "corporate-community compact" may be a more appropriate and neutral term for describing these agreements.[97]

Perhaps the best-known Good Neighbor Agreement is the highly publicized Unocal Agreement in Contra Costa County, California. In September 1994, residents of the California towns of Crockett and Rodeo were inundated by two separate chemical releases due to leaks from a Unocal facility in Rodeo. Unocal was initially unresponsive to community concerns. As demands for action grew, there were several public meetings and strat-

[90] Lewis & Henkels, *supra* note 89, at 147.
[91] Heiman, *supra* note 89, at 636-37.
[92] *Id.*, at 636 ("In its pursuit of economic and social, as well as ecological, sustainability, the Good Neighbor Project aims then to enlarge the community of 'stakeholders' having a direct role in industrial decision making to include plant workers, local residents, consumers and spokespersons for environment.").
[93] *Id.*
[94] *Id.* at 637.
[95] *Id.* at 641.
[96] Lewis & Henkels, *supra* note 89, at 147.
[97] *Id.*

egy sessions by community leaders, environmental groups, and labor unions. Ultimately, Unocal signed a Good Neighbor Agreement in order to receive land use approvals that were a precondition to continued operations. Unocal signed a legally binding agreement to upgrade the plant with pollution control equipment, provide for job training and security, guarantee independent community and worker audit access, and commit to toxic use reduction through reformulation of its gasoline production process. The Unocal agreement was unprecedented in scope. It also represented a new trend in the formation of coalitions consisting of both economically and environmentally affected populations, i.e., workers and plant neighbors, who are prepared to make joint demands in both arenas.[98]

Taken in the most positive light, "these agreements have led to the community and industry working together and have served as a model for those who live near chemical plants across the country."[99] But the Good Neighbor framework is not always presented in a neighborly manner. Some proponents talk of browbeating a company into an agreement under threat of revoking its charter,[100] and a recent press report described a Good Neighbor process as placing "pressure on a company" through a "strategy to hold the permit hostage through legal challenges."[101] In one extreme example, the end result of a Good Neighbor process with Exxon in Baytown, Texas was a defamation lawsuit.[102] While these are not very neighborly approaches, these sentiments and experiences reflect the powerlessness felt by some residents neighboring facilities. This lack of power leads them to seek whatever leverage they can. In light of this dynamic, Lewis's corporate-community compact might be a better analogy than a good neighbor agreement.

Still, good neighbor agreements remain viable for corporate entities to engage stakeholder groups in constructive dialogue with positive outcomes. The Unocal Agreement is still in place, fully funded, and maintained through a successor corporate organization. A recent agreement with the Stillwater Mining Company in East Boulder, Montana seems to have met the expectations of all participants.[103] In addition, a 1994 agreement with Tosco in Contra Costa County, California continues to evolve with a recent proposal to post monitoring results on the internet.[104]

E. Sustainable Community Initiatives

The sustainable communities movement has been described as a "quiet transformation" taking place in the U.S. and around the world, as citizens and local governments explore new ways to plan and act about their fu-

[98] The breadth of issues that the community required Unocal to address is testament to the effectiveness of such coalitions. Unocal agreed to provide millions of dollars to Rodeo and Crockett for a health clinic, parks, schools, vocational programs, and road improvements. It also mandated improved community oversight of operations at the refinery, enhanced community warning systems, and a better system for monitoring air pollution. Erin Hallissy, *Unocal Reaches Settlement in Pollution Case; "Good Neighbor" Pact is with Rodeo, Crockett*, San Francisco Chronicle, Dec. 21, 1994, at A15.

[99] Danny Perez, *A Star Returns*, Houston Chronicle, Dec. 27, 2001, at 1.

[100] Heiman, *supra* note 89, at 637.

[101] Karen Masterson, *Enough Is Enough, Already; Texas Refiners in Senate Spotlight*, Houston Chronicle, July 14, 2002, at A1.

[102] Ron Nissimov, *Exxon Attorney Denies Any Effort to Discredit, Libel Environmentalist*, Houston Chronicle, Apr. 14, 1998, at 22 (In this instance, Exxon did not complete a Good Neighbor Agreement because the level of trust between company and community negotiators had severely deteriorated).

[103] In May 2000, Stillwater Mining entered into a Good Neighbor Agreement on a collaborative basis with the Northern Plains Resource Council, the Cottonwood Resource Council, and the Stillwater Protective Association to address social and environmental issues related to its operations. A committee that includes the councils and Stillwater Mining will review technical and environmental issues to assure that community interests are considered in the company's decisionmaking process. *Mine Development Eased by Planning*, The Billings Gazette, Oct. 27, 2000, at A1; *See also Mining Exec: Industry Future Depends on Public Acceptance*, Associated Press State & Local Newswire, Nov. 15, 1999. Chris Allen, Stillwater Mining's Vice President for Environmental and Government Affairs, was enthusiastic that it "was absolutely the right thing for Stillwater Mining to do at this time … Our neighbors have learned that when we say we will do something, we do it. There is a cost involved, but it is definitely better than litigation." Quoted in Lane White, *Planning and Hard Work Drive Stillwater Mining's Growth*, Engineering & Mining Journal, June 2001. One NGO representative involved in the process acknowledged the agreement was "unprecedented as far as getting two traditional adversaries to hammer out something that went beyond what regulatory agencies required." *Mine Development Eased by Planning*, The Billings Gazette, Oct. 27, 2000, at A1. The agreement addressed various environmental mitigation efforts and will allow independent testing of water discharge. It will include citizen members on two committees to review environmental issues and new technology that might lessen tailings, the waste rock from milling concentrate. *Mine Development Eased By Planning*, The Billings Gazette, Oct. 27, 2000, at A1.

[104] A Good Neighbor Agreement with Tosco grew out of a toxic chemical release at the refinery over a 16-day period in 1994. The release sickened more than 1,000 people in downwind communities, primarily Tormey and Crockett, California. A new proposal would have real-time air pollution data gathered at the Tosco Rodeo refinery fenceline posted on the internet under a plan devised by two environmental groups working with county, state, and federal officials. The web posting would enable the public and agencies to obtain readings of air pollutants at five-minute intervals, 24 hours a day, seven days a week. Tom Lochner, *Project Would Put Toxin Levels on the Internet*, Contra Costa Times, Apr. 10, 2001, at A6 .

ture.[105] A sustainable community does not describe any one type of neighborhood, town, city, or region since environmental and socio-economic conditions vary dramatically from community to community, but most sustainable community activities do share certain core concepts and principles. The emerging ideal is a dynamic balance between social well-being, economic opportunity, and environmental quality. A sustainable community seeks a better quality of life for its citizens while embracing environmental stewardship by minimizing waste, preventing pollution, promoting efficiency, and developing local resources to invigorate the local economy.[106] In a sustainable community, a rich civic life and shared information encourage collaborative decisionmaking through stakeholder engagement.

Internationally, sustainable community initiatives are often referred to as "Local Agenda 21" initiatives, recognizing that Agenda 21, produced at the Rio Earth Summit, called for local action to address sustainability concerns.[107] A number of sustainable community umbrella organizations are global in scope. These include the International Council for Local Environmental Initiatives (ICLEI), the Stockholm Partnership for Sustainable Cities, and the Bremen Initiative.[108] One of the more interesting community-based initiatives to date is that launched by H.P. Bulmer in Herefordshire, United Kingdom (discussed below).

In the United States, the U.S. Conference of Mayors and the National Association of Counties have created The Center for Sustainable Communities, a joint venture that is intended to provide a forum for cities and counties to develop long-term policies and programs leading to economic enhancement, environmental stewardship, and social well-being—the three pillars of sustainable communities.[109] Some of the best known Sustainable Community initiatives in the U.S. include Sustainable Chattanooga, Livable San Diego, Sustainable Seattle, and the Burlington (Vermont) Legacy Project.[110] There have been several sustainable community initiatives noteworthy for their strong collaboration between corporate and stakeholder interests, but of special interest are Sustainable Racine (Wisconsin), which has been enthusiastically supported by the SC Johnson company, and the PRISM project, which benefited from the active involvement of General Motors.

1. Sustainable Racine

Sustainable Racine is one of the higher profile sustainable community efforts in the United States. SC Johnson, as the leading hometown business, was instrumental in bringing the initiative to life.[111] Sustainable Racine is a nonprofit, nonpartisan civic organization formed in 1996 to create a unified vision of the area's future, to decide what resources to marshal to make that happen, and to promote problem solving and partnership among community groups to achieve the goals.[112] The SC Johnson commitment to Sustainable Racine started at the top—Samuel Johnson, the third-generation family CEO, participated on the steering committee along with two other senior SC Johnson officials. Johnson's eldest daughter, the company's vice president for worldwide consumer products marketing, actively joined the Sustainable Racine leadership.[113] Other SC Johnson senior staff, including its manager of community relations, played key roles in the various implementing committees. SC Johnson helped launch Sustainable Racine by providing a $1.5 million grant to support its first three years.[114]

The vision of Sustainable Racine, like many similar sustainability initiatives, echoes the Brundtland Commission definition of sustainability: "meeting the needs of today as it involves our neighborhoods, our schools,

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[105] For an excellent overview and compilation of resources regarding sustainable communities, see MARK ROSELAND, TOWARD SUSTAINABLE COMMUNITIES: RESOURCES FOR CITIZENS AND THEIR GOVERNMENTS (1998). *See also* President's Council on Sustainable Development, People, Places and Markets: Comprehensive Strategies for Building Sustainable Communities. (Workshop proceedings) June 28-30, 1998. Warrenton, VA. There are a number of extremely useful websites dedicated to sustainable community information and resources, including Network for Sustainable Communities (www.sustainable.org) and the website for EcoIQ, a quarterly sustainable community magazine (www.EcoIQ.com/magazine/).

[106] *See* ROSELAND, *supra* note 105, at 14.

[107] For a more international perspective on Local Agenda 21 initiatives, see SUSAN BUCKINGHAM-HATFIELD AND SUSAN PERCY EDS., CONSTRUCTING LOCAL ENVIRONMENTAL AGENDAS: PEOPLE, PLACES AND PARTICIPATION (1999).

[108] International sustainable community or sustainable cities activities are addressed in detail on several websites. These include: The International Council for Local Environmental Initiatives (ICLEI) website www.iclei.org, The Bremen Initiative website www.bremen-initiative.de, and The Stockholm Partnerships for Sustainable Cities website www.partnerships.stockholm.se.

[109] www.mayors.org/USCM/sustainable/; THE JOINT CENTER FOR SUSTAINABLE COMMUNITIES, LOCAL TOOLS FOR SMART GROWTH: PRACTICAL STRATEGIES AND TECHNIQUES TO IMPROVE OUR COMMUNITIES (2000).

[110] www.chattanooga.net/sustain/ (Sustainable Chattanooga); genesis.sannet.gov/infospc/templates/esd/index.jsp (Livable San Diego); www.sustainableseattle.org (Sustainable Seattle); www.iscvt.org (Burlington Legacy).

[111] Sustainable Racine website, *available at* www.sustainable-racine.com/ (last visited Aug. 4, 2002); Sustainable Racine Vision Council, *Towards a Vision: Decide Our Tomorrow's Today*, Apr. 1998.

[112] Robert Mullins, *Feel-good for Racine*, BUSINESS JOURNAL-MILWAUKEE, July 3, 1998, at 3.

[113] Geeta Sharma-Jensen, *S.C. Johnson Executive's Sense of Business Is in Her Bloodline*, MILWAUKEE J. SENTINEL, Jan. 11, 1999, at B1.

[114] David Cole, *Community and Government Are Partners in Sustainable Racine; Revitalizing Neighborhoods and Changing Attitudes Among Organization's Goals*, MILWAUKEE J. SENTINEL, Dec. 6, 1998, at 4.

businesses, young people and our quality of life in such a way that future generations will be able to carry on the effort to meet their own needs."[115] Sustainable Racine operates on a few simple principles:

- Cooperative efforts are the key to sustainable progress to assure we own a common vision, work together to break down barriers, and share and accept responsibility for making it happen.
- Education is critically important to a community's sustainability.
- The process of sustainability will never end, and benefits will be realized along the way.

The Sustainable Racine initiative relies on maximizing stakeholder input. The launch of the initiative was a model of community outreach and participation. In January 1998, the Sustainable Racine visioning process began. No fewer than 3,000 people participated in this visioning process when Racine area residents met at 23 different sites throughout Racine and the towns of Sturtevant, Caledonia, and Mt. Pleasant. The input from these forums, including from those who participated via cable television, began laying the foundation for a vision and goals of what Greater Racine needed to do to become a sustainable community. A Sustainable Racine Vision Council, comprised of nearly 150 Greater Racine area residents, developed 80 goals grouped into ten categories dealing with issues such as improving education, ensuring smart growth, improving downtown, and improving neighborhoods. The process then sought to find common ground among competing interests and groups in the community in an ongoing manner. It also sought to "maintain a kind of citizen voice and leadership support for a set of goals over a long period of time."[116]

Sustainable Racine remains a vibrant initiative. It sponsors an annual Make a Difference Day, with the 2000 installment drawing over 11,000 local participants.[117] One follow-on activity has focused on the development of indicators of sustainability relevant to Racine. A multi-stakeholder process was established to evaluate the indicators developed by the working groups over a three-year period concluding in 2003. Another follow-on activity launched in 2000 was called Preparing for Diversity, which uses small group study circles to address the social component of sustainability. The program has proven to be an effective means to address racism and improve social equity throughout Greater Racine.

[115] *Id. See also* Sustainable Racine website, *available at* www.sustainable-racine.com (last visited Aug. 4, 2002); Sustainable Racine Vision Council, Towards a Vision: Decide Our Tomorrow's Today, Apr. 1998.

[116] Mullins, *supra* note 112, at 3.

[117] *Racine Sets a Day for Building a Better City*, MILWAUKEE J. SENTINEL, Oct. 22, 2000, at 4.

2. PRISM

The Partnership for Regulatory Innovation and Sustainable Manufacturing (PRISM) brought together a range of business, community, environmental, and regulatory entities to develop a model process for a community-based alternative regulatory system (ARS).[118] The key components of an ARS agreement are: developing a public involvement plan, establishing environmental performance obligations, making innovative environmental management systems commitments, and establishing accountability mechanisms. The ARS uses innovative regulatory approaches to achieve increased operational flexibility and improvements in environmental performance with accountability that functions through better information, increased participation in decisionmaking, and transparency of results.

The model represented a consensus of environmental, business, community, and government leaders to advance the principles of better environmental performance, increased operational flexibility, and enhanced public involvement. General Motors played a leading role in this activity, which was largely based on the results of the President's Council for Sustainable Development's Auto Team.[119] The PRISM effort produced a multi-stakeholder consensus report that contained an alternate regulatory system that integrated life cycle pollution prevention into core business functions, specific environmental performance standards and accountability structures, and an implementation proposal.[120]

Stakeholder engagement was a central theme for the the PRISM project. The participants concluded that for an ARS to succeed "[i]nvolvement must begin at the outset and continue through the process of ARS development and implementation," and they specifically acknowledged that "this involvement will enable more site specific concerns to be addressed."[121] The PRISM dialogue built on previous efforts "by resolving many substantive and procedural issues that lie beneath the jointly shared concepts for improving the current environmental protection system. The PRISM participants concluded that, "to successfully implement the ARS, stakeholders need to transcend traditional roles in order to make the system work better for all."[122]

[118] Along with GM, the PRISM project brought together Dayton Power & Light, Citizens Policy Center, Ecology Center of Ann Arbor, Edgemont Neighborhood Coalition, Environmental Defense Fund, Michigan Department of Environmental Quality, Ohio Environmental Protection Agency, and the US Environmental Protection Agency.

[119] The PRISM partners sought to integrate pollution prevention and product stewardship into core business practices and flexible regulatory approaches.

[120] PRISM report at 6-7. The PRISM report is available at www.alt-path/prism/index.htm (last visited Aug. 4, 2002).

[121] *Id.*, Executive Summary, at 1.

[122] *Id.* at 3 (emphasis added).

Dayton, Ohio was considered as a possible pilot community for the implementation of PRISM, but the participants were unable to maintain sufficient critical mass for a follow-up phase. GM concedes that PRISM was ahead of its time, and remains open to the possibility of reviving an implementation activity. [123] Nonetheless, the results of the PRISM dialogue constitute a sophisticated template for constructing a multi-stakeholder sustainable community program.

> The alternative regulatory system detailed in this document provides a roadmap for state and federal governments engaged in regulatory reinvention; an opportunity for forward thinking companies to gain operational flexibility while becoming more efficient, environmentally protective, and responsive to community needs; and a means for the public to engage in meaningful dialogues with governments and companies regarding environmental performance.[124]

The PRISM ARS model builds upon the strengths of stakeholders by involving them in a collaborative consensus-building process that ensures that their individual interests and values are considered in the environmental decisionmaking process.

3. Bulmers

To widespread acclaim within the United Kingdom, the HP Bulmer Company (Bulmers) is putting its business through probably the most searching self-examination using sustainability principles ever embarked upon by a major British corporation. Bulmers is in the process of creating a model approach for a sustainable community effort.[125] Bulmers is a major producer of alcoholic beverages and is best known for its cider products.[126] The company is vested in the community, as the Bulmer family owns 51percent of the company and has an enduring interest in the vitality of Herfordshire's farming community. Established in 1889, the company itself has deep roots in Herefordshire, with the local growers supplying its main raw materials for over a century.

The overall goal of Bulmers' sustainability initiative is to create a replicable regional model for sustainable land use in Herefordshire.[127] Bulmers now views sustainability as both an opportunity and an imperative.[128] Bulmers' director of sustainability noted that: "Sustainability for us is not an add-on, as it has for some companies who are doing all the stuff with stakeholders because they've got themselves in a corner and have no option …We don't see it as an added cost, but as an opportunity—and in every area we've looked there is a case."[129]

Bulmers' sustainability team must now demonstrate that the social aspects of sustainability can increase marketing efficiencies and boost profits significantly.[130] Bulmers has commissioned the UK-based Forum for the Future to develop a green accounts procedure for the company. Its environmental and community objectives are all aimed at "making sustainability a defining feature of Bulmers and a core source of competitive advantage by 2003."[131] The community-level process has been unusually open and inclusive, involving employees, community representatives, and the local college. Bulmers has invited some of the top names in corporate sustainability to participate, and, among others, the Rocky Mountain Institute staged a charrette to kick off the initiative. An astounding range of ideas have been generated from these initial dialogues.[132] Engaging stakeholders in this agenda would mark another breakthrough in sustainable business practices.[133]

IV. RESEARCH TRENDS AND THE STAKEHOLDER CONVERGENCE

Business leaders and management theorists are increasingly aware of the need to place environmental or

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[123] Personal communication with Chris Bates, General Motors' lead for PRISM (July 9, 2002).

[124] PRISM Project Team transmittal letter (Sept. 1998).

[125] Through the Bulmer Foundation, the company has established a center at Holme Lacy College in Herefordshire with the intent of establishing it as Europe's leading educational center for sustainable agriculture and land management. The overall aim is to "make sustainable ways of living and working possible in conjunction with a fundamental shift in our human understanding and values." For further details, see Kenneth Bowe, *College Takes Route to Sustainable Farming and Land Management* and *Exploring What It Can Mean for Business*, FARMERS GUARDIAN, June 1, 2001, at 32, and Kenneth Bowe, *Seeking a Sustainable System*, FARMERS GUARDIAN, Mar. 1, 2002, at 26.

[126] Bulmers has been doing well in the United Kingdom, controlling 60% of the cider market. Bulmers also has exclusive UK rights for several international lagers. *Cider with Sustainability* and *HP Bulmer: Ferment of Sustainability Ideas, in* ENDS REPORT 17 (Jan. 2002) [hereinafter ENDS REPORT]; *see also Bulmer Holdings PLC—Final Results*, REGULATORY NEWS SERVICE, July 9, 2001.

[127] ENDS REPORT, *supra* note 126, at 18.

[128] *Id.* at 2.

[129] *Id.* at 17.

[130] *Id.* at 20.

[131] *Id.* at 17.

[132] Bulmers has generated a rich stream of ideas for greening its operations from the farm and process plant to packaging and logistics—and for enhancing its role in the local community. The RMI charrette suggested that Bulmers will need a wide-ranging rethink of its relationship with the rural community if it is to realize the goal of helping the county to become a sustainability model. Two themes were developed at the charrette: to increase local procurement of raw materials to provide greater long-term security of income to the county's farmers and to promote sustainable orcharding. *Id.* at 19-20. *See also* Department for the Environment, Food and Rural Affairs (UK), Organic Scheme Protects Old Orchards and Landscape, Sept. 25, 2001 (press release re: Bulmers' program).

[133] ENDS REPORT, *supra* note 126, at 20.

sustainable development considerations in a strategic business context. The inclusion of sustainability issues in corporate mission and values statements are becoming commonplace, and there is a parallel increase in measuring, reporting, and communicating to the public on such issues in real time.[134]

Given the emerging nature of the environment as a strategic issue, conceptual linkages between strategic management and the environment are still in their infancy. Several studies explore the link between environmental management and the firm's profitability, primarily stressing the market gains and cost savings resulting from environmental management.[135] However, not all companies understand that establishing positive relationships with stakeholders makes good business, as well as ethical, sense. By examining the levels of corporate response to stakeholders, it may be possible to better understand the business and societal values added by certain kinds of stakeholder relationships.[136]

A. Measuring the Business Value of Stakeholder Relationships

A three-tier model for corporate social responsibility provides a model for understanding the nature of a firm's stakeholder relationships. The three aspects include: social obligation (a response to legal and market constraints), social responsibility (congruent with societal norms), and social responsiveness (adaptive, anticipatory, and preventive). The second tier requires that a company move beyond compliance to recognize and internalize societal expectations, while the third tier requires that a company develop the competence to navigate uncertainty, maximize opportunity, and engage effectively with external stakeholders on issues and concerns.[137] According to Svendsen et al., increased attention to the link between positive stakeholder relationships and competitive advantage has been manifested in at least four areas:

- Failure to establish and nurture stakeholder relationships creates shareholder risk.
- Strong relationships with and between employees, and with supply chain and business alliance partners are a prerequisite for innovation.
- A dense network of relationships provides resources and information necessary for the development of new markets and opportunities.
- Relationships are the source of a good reputation and enhanced brand value, both of which create a myriad of business benefits.[138]

Some of the latest thinking about measuring the business value of stakeholder relations and public participation derives from the concept of social capital. It has only been in the past several years that researchers have turned their attention to studying social capital within organizations and specifically within business organizations. Svendsen et al. propose to measure relationship quality using the concept of social capital. In this context,

> [s]ocial capital consists of the stock of active connections among people: the trust, mutual understanding, and shared values and behaviors that bind the members of human networks and communities and make cooperative action possible … Social capital that appear to be especially relevant to the study of business value of relationships with different types of stakeholders inside and outside the firm.[139]

Thus, a firm ought to carefully select strategies and processes that reflect and support its web of stakeholder relationships. In other words, once a company has articulated its corporate strategy and goals, it can seek to identify those stakeholders with the greatest capacity to influence the achievement of those goals.[140]

Similarly, stakeholder integration may be viewed as a corporate capability or resource arising as a result of product stewardship which requires the integration of perspectives of key external stakeholders, such as environmental groups, community leaders, the media, and regulators into product design and development.[141] This resource-based view of the firm emphasizes the key role of strategic management in adapting, integrating, and reconfiguring internal and external skills, resources, and functional competencies. Firms develop a network profile or portfolio of ties to specific partners for certain activities. These relations then serve as both a resource and a signal to markets of the quality of the firm's activi-

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[134] Carl Frankel, In Earth's Company (1998); Elkington, *supra* note 7. *See also* David Wheeler & John Elkington, *The End of the Corporate Environmental Report? Or the Advent of Cybernetic Sustainability Reporting*, 10 Bus. Strategy & the Env't. 1-14 (2000); Stuart Hart & M.B. Millstein, *Global Sustainability and the Creative Destruction of Industries*, 41 Sloan Mgmt. Rev. 22-33; Andrew Hoffman, Competitive Environmental Strategy: A Guide to the Changing Business Landscape (2000).

[135] Michael Porter & Claes van der Linde, *Green and Competitive: Ending the Stalemate*, 73 Harv. Bus. Rev. 120-23 (1995); Forrest Reinhardt, *Environmental Product Differentiation: Implications for Corporate Strategy*, 40 Cal. Mgmt. Rev. 43-73 (1998).

[136] Ann Svendsen et al., Measuring the Business Value of Stakeholder Relationships (2001).

[137] *Id.* at 7 (reinterpreting Sethi's three-tier model).

[138] *Id.* at 9.

[139] *Id.* at 23.

[140] *Id.*

[141] Stuart Hart, *A Natural Resource-Based View of the Firm*. 20 Acad. of Mgmt. Rev. 986-1014 (1995).

ties and products. For example, in establishing an environmental management system, an organization can build trust and add value to its EMS if external stakeholders are actively involved in the design and implementation.[142]

B. Multidisciplinary Contributions to the Emerging Stakeholder Convergence

Many other disciplines are contributing to the understanding of stakeholder dynamics, its potential impact on business and industry, and ultimately on governance and institutions. In practice, though, there have been few interdisciplinary connections.[143] Still, at least one scholar sees important collaborative networks forming:

> [N]ew forms of green expertise can be seen as a convergence of interests between environmental organizations, governmental agencies and business firms. The shifts in orientation have manifested themselves both on the discursive level, where new principles of environmental science, technology and management are being formulated, as well as on a practical level, where networks of innovators are serving to link universities, business, and government in new configurations. In between, at an intermediary level, policymakers seek to design appropriate programs and policy measures to move science and technology in more strategically "ecological" directions.[144]

The three areas of cutting-edge inquiry described below seem especially significant for the emerging stakeholder convergence. These are all promising lines of interdisciplinary research. Ultimately, a better understanding of stakeholder engagement will develop from these perspectives—to the benefit of businesses, regulators, and the public at large.[145]

1. The Reputation Commons and Stakeholder Sanctions

In studying industry self-regulation, King et al. are interested in the dynamics of a reputation commons problem, where stakeholders can impose sanctions, and stakeholders do not differentiate among firms in an industry sector. "Unlike a physical resource that must be subdivided by physical barriers, a common pool resource such as a reputation commons must be subdivided by information. To privatize the resource, managers must help stakeholders to differentiate among firms in the industry."[146] Therefore, the King et al. study analyzes when members of an industry will share a collective reputation and describes the individual and collective strategies that might be used to privatize this collective reputation. They posit that the addition of a strategic actor—the stakeholder—to the traditional common pool resource problem changes the set of potential for success of self-regulation. This line of research, especially important in the emerging information age, ties issues of information costs to questions and access to information. Further inquiry may suggest optimal conditions for successful self-regulation.

2. Corporate Responsibility v. Stakeholder Responsibility

As a complement to corporate responsibility, some researchers have suggested the need to consider the parameters of stakeholder responsibility. For example, according to Windsor, "Stakeholders voluntarily making demands…thereby bear some responsibility, which is otherwise ill-defined in general and definable only by reference to specific circumstances, and only for unintended negative consequences."[147] This line of thought offers key lessons for managers in that stakeholder responsibilities often involve moral and citizenship duties requiring collective action, for which business leadership may be crucial. In brief, Windsor claims that mutual and joint responsibilities of stakeholders fall into four general categories: with the firm, among stakeholders themselves, common pool resources (especially the environment), and the commonwealth. Stakeholder responsibilities toward the firm, therefore, will require that managers first conduct themselves morally, and existing notions of corporate responsibility and citizenship do not always support that pattern of conduct.[148]

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[142] *See* Magali Delmas, *Stakeholders and Competitive Advantage: The Case of ISO 14001*, 10(3) Production & Operations Mgmt. 343-58 (2001) (citing J. Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. Mgmt. 99-120 (1991); Margaret Peteraf, *The Cornerstones of Competitive Advantage: A Resource-Based View*, 14 Strategic Mgmt. J. 179-93 (1993)).

[143] Andrew Jamison, *On the Ambiguities of Greening*, 13 Innovation 249, 252 (2000).

[144] *Id.* at 254.

[145] *Id.* at 250.

[146] Andrew King, Michael Lenox & Michael Barnett, *Strategic Responses to the Reputation Commons Problem*, *forthcoming in* Hoffman & Vantresca eds., Organizations, Policy, and the Natural Environment: Institutional and Strategic Perspectives (Unpublished April 2000 manuscript on file with author). *See also* Andrew King & Michael Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43(4) Acad. Mgmt. J. (2000).

[147] Duane Windsor, *Stakeholder Responsibilities: Lessons for Managers*, J. Corp. Citizenship 19-35 (Summer 2002).

[148] Windsor, *supra* note 147, at 22-23. ("It is necessary to address stakeholder responsibilities concretely, by type of stakeholder and within specific circumstances. Otherwise, one cannot answer the vital question: do customers, employees, and suppliers, for instance, have responsibilities to the firm, beyond any established by law or by contract; or to other stakeholders, beyond any established by general moral and citizenship responsibilities?").

3. From Interest Representation to Collaborative Governance

Freeman proposes a model of collaborative governance as an alternative to the model of interest representation, arguing that the assumptions that inform interest representation limit its explanatory capacity and normative appeal.[149] In academic legal circles, Freeman's work is on the leading edge of the convergence of issues relating to environmental decisionmaking, sustainability policy, and stakeholder dynamics. Freeman has investigated regulatory negotiation and EPA's Project XL, finding that both embody elements of a collaborative model but concluding that despite their promise these experiments fall short of the collaborative ideal. Freeman argues that, "While collaboration may require greater deference to agency decision-making at a minimum, … the pursuit of collaboration requires a willingness to transcend traditional debates about agency discretion and to experiment with nontraditional forms of accountability." [150]

Collaborative governance requires problem solving, broad participation, provisional solutions, the sharing of regulatory responsibility across the public-private divide, and a flexible, engaged agency. Freeman concludes that that most common objection to such "cooperative," "co-regulatory," or "reflexive" processes is that they undermine legitimacy by reducing accountability and delegating public responsibilities to private parties. She explains that the typical response to such concern, which is to constrain agency discretion, frustrates the collaborative impulse needed to develop models for enhanced stakeholder engagement and collaborative governance.[151]

V. TOWARD A VIRTUOUS CIRCLE

In the recent UNEP Sector Report for Finance and Insurance, Carlos Joly of Storebrand articulated a vision of a thematically and institutionally interconnected playing field:

> The concept of fiduciary responsibility is in the process of being expanded to include the broader social and environmental interests of the owners of pension and life insurance funds. There is a growing realization that there be no systematic conflict between profitability and environmentalism… *In short, in the United States and Europe we are beginning to see the outlines of what could become a virtuous circle, connecting public concerns, environmental legislation, corporate environmentalism, and financial markets.*[152]

UNEP's own assessment noted that while many of the industry organizations and associations were able to report on progress, many are not currently constituted to make specific global commitments on behalf of their industry. UNEP suggested a similar paradigm shift: "a new kind of governance that could evolve in the 21st century with the involvement of stakeholders."[153] Increasingly, business and industry will see their "social license to operate" contested if there is a failure to recognize that the new opportunities of globalization carry new global responsibilities, including the obligation to help meet social needs that cannot be met by the market alone.

The WBCSD has concluded that sustainable development is just too big for companies to handle individually, regardless of their size. The WBCSD's set of sector-level projects, led by member companies, look at sustainability performance and challenges for the whole value chain of an industry sector.[154] To ensure that proposals developed are not industry solutions only, WBCSD projects extend beyond industry members to "harness independent research, stakeholder consultations and partnerships [to address] how a particular industry can contribute to sustainable development."[155] Stigson describes the projects as "based on the participatory concept, bringing together stakeholders with widely differing views, and seeking to build partnerships between industry, government and other institutions to identify ways forward."[156]

There is evidence that the private sector understands the opportunity presented by the new playing field. For example, the UNEP Chemicals sector report acknowledges that stakeholder concerns are "irrefutable facts" and "part of the framework conditions—just like laws and tax regulations." The Chemicals sector report accepts the need for an increase in the participation of the stakeholders and shared responsibilities:

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[149] Freeman, *supra* note 28, at 30.

[150] *Id.* at 2.

[151] *Id.*

[152] Carlos Joly, *Mainstreaming Best Practice: the Potential of Voluntary Initiatives and Creative Regulation*, *in* FINANCE AND INSURANCE SECTOR REPORT, *supra* note 45, at 25-26 (emphasis added).

[153] www.uneptie.org/outreach/wssd/global/pub_global.htm (last visited July 26, 2002).

[154] Bjorn Stigson, president WBCSD, quoted in *Companies Can Leverage Abilities to Promote Sustainable Development*, in GreenBiz.com (electronic newsletter) [hereinafter Stigson Comments], *available at* www.greenbiz.com/news/news_third.cfm?NewsID=20826 (last visited Aug. 4, 2002).

[155] According to Stigson, the ultimate purpose is to change industry practices and policies to make them more sustainable. The six WBCSD sector projects are: forestry; sustainable mobility, cement sustainability initiative, mining, minerals and sustainable development, electrical utilities, financial sector.

[156] Stigson Comments, *supra* note 154.

> The more companies and federations accept their responsibility in society and are willing to do necessary things through voluntary initiatives and agreements, the more they must accept the need for stakeholder involvement in open and transparent monitoring processes. Stakeholders can help the chemical industry by looking at things from a different perspective and with a different expertise. But participation of course also means taking on responsibility. Being part of a monitoring process is no longer a totally detached activity. Mutual respect and consensus-driven communication processes have to be the basis for common definitions of problems and approaches to solutions.[157]

On the eve of the World Summit, governments need to reflect on a different problem: Are the traditional institutions and instruments still suited to resolving the problems in the emerging global community? While business and NGOs have transformed their modes of operation, governments have not. Now is the time to develop a dialogue to consider institutions of international governance that are needed to match the commercial and civil institutions rapidly emerging at the global level.[158]

While expectations are high for the WSSD—perhaps unrealistically so— the potential for breakthroughs at several levels is real. For example, the Type II agreements may open some eyes—in business, in government, and among participating NGOs—to new possibilities of partnership and stakeholder engagement. The theme of good governance, which has resounded so strongly through the Preparatory Committee meetings, should provide a platform for the governmental public participation and private sector stakeholder engagement issues (which we can now recognize as two sides of the same coin) well past the WSSD. It is almost irrelevant whether the Summit is ultimately viewed as a substantive or political success, because it is clear that it will stand as a reference point marking the era of "stakeholder convergence."

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[157] CHEMICALS SECTOR REPORT, *supra* note 44, at 73.

[158] Simon Upton, *Some Reflections on the Eve of the Johannesburg Summit*, STAKEHOLDER-FORUM, Aug. 2002, at 4-5.

PART II

REGIONAL INITIATIVES ADVANCING PUBLIC INVOLVEMENT

INTRODUCTION

Since the 1992 Rio Declaration incorporated public access to information, participation, and justice in Principle 10, regional initiatives promoting public involvement have proliferated. This part examines the development and content of many of these regional initiatives, including (chronologically) those in North America, Europe and Central Asia, the Americas, Africa, East Africa, and Asia and Europe. Due to the widespread development of such initiatives, the regional initiatives discussed in this volume are not comprehensive, but rather reflect the most developed initiatives found in different regions of the world.[1]

In the first chapter of this part, Dowdeswell examines the North American Commission for Environmental Cooperation (CEC) that was established pursuant to the 1993 North American Agreement on Environmental Cooperation. The CEC constitutes a unique institutional model for simultaneously advancing environmental sustainability and trade liberalization in a region. Dowdeswell documents many of the CEC's innovative approaches to improve environmental governance in North America, focusing on those that engage the public in governance processes.

Next, Kravchenko discusses the rights-based framework for public involvement established by the 1998 UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, popularly known as the Aarhus Convention. The chapter also examines the 1991 UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context and the 1999 UN/ECE Protocol on Water and Health. While the latter two are significant, the Aarhus Convention merits the most attention. Indeed, the legally binding Aarhus Convention is the most comprehensive articulation of procedural rights of all the regional initiatives, and Kravchenko sets forth the various provisions establishing rights and responsibilities regarding public involvement in environmental matters.

In the Americas, Caillaux, Ruiz, and Lapeña place the 2000 Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development within the context of national law and practice of the hemisphere. The authors discuss the development of the nonbinding framework for the ISP, as well as the potential of the ISP to foster better public access to information, participation, and justice in the region.

In the following chapter on Africa, Odote and Makoloo examine various pan-African and subregional initiatives for public participation in environmental management. At the African level, most of the developments are found in regional declarations, conventions, and other pronouncements. The subregional initiatives are more advanced, particularly in East Africa and Southern Africa.

Expanding upon Odote and Makoloo's survey of the subregional initiatives, Tumushabe analyzes the 1999 Memorandum of Understanding on Environment Management for the East African nations of Kenya, Uganda, and Tanzania. This chapter examines the basic framework that was established for access to information, public participation, and access to justice in the East African Community. While the MOU seems to have been intended as a prelude to an environmental protocol to the EAC Treaty, such a protocol has yet to be negotiated. Tumushabe concludes that while the MOU has yet to be implemented or enforced, awareness of it has been growing and the profile of the MOU is likely to increase.

In the final chapter, Hildén and Furman discuss the draft Asia-Europe Meeting (ASEM) document on Towards Good Practices for Public Involvement in Environmental Policies. Hildén and Furman highlight how the unique process of developing the document—in a political discourse that lacks a secretariat or other coordinating body—has hindered its elaboration and acceptance. The chapter sets forth many promising provisions, including some innovative aspects of the document. In looking forward, Hildén and Furman consider how document could form the basis pilot projects and legislative development to advance public involvement in the region.

[1] *See* Carl Bruch & Meg Filbey, *Emerging Global Norms of Public Involvement*, in this volume (listing other regional initiatives that bear on public involvement that are more general, such as the CARICOM Charter for Civil Society, or less developed, such as the Mediterranean proposals).

These various regional initiatives have many common provisions regarding access to information, participation, and justice. The tables below compare the mechanisms found in the Aarhus Convention, the ISP, the draft ASEM Good Practices Document, the East African MOU, and the NAAEC. The first of the three tables compares provisions relating to access to information in the different regional instruments, the second relates to public participation, and the third compares access to justice provisions.[2]

TABLE 1: ACCESS TO INFORMATION

	Aarhus (Europe/ NIS)	ISP (the Americas)	Draft ASEM (Asia Europe)	MOU (East Africa)	NAAEC (North America)
Broad Definition of "environmental information"	X	X	X		X
Limited exceptions to access	X		X	X	X
Requested information provided for free or for a reasonable fee	X		X		
Requested information provided within a reasonable timeframe	X	X	X		
Active dissemination	X	X	X	X	X
State-of-the-Environment reports	X	X	X		X
Pollution inventories	X		X		X
Eco-labeling	X		X		
Environmental auditing	X	X	X		X

[2] These tables are adapted with permission from Carl Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428, 10447-49 (2002).

TABLE 2: PUBLIC PARTICIPATION

	Aarhus (Europe/ NIS)	ISP (the Americas)	Draft ASEM (Asia Europe)	MOU (East Africa)	NAAEC (North America)
Environmental Impact Assessments (EIA)	X	X	X	X	X
Public Participation Required for policies, regulations, plans, and programs	X	X	X		X
Public involved early	X	X	X	X	
Public interest NGOs can participate	X	X	X	X	
Active dissemination	X	X	X		
Notice required	X	X	X		X
Information provided free of charge	X		X	X	
Comments permitted and taken into account	X	X	X	X	X

TABLE 3: ACCESS TO JUSTICE

	Aarhus (Europe/ NIS)	ISP (the Americas)	Draft ASEM (Asia Europe)	MOU (East Africa)	NAAEC (North America)
For access to information	X	X	X	X	X
For public participation	X		X		X
For environmental violations	X	X		X	X
Guarantees of fair, efficient, affordable, and transparent system	X	X	X	X	X
Non-discrimination	X	X	X	X	X

The chapters in this part illustrate the common elements of the various regional initiatives that have emerged following the adoption of Rio Principle 10, as well as some of the innovative governance approaches that have yet to be adopted elsewhere. The variations among these initiatives frequently are due to the particular history, political environment, and economic development of each region. The areas of commonality are significant, though, and are likely to continue to grow as experiences are shared among the regions and demand for clearly articulating, implementing, and ensuring public involvement grows.

THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION: A CASE STUDY IN INNOVATIVE ENVIRONMENTAL GOVERNANCE

Elizabeth Dowdeswell [*]

We live in a world where ideas cross borders as if they did not exist, where cyberspace is beyond national control, and where the speed and magnitude of capital flows is simply incredible. The powerful forces of the global marketplace and new communications technology have combined to radically reshape societies and blur national borders. This is the century of globalization. The integration of world markets and the movement of capital, goods, technology, and information has narrowed our global space and accelerated the pace of change.

Not surprisingly this phenomenon has both positive and negative impacts. The jury is still out on how to avoid a collision between economic expansion, growing ecological pressures, and significant challenges to social cohesion. Citizens around the world are now engaging in discussions about economic efficiency, the liberalization of trade, and deference to the marketplace in an effort to put a human face on globalization.

On the environmental front, practically any assessment concludes that there is no room for complacency. Sobering reviews of the ecological fate of the earth abound.[1] They tell compelling stories of a continuing assault on the Earth's life support system—of waste, pollution and poisons, and a loss of natural resources and biodiversity. They portray an urbanizing world in which two-thirds of humankind fall far short of having a decent quality of life.

There is a growing sense of alienation as citizens question whether traditional institutions and political processes have kept pace with the changing world and continue to meet their expectations. Consequently, as we enter the 21st century, governance has become a popular topic of debate. The architecture of our institutions and the design of processes for making decisions are under review.

Ten years ago at the Earth Summit, world leaders embraced the concept of sustainable development. Bringing together environmental, economic, and social considerations promised much improved decisions. This was a response to globalization that imagined real strides forward in the health of the environment, a more equitable sharing of the earth's resources, and a much improved quality of life for more of the planet's people.

Today, as the world community prepares for the World Summit on Sustainable Development, that promise has not been fully realized. Sustainable development remains a work in progress. We know that a sustainable planet is not an unreachable goal, so why is action on the sustainable development agenda so elusive? Part of the answer may lie in international institutions that seem to be crippled, incoherent, slow to respond, and unable to engage effectively all sectors of society. To respond to such a quintessential global issue as environment and to foster the interdisciplinarity demanded by sustainable development requires enlightened and purposeful organizations and the inspiration of an empowered citizenry. The matter of improved environmental governance is clearly on the Summit's agenda.

In the search for effective models of governance, the North American Commission for Environmental Cooperation (CEC), a pioneer in linking trade and environment, has much to offer. This chapter describes a unique institutional model of cooperation designed to further environmental sustainability within a regime of trade liberalization. It documents actual examples of the manner in which the Commission for Environmental Cooperation has incorporated elements of good governance now being discussed internationally, particularly by engaging the public. Section I surveys the mandate and organizational structure of the CEC, as well as the context in which it has evolved. Section II examines some of the innovative approaches the CEC has adopted to improve environmental governance in North

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[1] *See, e.g.*, UNITED NATIONS ENVIRONMENT PROGRAMME, GEO: GLOBAL ENVIRONMENT OUTLOOK 3 (2002), *available at* www.unep.org/GEO/index.htm (last visited July 22, 2002); WORLD RESOURCES INSTITUTE, WORLD RESOURCES 2000-2001 – PEOPLE AND ECOSYSTEMS: THE FRAYING WEB OF LIFE (2000), *available at* www.wri/org/wr2000/index.html (last visited July 22, 2002).

America, with particular attention to those activities that have enhanced public access to information, participation, and justice. This chapter concludes with a consideration of the potential relevance of the experiences of the CEC for other regions, as well as a glimpse into the future of the CEC.

I. THE PROMISE OF TRILATERAL COOPERATION: THE COMMISSION FOR ENVIRONMENTAL COOPERATION

The CEC is a unique institutional model in many ways. First, it seeks to further environmental sustainability within a regime of trade liberalization.[2] Second, the geographic make-up of the CEC links countries at different stages of development. Third, it has committed to meaningful involvement of all sectors of society. And fourth, the CEC has adopted and developed several innovative governance tools and techniques.

The Commission was established by the North American Agreement on Environmental Cooperation (NAAEC)[3] between the governments of the United States, Canada, and Mexico. Considered to be a side agreement to the North America Free Trade Agreement (NAFTA),[4] it has been in operation since 1994.

These three governments believed that a free trade agreement was important for the stability and prosperity of North America. By systematically promoting economic integration, wealth would be generated and technology advanced throughout the region. They also understood that there was a linkage between environment and trade, and they were convinced environmental quality could be protected and enhanced concurrently with economic integration.

While the three governments negotiated NAFTA, citizens, nongovernmental organizations (NGOs), and trade unions in the region were concerned about the potential impacts of trade liberalization. Trade unions worried about loss of jobs, and environmental organizations feared that increased industrial activity would lead to more pollution and greater pressure on natural resources. Many feared that increased competition would encourage countries to lower environmental standards to attract investment, creating pollution havens. There was also the possibility that the integrity of multilateral standards and legal regimes and domestic environmental laws and standards could be challenged as unnecessary trade barriers. Finally, a focus on providing domestic industry with a competitive advantage in open markets could lead to a reduced emphasis on enforcement of environmental laws.

The governments sought to respond to these concerns by recognizing sustainable development as one of the goals of NAFTA itself. NAFTA specifically exempted certain multilateral environmental agreements should inconsistencies occur,[5] and sought to address directly the issue of a race to the bottom in environmental standards. Furthermore, a parallel environmental agreement—the North American Agreement on Environmental Cooperation—was negotiated to promote cooperation in raising environmental standards and tackling regional issues of environmental concern.

A. The North American Context

The 2001 Report of CEC's Executive Director notes that NAFTA has defined North America as an integrated economic region producing US$8 trillion worth of goods and services with total trade for 2000 worth US$700 billion. Trade and economic integration challenges environmental institutions to keep pace, to understand the challenges, and to devise public policies that realize the full benefits that open markets can bring. Cooperation and partnerships with the private sector and civil society can ensure that these benefits, such as new communication networking capacities and diffusion of environmentally beneficial products, are used in the service of the shared environment.

Although North America has made progress in conserving natural resources and protecting the environment, increased economic activity, transportation, and population growth are creating additional stress. The three countries share concerns about the quality of air and water, the long-range transport of air pollutants, hazardous waste generation and disposal, declining natural resources, loss of native species, and introduction of invasive alien species.

Environmental degradation brings real economic costs. Correspondingly, investments in environmental protection can strengthen the economy by helping to

[2] The CEC mission statement reads, "The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States."

[3] North American Agreement on Environmental Cooperation, done Sept. 8-14, 1993, entered into force Jan. 1, 1994, U.S.-Can.-Mex., 32 I.L.M. 1480, *available at* www.cec.org/pubs_info_resources/law_treat_agree/naaec/naaec02.cfm?varlan=english (last visited July 23, 2002) [hereinafter NAAEC].

[4] North American Free Trade Agreement, done Dec. 8, 1992, entered into force Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, *available at* www.nafta-sec-alena.org/english/index.htm?nafta/nafta.htm (last visited July 23, 2002) [hereinafter NAFTA].

[5] *Id.* art. 104 (specifically mentioning the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal).

achieve efficiencies and creating predictability and stability for investors. The links between the environment and the economy are becoming particularly clear in key sectors of energy, transportation, and hazardous waste.

B. The North American Agreement on Environmental Cooperation

The vision of the NAAEC is three countries working together to protect a shared environment. The preamble highlights the importance of cooperation in achieving sustainable development. It links the goal of enhanced levels of environmental protection with the trade objectives of NAFTA. The role of public participation in environmental governance is emphasized. While recognizing the authority and responsibility of each country to manage resources within its own jurisdiction, it acknowledges differences in circumstances and capabilities and consequently the benefits of a cooperative framework.

The objectives of the NAAEC specifically elaborate the intent to protect and improve the environment, now and in the future through cooperation and mutually supportive environmental and economic policies. A specific objective is to avoid creating trade distortions or new trade barriers.[6] In parallel, NAFTA recognizes that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures.[7] Enhanced enforcement of and compliance with environmental laws and regulations is identified, as is the promotion of transparency and public participation. Generally, the NAAEC obligates the three member countries to:

- prepare periodic reports on the state of the environment,
- develop emergency preparedness measures,
- promote education,
- further scientific research and technology development,
- assess environmental impacts, and
- promote the use of economic instruments.

Many of these commitments and activities are discussed in further detail later in this chapter.

In addition, countries assume specific obligations to provide high levels of environmental protection; to publish their laws, regulations, and procedures regarding matters covered by the agreement; to effectively enforce laws; to ensure access to remedies for violations of environmental laws; and, to establish procedures for judicial and quasi-judicial proceedings. There are two particularly innovative and noteworthy provisions: the opportunity to hear submissions from persons or non-governmental organizations asserting that a country is failing to effectively enforce its environmental law; and an extensive process articulated for consultation and resolution of disputes, including suspension of benefits. Finally, cooperation and provision of information are highlighted.

C. The Architecture of the Commission for Environmental Cooperation

The CEC consists of a council, a secretariat, and a public advisory council. The Council of Ministers is the governing body of the CEC. It is composed of cabinet-level representatives from the environment departments of the three countries. The Council meets at least once a year to identify priorities, discuss issues, approve the annual budget and work program, and meet with the public. Through its alternate representatives, it oversees the Secretariat and implementation and interpretation of the Agreement. The Council has created a general standing committee—a North American committee on enforcement, compliance, and cooperation—and a North American working group on the sound management of chemicals.

The Secretariat implements the work program of the Council, including initiatives and research on matters pertaining to environment and trade, the North American environment, and environmental law and standards. It also processes citizen submissions on enforcement matters. Article 11(4) of the NAAEC prescribes the independence of the Secretariat and obliges each Party to "respect the international character of the responsibilities of the Executive Director and the staff." The executive director is appointed for a three-year term, which is renewable once. She is assisted by a director from each other country. The Secretariat has created consultative, expert, and project advisory groups as appropriate to issues under study.

The Joint Public Advisory Committee provides independent advice to the Council on all matters within the scope of the Agreement. The Committee may also provide relevant scientific, technical, or other information to the Secretariat, including information to be used in developing a factual record under Article 15 (see below). The Advisory Committee is composed of fifteen individuals, with the government of each country appointing five. As representatives of the North American community at large, they help ensure that public concerns are communicated to the Council. On occasion, the Advisory Committee has been directed to consult with the public. Each country has also appointed national and governmental advisory committees to advise the ministers on national priorities.

As a steward of the North American environment, the CEC has organized its work program in four clus-

[6] NAAEC, *supra* note 3, art. 1(e) (objective to "avoid creating trade distortions or new trade barriers").

ters. These include: environment, economy, and trade; conservation of biodiversity; protecting the environment for better human health; and law and policy.[8] An annual budget of US$9 million with equal contributions from each country, was approved for the first three years of CEC's operation. This supports all of the CEC's work, including in the four thematic areas, as well as responding to citizen submissions and administering the North American Fund for Environmental Cooperation. The *Proposed Program Plan and Budget: 2002-2004* projected a budget of US$14,746,000 for 2002.

II. GOVERNANCE INNOVATIONS AT THE COMMISSION FOR ENVIRONMENTAL COOPERATION

Changing global circumstances have caused the international community to examine the institutions, instruments, and processes that will guide our transition to sustainability. Although the understanding of governance varies from region to region, consensus is developing about the attributes of an effective system of governance. A new generation of international environmental organizations will undoubtedly evolve to incorporate these attributes.

The CEC demonstrates that a regional model of cooperation, built on a foundation of good governance principles, can be developed to promote sustainable development. In an integrated way, it pursues environmental cooperation, addresses environmentally related trade and economic issues, and promotes public participation and accountability.

The following examples of the Commission's work provide insight into how the CEC has recognized and attempted to be guided by emerging standards of effective governance as discussed in international fora, such as the UNEP Intergovernmental Environmental Governance process. The CEC's experiences are clustered according to eight different facets of good governance: information and accountability, coherence, coordination, compliance, capacity building, inclusiveness, consensus, and continuous learning. However, it is worth noting that most of these eight attributes can in fact be found to varying degrees in most of the work pursued by the CEC.

A. Accountability and Information

The Commission's commitment to accountability is drawn from the Agreement itself. Transparency, public participation, provision of information, and reporting are specific objectives and obligations.[9] These core values are reflected in the design and operation of CEC.

Internally, the CEC has put in place governing structures for reporting on financial and program results.[10] Furthermore, an *Evaluation Framework of the CEC—Principles and Procedures* has been designed to measure the results and effectiveness of the Commission's work.[11] The CEC management continues to review the existing accountability and reporting mechanisms to determine if they are sufficient and responsive.

Public consultation is institutionalized at every level of Commission activity from the formally mandated Joint Public Advisory Committee (JPAC) to opportunities provided for stakeholders to address members of the Council at the annual meeting.[12] There are also provisions for citizens to submit petitions and countries to establish national advisory committees. The JPAC has been particularly successful in facilitating public discussion and input, playing an assertive role in providing advice to the Council. Similarly, making information available to the public is a normal course of events through databases on the CEC website; consultation on draft reports and papers; an annual report which includes reporting not only on the actions of CEC, but also the actions of the three governments as they respond to the policies and programs of CEC; and independent reporting by the Secretariat under Article 13. Moreover, it is a requirement to publicly release environmental noncompliance information.[13]

1. Pollutant Release and Transfer Registers (PRTRs)

Pollutant release and transfer registers provide an overview of the on-site releases of industrial pollution directly into the air, water, and land as well as chemicals sent off-site for treatment or disposal. *Taking Stock* is a North American inventory of releases and transfers of specific pollutants.[14] It provides data on the type, location, and amount of 210 chemical substances from sectors such as primary metals, chemical manufacturing, electric utilities, and hazardous waste management. Although not all chemicals, sources of pollution, or re-

[7] NAFTA, *supra* note 4, art. 1114(2).
[8] *See* www.cec.org.
[9] For example, NAAEC Article 7 notes that in all procedural matters, parties shall seek to ensure that proceedings are "open to the public, except where the administration of justice otherwise requires."
[10] Report of the Executive Director, regular session of the CEC Council (June 18-19, 2002) (quoting a statement of the auditor).
[11] *See id.*
[12] *See, e.g.*, Framework for Public Participation in Commission for Environmental Cooperation Activities, NACEC Doc. C/DIR/01/Rev.11 (Oct. 22, 1999), *available at* www.cec.org/files/pdf/GUIDE19E_EN.PDF (last visited July 23, 2002).
[13] NAAEC, *supra* note 3, art. 5(1)(d).
[14] *Taking Stock* is available on the CEC website at www.cec.org/takingstock/ (last visited July 24, 2002).

leases from the mining sector are included, the latest report shows an increase in reported data. The report allows citizens to compare national pollutant release and transfer registers. *Taking Stock*, and PRTRs more generally, is based on the belief that the public has a right to information that can identify opportunities to reduce waste, cut costs, and create a safer environment for workers and local communities. By improving transparency and dissemination of information, this tool also makes North America a leader among the OECD members[15] in pollutant inventory development and in the regional integration and use of such information.

In recent years, the CEC has made it a priority to support government, industry, and NGO efforts to develop pollutant release and transfer registers in Mexico. In addition to technical support, the CEC has distributed guidance material and a CD-ROM on release estimation techniques for industry. Data from Mexico will be included as it becomes available. In fact, 117 Mexican facilities reported 1999 data voluntarily. In December 2001, new legislation was passed in Mexico that provides for a mandatory, publicly accessible program.

With the production of its fifth *Taking Stock* report, CEC will upgrade its website to be interactive. The new website will allow users to generate comparisons and track trends for particular chemicals, sectors, or geographic regions of interest.

2. Citizen Submission Process

The NAAEC states that each country shall ensure that its laws and regulations provide high levels of environmental protection and that these environmental laws and regulations shall be effectively enforced. Articles 14 and 15 of NAAEC provide perhaps one of the most novel governance mechanisms by which the public can assess how NAFTA governments are living up to their environmental commitments.[16]

This "whistleblower" mechanism in Article 14 empowers members of civil society to submit an allegation to the CEC Secretariat and request an independent review of the facts if they believe that a NAFTA party is not effectively enforcing its environmental law. Based on a recommendation from the Secretariat, the Council decides whether to instruct the Secretariat to develop a factual record and whether to release it to the public when it is completed (Article 15). A factual record outlines the history of the issue, the obligations of the party and its actions in fulfilling those obligations as well as any other facts relevant to the assertions made in the submission. Over the lifetime of the Commission, 22 cases have been dealt with, an additional 12 are currently under consideration, and 3 factual records have been released.[17]

While this procedure has no legal consequences, it makes governments more accountable to citizens for their performance in enforcement. Information is power. By putting these assertions of ineffective government action under a spotlight citizens and civil society organizations have access to information that might otherwise be unavailable to them. Armed with this information they can then influence government and industry processes of decisionmaking. Media attention plays its part in bringing local environmental issues to the attention of a continent-wide audience. Furthermore, the factual records can actually improve the enforcement of national government activities by objectively and independently higlighting gaps .

Safeguarding the integrity of the process has been the subject of much interest and debate, and will remain an important factor in CEC's credibility. The Council has established a public and transparent process for examining issues related to interpretation and implementation of Articles 14 and 15, and the JPAC has a pivotal role in this review process. The Council asked the JPAC to conduct a review of the history of citizen submissions including issues raised and actions taken and report on the lessons learned. In partial fulfillment of this request, JPAC has issued a call for public comments and organized public workshops. Only when this review has been completed will the pattern of real impact and remedial action be evident from the CEC citizen submission process—Have laws and regulations been revised? Has enforcement been strengthened? Have sensitive sites been given protected area status?

3. The North American Mosaic: A State of the Environment Report

This report—*The North American Mosaic: A State of the Environment Report*[18]—is the first comprehensive effort to assess the environmental condition and outlook in the region. It reflects "an incredibly complex, dynamic and interconnected system in which humans play a dominant and decisive role."[19] Using the frame-

[15] The Organisation for Economic Co-operation and Development (OECD) includes 30 member countries from Europe, North America, and Asia and the Pacific. For more information on the OECD's work on PRTRs, see www1.oecd.org/ehs/ehsmono/#PRTRS (last visited July 23, 2002).

[16] *See, e.g.*, David L. Markell, *The Citizen Spotlight Process*, ENVTL. F., Mar./Apr. 2002, at 32.

[17] The inventory and status of submissions is available at www.cec.org/citizen/status/index.cfm?varlan=english (last visited July 24, 2002).

[18] COMMISSION FOR ENVIRONMENTAL COOPERATION, THE NORTH AMERICAN MOSAIC: A STATE OF THE ENVIRONMENT REPORT (2002), *available at* www.cec.org/files/PDF/PUBLICATIONS/soe_en.pdf (last visited July 24, 2002).

[19] *Id.* at vi.

works of sustainability, the ecosystem approach, and pressure-state-response analysis, the *Mosaic* includes comparative data, commissioned reports, and background papers. Assembled in the *Mosaic*, this information paints a picture of an ever-growing ecological footprint. While it identifies some unsustainable trends, it also highlights many examples of the positive results of individual and collective efforts.

The report was released in late 2001, making headlines in North American media. It was disseminated to stakeholders in hard copy by mail and to the CEC's networks in an electronic version, in the three languages of the commission (English, French, and Spanish). The drafting of this first report about the state of the environment in North America involved hundreds of experts and resource centers, as well as cooperation with various research groups and the United Nations Environment Programme (UNEP).

B. Coherence

Achieving political coherence between the objectives of an organization and all of its related activities is a challenge. The core mission of the CEC concerns the complex and dynamic trade and environment relationship. The language of the NAAEC, the established operational processes, and the work program of the Commission all provide clear evidence of a logically integrated framework. Political coherence is assured, and integration is a fundamental operating principle.

1. Environmental Assessment of Trade Agreements

It is now common practice to undertake project-based environmental impact assessments which incorporate public notice, a comment period, hearings, and perhaps modification of the project before acceptance or licensing. Less common are environmental impact assessments of policies.

The CEC has an explicit mandate to monitor the effect of trade on the environment.[20] In 1995, the CEC began by identifying and trying to understand the linkages between environment and trade. It undertook four studies: an examination of the operation of NAFTA's environment-related institutions; an issue study on maize in Mexico; an issue study on cattle feedlots in Canada and the United States; and an issue study on electricity in the three countries.[21] This led to the development of assessment methodologies and tools to evaluate the environmental effects of trade liberalization.

The 1999 "Final Analytical Framework"[22] sets out a method for analyzing the links between changes in economic activity and changes in environmental quality. The framework is the foundation for current and future attempts to identify changes in environmental quality trends and whether they are linked to trade liberalization in North America. The CEC's work has also made a contribution beyond its borders. That framework is now being used by others to look at other trade accords within the jurisdiction of the World Trade Organization and the negotiations of a Free Trade Agreement in the Americas.

Through a public call for papers, issued in late 1999, the public was invited to submit research proposals that would translate the framework into action. Fourteen research groups or experts were then selected by an Advisory Group to comment and provide direct advice. All of this was shared with 300 citizens, academics, and industry experts. A North American symposium on *Understanding the Linkages between Trade and Environment: Assessing the Environmental Consequences of NAFTA* examined the extent to which domestic environmental laws have changed in design, stringency, or enforcement and whether such changes are linked to NAFTA. Planning for a second symposium and additional commissioned papers is underway.

The Commission is tasked to work with the appropriate trade bodies under the NAFTA Free Trade Commission to ensure that environmental concerns are taken into account should there be a potential for conflict between trade and environment policies. Moreover, Article 10(6) of the NAAEC calls upon the CEC Council to cooperate with the NAFTA Free Trade Commission in order to help resolve or prevent environment-based trade disputes. Thus far, it does not appear that this foreseen cooperation has been realized. Developing a collaborative working relationship has been slow, but opportunities exist to reach decisions that are mutually supportive, such as in the working groups on automobile standards and pesticide registration.

2. Shade Coffee

Lack of success in implementing sustainable development is often attributed to a failure to be integrative. The CEC's shade coffee project illustrates an innovative model that integrates the promotion of sustainable agriculture, the sustainable use of biodiversity, support

[20] *See* www.cec.org/programs_projects/trade_environ_econ/project/index.cfm?projectID=12&varlan+english (last visited July 24, 2002) (describing the CEC's Environment, Economy and Trade program).

[21] Several of these studies have been published as part of the Environment and Trade Series, available at www.cec.org/pubs_docs/scope/index.cfm?varlan=english&ID=14 (last visited July 24, 2002).

[22] *See* Assessing Environmental Effects of the North American Free Trade Agreement (NAFTA), Environment and Trade Series No. 6, *available at* www.cec.org/files/pdf/ECONOMY/engframe_EN.pdf (last visited July 24, 2002).

of local communities, and promotion of trade. For example, the CEC held several meetings with farming cooperatives, as well as with various intermediaries—including coffee millers, buyers, brokers, and financial agents involved in rural credit. The CEC recognized that a more integrated economy provides opportunities for employing economic incentives and financial instruments in support of sustainable development. With the participation of these constituencies, the CEC explored ways in which the power of the market could be harnessed to support the conservation of biodiversity and local economies, promoting practices that were viable economically and preferred environmentally.

The CEC undertook important analytical work to identify the challenges and opportunities for marketing shade-grown products, with a special focus on coffee. In collaboration with the Smithsonian Migratory Bird Center, it identified criteria for shade-grown coffee and worked with all those involved in the coffee chain to develop baseline environmental data on forest cover and land use patterns associated with coffee production in Mexico. This baseline data is also significant in understanding the strong relationship between biodiversity hotspots and coffee-growing areas. The data is also being improved to understand the rates and causes of deforestation and the effects of forest loss on biodiversity and the indigenous peoples in the tropical forest areas of southern Mexico. Ultimately, this information should provide a solid basis for effective public policy. Simultaneously, the CEC worked with coffee producers, certification bodies, retailers, and financial institutions to assess and communicate opportunities for this commodity. Financial institutions are now considering microloan packages to provide working capital to small-scale farmers.

C. Coordination

A coherent institutional framework fosters integration and coordination and avoids fragmentation of effort. Effective and efficient organizations try to harmonize policies, norms, and functions throughout their programs and ensure that a predictable process is in place to channel information to decisionmakers. Shared agenda-setting and common approaches are likely to enhance synergies and linkages between programs and strategic partners. Furthermore, coordination harnesses the energies and efforts of citizens and organizations more efficiently and enhances transparency as the parts can be seen within the context of the whole.

1. Meeting International Obligations

The CEC's efforts do not exist in isolation of related international initiatives, standards, and legal regimes. In fact, much of the CEC's work makes a major contribution to effective implementation of global treaties and agreements through regional collaboration. The CEC programs that have been enhanced by public participation may well enhance the effectiveness of international initiatives, as described in some of the examples below. In addition, public access to international environmental issues and objectives has increased through the CEC's efforts. A few examples include:

- The development of the North American Biodiversity Information Network underpins the capacity of countries to further the work of the Biodiversity Convention; training of wildlife enforcement officers is of direct benefit to the effectiveness of the Convention on International Trade in Endangered Species.
- The United Nations has designated 2002 as the Year of Ecotourism. The CEC will highlight the results of its work in sustainable tourism: a report of "best practices" in North America's natural areas; development of a plan for sustainable whale watching in the Baja to Bering coastal area; undertaking, via a competitive process and with some private sector funding, a pilot demonstration project regarding whale watching; and a website. These projects are also linked to international efforts to combat land-based sources of marine pollution.
- The Commission analyzed possible climate-related investment opportunities for small and medium-sized enterprises in three industrial sectors in Mexico and analyzed the potential for greenhouse gas trading.

Some of these activities are discussed below in more detail.

2. Children's Health and the Environment

There are many examples of the CEC's attempts to coordinate and integrate its activities with the work of others, including academic institutions, international institutions, and NGOs. One such example is the fostering of partnerships with those working in the health sector. A CEC-sponsored symposium on children's health and the environment led to a Council resolution to develop a cooperative agenda for trilateral action on children's environmental health in North America. Specific project activities have been initiated, including preliminary work for the development of children's environmental health indicators.

An Expert Advisory Board of key professionals in the field has been created to offer advice on the nature of the agenda. An inventory of national, bilateral, and trilateral activities related to children's environmental health was compiled as a basis for identifying opportu-

nities for trilateral cooperation. A draft Cooperative Agenda outlines ongoing, planned, and proposed activities, focusing on asthma and respiratory disease, as well as lead and other toxics; tools for decisionmaking including risk assessment and economic valuation; and strengthening the knowledge base, public education and outreach. This agenda was circulated for public comment and followed by a public meeting in Mexico City in March 2002.

The CEC also has reached out to the World Health Organization, the Pan American Health Organization, the International Joint Commission (United States & Canada) (IJC) Health Professionals Task Force and Ministers of Health in the Americas developing a network of experts and organizations in support of an issue that increasingly is becoming an issue of public concern.

D. Compliance

Trust and confidence in an organization is influenced by the organization's efforts to promote compliance with its decisions and policies, as well as its transparency and accountability. The NAAEC creates certain compliance obligations for countries and guidance for the Commission in monitoring compliance and enforcement. The following examples illustrate how the CEC engages members of the public in the design process of the enforcement and compliance regime, how it makes information available in order that the public can monitor progress, and how access to justice is promoted.

1. Compliance Guidance

The Council has identified the importance of developing a baseline against which trends in domestic legislation and implementation may be monitored to ensure that domestic laws are being effectively enforced. The development of compliance indicators that show real changes in environmental performance and the promotion of improved performance through environmental management systems, voluntary agreements, and standards are additional areas of concentration. A guidance document entitled *Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems*[23] has been prepared, and DuPont Mexico has agreed to be the first private sector participant to use the guidance document. A special report on enforcement activities composed of three country reports has also been prepared.[24]

2. Wildlife Enforcement Training

In conjunction with the North American Wildlife Enforcement Group, a network of senior wildlife enforcement officials from Canada, Mexico, and the United States created in 1995, the CEC organized a training workshop for over 70 wildlife enforcement officers to focus on enforcement issues related to trophy hunting and game farming. Regulatory systems, inspection techniques, and species identification were reviewed. Enforcement issues relating to invasive species will be the topic for the training sessions in 2002. A two-day forum was organized to identify avenues for public participation; to explore differences in wildlife enforcement in the three countries; and to build public support for enforcement, including identifying appropriate partnerships between agencies and the public.

3. The North American Regional Enforcement Forum

A network of environmental enforcement officials from each of the three countries has been created to pursue common strategies, exchange information, and develop training programs. This North American Regional Enforcement Forum has provided guidance to the CEC on issues such as voluntary compliance initiatives and the tracking and enforcement of transboundary movement of hazardous wastes. It also has involved the JPAC in its annual meeting and is discussing citizen participation in working group projects.

E. Building Capacity

The CEC has concluded that investment in environmental protection and the effective enforcement of environmental laws will enable countries to come to terms with any environmental challenges that are raised by liberalized trade. Financial and technical resources are required. Those of Mexico are more limited and represent a constraint to the achievement of regional environmental objectives. Accordingly, sharing expertise, facilitating transfer of technologies and funding, and the strengthening of national institutions have been built into many CEC projects.

More recently, the CEC has been exploring partnerships with the private sector in supporting the twin goals of biodiversity conservation and economic development with a focus on green goods and services. Considerable effort has been directed to developing a dialogue with public and private sector financial agents to attract capital for green goods and services, from sustainable agriculture and renewable energy technologies to green tourism. This includes working with private commercial banks and venture capitalists as well as pub-

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[23] *See* www.cec.org/programs_projects/law_policy/enforce _compliance/pubs422.cfm?varlan=english (last visited July 24, 2002).

[24] North American Working Group on Enforcement and Compliance Cooperation, Special Report on Enforcement Activities (2000), *available at* www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=430 (last visited July 24, 2002).

lic agencies at the domestic and international levels. The CEC also continues to work more generally with the financial services sector to tailor the myriad of environmental information to meet the operational needs of credit and investment leaders.

1. Association of Air Quality Professionals

The CEC air quality program initiated a cooperative effort with the United States-Mexico Foundation for Science in Mexico City (established by Mexican Nobel laureate Mario Molina) to launch an association of air quality professionals in Mexico. This is the first national organization of its kind in Mexico and will help disseminate lessons learned from Mexico City and border cities and provide a focus for exchange opportunities with comparable organizations in Canada and the United States. The CEC has also sponsored a variety of meetings including air quality administrators, air emission inventory developers, experts on heavy-duty truck inspection programs, and the general public with the purpose of improving trinational air quality through the development of technical and strategic tools and facilitating coordination. Reports from these meetings are made available on CEC's website.

2. Pollution Prevention

The CEC has undertaken 10 pilot projects in Mexico to demonstrate the economic and environmental benefits of pollution prevention techniques and technologies. With the participation of Mexico's National Confederation of Industrial Chambers, a Pollution Prevention Fund (FIPREV) was set up to support the implementation of projects in small and medium-sized Mexican businesses. The revolving fund—with a contribution of US$350,000 from the CEC and US$650,000 from the Mexican business group Concamin—is managed by Concamin, the US Council for International Business, and the Canadian Council for International Business. The CEC reported that as of December 2001, 35 loans totaling US$957,000 had been granted and seven more were in the pipeline. The CEC has noted that "[t]he companies implementing these projects have collectively avoided the use of 2,100 tons of chemical inputs and 113,500 cubic meters of water annually."[25]

In 2000, at the initiative of the CEC, a Mexican Pollution Prevention Round Table met for the first time. Its membership includes 13 different organizations and institutions from government, industry, academia, technical and financial assistance agencies, and the nongovernmental sector. Cooperation with companion roundtables in the United States and Canada is being explored with the vision of developing specific projects, analyzing North American pollution prevention policies and linking electronically each roundtable's website.

3. The North American Fund for Environmental Cooperation

The North American Fund for Environmental Cooperation (NAFEC) has awarded 160 grants to community-based projects between 1996 and 2002, totaling US$5.8 million. In 2001, the grants focused on marine protected areas and children's health and environment while the new round announced in 2002 will focus on projects related to renewable energy, energy conservation, and energy efficiency. This fund provides an opportunity to support action on the front lines of the environmental movement. For example, the Fund has strongly supported community-based approaches to trade in green goods and services and promoted exchange among communities involved in sustainable tourism and agriculture.[26]

Various projects support increasing access to information and strengthening public participation. For example, a project on "Health Schools, Healthy Children" seeks to make information about pesticide use in schools in the US state of Washington available in order to empower communities to bring about a reduction in pesticide use. Another project promotes the right to environmental information in Baja California, Mexico. The Netukullimk GIS Management Project uses modern technology to preserve local knowledge in indigenous communities in Nova Scotia, Canada. The development of a management plan for conservation of Cozumel Protected Natural Area specifically seeks to strengthen public participation. Yet another project will encourage public participation in the protection of children's health and the environment among the indigenous Zapoteca communities in southwestern United States and northeastern Mexico. Initially designed to create an awareness of risks from agrochemicals, this project envisions involving in the public in conducting inventories.

The Fund enhances the capacity of organizations and the public to participate in the work of the CEC by providing funding as well as other types of support such as technical assistance, facilitating networking, and sharing of information. In 2000, the Fund brought together nongovernmental organizations involved in PRTRs and

[25] Press release, North American Commission for Environmental Cooperation, CEC's Innovative Pollution Prevention Fund Spotlighted at Prague UNEP Meeting (April 30, 2002), *available at* www.cec.org/news/details/index.cfm?varlan=english&ID=2471 (last visited July 24, 2002).

[26] *See* www.cec.org/grants/index.cfm?varlan=english (last visited July 24, 2002). Projects are also profiled in the CEC's newsletter *Trio*.

environmental management systems together with government and industry to develop approaches that could meet the needs of all stakeholders. The Fund will also offer a workshop on North American environmental issues in association with the Concordia University Institute on Management and Community Development Summer Program which attracts representatives from 800 community organizations.

The CEC also promotes networking and exchange among Fund grantees and other stakeholders in order to build capacity in understanding environmental management issues and to develop common approaches to supporting community-based initiatives. It shares information about the Fund, organizes workshops, and collaborates informally.

F. Inclusiveness

The merits of involving citizens, NGOs, and the private sector in seeking and implementing solutions to environmental problems is increasingly obvious. First, the capacity to create partnerships and strategic alliances is essential when faced with an expanding agenda and limited resources. In addition, some of the problems the three countries face are exceedingly complex and demand the best minds from a variety of sectors. Ultimately, a broad range of input should improve the quality of decisions taken. The CEC draws significantly on expertise in universities, NGOs, business groups, and government agencies; and this interaction allows the CEC to remain current and relevant. Individual citizens often can provide the necessary ground-truthing of academic concepts, pointing the way to pragmatic and innovative solutions. Furthermore, public participation in the CEC's work builds a constituency ready to take direct action themselves in local communities on local problems and confident enough to influence decisionmakers.

Communication is key to building these relationships. The CEC uses all the tools at its disposal: a quarterly newsletter *Trio,* attractive and readable reports, a live audio web-cast of symposia, and a website that seeks to be engaging and current.

1. North American Biodiversity Information Network

Working with collectors of biodiversity information in academia, government and the nongovernmental sector, the CEC has helped establish the North American Biodiversity Information Network (NABIN). This new on-line tool enables unprecedented access to a virtual museum of biodiversity information through a web-based portal that links species-oriented search tools to other environmental and socio-economic databases.[27] It involves the participation of 53 institutions, 75 data sets, and 45 million data points. The CEC leveraged over US$1 million, primarily through the (US) National Science Foundation, to develop the network. In response to the Council's emphasis on improving public access to biodiversity information, attempts are being made to unify and simplify NABIN's applications.

2. A Biodiversity Agenda for North America

The development of a 15-year strategy for conservation of biodiversity in the region[28] has been the result of extensive collaboration with public and private stakeholders, including indigenous groups and leading ecologists. The process began with the development of an Integrated Baseline Report[29] to identify concrete opportunities. A broad spectrum of North American stakeholders reviewed the Report and provided crucial information in developing the strategy. This was followed by a workshop of 21 leading ecologists who identified geographic priorities according to biological continental significance and the level of threat. The result is a framework of aims, objectives, and priorities for action.

Specific areas of collaboration exist in the North American Bird Conservation Initiative and among those interested in species of common concern and the grasslands of the prairie ecoregion. As a matter of practice and policy, all reports and documents have been made available through the CEC website. Moreover, collaborating partners are free to disseminate the information to their networks as well.

3. Marine Protected Areas

The Marine Protected Areas (MPA) initiative is designed to use networks to mobilize action and build capacity of governments, institutions, NGO partners, and interested individuals throughout the region to protect critical marine habitats. The network attempts to answer three questions: What species at risk are of common concern, and what collaborative action can be taken? Where are the high priority marine and coastal habitats most in need of conservation? What are realistic conservation objectives and targets, and how will effectiveness be measured over time? Activities range from the conceptual to the practical. They include mapping marine and estuarine ecosystems of North America and valuing their economic benefits, as well as integrated management planning and the development

[27] *See* www.cec.org/programs_projects/conserv_biodiv/project/index.cfm?projectID=21&varlan=english (last visited July 24, 2002).
[28] *See* www.cec.org/programs_projects/conserv_biodiv/project/index.cfm?projectID=15&varlan=english (last visited July 24, 2002).
[29] See www.cec.org/files/pdf/BIODIVERSITY/draftstatus-e_EN.pdf (last visited July 24, 2002).

of protection standards. One focus is to develop and implement crosscutting conservation initiatives in areas with shared ecological links such as the marine region stretching from Baja California to the Bering Sea.

Fostering an ocean ethic among citizens and their institutions will be an important component of the plan. The CEC recognizes that success will depend on public awareness and participation in the planning and management of MPAs from the network design to local implementation at specific sites. The public has been and will continue to be involved. Multisectoral working groups involve and consult with the academic community, indigenous groups, and NGOs. The network will be supported by a web-based inventory using a state-of-the-art information system that will rely on content and data from existing sources in the three countries.

G. Building Consensus

Sustainable development is an integration of environmental, economic and social considerations. Thus, the capacity to shape a consensual definition of the problem, the direction to be pursued, and a range of means to achieve results is essential. It also requires significant skill and effort. For example, one CEC consultative process began with an expert panel of 40 scientists, moved to a consultative group of 50 public and private sector participants to give advice regarding the scope and direction of the initiative, and was followed by a smaller policy committee of 20 professionals experienced in the development and ultimate implementation of air pollution policies to identify elements of a strategy.

1. The Silva Reservoir

In the winter of 1994-95, some 20,000 to 40,000 waterfowl on their migratory route died in the Silva reservoir in Guanajuato, Mexico. The CEC convened a panel of scientists to determine the factors that may have contributed to the deaths. An extensive process of research, public participation, and collaboration to determine causes of the die-off and potential solutions was necessary to facilitate scientific and policy consensus. The results of the exploratory study revealed a complex situation requiring a coordinated solution involving social, industrial, legal, infrastrucural, and ecological components.

The CEC worked with the government of the State of Guantajuato in Mexico, industries (particularly those in the tannery sector), and NGOs to develop a plan to restore the reservoir. A study of government structures was undertaken and environmental training courses were given to government, industrial and business personnel as well as the public. A Council for Public Participation was created to enhance involvement in state environmental procedures. A state environmental program was developed that included the creation of a system of protected natural areas, and the Silva Reservoir was designated one of those protected areas.

The National Water Commission undertook an integrated program to clean up the reservoir. This program included construction of industrial collectors, a wastewater treatment plant, and the establishment of an industrial park for the relocation of 120 tanneries. The CEC promoted pollution prevention initiatives and demonstrated that through low cost technologies the chromium discharges could be reduced significantly, benefiting both industry and society.

Today, there have been significant pollution prevention advancements in the tannery sector and the reservoir has been declared an ecological preserve. Once again, the reservoir is a healthy habitat for migratory birds of North America while also supplying agricultural users with a cleaner source of water. International cooperation, local government vision, public participation, and business commitment all contributed to this success story.

2. Sound Management of Chemicals

In response to the more than 70,000 chemicals in commerce in North America, few of which have been tested for their toxic effects, the CEC launched the Sound Management of Chemicals (SMOC) program in 1995. The CEC established a process by which government officials—in consultation with NGOs, industry, and sub-national governments—identify chemical pollutants of common concern and develop North American regional action plans (NARAPs) to reduce or phase out such pollutants. The process is an inclusive, consensus-building one involving different levels of government, industries and industry associations, environmental NGOs, and the academic community.

The SMOC working group is composed of two senior officials with duties pertaining to regulation or management of toxic substances from each country. They have encouraged active stakeholder participation at working group meetings, usually on the first of a two-day meeting. On the second day, the group reviews the input received and conducts its business. Additionally, all draft NARAPs and selection criteria reports are made available on the website and subject to public scrutiny through a broad stakeholder consultation meeting and a call for individual comments before being recommended to Council for action. Although each action plan is unique, there are some common steps in its development: workshops to determine the state of scientific knowledge; the creation of databases; the communication of best practices; and the development of an education awareness strategy.

Action plans have been developed for PCBs, DDT, mercury, and chlordane with concrete and compelling results. Chlordane is no longer produced or used in North America. Mexico has moved in deliberate fashion to virtually phase out the use of DDT, instituting other means to control the threat of malaria. North America is now a "DDT-Free Zone." Plans now being developed to reduce dioxins, furans, and hexachlorobenzenes. Finally, Mexico is considering identifying the CEC as an "executing agency" for purposes of developing its national implementation plan to meet its obligations under the Stockholm Convention on Persistent Organic Pollutants.

H. Continuous Learning

The pace and extent of change require an organization with agility and adaptive capabilities. Knowledge production and dissemination is at the center of the CEC's approach. Rigorous conceptual development and analysis has allowed the organization to seek the most current scientific information, design frameworks in which that information can be understood and used to provide early warning of emerging issues, build consensus with stakeholders about policy responses, and communicate effectively with the public. For example, in the green goods and services sector, the CEC is demonstrating the importance of linking assessment work on environmental characteristics with better use of social science tools (to understand consumer interests) and economic analysis (to understand producer challenges and financing opportunities).

The CEC has developed comparative and comparable monitoring tools, inventories and sophisticated predictive models that can work in the different political, economic, and social contexts of the countries and communities in North America.[30]

1. Environmental Challenges in the Evolving North American Electricity Market

Developing sustainable approaches to energy remains a complex challenge, as well as an essential aspect of response strategies to climate change. Early in 2000, the CEC Secretariat launched an initiative under Article 13 of the NAAEC, comprising analytical reports and working papers as well as public events. The CEC Electricity and Environment Advisory Board, which brings together senior representatives of the utilities sector together with environmental and regulatory experts, was established to advise on the development of this initiative. They developed a statement and recommendations that were provided to the Council in 2002.

With its working paper on North America's integrated electricity market,[31] the CEC has recognized a critical emerging issue in the North American context. It has developed a process to examine the environmental effects of restructuring and increased development and trade and then to explore the consequent required policies that would facilitate cross border collaboration. All working papers were made available on the CEC website. A call for comments was posted on the website, and over 10,000 organizations and individuals were invited to comment during a six-week period.

The CEC also sought to foster a dialogue and get input from industry experts, academia, government and the nongovernmental community through three symposia and workshops on the environmental challenges and opportunities of the North American electricity market, emissions trading, and emerging renewable energy in North America. This initiative focuses on demand-side efficiency and incentives. An on-line database describes key developments in restructuring of the sector, as well as environmental and renewable portfolio standards.[32]

The final report, *Environmental Challenges and Opportunities of the Evolving North American Electricity Market*, was transmitted to the Council in April 2002, and the Council agreed to further work in this field.[33]

III. A WORK IN PROGRESS

In creating and developing the CEC, the leaders of Canada, Mexico, and the United States have articulated a vision that seeks to deepen a sense of community, promote mutual economic interest, and ensure that NAFTA benefits extend to all regions and social sectors. They have sought to develop and expand hemispheric and global trade, with increased trilateral and international cooperation in the trade and environment sectors. A central tenet of this integration has been promoting and ensuring public access to information, participation, and justice.

Responding to that vision will bring opportunities and challenges for the CEC. The organization was built on the foundation of the pursuit of prosperity through open markets and sustainable development. That mission has not changed.

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[30] One example has been the development of state-of-the-art techniques to model the potential impact of continental dioxin emissions. Another is the development of a partial equilibrium model to examine possible trade-environment links with respect to electricity market integration.

[31] *See* www.cec.org/files/PDF//1_Vaughan-e.pdf (last visited July 24, 2002).

[32] *See* www.cec.org/databases/certifications/Cecdata/index.cfm?websiteID=3 (last visited July 24, 2002).

[33] *See* www.cec.org/files/PDF//CEC_Art13electricity_Eng.pdf (last visited July 24, 2002).

At its 2001 meeting, the Council established a framework for future CEC activities. It emphasizes:

- gathering, compiling, and sharing high-quality environmental information;
- promoting the use of market-based approaches;
- cooperating regionally in the implementation of global commitments;
- building capacity for stronger environmental partnerships;
- strengthening strategic linkages to improve sustainability; and
- promoting public participation in the CEC's work.[34]

Specifically, the Council recognized that timely and accurate information is essential for the development of good policy and good decisions and that access to knowledge is fundamental to the ability of citizens to act. The Council further expressed its commitment to strengthening public participation in all aspects of the CEC's work and recognized the valuable contribution of the public and JPAC.

What does the future hold? We can be sure that environmental problems will continue to transcend borders, necessitating cooperation. It is evident that environmental issues are becoming increasingly complex. The number of institutions will grow. There will be challenges to implementation as weak compliance and enforcement mechanisms undermine the best of policies and intentions. Under such circumstances, effective citizen engagement will be needed more than ever.

In this region, the environmental challenges of water management and hazardous waste and the potential of a North American approach to energy markets will continue to gain importance. The CEC will also encounter the negotiation of additional trade regimes, incorporation of the Doha agenda, new scientific understandings and technological developments, and increasingly sophisticated market instruments. High public expectations will persist as citizens and their organizations seek to make their voices heard on matters that affect their health, well-being, and quality of life.

We can also see the emergence and evolution of institutions capable of dealing with change and complexity. They are those that use knowledge-intensive models and approaches, that develop a more integrated management framework, that engage all sectors of society, that integrate science and policy, and that promote the sharing of information. Institutions that exhibit these characteristics will be agile and responsive and consequently garner respect for their effectiveness.

The CEC remains unique in its objective of furthering environmental sustainability within a regime of trade liberalization. The CEC's state of the environment report concluded that "North America is often looked to as a model for prosperity and progress. We can become a model of environmental stewardship and social equity."

That aspiration can be realized. The understanding that citizen engagement is not only just, but also effective in achieving the objectives of the NAAEC was recognized in the very drafting of the agreement, including for example provision for citizen submissions. But it is more than words. The organizational design of the CEC has institutionalized the commitment to public involvement through the creation of the JPAC. Policies and programs explicitly and implicitly turn to stakeholders to define, shape, and comment upon the CEC's work. Furthermore, the tools have been developed to facilitate participation: financial resources are available through the NAFEC, and access to information from databases such as PRTRs to reports of expert meetings and drafts of proposed policies is assured.

All is not perfect, of course, but the point to be made is that the principle of citizen engagement has been embraced. Through trial and error, improvements in the CEC's processes are being made, greater numbers of stakeholders are involved, and the impact on decisions is being felt and will be documented.

Perhaps the North American experience will be of interest to others engaged in discussions and debate about building vibrant and effective environmental institutions, whether national, regional, or international. The Commission for Environmental Cooperation is a work in progress, but one that has recognized and put in place the fundamental elements of good governance that will support the transition to sustainability.

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[34] *See* www.cec.org/files/PDF/COUNCIL/01-00com_EN.pdf (last visited July 24, 2002).

PROMOTING PUBLIC PARTICIPATION IN EUROPE AND CENTRAL ASIA

Svitlana Kravchenko *

I. BASICS

The main regional instrument on procedural rights in the region covering Europe (Western, Central, and Eastern, including the Central Asia states of the former Soviet Union) is commonly known as the Aarhus Convention. A variety of other regional legal instruments also contain some provisions relating to public participation.

The Aarhus Convention is formally titled the United Nations Economic Commission for Europe (UN/ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[1] The Aarhus Convention was signed in Aarhus, Denmark in 1998 by 39 countries in Europe and Central Asia, as well as the European Community, and it entered into force October 30, 2001.As of July 31, 2002, 22 nations had ratified, adopted, or acceded to the Convention. This legal instrument is devoted entirely to environmental procedural rights—public access to information, participation, and justice—and detailed procedural duties applicable to all levels of government.

For the first time in international law, the public was intimately involved in conceptualizing and negotiating the convention. The Pan-European ECOForum, a non-governmental coalition, participated in all eleven sessions of negotiations, the process of ratification, the entering into force, and the early implementation of the Aarhus Convention. The type and degree of involvement by nongovernmental organizations (NGOs) in the negotiations that produced the Aarhus Convention were themselves a remarkable example of public participation and undoubtedly helped shape the final document.

In addition to the Aarhus Convention, other regional legal instruments containing environmental procedural rights include the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, which was signed in Espoo, Finland, in 1991 (Espoo Convention),[2] and the Protocol on Water and Health, which was signed at the Ministerial Conference "Healthy Planet" in London in 1999.[3] This chapter will discuss all three international legally binding instruments, but will focus primarily on the Aarhus Convention.[4]

A. Framing Procedural Rights

The Aarhus Convention is an elaboration of Principle 10 of the Rio Declaration in the region of the United Nations Economic Commission for Europe. The procedures required under the Aarhus Convention move far beyond mere principles or goals to declare legal rights of individuals and specify definite and detailed legal obligations of the states that are parties to the Convention.

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[1] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention].

[2] UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo, Finland on Feb. 5, 1991 [hereinafter Espoo Convention].

[3] Water and Health Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *done at London*, England on June 18, 1999, U.N. Doc. E/ECE/MP.WAT/AC.1/1998/10, *available at* www.unece.org (last visited July 17, 2002).

[4] Other UN/ECE instruments with provisions for public involvement include the (1992) Convention on Transboundary Effects of Industrial Accidents and the (1998) Protocol on Heavy Metals to the (1979) Convention on Long-Range Transboundary Air Pollution.

Furthermore, public participation provisions exist in some global international instruments that are beyond the scope of this chapter. The Convention on Biological Diversity (CBD) allows for public participation in environmental impact assessment procedure in Article 14.1. The Cartagena Protocol on Biosafety to this convention in Article 23 foresees providing information to the public, especially about living modified organisms; consulting with the public; and public participation in decisions concerning insurance of biosafety with consideration of risks for human health. In the United Nations Framework Convention on Climate Change (UNFCCC), Article 6 requires public participation in consideration of the issues of climate change and its consequences and in the development of reaction measures. *See* Carl Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 Envtl. L. Rep. 10428, 10430-31 (2002).

The rights of individuals are expressed in the objective of the Convention contained in Article 1. Each party to the Convention "shall guarantee the rights of access to information, public participation in decisionmaking, and access to justice." These rights are generally stated, but their corresponding obligations on the state are specified in exacting detail.

For example, an individual's right to information in Article 1 is guaranteed by an obligation on the state in Article 4 to collect and provide environmental information without regard to any special interest of the individual, as soon as possible, subject to only specified exemptions, and at a reasonable cost.

Furthermore, Article 5 obligates public authorities to obtain and update specific environmental information and to establish mandatory systems for adequate flow of information to the public about proposed and existing activities that may significantly affect the environment. In the event of any imminent threat to human health or the environment, public authorities must disseminate immediately to members of the public who may be affected all information that could enable the public to take measures to prevent or mitigate harm arising from the threat.

Similarly, an individual's right to participation in Article 1 is reflected in detailed, corresponding obligations on the state in Article 6 to inform the public at an early stage of decisionmaking on certain activities, to involve the public in the decisionmaking process, and to take public opinion into account when making decisions.

In contrast to these mandatory state obligation in Article 6 for project decisions, Article 7 formulates the obligations of the state to allow public participation in decisionmaking in the preparation of plans, programs, policies, and legislation in a soft and general manner: "Each party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programs relating to the environment . . . To the extent appropriate, each party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment." With regards to public participation in the preparation of executive regulations and other legally binding rules that may have a significant effect on the environment, the language in Article 8 is even weaker: "Each party shall strive to promote effective public participation at an appropriate stage . . .."

Finally, the right of access to justice in Article 1 is implemented through Article 9, which obligates states to make justice available, affordable, and effective.

Each of the obligations and requirements of the Convention will be discussed further in the sections below. Sections II, III, and IV examine access to information, participation, and justice, respectively. First, though, the following subsection considers public involvement in transboundary matters.

B. Public Involvement in Transboundary Matters

The UN/ECE Conventions have been adopted in a political environment that has seen the emergence of a strengthened European Union that also faces the possibility of dramatic expansion in the coming years. In this context, environmental, social, and political boundaries have become more porous, and there is an accompanying recognition that the public needs to—indeed should have the legal right to—know about and be involved in transboundary decisions.

1. The Aarhus Convention

Public involvement in transboundary matters is envisaged by general provisions in Article 3 of the Aarhus Convention and by additional provisions in Articles 4, 6, 7, 8, and 9.

Article 3.9 broadly allows citizens of other countries to obtain information, participate in decision-making, or obtain access to justice "without discrimination as to citizenship, nationality, or domicile." This provision clearly includes public involvement in transboundary matters, as the place where someone lives (domicile) is irrelevant.

Article 4 provides that information may be requested "without an interest having to be stated," thus a state may not legislatively restrict information requests to its own citizens or residents. Therefore, applying the principle of nondiscrimination in Article in 3.9, a resident of another country has the right to request and receive a wide range of information, including that relating to transboundary issues.

Articles 6, 7, and 8 also impose no geographical restrictions for public participation. Article 6.2 requires that the "public concerned" be notified of a specific activity, and Article 6.6 authorizes access to relevant information free of charge, regarding any proposed specific activity. The term "public concerned" is defined in Article 2.5 to encompass those who are "affected or likely to be affected by, or have an interest in, the environmental decisionmaking." While not specifically stated, this definition could obviously include transboundary public notification and free access where a specific activity may have transboundary environmental effects. Furthermore, even if someone does not receive notification of a specific activity, he or she may nonetheless participate in the decision-making process. Articles 6.3 and 6.7 state that "the public" (not merely the "public concerned") may participate in making comments before the decision is taken. Since the "public" is defined in Article 2.4 to include any natural or legal

person, any member of the public anywhere has the right to comment on a transboundary matter, just as with any other matter. Article 7, regarding plans, programs, and policies, also uses the broad term "the public" for public participation. Article 8, regarding executive regulations and other generally applicable legally binding rules, likewise allows "the public" (without geographical restriction) the opportunity to comment.

The more difficult question is whether the access to justice provisions of the Convention explicitly envisage citizen litigation of transboundary matters. Does the Convention require that legislation guarantee the right of a member of the public to go to court (or a similar independent body) in transboundary situations? Article 9.2 states that the "public concerned" must have this right for specific activities (Article 6) and, if the country chooses, also for plans, programmes, policies, and executive regulations or legally binding rules. Since someone in a transboundary context may be affected by an activity or have an interest in it, this allows access to justice to such a person. Furthermore, members of the "public" (not only the "public concerned") can file lawsuits against decisions, acts, or omissions under national environmental laws unless national law imposes criteria restricting such standing. Nonetheless, national law may not contravene the nondiscrimination requirement of Article 3.9.

In conclusion, the provisions of the Aarhus Convention provide both broad and specific rights of the public to obtain information and participate in decisions with transboundary impacts. The Aarhus Convention also promotes transboundary access to justice, albeit in a less clearly defined manner.

2. The Espoo EIA Convention

The Espoo Convention involves actions whose impacts are transboundary and requires parties to provide for participation by the public in an affected state. The Espoo Convention states in Article 2.6 that each party "shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the party of origin." For example, if Moldova (party of origin) were to propose to build an oil terminal on the Danube river, which could impact the wildlife in the territory of Ukraine (affected party), Moldova must provide an opportunity for the Ukrainian public to participate in this decision. This opportunity should be the same opportunity given to the Moldovan public.

Furthermore, the Espoo Convention provides in Article 3.8 for a notification procedure in which the parties must ensure that the public of an affected party "be provided with possibilities for making comments or objections" regarding the proposed activity that may have a transboundary effect. Reinforcing the EIA requirements of the Espoo Convention, the Aarhus Convention also provides in its Article 6.2(e) that the public concerned must be notified of any activity that is "subject to a national or transboundary environmental impact assessment procedure."

In addition, a draft Protocol on Strategic Environmental Assessment to the Espoo Convention is being negotiated, and it is expected to be signed in 2003. This Protocol envisages public participation in plans and programs in both the national and transboundary contexts in its articles 4, 10, and 13. The possibility of developing a legally binding instrument such as the Protocol to expand upon Articles 7 and 8 of the Aarhus Convention was discussed during the Second Meeting of Signatories for the Aarhus Convention. The meeting decided to prepare the Protocol under the Secretariats of both the Aarhus and Espoo Conventions. Later, the Committee on Environmental Policy of UN/ECE decided to develop the SEA Protocol under the Espoo Convention with the involvement of the Aarhus Secretariat and experts, since the Aarhus Convention had not yet entered into force.

II. ACCESS TO INFORMATION

The access to information provisions of the Aarhus Convention have the potential to significantly restructure the relationship between governments and their citizens (and others) in a region of the world where information often has been kept secret or otherwise closely held.[5]

A. Definition of Environmental Information

The Aarhus Convention gives a broad definition of environmental information. According to Article 2.3, environmental information includes information on the elements of the environment such as air, water, soil, landscape, and natural sites; biological diversity and its components, including genetically modified organisms and the interaction between them; and factors, such as energy, noise, and radiation. The definition also includes

[5] In addition to the Aarhus Convention, the Protocol on Water and Health to the UN/ECE Convention on Protection and Utilization of Transboundary Watercourses and International Lakes, *adopted at* the Ministerial Conference in London in 1999, contains an article on Public Information. Article 10 of the Protocol requires that parties publish information and documents related to decision-making, take measures to make documents available to the public for wide discussion, and provide information requested by the public. This information includes water management plans; creation and development of systems of control and early prevention; and plans of activity in emergency situations. The article is modeled largely on Articles 4 and 5 of the Aarhus Convention.

activities, "administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment;" cost benefits and other economic analysis; state of human health and safety; and cultural sites, if they are affected or are likely to be affected by the state of the environment.

B. Passive Access to Information

The Aarhus Convention ensures passive access to information, which means that governmental bodies must respond to requests of persons or NGOs and provide environmental information. Article 4.1 states that the response must be in the form requested—written, electronic, graphic, etc—unless it is only available in another form. The government must provide the actual documentation and not just a summary or explanation of the information.

An important aspect of the provision is that the requester has no necessity to prove his or her interest. Therefore, anybody may request any environmental information without having a specific interest or being personally affected. In some countries, this will mean significant changes from the way that public officials and bodies have functioned in the past.

According to Article 4.2, information should be given as soon as possible, but no longer than one month after the request was made, unless the volume and complexity of the requested information requires more time. In any case, the information must be provided no later than two months after the request.

There are some general exceptions to granting requests. According to Article 4.3, a request may be refused if the public authority does not hold such information or the request is unreasonable or formulated in too general a manner. A request can also be denied if it concerns material "in the course of completion" or if it concerns "internal communications" of a public authority. However, any such decision must be made only after "taking into account the public interest served by disclosure."

There are also more specific exceptions in Article 4.4, for example if information disclosure may adversely affect:

- the confidentiality of proceedings of a public authority;
- international relations, national defense, or public security;
- the course of justice, the ability of a person to receive a fair trial and the ability of the public authority to conduct an inquiry of a criminal or disciplinary nature;
- the confidentiality of commercial and indus trial information when this confidentiality is protected by law (but information on emissions that is relevant to the protection of the environment should be disclosed);
- intellectual property rights;
- the confidentiality of personal data; and
- information that could harm rare or endangered species.

There is a presumption in favor of access to information. For example, the Preamble states that citizens must have access to information in order to assert their right to live in a healthy environment, and Article 1 states that each party "shall guarantee" the right of information. Articles 4.1 and 4.4 state that the list of exceptions is exclusive and may not be interpreted broadly. Article 4.1 states that each party shall make information available subject to only the exceptions provided in the Article itself, and Article 4.4 states that the exemptions "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure."

Any refusal must be in writing, according to Article 4.7. The refusal must provide information on review procedures available under Article 9 for appealing the decision.

Public authorities may be allowed to charge a fee for supplying information, but the charge should be reasonable. Public authorities also must indicate when charges might be levied or waived and when the supply of information is conditional on advance payment. In addition, Article 5.2(c) specifies that information should be given free of charge if it is available in publicly accessible lists, registers, or files.

C. Active Access to Information

The Aarhus Convention in Article 5 establishes active access to information and a mandatory system to ensure a flow of information about proposed or existing activities that may significantly affect the environment. Public authorities shall possess, update, and disseminate relevant environmental information, using lists, registers, or files,[6] electronic databases,[7] national reports,[8] and a system of pollutant release and transfer registers involving pollution from private or other facilities.[9]

In emergency situations, all information that may enable the public to take measures to prevent or mitigate harm to the environment or health and that is held by public authorities should be given to the members of public who may be affected immediately.[10] There are, however, no special mechanisms for ensuring that this dissemination will occur.

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[6] Aarhus Convention, supra note 1, art. 5.2.
[7] *Id.* art. 5.3.
[8] *Id.* art. 5.4.
[9] *Id.* art. 5.9.
[10] *Id.* art. 5.1(c).

In addition, Article 6 of the Aarhus Convention, which generally concerns public participation, also contains many provisions related to the active provision of information to the public in the course of decision-making on specific activities or projects. For example, under Article 6.2, the public concerned shall be informed early in an environmental decision-making procedure and in an adequate and effective manner about the proposed activity and its significant effects on the environment. Each party shall require the competent public authorities to give the public concerned access to all information relating to the decision-making. This may be provided upon request, if the national law so requires. The public concerned must have the right to examine the information free of charge and as soon as it becomes available.

D. Environmental Impact Assessment (EIA) Procedures

The Aarhus Convention does not set forth environmental impact assessment procedures, but the public must be told if an EIA procedure applies, according to Article 6.2(e), and information must be provided, as described in the previous section.

The Espoo Convention sets national procedures for evaluating the likely transboundary impacts of a proposed activity on the environment. Each party must take the necessary legal, administrative, and other measures to implement the EIA provisions for proposed activities listed in Appendix I (i.e., those that are likely to cause significant adverse transboundary impacts). The party of origin must initiate an EIA procedure that permits public participation and prepare EIA documentation, described in Appendix II, that it provides to the affected party.[11]

E. State of the Environment Reports

The Aarhus Convention in Article 5.4 obligates parties to provide a National Report on the State on the Environment regularly, with an interval that should not exceed three or four years. In some countries of the region (for example, Moldova, Russia, and Ukraine) a National Report is prepared every year, published (usually with a one year delay), and posted on the internet. The National Report should include information about the quality of the environment and pressures on the environment. In addition, Article 5.5 obligates a party to disseminate to the public new policy and legislation, treaties, and other significant international documents.

[11] Espoo Convention, supra note 2, art. 2.2.

F. Pollution Inventories

Article 5.9 of the Aarhus Convention requires each country to develop a coherent, nationwide system of pollution inventories or registers. These inventories or registers are to be based upon a structured, computerized, and publicly accessible database compiled through standardized reporting. It has been agreed that a legally binding instrument in the form of a protocol is needed, which will set forth more specific provisions. A draft Protocol on Pollutant Release and Transfer Register (PRTR) is being negotiated by an Intergovernmental Working Group created under the Aarhus Convention, with participation by NGOs.

The Protocol will contain detailed provisions on PRTR, such as what will be in registers; what substances must be reported and how often; monitoring and record-keeping; and public access to the information.

The Protocol will likely be open to countries that are not parties to the Aarhus Convention as an independent instrument. This PRTR Protocol will be ready for signature at the Fifth Ministerial Conference of the "Environment for Europe" process, to be held in Kyiv in May 2003.

G. Access to Other Relevant Information

Article 5.6 of the Aarhus Convention has a provision that while not mandatory, could enhance the flow of information to the public. It states, "Each party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labeling or eco-auditing schemes or by other means." For example, some companies label their food products as not containing genetically modified organisms or that they were produced without the use of chlorine. Market pressure in such circumstances can lead to industry-wide change. Article 5.8 provides furthermore that parties must ensure that consumer information on products is made available so that consumers can make "informed environmental choices."

The Aarhus Convention in Article 5.3 also foresees the establishment of publicly accessible websites that should contain electronic versions of state of environment reports; text of environmental legislation; environmental plans, programs, and policies; and other information.

III. PUBLIC PARTICIPATION

The Aarhus Convention has the potential to bring about major changes in the way democracy is practiced in Europe and Central Asia. The Convention requires

public participation in governmental decisionmaking far beyond previous practices and legislation in the region, particularly regarding specific development projects. The Convention also expresses the need for public participation in the formulation of policies, executive regulations, plans, and programs, but its requirements in this regard are much weaker.

A. Avenues for Public Participation

1. Aarhus Convention

Article 6 of the Aarhus Convention addresses public participation in specific, project-level activities that may impact the environment. This Article sets out procedures for public participation in decisions regarding specific activities that are listed in Annex I. Annex I includes 20 categories of activities impacting the environment, such as mining, the chemical industry, energy sector, production and processing of metals, waste management, and industrial plants. In accordance with a party's national law, these procedures may also apply to decisions on proposed activities, which are not listed in Annex I, but which may have a significant effect on the environment, including transboundary matters.

Some exceptions to public participation in proposed projects are possible. For example, Article 6.1(c) allows parties to decide on a case-by-case basis, depending on national law provisions, not to apply the provisions of this Article to activities that propose to serve national defense purposes, provided that the party deems that its application would have an adverse effect on national defense. Each party shall determine whether such a proposed activity is subject to these provisions.

Each party must provide possibilities for public participation early in the process, when "all options are open" and effective public participation can take place.[12] Moreover, the public must have an opportunity to participate in all stages of decisionmaking, not just at the beginning.

In many countries of Europe, national legislation provides that the "public concerned" shall be informed about a planned activity that may impact the environment. Article 2 of the Aarhus Convention defines the "public concerned" to mean "the public affected or likely to be affected by, or having an interest in, the environmental decision-making." For the purposes of this definition, NGOs promoting environmental protection and meeting any requirements under national law are deemed to have an interest.

The public may send written comments to the responsible governmental authority or express its opinions orally during public hearings organized by the public authority or project proponent.[13]

According to Article 6.8, the governmental authority should take into account and incorporate public input into the decision on the proposed activity, or it should comment on and respond to the comments. The decision on the proposed activity must be made available to the public along with the reasons and considerations on which the decision is based.[14]

2. Espoo Convention

The Espoo Convention, in Articles 3.8 and 4.2, requires parties to notify the public and to provide the opportunity for public participation in environmental impact assessment procedures regarding proposed activities likely to cause transboundary environmental harm. In the final decision on the proposed activities, parties must take due account of the environmental impact assessment, including the outcome of consultations with public.[15]

B. Public Participation in the Development of Regulations, Policies, Plans, and Programs

Participation in decisionmaking at the strategic level (i.e., in the development of regulations, policies, plans, and programs) is provided in two parts of the Aarhus Convention and in a Protocol being drafted under the Espoo Convention. In addition, the Protocol on Water and Health requires the provision of information for participation.

1. Aarhus Convention

Article 7 of the Aarhus Convention encourages public participation in the preparation of plans and programs relating to the environment. Each party shall make appropriate provisions for the public to participate during the preparation of plans and programs. The language of Article 7 is advisory, especially on public participation in the preparation of policies: "To the extent appropriate, each party shall endeavor to provide opportunities for public participation in the preparation of policies relating to the environment."

In Article 8, governing public participation in executive regulations, the language is also somewhat soft. Rather than stating strict requirements, it provides: "Each party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation of executive regu-

[12] Aarhus Convention, supra note 1, art. 6.4.
[13] *Id.* art. 6.7.
[14] *Id.* art. 6.9.
[15] Espoo Convention, supra note 2, art. 6.

lations and similar rules affecting the environment." Draft rules should be published and the public given an opportunity to comment on them.

The public participation requirements of Articles 7 and 8 indicate that the states negotiating the Convention were not willing to go as far in the field of policies and legal norms as they were under Article 6 for actions involving a specific project, such as licensing or permitting. Subsequently, as discussed in section I above, the UN/ECE Committee on Environmental Policy decided to develop a Protocol on Strategic Environmental Assessment under the Espoo Convention, with the participation of Signatories of the Aarhus Convention, since the Espoo Convention had already entered into force.

2. SEA Protocol to the Espoo Convention

A draft Protocol on Strategic Environmental Assessment is being prepared under the Espoo Convention. The Protocol will develop a procedure for public participation in plans and programs. It may also cover policies and legislation, but the provisions on public participation in policy and legislation are still under discussion. The Protocol is expected to be ready for signing at the Fifth Ministerial Conference of "Environment for Europe" process in Kyiv in 2003.

3. Protocol on Water and Health

The London Protocol on Water and Health,[16] encourages public participation in decisions on water and health related issues. Article 5(i) requires that decision-making concerning water and health be guided by the principle that public participation, access to information, and access to justice should be provided. Article 5(i) provides few details, but is not restricted only to projects, and therefore would appear to be applicable also for plans, programs, and similar decisions.

IV. ACCESS TO JUSTICE

The access to justice provisions of the Aarhus Convention—set forth in Article 9—are both progressive and insufficient. They are progressive in that they establish legal standing for NGOs without having to prove any interest in the matter, they reduce financial and other barriers to justice, and they ensure that courts can grant adequate remedies, including injunctions. The Article 9 provisions are insufficient in that they do not provide much guidance on the specifics of ensuring access to justice, the pillar of public involvement, and one of the most difficult topics to implement.

[16] *See supra* note 5.

The Aarhus Convention provides for access to justice in three circumstances: (1) for violations of national environmental laws, (2) if a request for information under Article 4 is improperly denied, and (3) to review any act or omission relating to public participation under Article 6, or other Articles if a party decides to do so.

A. Redressing Environmental Violations

Article 9.3 of the Aarhus Convention requires parties to the Convention to provide "administrative or judicial review" procedures for "members of the public" who meet the criteria, if any, in national law, to challenge "acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment." This article provides for enforcement by the public against private entities, such as polluting companies or developers, and also for remedies against governmental bodies that violate the law.

Members of the public may seek access to justice under the Convention against private persons, including corporations, which are "legal persons" under the law.

The public may also seek access to justice against public authorities. This provision potentially includes both public enforcement authorities, such as a Ministry of Justice or local prosecutors who fail to enforce the environmental laws, and also other public authorities, whether or not environmental, such as a forestry department, Ministry of Transportation, or local housing authority, that act contrary to the national environmental law or fail to fulfill required duties.

Members of the public may be provided with direct or indirect enforcement. Article 9.3 states that a party to the Convention may provide judicial review (in which members of the public can file lawsuits themselves in the court system) or administrative review (in which members of the public can formally invoke administrative procedures to stimulate public enforcement authorities to take action against the private persons or public authorities).

Article 9.3 allows members of the public, when they meet any applicable requirements of national law, to have the access to justice that the law provides. Neither Article 9 nor Article 2 (Definitions) defines "members of the public," but Article 2.4 of the Convention does define "the public" to include both natural and legal persons, encompassing individuals and groups. If a country has specified criteria for determining which members of the public have access, these may be applied. However, whether there are limits to such criteria (in light of the broad goals of the Convention, including access to justice) will have to be resolved in the future.

B. Ensuring Access to Information

Article 9.1 of the Aarhus Convention allows access to a court of law or another independent and impartial body established by law if a request for information under Article 4 has been ignored, wrongfully refused, or inadequately answered. Final decisions by the court or independent body "shall be binding on the public authority holding the information." Since "any person" has this right of access to justice under Article 9.1, no test of the legitimacy of a person's interest can be imposed. In fact, even citizens or residents of another country can seek information—access to justice to enforce their right to information—under Article 3.9 of the Convention.

Access to justice regarding acts or omissions of public authorities under Article 5 of the Convention (relating to active collection and dissemination of information, such as publicly accessible lists of information, electronic access to information, information for consumers, and pollutant registers) is not covered by Article 9.1. Nevertheless, Article 5 duties could be considered to be part of national law "relating to" the environment, and thus covered by Article 9.3, discussed above.

C. Guaranteeing Public Participation

Article 9.2 provides access to justice to "members of the public concerned" to challenge the substantive and procedural legality of any decision, act, or omission subject to the provisions of Article 6 (public participation in decisionmaking regarding specific activities). Decisions, acts, or omissions subject to Article 7 (plans, programs, and policies) or Article 8 (executive regulations) can also be challenged if "so provided for under national law."

Unlike Article 9.1, the terms of Article 9.2 do not extend to "any person" but only to "members of the public concerned." This wording limits standing to those legal or natural persons "having a sufficient interest" or, when national law so requires, those "maintaining the impairment of a right." Although standing is to be determined "within the framework of national legislation," parties do not have complete freedom to determine who has an interest or a right. Article 9.2 states that this shall be determined both "in accordance with the requirements of national law," and "consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention." Thus, parties cannot interpret "sufficient interest" or "right" restrictively.

Furthermore, "NGO standing" is explicitly provided in Article 9.2. Article 9.2 provides that "the interest of any non-governmental organization" that meets the requirements of Article 2.5 of the Convention (those "promoting environmental protection") "shall be deemed sufficient." Such NGOs are also deemed to have "rights capable of being impaired" in a legal system that requires an impairment of a right to seek judicial redress.

D. Conditions to Enable Access to Justice

Article 9.4 imposes general requirements applicable to all categories of access to justice. A review procedure should be "fair, equitable, timely, and not prohibitively expensive." A fair review procedure means a process that is impartial and free of prejudice. Article 3.9 separately requires that access to justice be made available "without discrimination as to citizenship, nationality or domicile." The Article 9.4 requirement of fairness thus requires the judicial and administrative system to be non-discriminatory in a broader sense and free of prejudice, favoritism, or self-interest.

Access must also be effective. Article 9.4 states that remedies must be "adequate and effective," and include "injunctive relief as appropriate." This is significant, as injunctive remedies have traditionally not been as available in Europe as in some other parts of the world.

In addition, the Aarhus Convention provides that "Each party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted, or harassed in any way for their involvement."[17] This is a significant protection for freedom of speech and advocacy.

V. CONCLUSION

Public participation is becoming part of the political landscape in the UN/ECE region. The Aarhus Convention has given people a voice. This international legally binding instrument has declared the environmental rights of citizens—the right to a healthy environment, the right to information, the right to participation in decisionmaking, and the right to access to justice in environmental matters. Now begins the hard work of turning these declarations into reality.

According to Kofi Annan, the Secretary-General of the United Nations, the Aarhus Convention is the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations.[18] Its adoption is a remarkable step forward in the development of international law as it relates to participatory democracy and citizens' environmental rights. On the occasion of the Aarhus Convention entering into force, Dr. Annan commented that the active participation of

[17] Aarhus Convention, supra note 1, art. 3.8.

[18] Stephen Stec & Susan Casey-Lefkowitz, The Aarhus Convention: An Implementation Guide v (2000).

countries from Eastern Europe and Central Asia "clearly demonstrates that environmental rights are not a luxury reserved for rich countries."

The Aarhus Convention is not perfect, however. For example, its provisions on public participation are detailed for the approval of specific projects affecting the environment but are comparatively weak for the development of policies and executive regulations. In addition, its provisions on access to justice are progressive compared to the traditional laws in many countries, but they still contain too many compromises regarding existing national legislation.

Working groups created by the Meetings of Signatories are continuing to develop provisions through protocols and guidelines on pollutant release and transfer registries, genetically modified organisms, and public participation at the strategic level—in plans, programs, policies, and legislation. This has led to protocols on PRTRS and on SEA that are expected to be open for signature in 2003.

In furtherance of the goals of the Aarhus Convention, NGOs have been treated as partners from the beginning of negotiations for the Convention. At the First Meeting of the Parties in October 2002, a Compliance Mechanism and Rules of Procedures will be adopted. In continuation of the tradition of recognizing the public's right to speak and to be heard in Aarhus processes, the draft Compliance Mechanism provides that NGOs can participate in nominating independent experts for election to the Compliance Committee. Furthermore, the draft Rules of Procedure will allow an NGO representative to have a seat as an observer in the Bureau of the Convention.

The Aarhus Convention is only the beginning of the dialogue between government and civil society. There is still much work to be done in terms of its implementation, and the public will have a significant role to play in its implementation.

ENVIRONMENTAL PUBLIC PARTICIPATION IN THE AMERICAS

Jorge Caillaux, Manuel Ruiz, and Isabel Lapeña [*]

Public participation can strengthen democratic governance and enhance decisionmaking processes through the direct effective involvement of civil society in the different phases of the decisionmaking process. In a region where democratic rule has not traditionally been the rule but where democracies are developing and consolidating, public participation can play an important role in assisting in the development of these democracies.

This chapter briefly reviews policy and legal developments regarding environmental public participation in the Americas, focusing on Latin America. This chapter will describe recent policy and regulatory developments, particularly in the areas of access to information, participation in decisionmaking processes, and access to justice. In particular, this chapter focuses on an overall review of the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (ISP) of the Organization of American States (OAS).[1] Although still a recent international instrument, the ISP can be useful in promoting public involvement in the hemisphere.

The chapter is broadly divided into two sections. The first section addresses public participation and its policy and regulatory developments in different countries in the region. The second section analyzes the main provisions of the ISP and how they relate to the region's realities and institutional frameworks. This chapter concludes with some thoughts on measures that can improve public access to information, participation, and justice at the various levels in the Americas.

I. LEGAL AND CONSTITUTIONAL PROVISIONS IN THE COUNTRIES OF THE REGION

In contrast to the dictatorial and authoritarian regimes that ruled Latin America during the 1970s and part of the 1980s, from 1990 onwards, there have been significant political changes throughout the region. Democratic rule has emerged in many countries, and weak democracies have been strengthened. The frequent change of regimes in the region has led to constitutional reforms, and the new constitutions have incorporated modern concepts of governance and human rights. From 1972 to 1999, new constitutions have been elaborated in 16 countries in the region. All of them have sought to provide answers to new social demands, including environmental protection. This phenomenon has been termed the "Greening of Constitutions in Latin America."[2] Almost every new constitution in the region, with probably the only exception the 1994 Dominican Republic Constitution, has incorporated environmental principles and norms.

The inclusion of environmental issues in Latin American constitutions has progressed gradually.[3] First, the constitutions tended to establish state obligations to protect the environment. Second, this duty was extended to society as a whole—sometimes indirectly through other human rights—in conjunction with the recognition of the right to a healthy environment. Third, connections were made between environment and development, and constitutions prescribed that the economy should be oriented towards sustainable development. Finally, constitutions included references to certain environment components or areas that should be protected through specific legislation, such as in the case of the protection of wild fauna and flora or Amazonian conservation.

The right to a healthy environment has been included in the extensive catalogue of human rights in

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[1] Organization of American States Inter-American Council for Integral Development (OAS CIDI), Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, CIDI/RES. 98 (V-O/00), OEA/Ser.W/II.5,CIDI/doc.25/00 (Apr. 20, 2000), adopting Organization of American States, Unit for Sustainable Development and Environment, Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (1999) [hereinafter ISP], *available at* www.oas.org/usde/isp/1pgmissi.htm (last visited July 29 2002).

[2] Raul Brañes, *La Legislación Ambiental Latinoamericana en el Contexto de la Globalización Económica*, *in* SOCIEDAD PERUANA DE DERECHO AMBIENTAL, 10 AÑOS DEL CÓDIGO DEL MEDIO AMBIENTE: OPORTUNIDADES EN EL CONTEXTO DE LA GLOBALIZACIÓN ECONÓMICA 34 (2001).

[3] *Id.* at 35. To see the evolution of environmental legislation in Latin America and a comparative study of the constitutions in environmental matters, see Raul Brañes, *Derecho del Desarrollo Ambiental Latinoamericano y su Aplicación. Informe sobre los Cambios Jurídicos después de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo (Rio 1992)*, Programa de las Naciones Unidas para el Medio Ambiente, Oficina Regional para América Latina y el Caribe, México Distrito Federal, México (2001).

almost every constitution in Latin America.[4] Constitutional provisions usually go further than simply recognizing the quality of the environment as the basis for a new guaranteed human right. They also recognize the mutual responsibility of the state and society to protect the environment as a key principle to orient and inform economic development. In this regard, constitutions adopted after the 1992 Earth Summit have looked to the Rio Declaration and adopted intergenerational equity and sustainable development terminology, and some constitutions have modified their texts to incorporate principles of sustainable development.[5] In addition, environmental preservation as a responsibility of society as a whole has also been included in some constitutions, and in some, the possibility to establish environmental limits to individual rights is contemplated.[6]

A growing number of constitutions include provisions on environmental public participation. Colombia's 1991 Constitution—considered to be an environmentally oriented constitution with more than sixty environmental provisions—expressly includes a chapter on "Collective Rights and the Environment." For example, Article 79 recognizes that "every person has the right to enjoy a healthy environment. Law will guarantee community participation in the decisions that could affect it." Society's participation is, on the other hand, considered a state duty in Article 127 of the 1999 Venezuelan Constitution. The 1998 Ecuador Constitution establishes in Article 88 that every governmental decision that could affect the environment should first take into account the communities' views and, in this regard, society should be previously informed about proposed decisions. Furthermore, Ecuador's Constitution requires laws to guarantee the communities' right to participate.

Pursuant to these constitutional provisions, extensive laws and regulations have been elaborated by national environmental laws or codes, particularly those that create a national environmental framework. The holistic and systemic view of the environment that followed new environmental legislation must coexist, however, with previous but still prevailing sectoral regulation of water, forests, minerals, and other specific environmental aspects. This sectoral legislation has progressively started to adapt to environmental requirements. However, this sectoral tradition has meant that public

[4] For example, Article 19 of Chile's 1980 Constitution establishes that "every person has the right to live in an environment free of pollution." Ecuador's 1983 Constitution has an identical provision. The 1997 Constitution of Nicaragua guarantees that all Nicaraguan citizens have the right to inhabit a healthy environment. Brazil's 1988 Constitution establishes that all citizens "have the right to live in an ecologically balanced environment." Similarly, Colombia's 1991 Constitution also establishes that "all persons have the right to live in a healthy and ecologically balanced environment." And the 1999 Venezuelan Constitution recognizes that every person "has the individual and collective right to enjoy life and a safe, healthy and ecologically balanced atmosphere."

Some Latin American constitutions have enshrined the right as an individual fundamental right (such as Argentina, Chile, Ecuador, and Paraguay), while others contain the right under the title of collective rights or social rights and guarantees (including Colombia, Costa Rica, and Nicaragua). The Brazilian Constitution has incorporated it under the title of Economic and Financial Order. *See* Borrero Navia, *Derecho Ambiental y Cultura Legal en América Latina, in* JUSTICIA AMBIENTAL: CONSTRUCCIÓN Y DEFENSA DE LOS NUEVOS DERECHOS AMBIENTALES, CULTURALES Y COLECTIVOS EN AMÉRICA LATINA 57 (Enrique Leff ed., 2001).

[5] For example, Article 97 of Guatemala's 1985 Constitution refers to the concepts of sustainable development and shared responsibility, where the state, municipalities, and citizens have the obligation to promote social, economic, and technological development preventing pollution and ensuring an ecological balanced environment. Article 225 of the Brazilian Constitution explicitly establishes that citizens "have the right to an ecologically balanced environment, where this is a common and public use patrimony, essential for a healthy quality of life, imposing on public powers and collectivity in general, the duty of defending and preserving it for present and future generations." The 1994 Argentine Constitution establishes in Article 41 that citizens "enjoy the right to a healthy environment, appropriate for human development and for productive activities to satisfy present needs without compromising those of future generations…." In 1999, Mexico reformed its Constitution to include the principle of sustainable development, and the Constitution now establishes in Article 25 that the state has the duty to orient national development towards sustainability and integrity. The 1999 Venezuelan Constitution in Article 127 establishes that every generation "has the right and duty to protect and maintain the environment for their benefit and that of the world." Derecho del Ciudadano: Análisis Comparativo de Constituciones de los Regímenes Presidenciales, Base de Datos Políticos de las Américas (1998), *available at* www.georgetown.edu/pdba/Comp/Ambiente/derecho.html (last visited May 27, 2002).

Furthermore, Venezuela's Constitution establishes in Article 128 that the state "will carry out territorial planning in accordance with sustainable development principles." Finally, Ecuador's Constitution establishes in Article 3 that the state "will protect citizens rights to live in an environment that guarantees sustainable development" and that "the economy should have as an objective environmentally sound sustainable development."

[6] For example, the Constitution of Colombian states, with respect to property rights, that "property is a social function that implies obligations … as such, its ecological function is an inherent feature of property" (Article 8) and that "Law will establish limits to economic liberties when the social interest, environment and national cultural patrimony are at stake" (Article 333). Ecuador's Constitution also establishes, in Article 23, that "Law will determine restrictions to the exercise of certain rights and liberties to protect the environment." The Venezuelan Constitution similarly establishes, in Article 112, that "citizens can undertake freely to any economic activity without limits but for those established in the same Constitution, or by Law, related to causes of human development, security, health, environmental protection and others of social interest." Finally, the Chilean Constitution recognizes in Article 19 that "every person is guaranteed the right: to live in an environment free of pollution. It is the State's duty to prevent this right being affected and also to guarantee nature preservation. A Law can establish specific restrictions on the exercise of private rights and liberties in order to protect the environment …."

participation is regulated independently in the various sectors, and thus the elaboration of sound environmental procedures with respect to access to information, public participation, and justice has not been uniform. The immediate consequence has been legislative and institutional dispersion, inconsistency, practical gaps in the environmental and public participation guarantees, and limited coordination among authorities to respond to such fragmentation.

Prior to the adoption of the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (ISP) in 2000 by the OAS, most laws and regulations included some formulation of a right to participate in decisionmaking processes, but less than half really included participation provisions *per se*. Bolivia and Chile appear to be the countries with the most laws including participation provisions, while Argentina, Ecuador, and Mexico remain the countries with the fewest participation provisions.[7]

Among the legislatively mandated public participation provisions, priority is given to the right of the public to have access to decisionmaking, followed by access to justice and access to information. Although it seems to be a good sign that more emphasis is placed on processes of participation in decisionmaking—where a diverse range of mechanisms can be included to engage citizens directly in choices about environmental protection—the notable lack of laws ensuring access to information, however, significantly limits participation in matters of collective interest and, in particular, environmental matters. When translated into practice, these limited provisions for environmental information represent a failure or limitation in the participation framework, as information is a critical component of a citizen's effective right to participate in decisionmaking and to exercise his right to access to justice

II. THE INTER-AMERICAN STRATEGY FOR THE PROMOTION OF PUBLIC PARTICIPATION IN DECISION-MAKING FOR SUSTAINABLE DEVELOPMENT

A. Background

The foundation of government commitments to public participation in the Americas is in Principle 10 of the 1992 Rio Declaration, which states that "environmental issues are best handled with the participation of all concerned citizens at the relevant level." To ensure such participation, emphasis should be placed on access to information, access to process, and access to justice. This principle became a critical element of a number of the regional summits that took place after Rio. For example, the Plan of Action adopted at the 1994 Miami Summit of the Americas includes a chapter on "invigorating society and communities participation," and it declares that "a strong and diverse society, organized in various ways and sectors, including individuals, the private sector, labor, political parties, academics, and other non-governmental actors and organizations, gives depth and durability to democracy [and] a vigorous democracy requires broad participation in public issues."[8]

This commitment was addressed again at the 1996 Santa Cruz Summit Conference on Sustainable Development, where the countries of the Americas adopted a declaration supporting the full integration of civil society into the design and implementation of sustainable development policies and programs at the hemispheric and national levels. The Summit's Plan of Action makes the OAS responsible for the "formulation of an Inter-American strategy for the promotion of public participation in decision making for sustainable development." This strategy was mandated with promoting at the national level the exchange of experiences and information among government representatives and civil society groups with regard to the formulation, implementation, and improvement of sustainable development policies and programs, legal and institutional mechanisms, including access to and flow of information among the relevant actors, training programs, and consultation processes used at the national level to ensure civil society involvement.[9]

This mandate for a consultative process in developing the strategy is significant, but at the same time it represents a history of fora that the OAS has regularly convoked for government and civil society dialogue, often running in parallel with high-level meetings.

Over two years, the OAS collaborated with a broad array of government and civil society representatives throughout the hemisphere, national focal points, and a project advisory committee to develop an Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (ISP).[10] In April 2000, the OAS Inter-American Council for Integral Development approved the ISP.

The process leading up to the ISP was the first time that public participation experiences in so many different American countries were analyzed and the best prac-

[7] *See* www.oas.org/usde/isp/1pgmissi.htm (Legal Provisions, Findings) (last visited July 28, 2002).

[8] The Miami Plan of Action, *available at* www.summit-americas.org/miamiplan.htm#3 (last visited May 29, 2002). This 1994 Central American Summit for Sustainable Development held in Managua, Nicaragua also emphasized public participation.

[9] The Santa Cruz Summit Plan of Action, para. 16, *available at* www.summit-americas.org/boliviaplan.htm (last visited May 29, 2002).

[10] *See supra* note 1.

tices in the region summarized. From these summaries, a comprehensive approach to public participation was developed from a regional perspective. It was also the first time that the importance of the interaction between governments and civil society was so prominently highlighted as a critical component for sustainable development and was translated into an international strategy through policy recommendations and concrete guidelines for action. These guidelines establish a reference for future institutional design and legal frameworks in the countries of the region.[11]

The ISP is based on the understanding that public participation supports, rather than impedes, sustainable development. This premise rejects the idea that sustainable development requires a proactive, centralist environmental policy. Rather, promoting broad participation and the implicit extensive notions of democracy are considered beneficial to the sustainable management of natural resources.[12]

The ISP blurs the boundaries between the national and international contexts. The ISP responds to the increased concern of international law with issues that once were considered to be essential attributes of states sovereignty—public participation in governmental decisionmaking, transparency and secrecy, domestic legal procedures, and public administration, among others.

The same flexibility becomes apparent when treating the dichotomy between private and public interests. The ISP defines not only the role that the state should play but also the position of private persons and their responsibilities in participating in sustainable development in their own countries. However, the ISP only addresses states when establishing policy recommendations. It does not oversee the mutual responsibility of governments and civil society when implementing the other lines of action set forth in the ISP.

Public participation is defined as "all interaction between government and civil society, and includes the process by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects and programs."[13] Therefore, public participation policies are understood not only from the side of public institutions, for example by providing information or institutional mechanisms to allow participation. From the civil society perspective, public participation also means creating public responsibilities and awareness, so that real public participation in decisionmaking becomes feasible through necessary interaction.

This civil involvement is also evidenced in the ISP by a broad definition of legal standing to sue, whether in defense of collective interests or public interest before administrative or judicial bodies. The defense of public interests is not only an obligation of governments and administration but also of the public itself. Following that principle, the ISP advocates the involvement of citizens and organizations not only to protect their own interests, but also to promote public interests and concerns. In this sense, the ISP Policy Recommendations propose the need to create legal frameworks that "clarify and expand the legal standing of those persons and communities affected by development decisions, seeking a reasonable balance in the roles and joint responsibilities of the various levels of government and civil society."[14]

By including these ideas and concepts, the ISP seeks to ensure that they are reflected in procedural and administrative changes. These changes have already been introduced in some legislation, for example, by allowing nongovernmental organizations (NGOs) to act on behalf of public interests and by recognizing the existence of collective or diffuse interests and the need to defend them. They have been reflected not only by a broad definition of legal standing, but also in the promotion of access to administrative decisionmaking and access to information. In regard to these latter two issues, the need to prove a legitimate, direct private interest to justify access has been reduced in a number of countries.

In terms of governance, there is no doubt that these principles connote a comprehensive concept of democracy. Nevertheless, it is mainly the concept of legitimization[15] that serves as a theoretical foundation for public participation in the ISP document. Public participation promotes legitimacy and, as a consequence, acceptance of decisions related to the environment. Moreover, the ISP states that public participation introduces a broad range of ideas that motivate the development of alternative solutions, enhances the knowledge of decisionmakers, reduces the potential for serious conflict, increases the likelihood of improved and lasting solutions, strengthens the fulfillment of public standards and policies, provides opportunities for cooperation, builds trust among the participants, and leads to the creation of long-term collaborative relationships.[16] Environmental laws provide one example of how participation measures can be introduced into legal structures

[11] Since the ISP was adopted only two years ago, it is too soon to determine the full range of impacts that that such an initiative may have had in countries' institutions and regulations.

[12] Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, *in* 8 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW – 1997 (1998).

[13] ISP, *supra* note 1, at 6.

[14] *Id.* at 11.

[15] Ebbesson, *supra* note 12, at 75.

[16] *See* ISP, *supra* note 1, at 8 (benefits chapter).

to ameliorate the legitimization crisis that may exist in national legal regimes.[17]

In contrast with the 1998 Aarhus Convention,[18] which was recently ratified by European and Central Asian countries and has become a landmark for public participation, the ISP was born as a voluntary instrument. The text of the ISP focuses on the description of general provisions and objectives that could offer guidance to the countries in the region, rather than establishing specific and binding norms with compulsory timeframes. Therefore, it creates a framework of principles and recommendations for action that can guide state policies and civil society towards increased and more effective interaction. The document identifies common principles, presents a set of objectives, makes recommendations for achieving public participation, and urges the different states to adopt the participation measures contained in its recommendations. It leaves the parties to determine, according to each country's background and culture, the means by which the objectives can be attained.

Although the ISP developed from a regional initiative, it does not address how to promote public involvement at a regional level. It does not create regional procedures for participation or regional compliance mechanisms that could resolve regional environmental problems, such as transboundary conflicts.[19] It also does not propose regional platforms in which participation initiatives and barriers could be addressed or environmental information shared at an international context. The ISP applies to the OAS member states, and it is from this point of view that policy recommendations are made.

B. Content

The ISP is structured in two parts: the initial part of the document creates a policy framework to guide countries' efforts to formulate policies that ensure public participation in planning, environmental management, and decisionmaking for sustainable development; and the second part of the document provides practical recommendations for implementation at the national level.

Recommendations in the Policy Framework refer to six different areas: Information and Communication, Legal Frameworks, Institutional Procedures and Structures, Education and Training, Funding for Participation, and Opportunities and Mechanisms for Public Participation. Through these policy recommendations, the ISP encourages governments to create and strengthen formal and informal communication mechanisms to encourage information sharing. They also promote the development and implementation of legal and regulatory frameworks that ensure the participation of civil society in sustainable development decisions, guaranteeing public access to relevant information, access to the decisionmaking process, and access to justice. Countries also should develop institutional structures and procedures that facilitate civil society and government interaction, develop the capacity of individuals to participate with an increased base of knowledge in sustainable development issues, procure financial resources so that these practices become feasible, and support formal and informal opportunities and mechanisms for public participation.[20] The ISP supports its recommendations through an overarching set of principles that provides the foundation for a broad understanding of public participation.[21]

Following the policy recommendations, the ISP describes a set of actions that should be adopted and the rationale behind them. The specific provisions in the recommendations for action will be further examined from the perspective of the three pillars of public

[17] The lack of meaningful public participation in decisionmaking has been emphasized as one of the main causes of the lack of compliance with environmental laws in Latin America. For an analysis of this problem, see www.farn.org.ar/enforcement (last visited May 30, 2002).

[18] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention]; *See* Svitlana Kravchenko, *Aarhus, Espoo, and London: Promoting Public Involvement In the UN/ECE Region,* in this volume.

[19] Notably, though, the Inter-American Commission and Court of Human Rights provide one regional avenue for members of the public to protect human rights, including those relating to the environment and natural resources. *See* Danièle M. Jean-Pierre, *Access to Information, Participation and Justice: Keys to the Continuous Evolution of the Inter-American System for the Protection and Promotion of Human Rights*, in this volume.

[20] ISP, *supra* note 1, Policy Recommendations.

[21] *Id.* at Principles. These principles are:

- Access: In order to participate effectively, civil society should have timely access at the various levels of government to information, the political process, and justice.
- Proactive role of governments and civil society: Government and civil society should take initiatives and ensure opportunities for public participation, in accordance with their respective roles.
- Inclusiveness: This principle refers to the broad participation of a diversity of interests and sectors and a broad interpretation of standing, which is the right to attend and participate in administrative and judicial processes.
- Shared responsibility: The responsibility of civil society and governments to share the burdens and commitments of development.
- Openness: This principle should be included throughout the process of design, implementation, and evaluation of projects, policies, and programs.
- Transparency: This principle should apply to all concerned parties, ensuring that all objectives are explicit and that information vital to the decision process is reliable.
- Respect for public input: Citizen contributions should be evaluated and given proper consideration in a timely manner.

involvement: access to information, access to decision-making, and access to justice.

C. Access to Information

This subsection reviews how the ISP conceives of access to information, specific ISP recommendations for action to promote public access to information, and advances in the region.

1. Concept

Access to information entails a right by which any person may consult and select any documentation and information from public records administered by the state. According to the ISP, access to and exchange of accurate, relevant, and timely information, including scientific and traditional knowledge, is fundamental to assuring that civil society and government have the means and ability to participate meaningfully and responsibly in sustainable development decisions. Information raises the level of debate and influences opinions that might otherwise be compromised by mistrust and bias.[22]

This available information could comprise technical reports; scientific surveys; information about policies, programs, plans, and projects; information about various decisionmaking petitions; opportunities to make oral or written comments; and public and technical organizations' opinions. Free access to information is based on the public nature of relevant information regarding decisions affecting a person or community.[23]

This concept should not be confused with the state's duty to enable the public to know about its decisions and to collect environmental information and disseminate it to other stakeholders. These requirements compel governments to establish systems and structures for disseminating information—i.e. creation of databases, national reports, and monitoring statistics—and to provide a system for ensuring public access to environmental information. They also imply the obligation on the part of operators and developers to transmit relevant information about their potentially harmful activities to the competent authorities.

2. ISP Recommendations for Action

The state's communication and dissemination of environmental information is at the core of the ISP. The ISP seeks to ensure an appropriate flow of information to public authorities so that it can then be made available to all stakeholders. Thus, the ISP recommends that states strengthen mechanisms to gather the necessary information, exchange it with other stakeholders, and disseminate it to the general public; employ various means of communication that allow government and civil society to exchange relevant information on development; and use information and communication tools that are adapted to the local cultural and social conditions in order to engage all stakeholders.[24]

These recommendations are supported by various proposed actions, including the obligation of project proponents to introduce a complete information strategy that includes monitoring, auditing, and reporting into the various phases of the project. Another is the obligation of different stakeholders to share information opportunities, to participate in decisionmaking processes, and to raise public awareness of specific development projects or programs. Countries also should use the mass and interactive media to communicate and inform the public about sustainable development issues and expand access to the media for grassroots organizations and communities. Importantly, the ISP emphasizes that all the interested persons receive necessary information in the appropriate format at the right time.[25] The proposed actions do not make any reference, however, to the need to create specific instruments such as pollution inventories or to establish minimum mandatory elements of participation to be included in the system.

Special mention is made of the need for all stakeholders to be involved. Information should be disseminated with the guarantee that it is received by all stakeholders who are involved and at all stages in the process of decisionmaking. This duty is also applied to private sector economic activities when the proposed action could have environmental or social impacts, and thus the public, including isolated communities, should be involved in each level of the project cycle.[26]

To guarantee the effective provision of information, the ISP foresees the need to carry out evaluations on the quality of the information that is made available. The ISP provides that "government agencies, with the input of civil society organizations, should develop performance indicators to measure the effectiveness of information and communication programs, and should be responsive to user feedback."[27] The ISP also recommends academic institutions to monitor the quality and scientific grounds of such information.

Ultimately, access to this information depends on each country's approach to governance and its under-

[22] ISP, *supra* note 1, Recommendations for Action, Information and Communication, at 18.

[23] *See* Public Participation and Sustainable Development On-Line Module elaborated by SEI, REC, IISD, and FARN, *available at* www.farn.org.ar/docs/pp/ppmodule.pdf (last visited May 31, 2002).

[24] ISP, *supra* note 1, Recommendations for Action, Information and Communication, at 18.

[25] *Id.* at 19.

[26] *Id.*

[27] *Id.*, ch. 1.1.6, at 19.

standing of what constitutes open government. In addition, institutional elements such as economic resources and the expertise available at the governmental level are also critical factors that determine the quantity and quality of the environmental information that is provided and disseminated. In many countries of the region, the state's lack of capacity contributes significantly to the lack of adequate databases and environmental information.

With respect to free access to information, the ISP is relatively limited. It states that all levels of national and sub-national governments should create legal frameworks and institutional structures that permit such access, ensure timely access to information, establish clear procedures for requesting and receiving information, and provide contact points to facilitate the exchange of information.[28] The ISP considers access to information from a procedural point of view and addresses the states' role in facilitating such access. In this sense, the ISP also establishes that access to information should be assured by incorporating provisions into new and existing laws that grant public access to data, documents, and other information relevant or related to policy formulation and implementation, including information on the present quality of the environment, the environmental performance and conduct of regulated communities, and development budget proposals.[29]

However, the ISP does not recognize access to information as an explicit right of citizens that could be defended in administrative or judicial bodies.

In contrast with the Aarhus Convention[30] and due to ISP's soft language and purpose, the ISP does not take the further step of defining which entities should be the suppliers of information—for example, whether it should include private companies providing public services or only public institutions. It also does not mention the subjects that may seek the information—for example, whether it should be extended to organizations representing collective interests or only to individuals with a direct interest. Moreover, the ISP does not make any reference to the timeframe in which information should be made available, the type of information that can be excluded from public access, and whether the causes of denial of information by authorities should be explicitly mentioned. Finally, it does not define what constitutes environmental or sustainable development information.

Finally, the ISP considers citizen education a prerequisite for effective participatory processes, since education improves the ability of members of the public to act, whether it is on their own behalf or in defense of public interests more broadly. The ISP develops the theme of education as a separate line of action, and considers the lack of education to be one of the main barriers to public participation. The provisions on environmental education seek to increase "the capacity of individuals to participate in sustainable decision making with an increased base of knowledge (local, traditional and technical) of sustainable development issues and public participation practices."[31] In this regard, the ISP states that governments and civil society should promote activities to develop awareness and a culture of participation, link public participation and public interest to environmental and sustainable development issues, and create alternative instances of conflict resolution and active involvement.

3. Advances in the Region toward Access to Information

Citizen access to the information produced by public authorities has been generally included in constitutions and laws in the different countries of the region. The Argentine Constitution declares in Article 41 the obligation of authorities to provide environmental information. At the provincial level, the legislature of Buenos Aires Province recently approved the Access to Environmental Information Law,[32] which is the first such law in Argentina.[33] This law establishes an obligation for authorities to systematize environmental information by creating databases, organizing available information, creating an environmental information registry, and disseminating an annual report. The law also guarantees a citizen's right to demand information about the "state and management of the environment and natural resources" without the need to show a special or specific interest.[34] Other advances in the law include: sanctions against civil servants who impede the right to obtain information; the burden of proof is placed on any authority that denies access; and broadening the obligation to provide information to every institution that provides public services, including private sector entities.[35]

Concrete access to information provisions, influenced by the 1992 Rio Declaration, have also been included in general environmental laws and sectoral laws in the Americas.[36] For example, Colombia established,

[28] *Id*., ch. 1.1, at 18.
[29] *Id*., ch. 2.1.1, at 22.
[30] *Supra* note 18.
[31] ISP, *supra* note 1, ch. 4, at 30.
[32] Law 303/1999, BOCBA No. 858, 13/01/2000, *available at* www.farn.org.ar/bd/ecologis/tc/3347.html (last visited June 3, 2002).
[33] García Conto & Caeiro, *Ley de Acceso a la Información Ambiental en la Búsqueda de la Transparencia y la Eficacia*, *in* La Ley. Suplemento de Derecho Ambiental (2000).
[34] *Supra* note 32.
[35] *Id.*
[36] In addition to the Colombian examples, Mexico's 1996 General Law on Ecological Equilibrium and Environmental Protection (LGEEPA) incorporates norms related to the right to access to public sector environmental information.

in Law 99/1993, a person's right to directly file an information petition for information relating to pollution and to human health dangers corresponding to pollution. Such a petition must be answered within ten days. In addition, Article 74 of Colombia's Constitution allows any person to invoke the right to be informed about the quantity and destiny of the financial resources relating to environmental preservation. The Constitution also creates in Article 268 a special body called the Contraloría General de la República, which has, *inter alia*, the function of providing an annual report on the state of natural resources and the environment. Additionally, environmental education is contemplated in some Latin American constitutions.[37]

Finally, the scope of the right of access to information has been further defined by the successive exercise of legal actions and appeals before tribunals and courts. This clarification of the right and development of specific legal mechanisms for compelling the release of information highlights the critical importance of specified causes of action to seek judicial redress when information is denied. For example, Article 100 of Peru's 1993 Constitution created a special appeal called *habeas data* against any act or omission of a public authority, civil servant, or any other person who interferes with the constitutional right to obtain information.[38] The action of *habeas data* has already been successfully invoked and applied by the Peruvian Society for Environmental Law (SPDA) to challenge a denial by the Ministry of Energy and Mines to provide information related to the building and closure of a mining tailings pond by the Compañía Aurífera Retama. On Sept. 19, 1996, the Supreme Court issued its landmark ruling declaring that the information solicited was of a public character and that the judiciary could not exempt itself from cases whose main object is the protection of collective interests. This jurisprudence has broad implications, and it has provided legal support to other information requirements placed on public authorities.

In practice, the use of *habeas data* actions has even reached the OAS Inter-American Commission on Human Rights. For example, *habeas data* was invoked to appeal the denial by the Chilean Foreign Investment Committee of information related to its evaluation of the forestry exploitation by the timber company Forestal Trillium Ltda.[39] The action was brought by the Chilean NGO TERRAM under Articles 1, 2, and 13 of the American Convention on Human Rights, which recognizes the access to public information.[40] On September 5th, 2000, the action was also brought against the State of Chile under Article 23 of the Convention, which declares that citizens have the right to participate directly in the management of public affairs. This case is still underway.

With respect to environmental information dissemination, the majority of environmental laws in the region have authorized the creation of a *Sistema Nacional de Información Ambiental*, or national environmental information system, to compile, register, organize, and disseminate environmental information. For example, national environmental information systems have been developed in Argentina, Chile, Colombia, and Mexico with the aim of supporting environmental management and decisionmaking.[41] These on-line systems normally consist of a searchable webpage that connects several databases through websites and documentation centers located in several regions in each country, and they normally allow for direct use of databases on environmental legislation and documentation.

The Mexican government's initiative to use the media to disseminate environmental matters includes a periodical magazine, *La Gaceta Ecologica*, which has been published since 1988. Its content focuses on national and international environmental information, national environmental legislation, natural protected areas, environmental impacts, and the use of natural resources. The *Gaceta* is published every three months and is sent to members of the general public who are subscribers. After a while the same information can also be obtained electronically for free at the *Gaceta* website.[42]

Apart from the initiatives mentioned above, some framework environmental codes or legislation in the region require national environmental authorities to develop and annually publish national environmental reports. For example, Mexico recently published *Sustainable Development Indicators 2000*.[43]

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[37] *See* COLOMBIA CONST. art. 67 (environmental education is a state duty); ARGENTINA CONST. art. 41 (same); VENEZUELA CONST. art. 127 (environmental education must be included in the education curricula).

[38] *See* Carlos Chirinos, *Acciones de Interés Público: Protección del Medio Ambiente*, Tema No. 12, Seminario de Integración de Teoría General del Derecho, semestre 97-II, Pontificia Universidad Católica del Perú, Facultad de Derecho, Lima (Jan. 1996).

[39] *See* www.terram.cl (last visited May 30, 2002); *see also* the San Jose Convention, *available at* www.oas.org/juridico/english/Treaties/b-32.htm (last visited June 3, 2002).

[40] For more information on the American Convention on Human Rights (i.e., the San Jose de Costa Rica Agreement), see Jean-Pierre, *supra* note 19.

[41] *See* [Argentina] Sistema de Información Ambiental Nacional (SIAN), *available at* www.medioambiente.gov.ar/sian/default.htm (last visited July 23, 2002); www.medioambiente.gov.ar/mlegal/marco/res459_98.htm (last visited July 23, 2002) (containing the mandate for the SIAN); [Chile] Sistema Nacional de Información Ambiental, *available at* www.sinia.cl (last visited May 25, 2002); [Colombia] Sistema Nacional de Información Ambiental, *available at* www.ideam.gov.co/index4.asp (last visited May 25, 2002).

[42] *Gaceta Ecologica*, *available at* www.ine.gob.mx/ueajei/publicaciones/consultaListaPub.html?id_tema=13&dir=Temas (last visited June 3, 2002).

[43] *Available at* www.ine.gob.mx (last visited June 3, 2002).

Public access to information can be critical for rooting out corruption, but existing systems in many countries have not been very effective in addressing corruption. Hence, it becomes even more important to develop mechanisms to ensure transparent provision of information, that the information should be granted as a right, and that citizens can enforce these and other collective rights through courts.

In this sense, the globalization of communication networks has given a new dimension to the content of the right, creating new information demands and thereby pushing public authorities toward more open and transparent information policies. Despite the cultural and economic barriers in the region, such as the high levels of illiteracy and poverty, the impact of the Internet and related technologies on public involvement in environmental decisionmaking is already evident. For example, the use of Internet in the region has increased from approximately 14.3 million people that used Internet in December 2000 in South America to almost 25.4 million nowadays, or about 7.2 percent of the current population of 355 million.[44] Although far from the 44 percent of users in North America, the explosion of Internet use in the region is predicted to continue to increase regionally by 40 percent each year until 2005.[45] The Mexican government has quickly become aware of the importance of such media and has already used it to launch a public consultation regarding a law on transparency and access to governmental information.[46]

There have been considerable advances in creating legislative frameworks on access to environmental information. However, there have only been limited parallel advances in the creation of information platforms and legal systems generally to make the environmental information developments effective. Additionally, most countries have seen few changes in the traditional culture of Latin American bureaucracies toward more open and transparent attitudes. Finally, the environmental information developments have not been accompanied by adequate binding mandates on authorities to establish specific mechanisms—registers, pollution databases, and other instruments—designed to compile, organize, and disseminate environmental information.[47]

[44] Statistics obtained from Éxito Expotador, *available at* www.exitoexportador.com/stats2.htm (last visited June 3, 2002).

[45] *See* www.nua.ie/surveys/index.cgi?f=VS&art_id=905356630&rel=true (last visited June 3, 2002).

[46] The Initiative is *available at* www.ltg.org.mx (last visited June 10, 2002).

[47] As an example, see the assessment realized in Chile by Access Initiative in relation to weaknesses and strengths in access to environmental information in Chile *available at* www.casapaz.cl/biblioteca/acuerdos/a14/acuerdo14-6.htm (last visited June 14, 2002).

D. Access to Decisionmaking

This subsection examines how the ISP conceives of public participation in decisionmaking, specific ISP recommendations to promote public participation, and regional advances at the national level.

1. Concept

The notion of a representative democracy and citizenship rests on adequate and effective participation. Complementary mechanisms to participate in representative institutions are critical in an organized society so that an extensive net of intermediate groups and voluntary associations can be formed outside state bodies. Implicit in this rationale is the concept of an empowered and active citizen, the need for governments to open different public platforms, and community involvement in implementing government policies. Structural changes in countries in the region are slowly developing in that direction, as new and more evident demands from citizens have emerged. In fact, it could be argued that a strengthening of civil society in the region is starting to become apparent—particularly in comparison to the government rule of the 1980s—and that civil society is realizing certain successes in promoting accountability and participation in higher levels of decisionmaking.

At the same time, public participation looks to good governance principles at least as much as to representative democracy for its underpinnings. Public participation may be ensured and advanced in a variety of different democratic systems, as well as other political systems in which leaders are not elected in what may be deemed a "democratic" manner.

2. ISP Recommendations

The ISP proposes different lines of action that focus primarily on involving the public in decisionmaking through legislative, regulatory, and institutional reforms. For example, the ISP explicitly recommends that "legislative and administrative bodies should ensure public access throughout the process of formulating and implementing policies, laws and regulations, including the approval of development proposals, projects and budgets, the granting of permits, the process of assessing environmental impacts, and the establishment of specific environmental performance standards."[48] Thus, public participation in decisions relating to projects as well as broader programs, policies, regulations, and laws is advanced.

[48] ISP, *supra* note 1, ch. 2.1.2, at 23.

For effective participation to occur, the legal standing "to participate in development decision-making and implementation should be granted to all who are interested or affected by the decisions, regardless of their race, ethnicity, culture or gender."[49] While the ISP does impose some limit on who may have a right to participate (they should have some personal interest in the outcome of the decision), the ISP notably does not require any special interest. Moreover, the ISP mandates nondiscrimination in public participation, so that those persons and communities that traditionally have been marginalized—including women and vulnerable groups such as indigenous populations, youth, and disadvantaged racial and ethnic minorities, including disadvantaged populations of African descent—have an equal claim and opportunity to participate in decisions that could affect them.[50] The ISP also highlights the need to facilitate local and grassroots participation through the development of community organizations.

During legislative reform processes, the ISP articulates the need to include civil society in the governance process, recognizing the need to achieve a reasonable balance in the respective roles and responsibilities of government and civil society. In the overall decisionmaking processes, decentralization policies and technical assistance are particularly necessary to ensure broad participation of civil society at the local level.[51]

Following the ISP rationale, public participation should also be embedded in institutional procedures and structures so that participatory practices are incorporated into institutional decisionmaking procedures at all levels, and channels are created that allow for a continuous dialogue with civil society.[52] In this regard, the ISP proposes the creation of formal joint management structures, such as co-management schemes to facilitate working relationships with local communities and citizen groups, ad hoc joint management schemes to allow for partnerships, and the inclusion of civil society representatives on boards of directors and advisory committees.[53]

The ISP also highlights the government's duty to undertake assessments participatory mechanisms using performance indicators. These indicators of participatory practices are to be developed in implementing their policies, programs, and projects.

With the same aim, the ISP requests that all stakeholders search for new opportunities and mechanisms for consultation, participation, and conflict resolution that allow for the inclusion of different sectors of society in decisionmaking. It recommends strengthening multisectoral institutions, such as National Councils for Sustainable Development and councils at the local level that could involve a broad range of stakeholders.[54]

In regards to incorporating participatory practices into the approval process for developing projects, the ISP recommends that governments and private institutions create management tools that can be used throughout the project cycle, in order to provide a flexible, dynamic, and two-way consultative process.[55] Specifically, the ISP recommends roundtables, public hearings, workshops, and technical meetings be convened during the evaluation of social and environmental impact assessments.[56] In addition, decisionmakers have an final obligation to incorporate or respond to public comments they received during the process.[57]

In contrast to the Aarhus Convention, the ISP does not give any guidance for activities that may have a significant effect on the environment. The ISP also does not specifically refer to the importance of early public participation in different processes when there still exists an opportunity to choose among different development alternatives and, therefore, public participation can be most effective.[58]

3. Advances in the Region toward Access to Decisionmaking

Some Latin American constitutions recognize a citizen's right to participate in decisionmaking which affects the citizen's quality of life. For example, Ecuador's Constitution introduces a criteria in Article 83 for community participation in environmental control. It guarantees that indigenous communities have a collective right to be consulted on nonrenewable resources exploitation, conservation of renewable natural resources located on their lands, and the preservation of their biodiversity management practices. Furthermore, Article 88 also requires the government to take into account communities, their right to be informed, and their

[49] *Id.*, ch. 2.2.2, at 23.
[50] *Id.*
[51] *Id.*
[52] *Id.*, ch. 3, at 27. The ISP states that "as societies develop, their institutional structures become more complex, which makes necessary the strengthening of institutional policies and structures for promoting the systematic interaction with the public. Institutions should be encouraged to innovate, and public-private partnerships should be promoted and consolidated, whenever possible, in order to address this need."
[53] *Id.*, ch. 3.2.1, at 28.
[54] *Id.*, ch. 6, at 39.
[55] *Id.*, ch.3, at 27.
[56] *Id.*, ch.6, at 40.
[57] *Id.*, prin. 7 (comments must be "evaluated, analyzed, and given proper consideration in a timely manner").
[58] While not clear on the matter, ISP Specific Objective b does recognize "Full participation [in] planning, decision-making, follow-up, and evaluation on sustainable development" which could be read to suggest participation at various stages of decisionmaking, including early in the process.

participation in any governmental decision that may affect the environment.[59]

Many national laws, particularly general, framework environmental laws, establish procedures for involving the public in governmental decisionmaking processes. For example, Colombia's General Environmental National System Law guarantees every person's right to intervene in administrative processes related to the concession of permits and licenses that could affect the environment;[60] the obligation to hold public hearings in such processes;[61] and the publication of final decisions, which includes notification to all citizens who would have previously demanded the information.[62] Similar requirements have also been introduced when administrative and legal reforms may affect the environment. For example, Article 63 of the 1996 Constitution of the Province of Buenos Aires Constitution mandates public hearings on legislative proposals related to urban planning, siting commercial or industrial facilities, or modifications in the use or status of public domain resources.[63]

In addition, according to the inventory conducted by the OAS during the process of elaborating the ISP, the majority of environmental laws in the region include some form of participation in decisions regarding specific projects through environmental impact assessments (EIA) processes. Citizens are more likely to have a right to participate under EIA laws than they do under other areas of environmental laws, such as water quality laws.[64] For example, this has been the case in the energy and mining sector policies in Peru, where the Ministry of Energy and Mines issued a 1996 Decree requiring public hearings as part of the approval process for EIAs.[65]

As a practical matter, it is often difficult for legal proposals of public participation to develop into anything beyond a merely *pro forma* requirement. For example, it is a common feature for consultation processes to be developed ex-post, once the development decision has been made and just before its final approval, instead of being articulated ex-ante, at the beginning of the assessment of the project when all options are open and public participation can be most effective. Even where the public participates early in the process, practice often shows that government authorities are do not know how, or are unwilling, to take into account the input from the public participation.

The lack of adequate capacity and organization at the grassroots level frequently impedes effective public participation in the development of policies and projects. To ensure grassroots representation, Bolivia's Public Participation Law promotes and gives legal personality to indigenous and farming committees constituted as Organizaciones Territoriales de Base.[66] These organizations should be established following their traditional rules, and, once registered, are considered to have certain rights and obligations with respect to public participation. They can, for example, express their concerns over local development issues, participate in public hearings, supervise municipal services, and bring legal claims under relevant environmental laws.[67]

Interesting initiatives have also emerged in the effort to develop new forms of participation and new platforms to embrace public and private interests in sustainable development issues. One example can be found in the Regional Environmental Commissions (CARs) in Peru,[68] which are formed by representatives of local government agencies, members of different sectors of the national government, the private business sector, NGOs, and academic institutions to coordinate local institutional actions and elaborate an Environmental Action Plan for the Regions. Similar initiatives have also been adopted in formal governmental decisionmaking processes by involving representatives from social and environmental NGOs, so that complex environmental problems can be studied from a broad, pluralistic perspective. This has been the case with the Committee on Biological Diversity (CONADIB)[69] and with the creation of specific consultative groups, such as the Peruvian National Group on Biosafety. Institutional participation has also been adopted in Paraguay where Law No. 40/90 created the National Commission on the

[59] *See also* COLOMBIA CONST. art. 330 (requiring the government to ensure the participation of representatives from indigenous community in decisions regarding the exploitation of natural resources in their territories).

[60] Law No. 99 of Dec. 22, 1993, art. 69.

[61] *Id.* art. 72.

[62] *Id.* art. 71.

[63] *See* www.legislatura.gov.ar/1legisla/constcba.htm#_Toc405121815 (last visited June 4, 2002). Article 63 of the 1996 Buenos Aires Province Constitution states that the Legislative, Executive or "Comunas" can convoke public audiences to discuss matters of general interest for the city with the obligatory participation of competent public officials. These audiences are mandatory in the case of projects related to urban development, industrial edifications, and the use of public goods.

[64] *See* www.oas.org/usde/isp/1pgmissi.htm (Legal provisions, Findings) (last visited July 28, 2002).

[65] Reglamento de Participación Ciudadana en el Procedimiento de Aprobación de los Estudios de Impacto Ambiental Presentados al Ministerio de Energía y Minas, approved by Ministerial Resolution No. 728-99-EM/VMM, published Diario Oficial El Peruano, Sept. 1, 2000.

[66] [Bolivia] Public Participation Law No. 1551/1994, art. 2.

[67] *Id.* art. 7.

[68] The CARs are regulated by Supreme Decree No. 022-2001-PCM, which approved the Reglamento de Organización y Funciones del Consejo Nacional del Ambiente-CONAM, published Diario Oficial El Peruano, Aug. 3, 2001, art. 59.

[69] To see CONADIB functions and constitution, consult Title VIII Supreme Decree No. 068-2001-PCM, published June 20, 2001 – Reglamento de la Ley sobre Conservación y Aprovechamiento Sostenible de la Diversidad Biológica.

Defense of Natural Resources, which includes the participation of the private sector and civil society.

E. Access to Justice

This subsection examines how the ISP conceives of access to justice, specific ISP recommendations to promote access to justice, and regional advances at the national level.

1. Concept

Public participation and access to courts are closely linked. Any member of the public who has a sufficient and legitimate interest should be ensured access to an action or a review of his case by a court of law. In fact, access to justice is understood as the opportunity to obtain a specific and complete solution to an environmental conflict from judicial or independent administrative authorities. Access should be nondiscriminatory in that all persons should have an equal opportunity to protect their rights through judicial redress and to obtain through this process results that are fair and just.

Environmental jurisprudence has increased in the region through the 1990s. In fact, the concepts of environmental and participatory rights that are enshrined in constitutions and legislation in the region has successively been defined made concrete by public interest court cases. Currently, this right of access to justice has itself constituted an increasingly important instrument in requiring accountability in public institutions.

2. ISP Recommendations

The ISP establishes some basic recommendations for action related to access to justice that could guide states in guaranteeing the right. Specifically, the ISP focuses its recommendations on two main points: the right to appeal before an independent administrative or judicial body, and the guarantee of sufficient legal standing. Specifically, ISP provides that meaningful access should be assured by providing legal standing—in essence, the legal right to appear before judicial or administrative bodies—for all affected and interested parties; the right of appeal to or review by, when pertinent, a higher governmental authority; through alternative dispute resolution mechanisms to promote settlement; and through maintenance of independence among authorities responsible for implementation, appeals, and oversight.[70]

The ISP leaves as a matter for national law to define the terms "interested parties" and "sufficient interest." However, the ISP recommends the extension of legal standing to interested or affected persons, organizations, and where pertinent, communities, with particular emphasis on persons and communities traditionally marginalized, including women and vulnerable groups such as indigenous populations, youth and disadvantaged racial and ethnic minorities (including disadvantaged populations of African descent).[71]

3. Advances in the Region Towards Access to Justice

Although judiciaries throughout the region have contributed to the creation of environmental jurisprudence, the defense of environmental and social interests before courts still faces many barriers. The principal barriers are the lack of an appropriate legal framework in which to protect the frequently diffuse interests; the limited capacities of judges to review conflicts with complex legal and scientific issues; and corruption. Attempts to reduce these barriers have led to the creation of specific environmental actions, specialized environmental tribunals, funds to mitigate environmental problems, and the extension of legal standing, among other measures.

The defense of environmental interests generally rests on traditional administrative, civil, and penal actions. Few countries recognize the possibility of specific environmental actions or appeals. Constitutional actions based on provisions ensuring environmental quality as well as the protection of human rights constitute a powerful set of tools that complement actions before civil courts, penal courts, and administrative bodies or courts. The most successful "environmental" actions have been linked with the protection of property rights rather than with the creation of specific environmental responsibilities and environmental damage reparation, unless they had direct consequences on human health. Finally, the actions brought by individuals and NGOs to protect the environment are more common than those from public prosecution institutions.[72]

The intervention of tribunals in environmental conflicts in the region has been based upon constitutional actions,[73] mainly in those countries where the right of a healthy environment has been constitutionally enshrined with specific provisions to make it effective. This has been the case in Chile, in which the 1980 constitution

[70] ISP, *supra* note 8, ch. 2.1.3, at 23.

[71] *Id.*, ch. 2.2, at 23.

[72] Raul Brañes, *El Acceso a la Justicia Ambiental en América Latina: Derecho Ambiental y Desarrollo Sostenible*, *in* El Acceso a la Justicia Ambiental en América Latina, Memorias del Simposio Judicial Realizado en la Ciudad de México del 26 al 28 de Enero del 2000, Serie Documentos sobre Derecho Ambiental, No. 9, Programa de las Naciones Unidas para el Medio Ambiente (PNUMA) y Procuraduría Federal de Protección al Ambiente del Gobierno de México (PROFEPA) Ciudad de México, México (2000), at 45.

[73] Isabel Martinez, *El Acceso a la Justicia Ambiental en América Latina durante la Década de los Noventas: Reformas y Desarrollos*, *in* Environmental Law in Developing Countries, IUCN Environmental Policy and Paper No. 43 (2001).

led to the development of significant environmental jurisprudence.[74] The Constitution in Chile explicitly recognizes in Article 20 an environmental action termed *recurso de protección* or a "protection appeal" that may be brought when the right to live in a pollution-free environment is affected by an illegal act from any person or public authority. Other constitutions have streamlined this right through actions created for the defense of public, collective, or diffuse interests, also called "class actions." In Article 43, Argentina's 1994 Constitution includes the *acción de amparo* which may be brought by affected persons, ombudsmen, and civil society organizations against any act or omission that impairs constitutionally acknowledged rights, including the right to environmental conservation, consumers protection, and others rights that are shared collectively. Similar actions have been included expressly in the constitutions of Brazil,[75] Ecuador,[76] and Venezuela.[77] In such cases, the standing is generally broad, being open to individuals, civil society associations, public prosecutors, ombudsmen, municipalities, and public enterprises, among others—except that Bolivia grants legal standing only to directly interested individuals.

However, the lack of explicit class actions for the constitutional defense of collective interests may inhibit the defense of environmental rights in some countries. This has been the case in Colombia,[78] whose constitution did not include the collective right to a healthy environment as a fundamental right due to the existence of an *accion de tutela*, although this gap has been overcome jurisprudentially. Similarly in Mexico, the 1999 constitution does not include a right to a healthy environment as a diffuse right but as an individual right to be defended by an *acción popular*.[79]

In civil courts, Chile's framework environmental law foresees the creation of specific environmental actions to be brought before Civil Tribunals, including the *acción indemnizadora* to obtain indemnity for environmental damage and the *acción ambiental* for reparation of an environmental impairment.[80] The standing for the first action corresponds to directly affected individuals, and the standing for the second action is limited to natural or legal persons who have suffered the damage, municipalities when the events occurred in their territory, and the state.

Brazil also has created a specific public action of responsibility when there has been harm to the environment, consumers, or the artistic, aesthetic, or historic patrimony.[81] In this civil action, legal standing includes the nation, states, municipalities, autarchies, public enterprises, foundations, mixed economy societies, and environmental NGOs.[82] In practice, the Public Prosecutor or *Ministério Público* has played a prominent role in using these actions for environmental protection.[83] Brazil's Constitution provides that the *Ministério Público* should promote and bring civil public actions to protect the public and social patrimony, the environment, and other diffuse interests.[84] To guarantee the role of the institution, Brazil has placed special emphasis on providing the *Ministério Público* with sufficient resources and assuring its impartiality by establishing tenure for its officials and by ensuring adequate salaries. The *Ministério Público* is critical in resolving conflicts through, for example, innovative agreements and environmental repair mechanisms to address environmental conflicts.[85] Citizens are also able to present an action before Costa Rica's *Fiscalia Ecologica* (the environmental prosecutor's office) against any environmental impairment.

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[74] Domingo Kokisch, *El Acceso a la Justicia Constitucional en Chile, in* EL ACCESO A LA JUSTICIA AMBIENTAL EN AMÉRICA LATINA, *supra* note 73, at 130.

[75] BRAZIL CONST. art. 5(LXXIII) ("Qualquer cidadâo é parte legítima para propor açâo popular que vise a anular ato lesivo ao patrimônio público ou de entidade de que o Estado participe, à moralidade administrativa, ao meio ambiente e ao patrimônio histórico e cultural, ficando o autor, salvo comprovada má-fé, isento de custas judiciais e do ónus da sucumbência.").

[76] ECUADOR CONST. art. 95 (stating that every person, representing his own interest or as a legitimate representative of a group will be able to bring an *accion de amparo* against any activity—by a public authority or an individual—that may prejudice his fundamental rights, including environmental rights).

[77] VENEZUELA CONST. art. 26 (providing that every person is ensured access to judicial and administrative bodies to defend his rights and interests, including collective or diffuse rights and interests).

[78] COLOMBIA CONST. art. 88 (foreseeing the possibility of initiating a popular action against any impairment over collective interest, including environmental rights, but leaving the regulation of this action to a later law).

[79] In the 1999 Mexico Constitution in Articles 103 and 107, the right to a healthy environment is included among the individual guarantees in whose defense the Constitution allows an affected person to initiate a *juicio de amparo*. However, the defense of the right presents additional barriers: the origin of the violation of the right has to be found in authority laws or acts and the defense of the right is only possible for the affected person.

[80] Ley de Bases del Medio Ambiente No.19,300 (March 9, 1994).

[81] Law No. 7,347/1985, Lei da Açao Civil Pública (July 24, 1985)

[82] *Id.* art. 5.

[83] According to the Confederaçao Nacional do Ministério Público, 97.6% of the initiated public civil actions correspond to the Minitério Público initiative. Sílvia Capelli, *Gestao Ambiental no Brasil: Sistema Nacional de Meio Ambiente-Do Formal a Realidad*, at 15, presentation made at the International Conference on Environmental Legislation Implementation and Enforcement in Latin America, Buenos Aires, Argentina, May 28-29, 2002.

[84] BRAZIL CONST. art. 129(III).

[85] *See* Capelli, *supra* note 83, at 16.

To protect diffuse (including environmental) interests through civil cases, the recent reform process of Peru's Civil Procedures Code has taken some remarkable steps. Article 82 of the Law defines a diffuse interest and broadens legal standing to include the public prosecutor, regional governments, local governments, and native and campesino communities and associations, among others.[86] It also provides that a decision that does not respond to the original claim will automatically be placed under Supreme Court jurisdiction, and that a decision that responds to the claim will be binding even on those parties that did not intervene in the civil process. Finally, the law provides that the relief set forth in the decision must be used for environmental repair or conservation.

Apart from Brazil, Chile, and the reforms recently introduced in Peru, most of the other countries in the region lack a specific civil environmental action and provide access to justice in environmental matters only through traditional civil actions. Hence, there is a limited but evolving framework on civil responsibility in Latin America. In most countries, current legal frameworks are inadequate to defend diffuse interests and ensure environmental responsibility. It becomes particularly evident in cases of claims for environmental repair, since the civil system only grants legal standing to persons with direct and subjective rights, preventing the access to justice in defense collective rights through public civil actions. Therefore, there is no adequate parallel in regular courts to the class actions that are contemplated in constitutional cases.[87]

Criminal codes and laws have increasingly incorporated environmental crimes, and these crimes increasingly are prosecuted. Prosecution of environmental crimes has its foundation in a number of Latin American constitutions, such as those of Brazil, Colombia, and Paraguay. Other countries have enacted special criminal environmental laws, such as Venezuela's 1992 Environmental Crimines Law and Brazil's 1998 Environmental Crimes Law, which includes criminal responsibility for legal persons such as corporate entities.[88] These laws have had important repercussions in protecting the environment in those countries.

At the administrative level, most Latin American environmental legislation has an administrative character and many environmental conflicts arise from disputes between administrative bodies and citizens regarding the implementation of environmental laws. In most cases, environmental laws normally require that citizens first file a complaint before an administrative body. In practice, most of the cases have related to the approval of EIAs.

In this sense, access to justice through administrative bodies has been promoted through a variety of mechanisms. In some instances, citizens must first go through administrative appeals before going to court to suspend damaging acts. For example, Costa Rica has created a specialized administrative court, the *Tribunal Ambiental Administrativo*, as an independent administrative body to hear any action against activities violating environmental laws. The Tribunal has jurisdiction to hear actions initiated by private parties or public bodies against any public or private person or entity that may have violated environmental and natural resources laws.[89] The creation of environmental public prosecutors inside administrative bodies has also occurred in Costa Rica through the *Contraloría Ambiental* and the *Procuraduría Ambiental y de la Zona Marítimo Terrestre*. Any person can use these bodies to identify and complain about an environmental violator, and the only requirement for formally bringing the lawsuit is that the complainant must identify the affected persons and describe the facts.[90] Mexico's *Procuraduría Federal de Protección al Ambiente (PROFEPA)* is a public prosecutor's office that reports to the Secretary of Environment and Natural Resources and it is in charge of monitoring the implementation of environmental laws.[91] The PROFEPA receives, investigates, and submits to the competent authority actions initiated by private parties on environmental matters. The legal standing before these bodies has been expanded from only individuals with a direct interest to also include social organizations.

Brazil is an example of a country where access to justice is ensured through several measures. One measure is the creation of specialized tribunals and itinerant environmental tribunals that function on boats in the Mato Grosso Province, an area in the biodiversity-rich Pantanal region which is also difficult to access. The judges, *Ministério Público*, and judicial civil servants receive environmental claims that emerge in these areas, resolving them through conciliatory processes or judicial actions.

[86] Law No. 27752, Ley que Modifica el Articulo 82 del Codigo Procesal Civil sobre Patrocinio de Intereses Difusos, DIARIO OFICIAL EL PERUANO (June 8, 2002).

[87] Brañes, *supra* note 2, at 74, 97. For example, in Argentina, individuals are the only ones that can bring an action for environmental reparation when the damage affects directly their rights or their patrimony. The only mechanism open to NGOs is an *accion de amparo*, a constitutional mechanism that seeks to cease damaging acts. However, an *amparo* will not permit NGOs to seek environmental damages.

[88] *E.g.*, [Venezuela] Ley Penal del Ambiente, published Mar. 1, 1992; [Brazil] Lei de Crimes Ambientais No.9,605 published Feb. 13, 1998, *available at* www.socioambiental.org/website/noticias/naintegra/docs/rtf/crimeamb.rtf (last visited June 5, 2002). In addition, Mexico reformed its Criminal Code in 1996 to include a chapter on environmental offenses.

[89] Decreto 25084-MINAE Reglamento de Procedimientos del Tribunal Administrativo, published March 26, 1996. *See* www.cesdepu.com/org/Tribunal%20Ambiental%20Administrativo.htm (last visited June 7, 2002).

[90] To view the requirements and content of the complaints, see www.crnet.cr/~defensor/dhr940_13.html (last visited June 7, 2002).

In 1998, the tribunal processed approximately 60 cases related to damage to flora and fauna.[92] Another interesting Brazilian initiative in environmental management has been the empowerment of environmental NGOs to manage ecological reserves, natural protected areas, and other areas of ecological interest.[93]

Finally, other noteworthy measures to facilite environmental protection through courts are found in Argentina, which allows public interest litigants to avoid the risk of being charged with court costs if they lose—*beneficio de litigar sin gastos*—when there is proof of lack of resources,[94] and in Colombia and Brazil with the creation of funds to redress environmental damages.[95]

F. The Central American Water Tribunal

At the regional level, participatory mechanisms have been reflected in the creation of regional institutions such as the Central American Water Tribunal.[96] This Tribunal has its foundations in the Central American Water Declaration of June 1998[97] and in the experiences of other water tribunals, such as the Brazil Water Tribunal created in 1993. The Tribunal began functioning in 2000 and has reviewed eleven cases concerned with conflicts in different shared rivers in the region. These include a hydroelectric project on the Lempa River in El Salvador and Honduras and a case in the San Juan River in Costa Rica and Nicaragua against the two countries for their failure to prevent deterioration of the river basin.[98]

This institution is constituted as an ad hoc, independent body that seeks to facilitate the resolution of water resource conflicts in the region by disseminating information and promoting the awareness and participation of civil society. This organization was created to allow citizens to protect and vindicate environmental and collective rights. It puts into practice civil society's capacity to act when governments fail to protect the environment against economic interests that cause environmental violations. Specifically, the Tribunal receives, processes, and reviews environmental complaints from citizens, communities, civic associations, and NGOs. The organization is not legally binding but seeks to raise public awareness and to organize diverse sectors of civil society to prosecute those individuals responsible for damaging or abusing water resources and aquatic environments in the region.

III. THE ISP'S POTENTIAL

The ISP was developed in a political context in which the promotion of democracy and transparency in government necessarily involves participatory mechanisms. At the same time, countries in the region now recognize the need to follow and adapt to the current international trends towards sustainable development. The OAS is the main political forum for the discussion and promotion of such values at the regional level. The OAS facilitates multilateral dialogues and allows progressive steps to be taken to strengthen democracies and human rights protection, as well as fight corruption and poverty, and it seeks to engage civil society in these dialogues.

In this sense, the importance of the ISP resides in its consolidation as a regional initiative to create a policy framework, to direct countries' efforts towards the formulation of public participation policies that ensure citizen participation, and to steer the implementation of such policies at the national level. The ISP represents a new instrument in which agreed principles of public participation are explicitly stated as a turning point in the policies of the region, as well as the future direction for governance. Hence, it is the state parties to whom the ISP is first addressed.

Some of the provisions of the ISP have already been implemented through environmental legislation and institutions introduced in some countries. However, this development has not been uniform in the region. On the contrary, there are evident differences. The advances mentioned in this chapter are generally found in only the countries that have been specifically identified, and do not necessarily apply generally to the region. Moreover, those countries in which participatory mechanisms have been introduced through laws need more consolidated structures to guarantee their implementation. At both the national and regional levels, the ISP proposals are significant for introducing a participatory culture and recommendations for better practices.

The ISP offers guidance to OAS parties by proposing several lines of action on participation. The ISP's concrete implementation is thus left to the discretion of the various nations.

In the region, many legal mechanisms adopted to promote public participation in environmental decisionmaking have been expressed in general frameworks or in instruments that have a voluntary character. In this context, however, there are often situations in which governments do not take the general frame-

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[91] *See* www.profepa.gob.mx (last visited June 7, 2002).

[92] Vladimir Passos de Freitas, *El Acceso a la Justicia Constitucional en Brasil, in* El Acceso a la Justicia Ambiental en América Latina, *supra* note 72, at 124.

[93] Resolução Conama No. 003/88. art. 1.

[94] Sergio Dugo, *El Acceso a la Justicia Constitucional en Argentina, in* El Acceso a la Justicia Ambiental en América Latina, *supra* note 72, at 106.

[95] Martinez, *supra* note 73, at 69.

[96] *See* www.tragua.com (last visited June 18, 2002).

[97] Central American Declaration on Water, done at San José, Costa Rica on July 8-10, 1998, *available at* tragua.com/declaracion.html (last visited July 29, 2002).

[98] *See* www.laprensahn.com/caarc/0009/c03003.htm (last visited June 18, 2002).

works into account and, therefore, implementation is limited. It is essential that general provisions adopted in environmental laws are adequately developed through regulatory mechanisms that allow real implementation. This is also true at the regional level. The ISP seeks to overcome this general lack of concrete actions, mechanisms, and institutions, through well-defined participatory proposals.

Among the different parties that contributed to the elaboration of the ISP, there is a shared understanding about the importance of setting principles of public participation and stating recommendations at a regional level, but also the general perception of significant barriers that may exist in their implementation.[99] A significant percentage of consulted government representatives in Mexico (almost 40 percent), for example, were skeptical about the potential of the ISP to facilitate public participation in decisionmaking on sustainable development issues in Mexico.[100] First, the term "sustainable development" is not entirely understood among governments and different sectors of civil society and has a limited implementation in the countries. Second, not only is there a question of designing participatory mechanisms and allowing participation, but also of guaranteeing participation and generating capacities so that people can actually participate. For that to occur, it would be necessary for governments to adopt programs or specific actions that could demonstrate a real commitment with ISP, its interpretation and viability. Third, the lack of political commitment of governmental bodies, politicians, and civil servants and the lack of a participatory culture represent potential barriers in many countries. Finally, participation should be put in the context of fragile democratic systems, corruption, centralized government, and significant ethnic and cultural differences, which are common features of many countries in the region.

Therefore, there is a need for new instruments that consolidate the principles set out in the ISP to put the principles into practice. It is necessary that new mechanisms develop the ISP in the specific contexts of access to information, access to decisionmaking, and access to justice. This process would be a good opportunity for states to benefit from participatory practices already existing in other countries and to assess and adopt them as appropriate to promote harmonized environmentally sustainable policies.

At the regional level, the OAS must remember the importance that it has to promote legal instruments that illuminate the path by which these participatory recommendations can find viability in practice. It is essential that new regional legal instruments, protocols, accords, or treaties are adopted to follow parallel efforts in other regions.

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[99] *See* www.oas.org/usde/isp/1pgmissi.htm (last visited July, 29 2002) (at Hemispheric Consultation Process, National Consultations Reports); *ISP Feasibility Chapter*, *in* COUNTRIES REPORTS, *available at* www.ispnet.org/reportes (last visited March 8, 2002).

[100] *Id.*

AFRICAN INITIATIVES FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL MANAGEMENT

Collins Odote and Maurice O. Makoloo [*]

Natural resources are the backbone of most African economies. How these natural resources are managed is at the root of governance within the African continent as it affects the livelihood of most citizens. In Africa, the traditional management structures were participatory. However, in colonial and post-colonial times, traditional structures were dismantled, leading to the adoption of top-down, state-controlled governance approaches. Under these approaches, communities are viewed as having interests and practices adverse to the environment and natural resources so policies are developed to keep citizens from the natural resources.[1]

These state-controlled governance approaches have largely failed. There has been a realization that for effective environmental management, communities and nonstate actors must be consulted and involved. Simply put, there must be citizen participation in natural resource management.

This chapter explores the development of public participation initiatives in the process of environmental management in Africa. It focuses on declarations, conventions, and other pronouncements within the continent of Africa that have sought to espouse the concept of public participation in environmental management.[2] This evolving regional framework is significant as its norms reflect national commitments to enhance opportunities for the public to be involved in decisions that affect their lives.

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[1] *See* Albert Mumma, *Review of Emerging Trends in the Laws on Community Management of Natural Resources in East Africa*, Workshop materials on Access to Environmental Justice, Jinja Nile Resort (June 18-20, 2000) produced by ELI, ACTS, Greenwatch, and LEAT.

[2] For a review of provisions in African constitutions guaranteeing access to information, freedom of association, public participation, and access to justice, see Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131 (2001).

Historically in Africa, public participation was central to natural resource management. In traditional African societies, governance was consultative and participatory. This traditional governance included mechanisms for citizen involvement and participation in decisions within the community. The advent of colonialism, with its attendant negative impacts, dealt a severe blow to African concepts and practices of public participation in governance.

Current developments globally make public participation very important in Africa. First, African governments increasingly tend to discourage direct government involvement in economic activities and instead support and encourage private investment to boost economic growth. This approach combined with the state's limited ability to monitor the environmental impacts of private activities make it imperative for citizens to play a greater role in environmental management. The importance of citizen involvement is compounded by the fact that most citizens in Africa are not only poor and live in rural areas but are also principally reliant on the continent's natural resources.

The second factor making public participation an imperative in Africa is the colonial legacy. Despite the independence of most states for over four decades, their laws and institutions are still a relic of the colonial past. These laws and institutions still inhibit transparency, participation, and accountability, especially in environment matters where the importance of natural resources make them a source of power.

This chapter discusses the trends in public participation within the African continent, highlighting opportunities to make public participation in environmental governance a reality within the region. The first section discusses general considerations of public participation in environmental management. The second section discusses Africa-wide initiatives, and the third section discusses sub-regional initiatives.

I. GENERAL CONSIDERATIONS OF PUBLIC PARTICIPATION IN ENVIRONMENTAL MANAGEMENT

The 1972 United Nations Conference on Human Environment held in Stockholm, Sweden, brought environmental management into the international spotlight. However, even before this conference regional concerns with environmental management had already manifested in Africa.[3] In 1968 for example, the African nations adopted the African Convention on the Conservation of Nature and Natural Resources, the first such regional effort in Africa.

By the time the United Nations Conference on Environment and Development (UNCED) was convened in 1992, it was increasingly evident that in order for environmental governance to be successful, the active involvement and participation of not only governments but also citizens and non-state actors was required. The recognition of the importance of citizen participation led to the articulation of Principle 10 in the Rio Declaration that stipulated procedures for enjoyment of citizen's environmental rights:

> 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 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 administrative proceedings, including redress and remedy, shall be provided.[4]

Since the Rio Conference, several international and regional instruments have elaborated on the procedural rights guaranteeing public participation in decisionmaking found in Principle 10. The most notable regional instrument to have done so is the Aarhus Convention of 1998.[5] It is one of the first, most detailed, and binding international instruments on environmental governance and public involvement.

While the African region has no regional convention that elaborates on environmental governance principles generally and public participation in particular, several covenants, treaties, and declarations have been adopted within the region that have provisions dealing with these issues. This chapter will briefly discuss some of these.

II. AFRICA-WIDE INITIATIVES

Several of the African charters, declarations, and organizations include provisions encouraging or mandating public access to information, participation, and justice. These instruments could provide a basis for the development of a set of African environmental government principles, including provisions for public access to information, public participation, and access to justice. These principles could be either binding or persuasive.

These charters, declarations, and organizations are discussed, along with their provisions addressing these issues. This section considers the African Charter on Human and Peoples' Rights, the Organisation of African Unity, the African Union, the African Ministerial Conference on the Environment, the New Partnership for African Development, the African Perspectives on World Summit on Sustainable Development, and the Africa Convention on the Conservation of Nature and Natural Resources in Africa.

A. African Charter on Human and Peoples' Rights

In the pre-colonial period, human rights in Africa were communally based. The rights of members of society were fully integrated into the rights of society as a whole.[6] Human rights were thus those recognized by the community and collectively enforced for the benefit of members of the society. In contrast, the exploitation of African resources and the subjugation of its people characterized the colonial period in Africa. This colonial period thus saw a regressive period in the development of human rights on the continent. Independence in Africa was greeted with a lot of euphoria as it marked the beginning of rule by Africans. It was hoped that it would also mark the beginning of the protection and promotion of human rights and the restoration of African dignity.

Post-independent Africa's concern with human rights can be traced to 1961, when 194 jurists from 32 countries met in Lagos, Nigeria under the auspices of the International Commission of Jurists. This meeting was

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[3] John Mugabe & Godber W. Tumushabe, *Environmental Governance: Conceptual and Emerging Issues, in* Governing the Environment: Political Change and Natural Resources Management In Eastern and Southern Africa, 21 (H.W.O. Okoth-Ogendo & Godber W. Tumushabe, eds., 1999).

[4] Rio Declaration on Environment and Devlopment, art. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

[5] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43; *See also* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

[6] U.O. Umozurike, The African Charter on Human and Peoples' Rights 17 (1997).

held when Governor General Azikiwe called on African states to adopt a convention on human rights. It was not, however, until 1981 that such a convention —the African Charter on Human and Peoples' Rights —was adopted in Nairobi.[7] The Charter came into force in 1986.

The Charter contains several provisions that are especially relevant for environmental governance. Article 7 contains provisions ensuring access to justice. This Article guarantees every individual the right to have his cause heard,[8] which includes the right to an appeal to competent national organs against violations of fundamental rights, the right to be presumed innocent until proved guilty by a competent court or tribunal, the right to the defense and counsel of one's choice, and the right to be tried within a reasonable time by an impartial court or tribunal. Article 9 guarantees every individual the "right to receive information" and to express and disseminate opinions. The Charter also recognizes an individual's right to free association. Moreover, the Charter at Article 24 provides that "all peoples' shall have the right to a general satisfactory environment favourable to their development." The charter therefore contains provisions that can be used and expanded upon to guarantee good environmental governance and public participation within the continent.

The institutional mechanism established by the Charter to protect human rights is the African Commission on Human and Peoples' Rights.[9] Compared to other regional human rights treaties, notably those for the European and American regions, the African Charter's protective regime is remiss in several respects. First, until 1998, the African human rights system did not have a human rights court. It was only in 1998 that the Assembly of Heads of States signed a protocol to the Charter that established an African Court on Human and People's Rights.[10] Second, the Commission has dealt with very few cases and its interventions are usually after the event.

The success of the African Charter on Human and Peoples' Rights in promoting environmental governance and public participation has been limited. It needs to be strengthened, and one critical measure would be through a specific regional instrument on procedural rights. The limited utility of the Charter may be traced to the great emphasis placed by African states on sovereignty and the concept of non-interference in the internal affairs of states. This emphasis has worked against an effective human rights protection system. The end result is that despite having provisions that encourage public involvement, the Charter's mechanisms are weak.

B. From the OAU to the AU: Promise or Peril?

In 1963, the Organisation of African Unity (OAU) was established as a pan-African Organization to deal with issues affecting the African continent. Just like the African Charter on Human and Peoples' Rights, the OAU Charter had both positive and negative aspects in its treatment of public participation.[11]

On the positive side, the charter recognized the importance of the Universal Declaration of Human Rights of 1948, which has provisions that address aspects of public participation. Also, under the aegis of the OAU, the African Charter on Human and Peoples' Rights was negotiated and adopted, and the OAU adopted several declarations and decisions on good governance.

In July 1996, the OAU summit passed a Declaration, "Africa: Preparing for the 21st Century," which addressed good governance within the continent.[12] The Declaration noted that at the close of the 20th century, Africa was "the most backward continent in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned."[13] The heads of states of OAU member countries agreed at the meeting to take appropriate steps to enable Africa to take up the challenges facing it. The declaration also noted that the 1990 Declaration on "Africa's Political and Economic Situation" had stated Africa's plight and poor development is due primarily to lack of an enabling environment and adequate development strategies and failure by states within the continent to provide good governance.[14] Resolving Africa's problems was the responsibility of African governments and its peoples.

The Declaration recognized the need for regional cooperation in addressing the problems facing the African continent. It also recognized that sustainable development can only be achieved through reliance on the principles of *inter alia* democracy, human rights, and good governance. This declaration clearly identified the importance of good governance and thus provides a fertile ground for advancing public participation.

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[7] African Charter on Human and Peoples' Rights, approved at Banjul on June 26, 1981, entered into force Oct. 21, 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 59 (1982).

[8] *Id.* art. 7(1).

[9] *Id.* art. 30.

[10] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted at Ouagadougou, Burkina Faso on June 9, 1998.

[11] The use of the past tense is due to the fact that the Charter has been superseded by the African Union following the launch of the latter in South Africa on July 9, 2002.

[12] Yaounde Declaration (Africa: Preparing for the 21st Century), AHG/Decl.3(xxxII), *available at* www.nhri.net/pdf/THE%20YAOUNDE%20DECLARATION.pdf (last visited July 22, 2002).

[13] *Id.* para. 2.

[14] *Id.* para. 7.

On the negative side, while the Charter establishing the OAU acknowledged the importance and application of the Universal Declaration of Human Rights and thus provided a useful framework for human rights protection, it, however, only mentioned the term "human rights" in its preamble and then only in very general terms. Another weakness with the Charter was the emphasis placed on non-interference with the internal affairs of member states.

The greatest hindrance to public participation and good governance within the context of the OAU was the emphasis placed on the principle of non-interference in internal affairs of states. At Article 3(2) of the Charter, the member states clearly stipulated that one of the principles that would guide them in achieving the objects and goals of OAU was that of non-interference in the internal affairs of states. Unfortunately, the over-reliance on this principle led to the failure and eventual collapse of the OAU, as it was never able to promote good governance within the continent. Its weakness led to efforts to replace it with a more effective successor, the African Union (AU).

The African Union has sought to depart from its predecessor in several aspects. Principally, the AU was modeled along the lines of the European Union and places good governance at the root of its obligations. The Constitutive Act of the AU,[15] however, still contains the principle of non-interference in the internal affairs of its members as one of its objectives. The AU does specifically have a mandate of intervening in the affairs of a member state pursuant to a decision by the Heads of State Assembly with respect to grave circumstances, such as war crimes, genocide, and crimes against humanity.[16]

The Constitutive Act of the AU places good governance at its center and gives the organization some teeth. It thus gives hope that the continent can go a step further and clearly enact a regional instrument that identifies, articulates, and guarantees procedural rights and public participation in environmental governance.

C. The African Ministerial Conference on the Environment (AMCEN)

The African Ministerial Conference on the Environment (AMCEN) is the only Africa-wide intergovernmental organization focused primarily on environmental issues. It was established in 1985 to strengthen the cooperation between African governments on economic, technical, and scientific activities to halt the degradation of Africa's environment and satisfy the food and energy needs of the African people. The Conference meets once every two years in a regular session.

Some of the roles of AMCEN include: providing continent-wide leadership by promoting awareness and consensus on global and regional environmental issues, especially those relating to international conventions on biodiversity, desertification, and climate change; developing common positions to guide African representatives in negotiations for legally binding international environmental agreements; promoting African participation in international dialogues on global issues of particular importance to Africa; reviewing and monitoring environmental programs at the regional, sub-regional, and national levels; promoting ratification by African countries of multilateral environmental agreements relevant to the region; and building African capacity in the field of environmental management.[17]

AMCEN aims to assist in adopting Agenda 21, and its objectives closely mirror those of the 1992 United Nations Conference on Environment and Development (UNCED). Accordingly, AMCEN focuses on building capacity in the region; enhancing information flow between countries, agencies, and sectors; and promoting political cooperation.[18]

AMCEN has sought to achieve its objectives by creating committees and networks in various environmental fields. These committees and networks also represent communication links in terms of both technical information and decisionmaking between local environmental institutions and of AMCEN, governments, and supranational organizations and agencies. "Co-ordination in terms of studies, data collection, processing and planning and projects execution is expected for every specialization to evolve from individual countries, to regional groupings and continental level."[19] Thus, AMCEN envisages information flow from the bottom through its structures to reach regional cooperation at the top level.

Nevertheless, AMCEN itself has not reached independence from institutional and technical support from external agencies. It is worth noting that the first meeting of AMCEN was initiated by the Governing Council of the United Nations Environment Programme (UNEP) in May 1983 at the request of UNEP's African members. This initial support of UNEP's secretarial services has continued, and AMCEN depends on UNEP for both expertise and funding.[20] Dependence on external support

[15] Constitutive Act of the African Union, approved at Lome, Togo on June 12, 2000, *available at* www.africa-union.org/en/commpub.asp?ID=41 (last visited July 22, 2002).

[16] *Id.* art. 3(d).

[17] AMCEN Constitution, art. 5, *available at* www.unep.org/ROA/1/Amcen/pdf/AMCENbur92.pdf (last visited July 19, 2002).

[18] Siri H. Eriksen, *Shared River and Lake Basins in Africa: Challenges for Co-operation*, African Centre for Technology Studies Ecopolicy Series No. 10, 23 (1998).

[19] AMCEN, 1990b, *Proceedings of the Third Meeting of the Management & Planning Group of AMCEN's Water Resources Network*, in Cairo, Egypt on Dec. 3-5, 1990, at 6.

[20] All materials on AMCEN are available only at the UNEP's website, *www.unep.org/ROA/1/Amcen/amcen_documentation.htm* (last visited July 22, 2002).

and lack of donor funding is a serious restraint on the implementation of AMCEN's program.[21]

Pursuant to its mandate, the biannual AMCEN meeting was held in Kampala, Uganda in July 2002. At this meeting, member states discussed a common African position for the forthcoming World Summit on Sustainable Development (WSSD).[22] As discussed below, the WSSD is an opportunity for the world to herald the gains achieved ten years after the Rio Conference and to address the gaps in implementation.

In the run-up to the Earth Summit in Rio de Janeiro in 1992, African heads of state developed a common position on the environment and development, which was presented at the Rio Summit.[23] The 1992 Common Position articulated the African needs, constraints, and opportunities for sustainable development, and called for a convention to combat desertification—ultimately one of the key instruments developed following the 1992 Earth Summit. The African Common Position on the Environment and Development continues to shape the environmental agenda in Africa, as nations and the international organizations invoke the Position to support and provide historical context for particular endeavors.[24] The evolving African Common Position on WSSD should look at issues of public participation in decisionmaking on environmental matters, access to information, and access to justice.

AMCEN has made several notable strides on environmental governance that need to be expanded upon. First, at the eighth session of AMCEN held in April 2000 in Abuja, Nigeria, the ministers adopted the Abuja Declaration.[25] In recognition of the need for African governments to bear primary responsibility for the means of implementation of the AMCEN policy and programs, a decision was made to establish conditions that would allow AMCEN to succeed and develop a stronger identity. The Abuja session thus adopted decisions on policy and institutional changes, medium-term programs, and measures to bring about stability and predictability in the financial base of the conference to enhance and revitalize AMCEN.

The medium term program, for the years 2002-4, had two main clusters. The first cluster dealt mainly with issues of environmental governance. It addressed environmental information, access to justice, early warning, and environmental security. It also dealt with AMCEN's role in securing Africa's stance in WSSD.

At the recently concluded AMCEN 9th meeting in Kampala, Uganda, a declaration on "The Environment for Development" (Kampala Declaration) was approved, which noted the importance of environmental governance within the continent.[26] In its preamble at paragraph 10, the Kampala Declaration recognized that "success in achieving global sustainable development will ultimately depend upon development and implementation of sound and cost-effective national response policies and measures; good environmental governance, effective participation by civil society and collection and exchange of quality data and information on the environment for use by national decision-makers." This clause in the preamble of the Declaration identifies environmental governance generally and public participation and access to information specifically as essential for sustainable development.

In paragraph 7 of the Kampala Declaration, Africa's environmental ministers committed themselves "to make every effort to integrate environmental concerns into national pursuits of economic development in Africa, while at the same time not neglecting the priorities of the continent for sustainable social, economic, and human development particularly for the benefit of the poor and marginalized communities." This should be expanded upon to ensure that the said communities have access to justice, which is essential for environmental governance.

A notable outcome of the Kampala meeting, which is reflected in paragraph 13 of the Declaration, is the endorsement of the proposal to establish a comprehensive information network to promote access and harmonization of data in the continent and to act as a basis for tracking environmental changes using quantitative indicators focusing on national needs. Such a network will facilitate the access to information on environmental issues and improve good governance and public participation in decisionmaking.

D. New Partnership for African Development (NEPAD)

The New Partnership for African Development (NEPAD)[27] is a holistic, comprehensive, integrated, strategic, and homegrown framework for the socio-economic development of Africa. NEPAD is an outgrowth of a variety of emerging ideas and earlier initiatives. Although the idea for the development of NEPAD can trace its roots to the concept of an African renaissance first ad-

[21] AMCEN, 1992.

[22] *See* Ugandan National Environmental Management Authority (NEMA), The East African, Apr. 22-28 2002, at 5.

[23] United Nations Economic Commission for Africa, African Common Position on Environment and Development (1992).

[24] *See* Carl Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 Envtl. L. Rep. 10428, 10441 (2002).

[25] Report of the Eighth Session of AMCEN, held in Abuja, Nigeria on April 2000.

[26] UNEP, Kampala Declaration on the Environment for Development, approved in Kampala, Uganda on July 4, 2002.

[27] *See* NEPAD's Constitutive Document, *available at* www.nepad.org (last visited July 18, 2002).

vanced by Nelson Mandela and clearly articulated by President Thabo Mbeki of South Africa, its immediate genesis is linked to the transformation of the OAU into the AU and the Millennium Development Goals agreed on by the United Nations at the turn of the 21st century.[28]

Efforts to replace the OAU with a more effective body were spearheaded by Colonel Muammar Gadaffi, the President of Libya. His proposals for the establishment of an African Union were approved at the extraordinary summit of the OAU in Sirte, Libya in March 2001. At the time, Algeria's President Abdelaziz Bouteflika was head of the OAU, President Mbeki was the Chairman of the Non-Aligned Movement, and Nigeria's President Olusegun Obasanjo was the Chairman of the Group of 77. The three leaders were charged with the task of drafting a common plan to address the problems of marginalization, underdevelopment, conflict, diseases, poor capacity, and bad governance. In the end, President Mbeki was the principal architect behind drafting the plan, which was called the Millennium Partnership for the African Recovery Programme (MAP).

At around the same time that MAP was developed, Senegal's President Abdoulaye Wade drafted what he called the Omega Plan, which he first presented to the Francophone African summit in Cameroon in January 2001. The two plans were merged into The New African Initiative (NAI), on July 2001 in the run-up to OAU heads of state meeting in Lusaka, Zambia. The heads of state meeting on July 11, 2001 approved the NAI. In October 2001, NAI was refined and adopted with its present name, New Partnership for African Development (NEPAD).

NEPAD's overriding goal is to end Africa's underdevelopment and poverty.[29] It strives to promote accelerated growth and sustainable development within the continent, eradicate widespread and severe poverty, and halt the marginalization of Africa in the globalization process. NEPAD seeks to achieve these goals by bringing about peace and political stability, instilling respect for human rights and political freedom, enshrining good economic and political governance, and launching programs to address Africa's shortcomings in infrastructure, education, health, science, and technology, amongst other areas.

NEPAD was developed by African heads of states and is conceived as the principal means of partnership for development between Africa and the rest of the world. NEPAD will be implemented through the African Union.

To achieve its goals, NEPAD is divided into seven main initiatives—peace, security, democracy, and political governance; economic and corporate governance; bridging the infrastructure gap; human resource development; capital flows; market access; and the environment.

The environment initiative under NEPAD targets eight areas: combating desertification, wetland conservation, invasive alien species, coastal management, global warming, cross-border conservation areas, environmental governance, and financing.[30] The environmental governance sub-theme offers an opportunity for NEPAD to fully develop principles and rules for public participation. Such rules could take the form of a regional strategy (such as the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development), a document on good practices (ASEM), or a binding convention (such as the Aarhus Convention). Whatever form it takes, the rules or principles should clearly expand on the three pillars of access to environmental information, public participation, and access to justice. Already NEPAD has proposed a process of enforcing standards within African countries through an African Peer Review Mechanism.[31] It has been proposed that nine codes of conduct will form the cornerstone of this process.[32] Only the code on democracy and political governance remains to be finalized. A timely opportunity exists to either include environmental governance in this code or to adopt a code on public participation in environmental governance.

Good governance is at the core of NEPAD's implementation strategy. There is acceptance that political and economic governance is the root of the concept of NEPAD and will lead to its eventual success. The importance of environmental governance within NEPAD is very clear. First, governance has been clearly identified as one of the issues under the environmental initiative of NEPAD. Second, effective governance founded on transparent decisionmaking and public access to official information is the basis of achieving sustainable development. Open decisionmaking processes not only spur economic growth but also lead to the entrenchment of democracy as citizens have an opportunity to participate in and influence public decisions.

The identification of governance as one of the critical aspects of the environment initiative provides an opportunity for African countries to secure the three pillars of environmental governance—access to information, public participation, and access to justice—and thus achieve the NEPAD agenda, which is based on partnership. This

[28] The Millennium Development Goals, approved at Millennium Summit on Sept. 2000, *available at* www.developmentgoals.org (last visited July 19, 2002).

[29] *See* NEPAD's Constitutive Document, *supra* note 27, paras. 1, 2, 67.

[30] *Id.* para. 138.

[31] *Id.* para. 85.

[32] Eight codes have already been approved: the code of conduct of good practice on monetary and fiscal policy; code of good practice on fiscal transparency; budget transparency; public debt management; principles of good corporate management; international accounting standards; international auditing standards; and core principles of effective banking supervision.

achievement will further the NEPAD objectives and the United Nations Millenium Development Declaration adopted by the heads of states in New York in September 2000. In the United Nations Millenium Development Declaration, the heads of states representing the international community committed themselves to support the consolidation of democracy in Africa and assist Africans in the struggle for lasting peace, poverty eradication, and sustainable development.[33]

Under the democracy and political governance initiative section of NEPAD, "it is generally acknowledged that development is impossible in the absence of democracy, respect for human rights, peace and good governance."[34] This initiative strives to strengthen the political and administrative framework of participating countries in accordance with the "principles of democracy, transparency, accountability, integrity and respect for human rights and promotion of the rule of law."[35] This initiative combined with the environmental initiative illustrates the recognition that African states have recently accorded to environmental governance, as they authorize states to be guided by the principles of transparency and accountability. For example, NEPAD expects that there will be access to information for the public since it is only through government allowing the public access to official information that the public can assess the extent to which the government is democratically conducting its affairs. It is also only then that the government can claim to be transparent and accountable.

NEPAD also intends to undertake capacity-building initiatives aimed at promoting participatory decisionmaking.[36] Public participation in decisionmaking will increase the knowledge base as individuals will be able to contribute their skills and expertise in the process of arriving at decisions. Moreover, allowing civil society to contribute to public discourses on environmental policies promotes democratic governance generally.

Participating NEPAD countries also commit to support efforts to strengthen national, sub-regional, and continental structures that support good governance.[37] This commitment can be actualized to the benefit of environmental governance by adoption of a continental instrument on environmental governance that clearly allows citizens access to environmental information, defines the procedures for accessing the information, defines the types of information that can be assessed, and authorizes penalties for officers who fail to make information accessible. The instrument should also address access to justice and public participation in decisionmaking.

The third meeting of the steering committee of the environmental component of NEPAD held in Dakar, Senegal from June 12-14, 2002 adopted the framework of an action plan for the environment initiative of NEPAD.[38] Although the action plan is only a framework, uses terms such as "may" and "should," and lacks time-specific targets, it does identify the importance of environmental governance and procedural rights. Section 3 of the plan states that the action plan will build on ongoing activities to be carried out by the African Ministerial Conference on the Environment (AMCEN), including the generation and dissemination of environmental information in Africa, environmental assessment, and strengthening of collaboration with major bodies in Africa.

One of the objectives of the action plan is to enhance effective participation of African major groups and their important contribution to inform intergovernmental decisionmaking and improve the institutional framework for regional environmental governance.[39] This regional framework could include the establishment of institutions through an agreement to ensure access to information, participation, and justice.

Despite its noble intentions, NEPAD has so far failed to fully involve non-state actors and citizens in its conceptualization and implementation, with the consequence that it risks being seen as a sole initiative of heads of states.[40] This runs counter to the spirit of partnership championed in the document and that is so essential for the success of the effort. Despite this weakness, NEPAD offers an opportunity for Africa and Africa's people to advance environmental governance within the continent.

E. African Perspectives on World Summit on Sustainable Development (WSSD)

Ten years after the Rio Conference on Sustainable Development, the world community will meet to review the progress made on the Rio commitments and specifically on implementation of Agenda 21. While Rio heralded the beginning of environmental governance as a crucial concern for the world, the 2002 World Summit on Sustainable Development (WSSD) held in Johannesburg, provides an opportunity to not only reaffirm commitments to environmental governance but also to accelerate efforts at implementation. The Summit also offers the opportunity to clearly recognize the role of individuals and nonstate actors in global affairs.

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[33] United Nations Millenium Development Declaration, adopted in New York on Sept. 2000, *available at* www.un.org/documents/ga/res/55/a55r002.pdf (last visited July 22, 2002).

[34] NEPAD's Constitutive Document, *supra* note 28, para. 79.

[35] *Id.* para. 80.

[36] *Id.* para. 83.

[37] *Id.* para. 84.

[38] UNEP, Framework of an Action Plan for the Environment Initiative of the New Partnership for Africa's Development (NEPAD), approved at Dakar, Senegal on June 12-14, 2002.

[39] *Id.* at 7.

[40] Personal observations of the authors based on numerous press reports and interactions with other people on the issue.

The Summit being held on African soil gives African countries the opportunity to push an African Agenda. It is also being held at a time when African countries have had some experience with sustainable development and hopefully have realized that it is a process that can only succeed with a partnership between governments and their citizens through their institutions.[41] The Summit also provides an avenue for Africa to foster commitment on public participation on environmental governance.

The African Civil Society Forum, held in Nairobi on October 15-16, 2001 in advance of the African Ministerial Prepcom preparing for the WSSD, clearly set the stage for the need for environmental governance to form part of the WSSD agenda and outcome. The Civil Society Position stipulated that security and environment are clearly linked with good governance and noted that part of the crisis in Africa has been due to autocratic governments, corruption, greed, patronage, and violation of human rights by the governments. The Position further identified obstacles to sustainable development in Africa, including lack of access to information and lack of public participation.[42] To rectify the obstacles, it was proposed that African governments commit themselves to systems of participatory democracy and eradication of poverty: specifically that a culture and practice be adopted that ensures access to information, justice, and the rights of people to participate in all aspects of decisionmaking.[43] The Civil Society Position also urged the African governments through their ministers to start a process of negotiating a binding instrument that guarantees these principles as enunciated in Principle 10 of the Rio Declaration.[44]

F. The Africa Convention on the Conservation of Nature and Natural Resources in Africa

The Africa Convention on the Conservation of Nature and Natural Resources in Africa, popularly known as the Algiers Convention, was adopted on September 15, 1968 in Algiers, Algeria by the heads of state and government of (the then) independent African states. As a fundamental principle, the contracting parties undertook "to adopt the measures to ensure conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interest of the people."[45]

The Convention as it presently exists has three articles that tangentially deal with issues of access to information, access to justice, and public participation in decisionmaking. The first is Article 13, dealing with Conservation Education:

> The contracting parties shall ensure that their peoples appreciate their close dependence on natural resources and that they understand the needs, and the rules for, the rational utilization of these resources. For this purpose they shall ensure that the principle indicated in paragraph (1) … form the object of information campaigns capable of acquainting the public, with and winning it over to, the idea of conservation.[46]

The second is Article 14, which calls for the incorporation of ecological, as well as economic and social factors, into the formulation of development plans. Finally, Article 18 deals with dispute resolutions. However, this only applies to the parties to the Convention —essentially states—implying that individuals may not benefit from this arrangement.

Perhaps due to lapse of time as well as recent developments in environmental management and especially the influence of the Rio Conference, the Convention has been marked for several amendments. One such proposed amendment is the introduction of a new article on procedural rights. If adopted, the proposed new Article 16 would provide:

> The parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate (a) dissemination of environmental information; (b) access of the public to environmental information; (c) participation of the public in decisionmaking with a potentially significant environmental impact; and (d) access to justice in matters related to the protection of the environment and natural resources.

The adoption of this amendment, together with other suggested amendments would truly herald a significant step forward in the journey of environmental governance.

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[41] For recommendations on public participation in sustainable development generally and for a case for incorporating it in the agenda of WSSD by African governments, see *Making the Concern for Africa the First Concern of Africans; Emerging African Perspective on Sustainable Development, Governance, and Globalisation*, presented to African Ministers for Environment at the Regional Prepcom for Africa, in Nairobi, Kenya on Oct. 15-18, 2001, *reproduced in* Sustainable Development, Governance, Globalisation: African Perspective 10-23 (2002).

[42] African Civil Society Position of the African NGO Forum, approved at Nairobi, Kenya on Oct. 15-16, 2001, *available at* www.johannesburgsummit.org/html/prep_process/africadocs/position_of_the_african_civil_society.doc (last visited July 22, 2002).

[43] *Id.*

[44] *Id.*

[45] Africa Convention on the Conservation of Nature and Natural Resources in Africa, art. 2, adopted at Algiers, Algeria on Sept. 15, 1968, entered into force June 16, 1998, *available at* www.mtnforum.org/resources/library/accnn68a.htm (last visited July 22, 2002) [hereinafter Algiers Convention].

[46] *Id.* art. 13(1)(a), (b).

Once adopted, however, it will be necessary for member states to develop and strengthen national legal policy and administrative measures necessary to implement and enforce the revisions. At the same time, the successful implementation of the Algiers Convention and its revisions must also be considered in the broader context of the emerging AU and its renewed hope to ensure respect for human rights.

The AMCEN meeting in Kampala, Uganda in July 2002 deferred making a recommendation on the adoption of the revised text and instead requested the AU to initiate a further process of intergovernmental negotiations, thus extending the long road of revising the Charter.

II. SUB-REGIONAL INITIATIVES IN AFRICA

Several organizations, charters, and agreements have developed in sub-regions of Africa that generally address the principles of public access to information, public participation, and public access to justice. These sub-regional initiatives include efforts in East Africa, southern Africa, and West Africa. These organizations, charters, and agreements will be discussed, along with opportunities to strengthen their provisions that address public involvement in the governance process. The discussed sub-regional initiatives are the East African Memorandum of Understanding, the Southern Africa Development Community, and the Economic Community of West African States.

A. East African Memorandum of Understanding (MOU)[47]

The East African Community, which collapsed in 1977, was a regional initiative between Kenya, Tanzania, and Uganda. It was formally revived on November 30, 1999, when the presidents of the three East African countries signed the Treaty for the Establishment of the East African Community.[48] With the revival of the East African Community, two developments relevant to environmental governance occurred. First, unlike its predecessor, the revived East African Community grants a principal role to the citizens of the three East African states. It clearly recognizes the role of private citizens and civil society. The importance of partnerships can also be discerned from the treaty's reference to partner states as opposed to member states in its predecessor. Second, the treaty identifies environmental management as one of the areas that the Community will address.[49]

The most explicit provisions dealing with public involvement within the context of East Africa are in a Memorandum of Understanding (MOU) among the three East African countries for cooperation in environmental management.[50] The MOU clearly recognizes and gives prominence to the importance of public access to environmental information, public participation, and access to the courts.

Article 7 of the MOU sets forth the commitment of the partner states to guarantee public participation generally. This Article guarantees the "full involvement of (the) People in the sustainable use and management of environment and natural resources." Public participation is further secured by Article 16(2)(a), which states that partner states agree "to promote public awareness programmes and access to information as well as measures aimed at enhancing public participation on environmental management and issues." Public participation is also included in the context of environmental impact assessment (EIA) where the states agree to ensure public participation at all stages of the process,[51] and again in the context of forest management, where it encourages partnerships with local people.[52]

The MOU also contains provisions guaranteeing access to environmental justice. The partner states have agreed to "develop measures, policies and laws which will grant access, due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by environmentally harmful activities in the territory of any of the partner states."[53] To ensure access to information, the MOU provides that the partner states agree to "promote public awareness programmes and access to information" on environmental matters and establish resource centers on environmental information and the use of EIA.[54]

The legal authority of the MOU is weaker than a formally binding legal convention or protocol. Indeed, in its provisions it contemplates the development of a protocol in the area of environment and natural resource management.[55] It does, however, offer a strong basis for developing a sub-regional instrument on environmental

[47] *See generally* Godber Tumushabe, *Public Involvement in the East African Community*, in this volume.

[48] Treaty for the Establishment of the East African Community, UN Treaty Registration No. 37437, *available at* www.eachq.org/Treaty/eac-TheTreaty.htm (last visited July 22, 2002).

[49] Chapter 19 of the treaty deals with cooperation in environment and natural resources management, while chapter 20 concerns itself with cooperation in tourism and wildlife management.

[50] Memorandum of Understanding between the Republic of Kenya and the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environment Management, approved at Nairobi, Kenya on Oct. 22, 1998 [hereinafter MOU].

[51] *Id.* art. 14(2).

[52] *Id.* art. 9(f).

[53] *Id.* art. 16(2).

[54] *Id.*

[55] *See id.* arts. 2(1)(C), 3(1).

governance encompassing the three pillars of access to information, public participation, and access to justice.

B. The Southern Africa Development Community (SADC)

The Southern Africa Development Co-ordination Conference (SADCC) was formed in Lusaka, Zambia on April 1, 1980, following the adoption of the Lusaka Declaration by nine founding member states. Twelve years later on August 17, 1992 in Windhoek, Namibia, the Declaration and Treaty establishing the Southern Africa Development Community (SADC), replaced the Coordination Conference.[56]

The SADC Treaty is a legally binding and all-encompassing framework by which countries of the region must coordinate, harmonize, and rationalize their policies and strategies for sustainable development in all areas of human endeavor. The Treaty commits the members to the fundamental principles of sovereign equality of member states; solidarity, peace, and security; human rights, democracy, and the rule of law; and equity, balance, and mutual benefit.

SADC's objectives include achieving sustainable utilization of natural resources and effective protection of the environment.[57] It aims to harmonize the political and socio-economic policies and plans of the members states; mobilize the people of the region and their initiatives to develop economic, social, and cultural ties across the region and to participate fully in the implementation of the programs and operations of SADC and its institutions; and to create appropriate institutions and mechanisms for the mobilization of requisite resources for the implementation of the programs and operations of SADC and its institutions.[58]

Every member has the responsibility to coordinate one or more sectors on behalf of SADC. For instance, Lesotho is currently in charge of environment and land management matters for SADC, while Zimbabwe takes care of food, agriculture, and natural resources.

SADC has developed a number of binding protocols on natural resources for its 12 members to adopt, including one on shared watercourses and one on mining.[59] These protocols contain, to varying degrees, environmental governance principles. The protocol on shared water systems, for example, contributes to the concept of sustainable development of water through very specific recommendations on what co-basin states can and cannot do. It then suggests collective management through integrated master plans, and it requires member states to exchange information and data on the watercourse.[60] Together, these provisions are concerned with the collection of a wide range of information, making that information publicly available, and promoting public participation in the management of international watercourses in southern Africa.[61]

In October 1999, the environmental ministers of the SADC region agreed to establish a binding environmental protocol, and the efforts to develop the protocol remain ongoing. This protocol could build upon national experiences in the sub-region as well as international initiatives to promote public involvement. Specifically, it could recognize that this protocol could incorporate procedural aspects of environmental management—such as public participation and access to justice—that are essential to implementing substantive environmental norms and standards.[62]

C. The Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS), which was established in 1975, seeks to promote integration and cooperation in order to create an economic and monetary union for encouraging economic growth and development in West Africa.[63] The highest decisionmaking organ of ECOWAS is the ECOWAS Authority, which is comprised of heads of state or government. The Authority is charged with administering and directing the integrative movement of ECOWAS. In this regard, "the ECOWAS Treaty is merely adopting the practice of both the past and existing economic, and even political schemes in Africa. It is often considered necessary in the continent to involve the highest level of political representation, usually the heads of state and/or government."[64] Another political body, the Council of Ministers, assists the ECOWAS Authority. The Executive Secretariat of ECOWAS is the institution charged with implementing the ECOWAS priorities.

ECOWAS has been slow in its progress. In view of the slow progress in ECOWAS, the 1975 Treaty has been revised. The principle of supranationality in the application of decisions and the autonomous funding of the budgets of the institutions have been introduced.[65]

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[56] Declaration and Treaty of SADC, *available at* www.dfa.gov.za/for-relations/multilateral/treaties/sadctrea.htm (last visited July 19, 2002).
[57] *Id.* art. 5.
[58] *Id.*
[59] Protocol on Shared Watercourses Systems in the Southern African Development Community (SADC) Region, approved at Johannesburg on Aug. 1995, entered into force Sept. 1998; Protocol on Mining in the Southern African Development Community (SADC), approved at Blantyre, Malawi on Sept. 1997.
[60] *See* Declaration and Treaty of SADC, *supra* note 56, art. 5.
[61] *See generally* Bruch, *supra* note 24, especially 10443-45.
[62] *Id.*
[63] ECOWAS Treaty, art. 2.
[64] S.K.B. Asante, *Regional Economic Co-operation and Integration in West Africa: the Experience of ECOWAS*, *in* Joining The Future: Economic Integration And Co-Operation In Africa 113 (O.S. Saasa ed., 1991).
[65] 25th Anniversary Report of the Executive Secretary, Introduction, at 1.

Numerous problems have been encountered by ECOWAS in the enhancement of the process of regional integration of West Africa. Some of these important problems include: political instability and bad governance that has plagued many of the countries; weak national economies with insufficient diversification; bad economic policies in certain cases; multiplicity of organizations for regional integration with the same objectives; failure to involve the civil society, private sector, and mass movements in the process of integration; and the defective nature of the integration machinery in certain cases.[66] The structure of the ECOWAS institutions has also hindered the progress. For example, ECOWAS does not provide a forum for the exchange of views with interest groups in the West African sub-region. Hence to a large extent, the broad masses of the people of West Africa are excluded from effective participation in the ECOWAS integration process either directly or indirectly through interest groups.[67] This situation does not bode well for environmental governance in ECOWAS, especially the principle of public participation in decisionmaking processes.

Signs are emerging, however, that the future prospects are good. For instance, the recent developments in the political and economic scenery of West Africa have gradually helped to remove the principle obstacles to integration. Among these developments are the advent of democracy in most ECOWAS countries, particularly in Nigeria, which is the dominant economy in West Africa; the gradual withdrawal of the state from the sectors of productive activity; and the realization that the private sector must be the mainspring of growth and economic integration.[68]

A broad consensus has also emerged around a number of key principles that should guide the integration process in West Africa over the coming years. The need for the implementation of these principles has been sharply realized by the constraints encountered and by the conditions that are required for the effective implementation of ECOWAS programs. Among these conditions are the need for internal political and economic stability, the need for coordination of macroeconomic policies at the regional level, and also the need to improve the operational procedures in the ECOWAS institutions. Most importantly, the member states must show a political commitment to implementing ECOWAS' priority programs.[69]

However, a careful analysis of the ECOWAS Treaty reveals that it does not address the concerns of public involvement in decisionmaking. Perhaps this omission can be attributed to the fact that ECOWAS's very existence is underpinned by economic concerns based on economic models that by their very nature excluded the participation of the public in the decisionmaking process. Furthermore, these economic models were created when economic issues were completely divorced from environmental concerns with no perceived connections. Indeed, the two concepts were even taken to be mutually exclusive.

Recent political and economic developments occurring in these countries are being influenced by emerging world trends that provide for and demand specific arrangements for access to information, public participation in decisionmaking, and access to justice. There is now an urgent need to amend the ECOWAS Treaty further so as to provide for environmental clauses with specific reference to access to information, access to justice, and public involvement in decisionmaking. As the member countries further democratize, it is to be expected that this democracy will spill over to the regional and sub-regional bodies. As the Executive Secretary of ECOWAS recently observed:

> West Africa has to grapple with the issues of development, and with the attendant problems which are many and varied. However, this new century affords a golden opportunity to end the region's marginalization. The last decade was one of rapid political change and the result has been the advent of more responsive governments following multi-party elections. Also there is now a broader consensus on the need to move away from the defective economic models of yesteryears. There is now talk of development underpinned by economic reforms, improved management of public affairs, human resource development and infrastructure growth. In addition, there is a much clearer awareness of the crucial role that regional integration can play in promoting the economic growth and development of the countries of the region.[70]

IV. CONCLUSION

The Rio Conference was a turning point in environmental governance. The overall objective of the conference was to promote the integration of the environment and development policies through effective international agreements and instruments, especially considering the needs and concerns of developing countries. To that end, various efforts must be made in the legal field. Priorities must be set for future lawmaking at the appropriate level, incorporating environmental and development concerns in a balanced manner.

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[66] *Id.* at 2.

[67] Asante, *supra* note 64, at 114.

[68] *See generally*, 2000 Annual Report of the Executive Secretary, *available at* www.ecowas.int (last visited July 18, 2002).

[69] *Id.*

[70] 2000 Annual Report of the Executive Secretary, *supra* note 68, at 1.

As the world has become more seamless, international cooperation is paramount in ensuring that events occurring in one part of the world do not cause harm in other parts of the world. Concomitantly, within the nation state, concerted efforts must be made to incorporate the input of the citizens in environmental governance. In the context of Africa, although it is gratifying to note that several regional initiatives have provisions on environmental issues, a number of them need to develop and adopt protocols that ensure public involvement in decisionmaking on matters with significant environmental effects as well as guaranteeing the public's access to environmental information and justice.

The initiatives underway within the African continent point to the importance of environmental governance for the continent's success in sustainable development. Owing, however, to the scattered nature of provisions on environmental governance in several instruments and declarations and also the legal status of some of the instruments, time should be ripe for these efforts and initiatives to coalesce into one legally binding instrument on environmental governance. This could be done through a collective effort among AMCEN, AU, and the environment initiative of NEPAD. Such an instrument would elevate environmental governance to its rightful place and clearly expound on the three pillars of environmental information access, access to justice, and public participation in a manner that is sensitive to African conditions and peculiarities.

PUBLIC INVOLVEMENT IN THE EAST AFRICAN COMMUNITY

Godber Tumushabe *

In 1998, the East African governments of Kenya, Tanzania, and Uganda adopted a Memorandum of Understanding (MOU) for Cooperation on Environment Management.[1] This MOU established a regional framework for continued cooperation of Kenya, Tanzania, and Uganda (known as the partner states) in the management and use of the countries' natural resources.

The East African MOU was developed at a time when there were accelerated efforts to revitalize the East African Community. The Treaty for the Establishment of the East African Community (EAC Treaty)[2] was adopted one year later after the MOU entered into force. Chapters of the EAC Treaty address environmental and natural resources management, wildlife management, and legal and judicial affairs.[3] While these chapters provide a framework in which public involvement may be advanced, particularly in the context of environment and natural resources, the MOU is much more explicit in promoting public involvement.

Developed under a UNEP/UNDP/Dutch Initiative, the MOU is the first such instrument to be assembled and agreed to in Africa. It covers a diverse range of topics from "Development and Enforcement of Environmental Legislation" (Article 7) to "Management of Lake Victoria Ecosystem" (Article 8), and "Development and Harmonization of Environmental Impact Assessment" (Article 14) to "Capacity Building and Supporting Measures" (Article 16). Throughout the MOU, provisions set forth specific standards and approaches for the partner states to ensure public access to information, participation, and justice.

The East African MOU includes both substantive and procedural rights that strongly support environmental rights and protection, and in many cases go beyond the scope of existing national legislation in the three countries.[4] Substantive rights, such as "the right of the people of the Partner States to a clean, decent, and healthy environment," are clearly and explicitly framed as citizen rights.[5] Procedural rights are framed as obligations of the partner states, and language throughout the MOU highlights the partner states' commitment and agreement to promote and ensure public participation, access to information, and access to courts.

Transboundary issues, and the need for public involvement in managing them, are at the core of the East African MOU. The Lake Victoria ecosystem is encompassed within Kenya, Tanzania, and Uganda, just as it joins the three countries. Lake Victoria, the second largest freshwater lake in the world and the largest in Africa, is known internationally for its biological wealth and threatened status. In recent years it has become apparent that citizens of these three countries must work together to effectively manage the watershed and the valuable resources found in it.[6] Management of fisheries, mining resources, land use, water quality and quantity all require the joint input, cooperation and dedication of the partner states.[7] One country's abuse or misuse of the shared natural resources could have negative impacts on the citizens in the other countries who depend upon the same resource to maintain their existing sustainable lifestyles and industries.

Wildlife migration is another issue with enormous transboundary implications. Mass migrations of savanna species, including wildebeest, zebra, gazelles, and their predators traverse Tanzania and Kenya, paying no heed to national borders. The magnitude of this event, and the economic benefits that it brings to communities in both countries, provide an important incentive

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[1] Memorandum of Understanding Between the Republic of Kenya and the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environment Management, done at Nairobi, Kenya on Oct. 22, 1998 [hereinafter East African MOU].

[2] Done at Arusha, Tanzania on Nov. 30, 1999.

[3] *Id.* chs. 19, 20, 24.

[4] With the addition of the East African MOU to the East African Community Treaty as an appendix, it has gained the force of law.

[5] East African MOU, *supra* note 1, art. 7(1)(a). The right to a healthy environment has been enshrined some of the national constitutions and laws in East Africa. *See, e.g.*, Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131 (2002); The [Kenya] Environmental Management and Co-ordination Act, 1999, No. 8 of 1999, sec. 3.

[6] *See* GLOBAL ENVIRONMENT FACILITY, KENYA, TANZANIA, UGANDA: LAKE VICTORIA ENVIRONMENTAL MANAGEMENT PROJECT, PROJECT DOCUMENT (Report No. 15541-AFR, 1996); *see also* Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 ENVTL. L. REP. 11389 (2001).

[7] East African MOU, *supra* note 1, art. 8(a) (mentioning these resources and others of the Lake Victoria ecosystem).

for these countries to cooperate on environmental management of the region. In order for Kenya, Tanzania, and Uganda to continue to develop sustainably, with the wildlife and overall ecosystem in mind, formal cooperation measures need to be put in place.

I. ACCESS TO INFORMATION

Access to information is provided for broadly and specifically in the East African MOU. In Article 16(2)(a) the Partner States agreed to "promote public awareness programmes and access to information" on environmental issues and management, without noting any limits or exceptions to access.[8] The breadth of this statement, and the lack of a limiting definition of "information," could be used by citizens and advocacy organizations to obtain access to a range of environmental and natural resource information.

Other articles of the MOU specifically mention information exchange with regard to forest resources,[9] wildlife resources,[10] the marine and coastal environment,[11] and hazardous waste.[12] In these cases, some specification is given as to the nature of the information to be shared. For example, in Article 12, the partner states agree to "share information on hazardous wastes including their transboundary impacts, importation, exportation, manufacture, transportation, storage and use."[13] In other cases, however, the nature of the information to be exchanged is more vague. While many of these provisions appear to focus on generating and exchanging information between states, these provisions should be construed in the broader picture in which generalized access to information should be institutionalized and guaranteed. Moreover, these provisions are important for articulating specific types of information that the partner states commit to collecting, analyzing, and ultimately—through Article 16(2)(a), if not elsewhere—releasing and disseminating to the public.

The East African MOU does not explicitly provide measures for passive or active access to information. However, the partner states have agreed to establish resource centers on environmental management, which would provide one mechanism for making environmental information available to the public (at least those who can travel to the center).[14] The partner states also agreed to use environmental impact assessments (EIAs) to involve the public in collecting and recording environmental information necessary for assisting in making development decisions that are expected to impact the environment.[15] Active dissemination of information relating to EIAs is deemed a "necessary regulatory measure for sustainable development."[16]

The discussion of EIA techniques, in Article 14 of the MOU, is framed by the responsibility of each partner state to "develop regulations and guidelines on environmental impact assessment,"[17] to "enact legislation to regulate environmental impact assessment,"[18] and to "develop programmes and procedures for dissemination of information on the operation and use of environmental impact assessment."[19] The MOU does not, however, mandate specific EIA procedures that are binding on the partner states.

II. PUBLIC PARTICIPATION

Provisions regarding public participation are presented throughout the East African MOU in varying degrees of specificity. The section on capacity building includes the broadest statement, declaring that the partner states agree to "promote . . . measures aimed at enhancing public participation on environmental management and issues."[20] Public participation is further articulated in sections on the development and enforcement of environmental legislation;[21] management of forest resources;[22] and the development, planning, and implementation of environmental impact assessment.[23]

However, the MOU does not provide many specific details regarding who has the right to participate, how they can participate, when the public should be involved, or who coordinates the participation. In Article 14, on environmental impact assessment, there is mention of the need for "enabling public participation at all stages of the process related to environmental impact assessment," giving some indication of the times at which public participation is invited.[24] This implicitly acknowledges international EIA standards that require the public to be involved at all stages of the EIA pro-

[8] *Id.* art. 16(2)(a).
[9] *Id.* art. 9(a).
[10] *Id.* art. 10(1)(c).
[11] *Id.* art. 11(b).
[12] *Id.* art. 12(e).
[13] *Id.*
[14] *Id.* art. 16(2)(b).
[15] *Id.* art. 14(1).
[16] *Id.* art. 14(3) ("The Partner States further agree to develop common programmes and procedures for the dissemination of information on the operation and use of environmental impact assessment as a necessary regulatory measure for sustainable development.").
[17] *Id.* art. 14(1).
[18] *Id.* art. 14(2).
[19] *Id.* art. 14(3).
[20] *Id.* art. 16(2)(a).
[21] *Id.* art. 7(1)(i) ("full involvement of their people in the sustainable use and management of environment and natural resources.").
[22] *Id.* art. 9(f) ("institute new techniques or measures which enhance compliance and provision of incentives and partnerships with local people").
[23] *Id.* art. 14(2).
[24] *Id.* art. 14(2).

cess, including at the scoping phase when all the options remain open.[25]

With regard to the coordination of participation, the Committee on Environment—the regional committee charged with the oversight of the measures set forth in the MOU—is described in Article 4. Although many of these points are vague, they do establish some basic principles and mechanisms that will promote and help to ensure public involvement in domestic and transboundary matters.

III. ACCESS TO JUSTICE

The East African MOU makes a number of specific strides toward setting guiding principles for enabling access to justice. The Partner States agree to "develop measures, policies and laws which will grant access, due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by environmentally harmful activities in the territory of any of the Partner States."[26] The implication of this provision would be to significantly lessen the burden that is often placed on citizens to demonstrate standing to sue (that is, their ability to be in court), particularly where their injury is shared by others as is typically the situation in environmental cases.[27]

The MOU is nondiscriminatory in who qualifies for access, due process, and equal treatment, in stating that "all persons who are or may be affected" must enjoy these rights. Article 16(3) expands on this nondiscrimination requirement, committing the partner states to "grant rights of access to the nationals or residents of the other Partner States to their judicial and administrative machineries to seek remedies for transboundary environmental damage."[28] Thus, in cases with potential transboundary implications, citizens of the other countries must be accorded the same rights to seek judicial redress as are accorded the citizens of the country in national jurisdiction. So, if the effluent from a gold mine in, say, Tanzania could harm fisheries in Lake Victoria, then citizens from Uganda and Kenya would be able to go to court in Tanzania to seek compensation and injunctive relief if they satisfy the same requirements that Tanzanian citizens would have to meet.

The partner states also agreed to "harmonize their definition of environmental offences, judicial and administrative procedures to promote consistency in compliance and enforcement."[29] This standardization of definition and procedure is important given the regional nature of the MOU, the shared natural resources, the legal and economic integration in East Africa, and the need for common rules to apply to citizens of all three countries.

IV. IMPLEMENTING AND ENFORCING THE PROCEDURAL RIGHTS OF THE MOU

The East African MOU plays an important role in assigning both substantive and procedural rights to the citizens of Kenya, Tanzania, and Uganda. This is significant, as Kenya does not provide for substantive right to a clean and healthy environment in its constitution,[30] and Tanzania's environmental provision is of questionable utility.[31] And, while both Uganda and Kenya provide for the right to a clean and healthy environment in their framework legislation, Tanzania is still debating the possibility of enacting such legislation. As a binding, regional instrument the MOU is then able to provide citizens with powerful tools to use in advocacy work, tools that potentially could allow for new and stronger interpretations of existing national legislation and constitutional rights. The MOU is a compelling tool that can add strength to citizen advocacy work when existing constitutional and national legislation is lacking.

At the national level, Uganda and Kenya have made legislative progress on the procedural rights of access to information and public participation, while in Tanzania, much is dependent on the pragmatic interpretation of existing legislation. With regard to access to justice, the regional access rights regime put in place by the East African MOU is far ahead of the national legal frameworks and practice.

As these examples demonstrate, East African countries have made commitments to implement the environmental governance norms agreed upon in Principle 10 of the Rio Declaration. However, the practice is still mixed, and there are significant financial and technical capacity constraints to fulfill these commitments.[32]

The enforceability of the East African MOU as a regional instrument was boosted by its incorporation as an annex to the East Africa Community Treaty. Furthermore, the East African Court of Justice was empanelled at the beginning of 2002, and it has origi-

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[25] *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 ENVTL. L. REP. 10428, 10447-48 (2002).

[26] East African MOU, *supra* note 1, art. 16(2)(d).

[27] *See* Bruch & Czebiniak, *supra* note 25, at 10442.

[28] East African MOU, *supra* note 1, art. 16(3).

[29] *Id.* art. 16(2)(e).

[30] It is only recently that the right to a clean and health environment was provided for in Kenya's Environmental Management and Co-ordination Act, *supra* note 5.

[31] In the ongoing constitutional review process in Kenya, however, there appears to be significant interest in amending Kenya's constitution to include a substantive right to a healthy environment.

[32] For example, most public interest litigants risk having to pay the attorneys' fees and courts costs if they lose, and they do not have the opportunity to recoup their fees and costs against the government if they win.

nal jurisdiction over matters relating to the implementation of the EAC Treaty. This creates tremendous opportunities for seeking redress based on the principles set out in the MOU in the absence of adequate enforcement mechanisms at the national level. However, there has yet to be a test case at the domestic level or before the East African Court of Justice. So, the practical import of the MOU at the national and sub-regional level remains uncertain.

There is also some question, particularly from government officials, regarding how much procedural rights in the MOU can be strengthened at this time. In fact, this highlights the broader issue of the meaning of the MOU, which was the result of a largely nonconsultative process. While the MOU may have been intended to lay the ground for an environmental protocol to the EAC Treaty, such a protocol has failed to materialize.

There remains much to be done in implementing, clarifying, and enforcing the measures set forth in the MOU. Awareness of the East African MOU is gradually growing, though, and the MOU has allowed for significant progress to be made.

TOWARDS GOOD PRACTICES FOR PUBLIC PARTICIPATION IN THE ASIA-EUROPE MEETING PROCESS

Mikael Hildén and Eeva Furman *

The Asia-Europe Meeting (ASEM) process was created by 10 Asian nations, the 15 European Union (EU) member states, and the European Commission in 1996 as an informal process for dialogue and cooperation.[1] Its purpose is to strengthen the political, economic, and cultural relationship between Asia and Europe. The process is based on cooperation within three fields: political (e.g., human rights and globalization); economic and financial (e.g., the removal of obstacles to trade and investments); and cultural and intellectual (e.g., research cooperation and protection of cultural heritage).[2] In 1998, the second ASEM summit established the Asia-Europe Environmental Technology Centre (AEETC) as a nonprofit organization. The purpose of the AEETC was to contribute to the protection and enhancement of environmental quality among the ASEM partners and to promote cooperation in environmental matters, including the transfer of environmentally sound technologies, among the ASEM partner countries.

When the AEETC was established, four priority areas were identified. These are: mega-cities; bioremediation; involvement of the public in environmental matters; and disaster anticipation, management, and remediation. Within each of these priority areas, the AEETC was expected to initiate activities that would foster a dialogue among the ASEM partners in the form of projects, meetings, seminars, and a major European Commission-sponsored conference.

In the area of public participation, the AEETC initiated a project that led to the development of a draft document, Towards Good Practices for Public Involvement in Environmental Policies. This document was presented at an informal meeting of ASEM ministers in January 2002 and then again at a meeting of Foreign Ministers in June 2002.[3]

This chapter will analyze the draft document, Towards Good Practices for Public Involvement in Environmental Policies. Due to the special nature of the ASEM, this analysis will emphasize the process of developing the document before considering its contents. A key finding in this chapter is that the lack of operative structures for the ASEM, such as a secretariat, has made it difficult to actively advance public involvement through political discussions.

I. PUBLIC PARTICIPATION AND THE AEETC AGENDA

The AEETC was established as a manifestation of the ASEM partners' commitment to environmental issues, as well as an avenue by which to foster a discussion of broader political issues. In the environmental field, it is often relatively easy to find common ground that can help overcome political barriers. For example, in 1974 the then seven Baltic coastal states managed to create for the first time a convention that covered all sources of pollution around an entire sea, despite the fact that the countries had widely differing political systems, history, and culture.[4] In Asia, the Mekong River Commission has made similar strides, although it does not yet involve all the countries of the Mekong watershed.[5]

The AEETC's initial list of priority areas was generated during the political discussion that surrounded its establishment in 1998. The list was broad and reflected the many different interests of ASEM partners. From the beginning, the emphasis was on developing a mutually beneficial dialogue. Business interests and technology transfers were high on the agenda, reflecting a strong emphasis on economic development within

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[1] The ASEM partners are Austria, Belgium, Brunei Durussalam, China, Denmark, Finland, France, Germany, Greece, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, the Netherlands, the Philippines, Portugal, Republic of Korea, Singapore, Spain, Sweden, Thailand, the United Kingdom, Vietnam, and the European Commission.

[2] *See* the EU website on ASEM, *available at* europa.eu.int/comm/external_relations/asem/intro (last visited June 30, 2002).

[3] Towards Good Practices for Public Involvement in Environmental Policies (Draft June 28, 2001), produced by AEETC for the Consideration of the Environment Minister's Meeting, *available at* www.vyh.fi/eng/intcoop/regional/asian/asem/junedraft1.RTF (last visited Feb. 20, 2002) [hereinafter Good Practices Document].

[4] Ain Lääne, *Protection of the Baltic Sea: The Role of the Baltic Marine Environment Protection Commission*, 30(4-5) AMBIO 260-62 (2001).

[5] *See* www.mrcmekong.org (last visited June 25, 2002).

the ASEM in the second field of cooperation (economic and financial).

The priority area of developing public involvement clearly differs from the other technically oriented priorities such as mega-cities, bioremediation, and disasters. It does, however, relate directly to the first field of cooperation on political issues, such as human rights and globalization.

Public involvement and the development of civil society have been high on the agenda of many European ASEM partners, and their importance has also been recognized by some of the Asian partners. However, in recent years, several ASEM partners have been confronted with negative and unsolicited public involvement through violent protests against development projects or environmental problems. Therefore, while all ASEM partners are invested in the priority area of public involvement, the actual scope of public involvement is somewhat vague and different partners hold different priorities.

A. The Project on Public Participation

Finland was one of the ASEM partners that supported the AEETC financially through project funding. The Government of Finland, focusing on its foreign policy priorities of good governance and development of civil society, decided to provide support for the activities on public involvement.[6] In line with its mandate, the AEETC coordinated activities on the public participation project. The AEETC contracted with the Finnish Environment Institute (SYKE) and the Thailand Environment Institute (TEI) to carry out the practical tasks related to the project. The general purpose of the project was to enhance networking among the ASEM partners' specialists on public involvement; to compile material on legislation, strategies, and practical experience; and to produce a set of guiding principles for good practices in public involvement in environmental issues.

An important source of guidance for the project was the process undertaken by the United Nations Economic Commission for Europe (UN/ECE) during the development of the 1998 Aarhus Convention.[7] In particular, the UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making (Sofia Guidelines),[8] endorsed in Sofia on October 1995 by European Environment Ministers, provided a useful starting point in the development of guiding principles for the ASEM. The Sofia Guidelines contain the key elements of public involvement that were set forth in Principle 10 of the Rio Declaration.[9] The non-binding and regional scope of the Sofia Guidelines made an ideal template for the ASEM. A non-binding document is the only viable option since the ASEM process is informal, a fact repeatedly stressed by the European Union (EU).[10] The public participation project was launched in June 2000 during a workshop in Hong Kong on public involvement in development projects at the annual conference of the International Association of Impact Assessment.[11] The conference was chosen as a starting point because environmental impact assessment (EIA) has been one of the key mechanisms for advancing public participation. Asian and European nations have considerable experience in ensuring public participation through the use of EIAs, and this experience could be utilized as a starting point to identify good practices for public involvement generally.

B. The Process of Developing the Good Practices Document

As noted above, the ASEM is an informal process consisting of dialogue and cooperation among ASEM partners, and therefore ASEM cannot produce binding documents. The ASEM functions by convening summit-level meetings every second year. Apart from the summit meetings, the ASEM process is furthered through a series of ministerial and working-level meetings, as well as a number of smaller-scale activities arising from these meetings. A Senior Officials Meeting (SOM) prepares the agenda for the political discussions that occur at the ministerial level meetings of Ministers for Foreign Affairs. Some examples of the smaller-scale activities are special meetings for Senior Environmental Officials and an informal meeting of the Ministers

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[6] *See* Program of Prime Minister Paavo Lipponen's Second Government, Apr. 15, 1999, *available at* www.valtioneuvosto.fi/vn/liston/base.1sp?r=696&k=en&old=385 (last visited June 25, 2002) ("Finland will continue to promote security as well as sustainable and balanced development in the world by working towards a strengthening of democracy, respect for human rights, the rule of law and equality.").

[7] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention]; *see also* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

[8] UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making, adopted at Sofia, Bulgaria on Oct. 25, 1995, *available at* www.unece.org/env/documents/1995/cep/ece.cep.24e.pdf (last visited June 30, 2002).

[9] Rio Declaration on Environment and Development, prin. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

[10] For the European Commission's website on ASEM, see europa.eu.int/comm/external_relations/asem/intro/ (last visited June 30, 2002).

[11] Antonio Fernandez de Tejada et al., *Public Participation and Development Cooperation*, IAIA:Vision Statements and Road Maps (2000), *available at* www.iaia.org/ (last visited June 30, 2002).

of the Environment that occurred in 2002. There is no secretariat for the ASEM process. Instead the SOM prepares and facilitates the political meetings. These characteristics of the ASEM process were factored into the development of the Good Practices Document.

When the public involvement project was launched in June 2000 after an initiation phase in the spring of 2000, the AEETC, SYKE, and TEI agreed that there should be some form of guiding principles or guidelines to assist in the development and implementation of the public involvement project by the ASEM partners. The first draft of the Good Practices Document was developed during the year 2000 and presented to AEETC's Pilot Phase Guidance Group (PPGG) meeting in December 2000. In 2000, an advisory group consisting of representatives from six ASEM member countries (China, Finland, Korea, Thailand, United Kingdom, and Vietnam) supported the project team in developing the Good Practices Document by providing comments and examining the political acceptability of the Document from the countries' perspectives.

The PPGG did not provide any substantial comments on the first draft and generally approved the project. In January 2001, a revised version was produced with the aim of presenting it to the Foreign Ministers' Meeting in May 2001. At this stage the draft was posted on the project's website,[12] which is available to the public. The draft was open to anyone for review and comment, and comments were explicitly invited from all interest groups. The AEETC also sent the Document to the official ASEM contact points for comments. This round of review resulted in comments primarily from experts and interest groups. The official ASEM contact points provided little input, and the AEETC was unsuccessful in obtaining any response from this group.

The lack of official response meant that plans to present a draft at the Foreign Ministers' meeting in May 2001 had to be abandoned. Instead, a new draft was produced in May 2001 for the consideration of the PPGG, with the assumption that the PPGG would decide on whether to forward the Document to the political process. In June 2001, the PPGG met, but problems related to the financial and technical administration of the AEETC that had slowed the progress of all projects were increasing, and consequently the PPGG was unable to reach any firm decision on what to do with the Document.[13]

The name of the Document was changed from Guiding Principles on Public Involvement in Environmental Aspects in the ASEM Countries to Towards Good Practices for Public Involvement in Environmental Policies to reflect the Document's non-binding character. Some changes were also made in the text to this effect. These changes were made as the result of comments received from the PPGG. The intention of the AEETC and its public participation project team was then to submit the Document to the political process of the ASEM in order to give it a visible role. This process, however, turned out to be very complicated.

C. Delivering the Good Practices Document to the Political Arena

In the summer of 2001, China invited all Ministers of the Environment to Beijing later in the year. China also distributed a draft Statement of the Chair that it considered a first step in guiding the outcome of the meeting. This draft document mentioned stakeholder cooperation but did not include explicit reference to public involvement. The European ASEM partners were confused by the rapid progress of the preparations for the ministerial meeting and were, as a group, unable to respond in a meaningful way to the Chinese initiative. There was confusion over the dates of the meeting, the status of the meeting, and the role of any documentation.

Despite these uncertainties, the AEETC and the project on public involvement initiated preparations for a side event to publicize the issue and focus attention on the Good Practices Document. Due to the uncertainties surrounding the ministerial meeting, only preliminary planning for the side event could be undertaken. The uncertainties continued throughout the autumn of 2001, during which time the statement of the Chairman was redrafted, with input from the AEETC, so that it mentioned public involvement.

In December 2001, the European ASEM partners were finally able to agree on the dates for the ministerial meeting—January 16-18, 2002. In conjunction with the preparations of the ministerial meeting, the AEETC accepted the Center for Environmental Education and Communication of the Chinese Environmental Protection Agency's (SEPA) offer to organize a seminar immediately preceding the ministerial meeting in Beijing. Once the dates for the ministerial meeting were set, the preparations for a seminar—Asia-Europe Dialogue on Public Participation and Environmental Decision Making—were finalized. Due in large part to the initiative of the SEPA, the side event seminar materialized on January 14-15, 2002 in Beijing. The seminar attracted considerable interest in the Chinese media and successfully brought together approximately 80 specialists from

[12] The Development of the Guiding Principles Document is available at www.ymparisto.fi/eng/intcoop/regional/asian/asem/asem.htm (last visited July 8, 2002).

[13] One example of the technical difficulties was that some delegations had not seen the Document in advance, despite the fact that it had been distributed twice during the spring of 2001 to all official ASEM contact points, including the PPGG.

universities, administration, media, and civil society. The majority of attendees were from China, but attendees also came from six European and three other Asian countries, as well as embassy personnel from the EU and the United States.

This side event contributed to a positive reception by ASEM governments towards the issue of public involvement. However, despite this positive reception, there were questions as to whether the Document on Good Practices would even be noted at the ministerial meeting. Since the AEETC did not have an official role in the preparations of the meeting or any formal status during the meeting, the AEETC could not take any initiative and was not able to present documents to delegates without being asked to do so by the ASEM partners. Thus, the Senior Environment Officials Meeting (SEM) received the Good Practices Document only after Finland had taken the initiative to ask for its distribution. After its distribution, it was possible to formally take note of the Document at the SEM and introduce statements reflecting its existence into the Chairman's statement of the ministerial meeting. The statement ultimately noted that the Environmental Ministers had agreed that the "exchange of experiences concerning good practices for public involvement should be promoted."[14]

This statement was crucial for obtaining recognition for the Document in the official political arena of the ASEM, that is at the Senior Officials Meeting (SOM) and the Foreign Ministers' Meeting. At this point, the formal role of the AEETC in advancing the Document diminished greatly because only ASEM partners can participate in the political process. The discussions on dismantling the AEETC after the pilot phase ends in October 2002 further distanced the AEETC from the ongoing political discussions. The uncertain status of the AEETC has for a considerable time negatively affected the visibility of the Good Practices Document because at the SEM and SOM some delegates have been reluctant to recognize any results of the AEETC's activities. Discussions about the fate of the AEETC replaced discussions and negotiations on the substance of the Document.

Finally, in the spring of 2002 the Good Practices Document was distributed at the SOM, and it was also recognized by the Foreign Ministers' Meeting, held June 6-7, 2002.[15] It remains to be seen whether the Document will also be noted at the ASEM summit in autumn 2002 and at the Environment Ministers' Meeting in Italy in 2003. The Document was disseminated and discussed at the International AEETC Conference on Public Participation, held in Bangkok, Thailand on June 10-12, 2002, which drew nearly 400 participants.[16] At the Conference representatives of the UN/ECE and the United Nations Economic and Social Commission for Asia Pacific (UN/ESCAP) agreed to initiate a dialogue on how to promote the contents of the Document further within UN/ESCAP, building on the experiences of the UN/ECE in developing the Aarhus Convention.

II. THE CONTENTS OF THE GOOD PRACTICES DOCUMENT

In refining the Good Practices Document, the editorial team included elements from the ASEM and AEETC mandates and deleted references to the processes within the United Nations system. This section describes the key elements of the Document as submitted to the Environment Ministers in January 2002. In particular, the Document will be compared to the Aarhus Convention, a geographically broad, binding international document on public involvement that also applies to a significant number of ASEM members.

The Document is still in draft form, as no political ASEM institution has formally approved it. Even though the title—Towards Good Practices for Public Involvement in Environmental Policies—does not refer to recommendations or guidance, the brief paragraph-based style of the Document suggests a guidance or guiding principles document rather than a set of cases of good practice. Therefore, developing a political document on guiding principles will be easier than if the Document contained lengthy descriptions of how to develop practices.

"Public involvement" was chosen as the general term for the topic because the responsible officer at the AEETC was concerned that there would be opposition to the concept of public participation. He felt that "participation" may be construed to hint at a right to interfere strongly with decisionmaking and thought that "public involvement" was a more neutral term. A further justification for the use of the term public involve-

[14] Chairman's Statement of the ASEM Environment Ministers' Meeting, para. 18, done at Beijing on Jan. 17, 2002, *available at* europa.eu.int/comm/external_relations/asem/min_other_meeting/env_min1.htm (last visited June 30, 2002).

[15] Chair Statement, Fourth ASEM Foreign Ministers' Meeting, done at Madrid on June 6-7, 2002, para. 5, *available at* europa.eu.int/comm/external_relations/asem/min_other_meeting/for_min4.htm (last visited June 30, 2002) ("Ministers gave special recognition to the valuable work carried out by the AEETC in promoting public participation in environmental affairs….").

[16] AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, *available at* www.aeetc.org/int_publ.html (last visited July 7, 2002).

ment was found in the World Bank's use of the terms, in which "public involvement" is the generic term that covers access to information, participation in decisionmaking, and access to justice. In practice, however, it turned out that the concern for the concept of public participation was largely unfounded because both involvement and participation are normally translated into the same word in Chinese, as well as in some other languages.

The Document divides public involvement into access to environmental information, public participation, and access to justice following, with some modification, the three main pillars of the Aarhus Convention. A fourth section addresses implementation, and an appendix defines the different types of involvement referred to in the Document. Public participation in the Document is not restricted to decisionmaking processes but also recognizes participation in planning. Due to the Document's nonbinding character,[17] the text of the entire document is less legally oriented and more directed towards practice. Still, the document is brief, with only 36 paragraphs.

The basis of the Document is that any natural or legal person should have the opportunity to be involved. For example, paragraph 1 states that "Any natural or legal person will have free access to environmental information at their request, subject to the terms and conditions contained in these elements of good practice." Authorities on levels ranging from the local to the supranational are responsible for providing these opportunities with respect to the three pillars of involvement.[18] The importance of facilitating the involvement of environmental organizations is also emphasized.[19] The Document stresses collaboration among the ASEM members to fulfill the recommendations. For example, possibilities to collaborate regionally should be explored to facilitate harmonized regional assessments and comparisons concerning the transparency and participatory features of planning and decisionmaking procedures.[20]

A notable feature of the Document is its emphasis on cultural issues, especially cultural differences.[21] This is not emphasized in the Aarhus Convention, which was developed in a region where cultural differences and changes are more modest. In contrast, though, completely different cultures are represented among the ASEM partners and the differences are very stark.

Cultural diversity is also emphasized in the context of access to information by requiring publication of up-to-date environmental information[22] in a form and media that accommodates the linguistic and cultural variety and different levels of literacy.[23] The section that addresses public participation emphasizes the right to participate regardless of gender, cultural or ethnic identity, language, citizenship, nationality, or domicile.[24] The Document further stresses the integrity of those who use their right to participate: lawful activities should not lead to penalties.[25]

The Document supports collaborative capacity building among the ASEM partners in their efforts to respond to the demands of public involvement.[26] This element is specifically stressed with respect to collaboration among authorities on a supranational level. While this collaboration does not necessary address transboundary matters, there is one paragraph that pro-

[17] *See* Good Practices Document, *supra* note 3, pmbl. ("These are not binding and not intended to replace existing procedures, including those that guarantee the rights of public involvement, adopted by international, national or provincial laws, law claim agreements, regulations or guidelines within the ASEM region.").

[18] *Id.* ("the promotion of public involvement requires that public authorities raise the public's environmental awareness in order to promote greater public understanding and support for environmental policies and enforcement and ensure transparency in their activities and are accountable for their actions, and that the information they provide is readily accessible to all, thus improving their credibility and strengthening support for their activities in their own socio-cultural context.").

[19] *Id.* para. 22 ("ASEM members are encouraged to establish formal and informal networks and other consultative processes to facilitate the involvement of environmental organizations and other interest groups in decision-making processes having significant environmental implications and to eliminate impediments or obstacles to public participation.").

[20] *Id.* para. 36 ("ASEM members will support ongoing activities and facilitate exchange of experiences of following the elements of good practice in the ASEM region and promote regular evaluation of the application of the public involvement.").

[21] *Id.* at pmbl. ("Recognizing the importance of cultural diversity and the close links between culture, society and the environment, and that ASEM members provide abundant examples of this diversity ….").

[22] *Id.* para. 4 ("Public authorities will regularly collect and update relevant environmental information, including social, health and cultural data ….").

[23] *Id.* para. 11 ("ASEM members will actively publicize the availability of the texts of international legal instruments, to which they are a party, and which establish procedures for public access to environmental information or public participation rights, preferably in their own language(s) and taking into account the needs of illiterate persons together with relevant conference resolutions or recommendations.").

[24] *Id.* para. 19 ("ASEM members will promote participation of the public, regardless of gender, cultural or ethnic identity, language, citizenship, nationality or domicile ….").

[25] *Id.* para. 26 (ASEM members "will ensure that persons involved in public participation in environmental matters are not penalized in any way for activities that are lawful.").

[26] *Id.* para. 36 ("ASEM members will support ongoing activities and facilitate exchange of experiences of following the elements of good practice in the ASEM region ….").

vides explicit recommendations on public involvement when there are transboundary environmental impacts.[27]

In Europe, international collaboration (including public participation) on transboundary environmental issues is a familiar task due to the EU cooperation and three UN/ECE Conventions: the Convention on Environmental Impact Assessment in a Transboundary Context (1991), the Convention on the Transboundary Effects of Industrial Accidents (1992), and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992).[28] Transboundary issues are therefore a natural part of the Aarhus Convention. In the development of the Good Practices Document, the issue of transboundary impacts was not self-evident in part because there are only few supranational mechanisms addressing transboundary environmental impacts in Asia. There is, however, growing interest in this issue from groups such as the Mekong River Commission.[29] Apart from this, the issue is not touched upon in supranational instruments among the Asian ASEM partners. Thus, this recommendation brings to light new features of public involvement, particularly in Asia.

The Document not only recommends that governmental administrations provide opportunities for involvement, but also recognizes that public commitment is a precondition for effective and successful public involvement.[30] This is an important aspect especially among the Asian partners of ASEM where the causes for an interest in participation can be complex. Interviews conducted during the project have suggested that participation sometimes may be motivated by economic rather than environmental interests.

A. Access to Information

The most extensive section in the Document addresses access to information. The list of issues addressed in the Document is broad and shares many approaches with the Aarhus Convention, including the list of conditions under which access can be denied. The Document recommends requirements for the collective development of transparent and participatory planning and decisionmaking processes among the ASEM partners. This section addresses mechanisms for systematic collection and updating of information[31] and suggests mandatory mechanisms where voluntary efforts are not sufficient.[32] The publishing of information is recommended through regular reports on the state of the environment. The EU Dobris reports[33] and the Association of South-East Asian Nations (ASEAN) reports on the environment[34] are cited as examples. No direct references to national legislation are made regarding access to information. The need for public awareness is emphasized in many parts of the Document, including the section on access to information.[35]

In the Document, the definition of environmental information is broad, covering natural, public health, and cultural elements, as well as activities "or other measures" that could significantly affect these components.[36] The definition seems slightly dated in referring to fauna and flora instead of biodiversity, and it does not specifically include GMOs. On the other hand, cultural aspects such as cultural sites and human settlements are mentioned as well as policies, plans and programs, and administrative measures and environmental management programs for environmental protection.

The Document urges authorities to provide information, including information on international issues.[37] There are no specific recommendations on time limits for providing the information, but the importance of setting time limits is emphasized.[38] The cost of obtain-

[27] *Id.* para. 17 ("In the case of transboundary environmental impacts between two ASEM countries, the two countries will cooperate in ensuring that the public in the affected country is also informed.").

[28] The UN/ECE website on environmental issues is available at www.unece.org/env/ (last visited July 4, 2002).

[29] Personal communication with Wiek Schrage, UN/ECE, 2002.

[30] Good Practices Document, *supra* note 3, at pmbl. ("Recognizing that public commitment is needed for the successful use of the tools given for public involvement….").

[31] *Id.* para. 4 ("Public authorities will regularly collect and update relevant environmental information….").

[32] *Id.* ("ASEM members will establish, where voluntary systems are inadequate, mandatory systems for ensuring that there is an adequate flow of information about activities significantly affecting the environment to the public authorities.").

[33] The Dobris report has been followed by several reports. *E.g.*, European Environment Agency, Environmental Signals 2001 – Benchmarking the Millenium, Environmental Assessment Report No. 9 (2002), *available at* reports.eea.eu.int/environmental_assessment_report_2002_9/en (last visited July 27, 2002).

[34] ASEAN State of the Environment Report, *available at* www.aseansec.org/viewpdf.asp?file=/pdf/soer00.pdf (last visited July 8, 2002).

[35] Good Practices Document, *supra* note 3, para. 15 ("ASEM members will cooperate in developing methods for enhancement of environmental awareness….").

[36] *Id.* app. 1 ("In the context of elements of good practice, environmental information means any information on the state of water, air, soil, fauna, flora, land, cultural and natural sites, human settlements and health, and on activities, policies, plans, programmes or other measures significantly affecting or likely to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.").

[37] *Id.* para. 10 ("ASEM members will actively publicize the availability of important national and international documents on the environment….").

[38] *Id.* para. 7 ("Public authorities will respond to a person requesting information within specified time limits.").

ing information is raised as a potential barrier to access. The general recommendation is that as much information as possible should be made available at no charge, although there are some cases where sharing of costs with the authorities is mentioned as appropriate.[39]

The Document encourages private enterprises to report regularly on how the impact of their activities on the environment has changed over time.[40] In a separate paragraph, enterprises are encouraged to use voluntary environmental management systems.[41] The section on access to information does not explicitly suggest good practices for EIA procedures, but since EIA is referred to in the section on public participation, the relevant elements of good practice related to access to information are applicable also in EIAs.

B. Public Participation

The section in the Document on public participation is shorter than the section on access to information. In part, this reflects the fact that to date there is less experience with participatory procedures than with distribution of information, and also that participatory procedures are more context-dependent than access to information. The Document does, however, recognize two tenets of participation: first, that there must be preconditions for participation in the form of basic rules and principles, and second that it is equally important to have the willingness and skill to implement those rules and principles in practical situations.

The section on public participation stresses participation in both planning and decisionmaking. The Document also stresses participation in policymaking,[42] which reflects a relatively recent development. Some ASEM partners, such as the Philippines, and the Nordic countries, actively encourage participation in the development of legislative proposals and have specific procedures for achieving this goal.[43] The Document encourages this kind of development and implicitly assumes that the likelihood of properly functioning participatory procedures in environmental matters can be increased by encouraging participation at the stage when the procedures are designed and not just when they are implemented.

The need for effective communication between authorities and the public is a basic recommendation of the Document, as well as the necessity of taking into account the information received from participants. Many ASEM partners are starting to experience planning processes in which nongovernmental organizations (NGOs) and other interest groups have been widely represented in the planning committees.[44] The need for responsive communication between environmental organizations and other interest groups is also emphasized in the Document.[45]

The Document urges ASEM partners to promote the education of the public on the rights and responsibilities of participation. It suggests that ASEM members utilize various available forms of mass media to reach wide audiences and enhance public knowledge. In this way, it is possible to ensure that persons involved in public participation in environmental matters have sufficient knowledge on how to participate, but this also recognizes that the responsiveness of the authorities is

[39] *Id.* para. 8 ("Environmental information will be available to the public for inspection free of charge. Any person requesting information will be provided with adequate facilities for obtaining copies of such information, subject to copyright provisions, on payment of cost of reproduction and dissemination, if appropriate. In specifying payments, a fee waiver will be considered in cases where the information is to be used in the public interest and disseminated to the public, since this may be viewed as cost-sharing with the authorities.").

[40] *Id.* para. 13 ("ASEM members will encourage entities whose activities have or possibly have an adverse impact on the environment to report regularly to the public on the environmental impact of their activities in order to show their efforts of mitigation.").

[41] *Id.* para. 14 ("Public distribution of information stemming from such voluntary schemes as eco-audits and management systems (e.g. EMAS and ISO14001) will be encouraged, as will eco-labeling schemes, such as the various regional and national eco-labels, for environmentally friendly products.").

[42] *Id.* para. 19 ("ASEM members will promote participation of the public, regardless of gender, cultural or ethnic identity, language, citizenship, nationality or domicile, in policy-making with environmental implications….").

[43] Roselita C. Paloma, *Environmental Law-Making with a Difference*, presentation at the AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, *available at* www.aeetc.org/int_output.htm (last visited July 7, 2002). In the Nordic countries, public hearings are frequently organized in connection with the preparation of bills, and both preparatory material and bills are available at websites of the government or the parliament. *E.g.*, www.valtioneuvosto.fi/vn/liston/base.lsp?k=en; www.finlex.fi/english/index.html (for approved legislation, including revisions) (last visited July 7, 2002).

[44] Experiences from the United Kingdom, *available at* www.the-environment-council.org.uk/dialogue/mn_dialogue_casestudies.shtml (last visited July 8, 2002); *see* Julie Fisher, NGOs and the Political Development of the Third World 48-50 (1998).

[45] Good Practices Document, *supra* note 3, para. 21 ("Before decisions possibly affecting or significantly affecting the environment are taken, ASEM members will introduce measures and procedures to ensure that the public's opinion is solicited and taken into account, including the views of environmental organizations and other interest groups."); *id.* para. 22 ("ASEM members are encouraged to establish formal and informal networks and other consultative processes to facilitate the involvement of environmental organizations and other interest groups in decision-making processes having significant environmental implications and to eliminate impediments or obstacles to public participation.").

equally important.[46] A high educational level of both the public and the authorities also reduces the risk of people being penalized for participatory activities that are lawful.

There is a need in many ASEM countries to raise both public awareness and the level of technical skills used to provide opportunities for public participation. This need is emphasized in the public participation section of the Document. Capacity building in the field of public participation is encouraged through recommendations to train public officials and educate the public about rights and responsibilities in participation.[47] EIAs are mentioned as an important means of participation in planning, and also reflect participation at an early stage when options are still flexible.[48] Participation in decisionmaking, on the other hand, is connected with the approval, permitting, and licensing of activities and the preparation of policies, plans, and programs.[49]

C. Access to Justice

The section on access to justice is very brief. It includes two guiding principles, which are fairly broad in scope. First, in addition to the general recommendations for ASEM members to promote practices where a natural or legal person may seek judicial or administrative review related to access to information or right to participate, the Document provides a recommendation on the characteristics of processes that enable access to justice.[50] Second, this section also recommends that the proceedings are "fair, open, transparent, and equitable" and that they are timely.[51]

Although the recommendations are clear and broad, they do not provide the details of how access to justice should be ensured. This vagueness reflects the different situations and opinions among the ASEM partner countries with respect to access to justice in environmental matters.

In the first distributed draft, the issue of legal standing was explicitly mentioned.[52] However, some representatives of ASEM partners felt that the consequences of the recommendation were difficult to grasp and it was therefore deleted in the final draft. This deletion reflects the fact that legal standing has traditionally been given a relatively narrow interpretation in many countries, i.e., appeals are possible only for those who can prove a direct material (i.e., economic) interest.

D. Implementation of the Good Practices Document

The implementation section in the Document reiterates the need for an appropriate legislative framework, practical measures, and capacity building. Some of the recommendations may be quite demanding in practice and could, if fully implemented, require important regulatory reforms.

The implementation of the Good Practices Document is closely linked with its draft status. As long as the Document is a draft, the Document cannot be implemented as a finalized document, although many of the individual measures and recommendations can be undertaken with the Document serving as a frame of reference.

Although the Document is nonbinding and establishes no obligations to modify national legislation, it

[46] *Id.* para. 20 ("ASEM members recognize that effective participation of the public will not occur unless there is effective internal communication and responsive management within the government authorities involved.").

[47] *Id.* para. 25 ("The relevant authorities will promote training of public officials to improve their understanding of their responsibilities in granting the public access to information and facilitating public participation in environmental decision-making.").

[48] *Id.* para. 23 ("Consultations will take place early in the decisionmaking process, at a stage when options are still open and public input can effectively be received. ASEM members will establish transparent procedures by providing relevant information, and permitting sufficient time for public discussions. Environmental impact assessment (EIA) is an environmental planning tool that provides a consultative process in which the public may be involved in decisions that could affect them and the environment. Where appropriate, the relevant authorities will give the public additional assistance and explanations.").

[49] *Id.* para. 24 ("ASEM members will ensure public participation of all concerned in the approval, permitting and licensing of activities that significantly affect the environment and in the preparation of policies, plans and programmes, preferably by means of explicit rights governing relevant administrative procedures. Such rights include, inter alia, the right to be heard, the right to propose alternatives, the setting of specified time limits, the right to a decision with justifications and the right of recourse.").

[50] *Id.* para. 28 ("ASEM members will promote an approach where a natural or legal person may seek judicial or administrative review in accordance with the relevant national legal system if the person believes that his or her request for information has been wrongfully refused or ignored, the response of the public authority to the request has been inadequate, or that he or she has been overcharged for the request, or if the person has been denied access to public participation.").

[51] *Id.* para. 29 ("Suitable legal guarantees will ensure that the judicial and administrative proceedings are fair, open, transparent and equitable and fall within specified time limits.").

[52] Good Practices Document, January 2001 draft, para. 33 ("It is desirable that legal standing will be given a wide interpretation in proceedings involving environmental issues.").

does articulate the need for regulations.[53] The Document further encourages national institutions to follow the proposed good practices and suggests that this will require a procedural and institutional basis.[54] The Document suggests a framework for the collaboration of ASEM partners in applying the recommendations within their national practices, and also encourages active cooperation among ASEM partners in the field of public involvement in order to ensure continuous improvement of practices and applications.

The future cooperation and exchange of experiences will require a special effort from the ASEM. However, the ASEM Foreign Ministers' Meeting of June 6-7, 2002, decided that the AEETC would be closed after its pilot phase.[55] Without the AEETC to collect and distribute information, it will be difficult to ensure that the activity continues in a systematic manner. Yet, the AEETC International Conference on Public Participation,[56] held in June 2002, demonstrated that there are a number of institutions, including those of the United Nations and several NGOs, that are working to promote the exchange of experiences related to public involvement in the ASEM region.

III. FUTURE ROLE OF THE GOOD PRACTICES DOCUMENT

Due to the current informal nature of the ASEM, it is not clear what status the Document will ultimately be given. The political meetings of the ASEM have expressed appreciation for the progress of the public involvement work and the Document, but the Document has not yet been the subject of a formal political negotiation by the ASEM partners. This option is not, however, out of the question. For example, the ASEM Ministerial Conference on Cooperation for the Management of Migratory Flows between Europe and Asia resulted in a declaration[57] similar in format to the Good Practices Document. Indeed, the Document still may become formally endorsed at a future ministerial meeting.

The potential role of the Document can be compared to the role of the Aarhus Convention in Europe. Although 38 percent of the countries that signed the Aarhus Convention are EU members (that is, 15 countries of 40 signatories), only 2 EU member countries are among the 21 countries that have ratified or acceded to the convention.[58] Currently, Denmark and Italy are the only EU countries that have ratified the Convention. Interesting patterns can be seen when these results are reflected against the general ratification status of the Convention. Most of the countries that have already ratified the Aarhus Convention are those which have limited traditions in public involvement due to their history.[59] Many are states that used to be part of the Soviet Union. These countries have been forced to revise their overall legislation due to political changes. This has provided them with opportunities to develop their national legislation to generally follow the requirements of the Aarhus Convention.

A study on the policies and practice of public involvement in European ASEM members was undertaken as a part of the process in developing the Document.[60] The study compared the hard law and soft law in 14 EU countries and analyzed 18 cases from various regions and sectors. In connection with the study on national legislation and soft law, the attitudes towards the Aarhus Convention were examined. In many EU member states, participatory procedures and other forms of involvement are well developed for many, but not necessarily all, sectors of society. There are various historical reasons for this situation, and the process around the Aarhus Convention has highlighted these discrepancies.[61] Although general legislation exists in most countries on all three pillars of public involvement, there are frequently gaps with respect to sectors and specific

[53] Good Practices Document, *supra* note 3, para. 31 ("ASEM members will distribute these elements of good practice to encourage national institutions to follow them."); *id.* para. 32 ("The effective implementation of access to environmental information and public participation in decision-making processes with environmental implications calls for the establishment of clear regulations providing procedural and institutional guarantees and programmes for their proper enforcement.").

[54] *Id.*; *see also id.*, para. 33 ("Where appropriate, ASEM members will set up organizational structures to facilitate the effective operation of the above guarantees.").

[55] Chair Statement, Fourth ASEM Foreign Ministers' Meeting, held in Madrid on June 6-7, 2002, para. 5, *available at* europa.eu.int/comm/external_relations/asem/min_other_meeting/for_min4.htm (last visited July 6, 2002).

[56] AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, *available at* www.aeetc.org/int_publ.html (last visited July 4, 2002).

[57] ASEM Ministerial Conference on Cooperation for the Management of Migratory Flows between Europe and Asia, held at Lanzarote on Apr. 5 2002, at Declaration, *available at* europa.eu.int/comm/external_relations/asem/min_other_meeting/mig.htm (last visited July 7, 2002).

[58] UN/ECE website for the Aarhus Convention, *available at* www.unece.org/env/pp/ (last visited July 8, 2002).

[59] Magda Toth Nagy et al., *Regional Overview: Central and Eastern Europe – Legal and Institutional Framework and Practices for Public Participation*, *available at* www.rec.org/REC/publications/PPDoors/CEE/overview1.html (last visited May 15, 2002).

[60] Eeva Furman et al., Signals for the Future Policy Support and Practice Concerning Public Involvement in Environmental Issues in the Member States of the European Union, AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, *available at* www.aeetc.org/int_output.htm (last visited July 4, 2002).

[61] *Id.*

issues. The Good Practices Document underscores these gaps further, even though it does not specify new requirements relative to the Aarhus Convention.

Although some countries have been able to rapidly develop the legal basis for ratifying the Aarhus Convention, the lack of legal tradition often leads to difficulties in implementing the requirements of the Convention in practice. The ratification of the Convention has, however, compelled these countries to address the matter nationally.[62] The Convention has also enhanced the activities of many NGOs in these countries both at a national and at an international level.[63]

The Good Practices Document could have similar impacts on the ASEM partners by forming a basis for pilot projects and as a reference document in legislative development. However, the lack of an international institutional framework for developing and advancing the Document may be a serious barrier for its continued effectiveness. Within the UN/ECE region, the UN/ECE has had an important role in providing material and maintaining the issue on the political agenda.[64] Since the ASEM is an informal process without a secretariat, the Good Practices Document lacks such an institutional champion. Therefore the effectiveness of the Good Practices Document in terms of true enhancement of public involvement will probably require that institutional players on the political scene adopt its key message. These parties might include the UN/ESCAP, the UNEP, the Asian Development Bank, and others, including international NGOs, which are able to play the role that the UN/ECE, the EU, the OECD, and many environmental NGOs have played in securing the position of public involvement on the political agenda in Europe.

It seems that the United Nations organizations are best suited for providing an institutional basis for the Document and the related activities. In particular contrast with the informal ASEM, the United Nations is more suited and accustomed to developing formal international documents.

Transforming from a non-status document to a non-binding but endorsed Guiding Principles Document to something more binding is a slow process. Binding international law can be viewed as a final goal. There is, however, evidence that soft law with high political status can contribute significantly to the development of national legislation and practices—and this may be done more rapidly and with a more modest commitment of resources. The Sofia Guidelines certainly led to considerable activities at the national level in the ECE region, and similar processes are also ongoing, especially within the OECD.[65]

The lack of ratifications of the Aarhus Convention among the European ASEM partners indicates that the development of laws and institutions ensuring public involvement can take a long time. Even after the legal guarantees have been developed for public involvement, gaps in the practical application of the legislation prevail. Institutional arrangements may be inadequate for genuine involvement, and there may be a lack of capacity to undertake the tasks. There is still a need for pilot studies and recommendations that would support continuous improvement after the formal adoption of legislation that supports extensive public involvement. The Good Practices Document will hopefully support this kind of development among the ASEM partners.

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[62] See www.unece.org/env/pp/national/rec.pdf (last visited July 4, 2002) (activities by organizations supporting the implementation of the Aarhus Convention).

[63] *Id.*

[64] *Id.*

[65] The OECD Public Management Programme (PUMA), *available at* www1.oecd.org/puma/ (last visited July 7, 2002).

PART III

INTERNATIONAL INSTITUTIONS

INTRODUCTION

To varying degrees, international institutions and processes have engaged the public in decisions about proposed activities and projects as well as broader policy and legal issues. While some of these efforts date back almost a century, most measures have been adopted in the past ten to fifteen years in direct response to public pressure. This part examines developments and experiences of advancing public involvement in a range of financial, trade, human rights, and environmental bodies.

The first three chapters address transparency, public participation, and access to justice in financial institutions. Bernasconi-Osterwalder and Hunter provide a comparative assessment of norms and practices for public access to information, participation, and justice in international financial institutions. They consider the institutions in the World Bank Group, as well as the various regional development banks in Africa, the Americas, Asia, and Europe. The process of opening up these institutions has been inconsistent, but the authors illustrate how most of these development banks have made some steps toward involving the public in each of the three pillars.

In the chapter on the African Development Bank (AFDB), Fall examines practical considerations in implementing the various AFDB guidance and policy on public engagement. Public access to information and participatory procedures are recent developments at the Bank, and the practice thus far is promising but inconsistent. This inconsistency is highlighted in the case study of the Middle Bani Plains Development Project in Mali, where a lack of transparency and public participation led to conflict. Since the Bank did not have an internal mechanism to investigate claims, this conflict escalated. The project is now suspended, and the AFDB is in the process of developing an inspection panel that is similar to the World Bank Inspection Panel discussed by Bernasconi-Osterwalder and Hunter.

The third chapter on financial institutions focuses on official export credit agencies. In this chapter, Rich and Carbonell analyze efforts to make these institutions more transparent, participatory, and accountable. Perhaps due to their more diffuse nature and the more parochial interests of governments in them (many nations have their own ECAs, including 12 parties to the Aarhus Convention), ECAs have withstood many of the NGO and community efforts to require them to engage affected individuals, communities, and organizations more effectively. Rich and Carbonell highlight the steps taken that have been made in certain countries as well as some recent regional developments (such as the Aarhus Convention and OECD processes) that might shape the way that ECAs function. This chapter also sets forth the various reasons for improving public involvement in the process by which ECAs lend their support to privately financed projects, including the need not to undermine the modest gains in having the international financial institutions incorporate public involvement and sustainability measures.

Moving from financing to trade, Gertler and Milhollin consider the troubled history of public involvement in the World Trade Organization. While the WTO has made some tentative steps to increase transparency, it maintains that public participation should be through national delegations. Moreover, recent attempts to provide an avenue for nongovernmental organizations to submit friend-of-the-court briefs before dispute resolution panels were loudly rejected. This traditional, statist approach—in which states are deemed to be the only entities with a legitimate interest in the WTO—to the international organization stands in stark contrast to the other international institutions and processes examined in this volume. Gertler and Milhollin conclude that little progress will be made in the foreseeable future to involve civil society organizations in WTO policymaking processes and empower them to participate in the dispute resolution process.

The next three chapters examine public involvement in various international processes and institutions, focusing on particular environmental media and issues, namely climate change, international watercourses, and mining. Eddy and Wiser analyze the emerging framework for engaging the public in the Clean Development Mechanism of the Kyoto Protocol. They review the basic rules that have been developed under the Marrakech Accords to provide access to information and public participation, and identifying gaps and unresolved issues. They also consider the limited opportunities for access to justice. As the framework is still evolving, Eddy and Wiser offer some recommendations from NGOs to fill the procedural gaps.

In the following chapter, Bruch and Fried bring together norms and institutional practices that ensure public access to information, participation, and justice

in the management of international watercourses. Drawing upon a variety of instruments and international water management authorities from around the world, this chapter highlights the rapidly emerging norms and how they have been implemented from the Mekong River to the North American Great Lakes to the Danube River. While access to information and public participation are the most developed, Bruch and Fried also describe a growing body of norms and practice in ensuring access to courts or independent investigative bodies in matters relating to international watercourses.

In the area of mining and minerals policy, Orellana considers local, regional, and global fora in which members of the public and NGOs have been able to participate. At the national and local levels, Orellana examines how civil society has been able to obtain information (for example, through the constitutionally mandated *habeas data*), participate in decisions, or seek judicial redress in matters related to minerals. Regional examples from Africa, the Americas, and Asia-Pacific are also mentioned, but they appear to be the least developed. A number of international and global processes have sought to engage affected communities and other civil society actors. Orellana considers the United Nations Environment Programme's Cyanide Code; the Mining, Minerals, and Sustainable Development Project (MMSD); and the certification of conflict diamonds, among others. In many instances, however, initial promises of collaboration between industry and civil society collapsed as the processes failed to adequately incorporate civil society perspectives.

The part, and this volume, concludes with an examination of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In this chapter, Jean-Pierre focuses on the access-to-justice opportunities that this hemispheric body presents to promote the protection of human rights, including those relating to the environment. Access to information and public participation are also highlighted. Analysing a case that the Court adjudicated, Jean-Pierre concludes that public involvement is fundamental to the Inter-American System for Human Rights.

DEMOCRATIZING MULTILATERAL DEVELOPMENT BANKS

Nathalie Bernasconi-Osterwalder and David Hunter [*]

In the past few years, thousands of people have gathered regularly at the annual and spring meetings of the World Bank Group and the International Monetary Fund (IMF) held in Washington DC, in Prague, and elsewhere to protest against the ways these institutions conduct business.[1] These events demonstrate the public's concern for the lack of democracy in the international financial arena and suggest that international financial institutions will continue to lose legitimacy unless they become more transparent and accountable to both the people affected by their projects and those whose tax money supports them.

Traditionally, only nation-states have had the right to participate in the creation and implementation of international law.[2] This model led to non-transparent international negotiations and institutions managed behind closed doors. However, in the past decades, civil society and some governments have begun to demand more transparency and participation wider in international affairs. As a consequence, a number of intergovernmental organizations—including various bodies of the United Nations (UN), international financial institutions, and trade regimes—have gradually moved toward more open and participatory governance.

This chapter will focus on these trends within multilateral development banks (MDBs), including primarily the World Bank Group and the major regional development banks. Section I reviews the emerging international recognition of the importance of public participation. Section II examines the emerging norms, mechanisms, and practices for promoting public access to information, participation, and justice in MDBs. Section III concludes by setting forth a proposal for an International Administrative Procedures Treat which could formalize and crystallize the largely ad hoc processes that have evolved to advance public involvement in international institutions.

I. RIO DECLARATION PRINCIPLE 10: ACKNOWLEDGING THE IMPORTANCE OF PUBLIC INVOLVEMENT

Although many governments and international institutions had for decades recognized the importance of public participation in environmental decisionmaking, only in 1992 at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro did the world community officially acknowledge public participation as a critical component to effective development. Principle 10 of the Rio Declaration on Environment and Development[3] explicitly endorses the necessity of access to information, access to decisionmaking, and access to justice in environmental decisionmaking. In the decade since Rio, public involvement in domestic decisionmaking has increased worldwide. Both countries and regions have undertaken initiatives to promote public involvement, as part of the recent emphasis on good governance.[4] In short, people all over the world want to know what their governments are doing and have a say in those decisions that affect their lives.

The same is increasingly true in the area of international policymaking. The public has come to conceive international institutions as functioning under outdated models of governance and diplomacy. "Post-feudal society set in amber" is how British scholar Philip Allott

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[1] *See Seattle Protesters Are Back, With a New Target*, N.Y. TIMES, Apr. 9, 2000; *World Bank and IMF Cut Short Prague Meeting*, GUARDIAN, Sept. 28, 2000; *George Washington University to Shut Sown During IMF/World Bank Protests*, WASH. POST, Sept. 7, 2001.

[2] For a history on participation of NGOs, see Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT'L L.* 2, 183-286 (1997).

[3] Rio Declaration on Environment and Development, U.N. Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26 (vol. I) (1992), 31 I.L.M. 874 (1992).

[4] *See* pt. II of this volume.

describes the international system, resisting the revolutionary changes of the Enlightenment that democratized national governance and grounded the root of government authority in the individual citizen.[5] International institutions, however, have made little room for direct citizen involvement and, thus, their decisions increasingly lack legitimacy. Reflecting these concerns, Agenda 21[6], a detailed action plan for realizing the Rio Declaration's goals, provides that the "United Nations system, *including international finance and development agencies*, and all intergovernmental organizations and forums," should enhance or establish procedures to draw upon the expertise and views of civil society and to provide access to information.[7]

II. PUBLIC ACCESS TO INFORMATION AND PARTICIPATION IN THE DECISIONMAKING PROCESSES OF MULTILATERAL DEVELOPMENT BANKS[8]

The World Bank Group is comprised of four separate, but related, institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA). IBRD and IDA provide loans to support public-sector projects. Together IBRD and IDA are most frequently referred to as the "World Bank." The primary difference between the IBRD and IDA is that IDA provides concessional or low-cost loans to the poorest countries (those having per capita annual income below US$1465 (in 1994 dollars). The IBRD provides loans at a higher rate (although at a rate that is still below market) to other developing countries and to countries in economic transition. The IFC and MIGA provide financial support to private sector projects in all developing countries or countries in economic transition. The IFC makes loans and equity investments in private sector projects, whereas MIGA provides insurance against political risks faced by private sector investments in developing countries (i.e., risks from civil unrest or war).

The Bank is made up of member countries that have agreed to the Bank's By-Laws and Articles of Agreement.[9] The member countries are represented in broad policymaking by a Board of Governors that meets once a year. Day-to-day policy decisions at the World Bank as well as decisions on specific loans are made by a 24-member Board of Executive Directors that meets several times a week at the Bank's headquarters in Washington, DC. Voting at the Executive Directors and at the Board of Governors is based on financial shareholding percentages, which are loosely based on a country's share of the global economy. The United States has the largest voting share of 17 percent. The seven largest industrial countries (the G-7) together comprise 45 percent of the voting shares at the Bank, and all of the donor countries together comprise a solid majority of the vote. Typically, however, decisions are made by consensus. The Board meetings and decisions are not open to the public, nor are the meeting minutes ever made public. Although most countries are grouped together and share an executive director, several larger countries, including the United States, have their own representative on the Board of Executive Directors.

The World Bank has a staff of over ten thousand. The Bank management is presided over by the World Bank President who also acts as the Chair of the Board of Directors. The Bank President, currently James Wolfensohn, is traditionally chosen by the United States. The management is responsible for the day-to-day operations of the Bank, subject to the policies and other decisions set forth by the executive directors or member governments.

In addition to the World Bank, six regional development banks exist to facilitate development in specific regions. These include the Inter-American Development Bank (IADB), Asian Development Bank (ADB), North American Development Bank (NADBank), African Development Bank (AFDB), European Bank for Reconstruction and Development (EBRD), and the Mid-East Development Bank. For the most part, the regional development banks are structured and operate in essentially the same way as the World Bank, although significant regional differences shape the politics, priorities, and approaches of the different banks.[10] For example, the ADB is much more heavily influenced by Japan than the other banks. Similarly, the EBRD is heavily dominated by the Western European donors, particularly the United Kingdom, Germany, and France.

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[5] Philip Allott, International Law and International Revolution: Reconceiving the World, lecture presented at Hull University (1989).

[6] Agenda 21, U.N. Conference on Environment and Development (UNCED), U.N. Doc. A/CONF.151/26 (vols. I, II, III) (1992).

[7] *Id.* art. 27(9).

[8] The following general description of the MDBs is adopted with permission from DAVID HUNTER ET AL, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1486 (2nd ed. 2002).

[9] *See, e.g.,* International Bank for Reconstruction and Development, Articles of Agreement, as amended effective February 16, 1989, *available at* web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040600~menuPK:34625~pagePK:34542~piPK:36600,00.html (last visited July 23, 2002).

[10] Overviews of the structures of all the institutions examined here are available on the MDBs' respective websites: www.worldbank.org; www.ifc.org; www.miga.org; www.adb.org; www.afdb.org; www.iadb.org; www.ebrd.org.

TABLE 1: MDB DISCLOSURE POLICIES

MDB	DISCLOSURE POLICIES AS OF JULY 2002	ADOPTED
World Bank [14]	The Disclosure of Information[15]	2001
IFC	Policy on Disclosure of Information[16]	1994
ADB	Confidentiality and Disclosure of Information Policy[17]	1994[18]
AFDB	Disclosure of Information Policy Paper[19]	1998
EBRD	Public Information Policy[20]	2000
IADB	Disclosure of Information[21]	1994

MDBs are the world's largest sources of development assistance.[11] In fiscal year 2001, the World Bank alone provided US$17.3 billion in loans to its client countries.[12] The MDBs are also the conceptual leaders for international development, leveraging their influence not only through their financial strength but also through intellectual leadership.

Given their leadership positions, MDBs should guarantee transparency and accountability through formalized processes with respect to all activities. At a minimum, such processes should give individuals and groups (1) the opportunity to obtain information, with only limited, explicitly defined exceptions; (2) the opportunity to participate in the decisionmaking process, including the right to timely notification and to having input taken into consideration; and (3) the opportunity to independent review when banks fail to comply with their duties to provide access to information or decisionmaking.

A. Access to Information

In the past decade, the public's access to information in MDBs has improved significantly, in large part due to strong external pressure. As one advocate noted: "Today's debates between MDBs and their critics usually lie in the definitions of *how much* information can be released for practical, political, or proprietary reasons, as opposed to *whether* information should be released at all."[13]

Each of the MDBs has adopted formal, written policies setting out clear standards for the release of information, particularly information relating to project design and preparation. The adoption of written policies replaced what were formerly ad hoc and often inconsistent decisions on public disclosure. These formal policies have introduced a measure of accountability and predictability in access to information issues.

[11] By comparison, foreign direct investment (FDI) expanded in 2000 to a global total of $1.3 trillion, with the developing countries receiving 19 percent of the total. *See* United Nations Conference on Trade and Development (UNCTAD), 2001 Investment Report. This growth in foreign investment has been reflected in the growth in importance of the IFC (lending and equity financing) and MIGA (risk insurance) in the past decade. Efforts to require minimum environmental and social standards at these institutions influence not only the specific private sector project involved but also serve as more general standards for foreign investors operating in developing countries.

[12] *See* www.worldbank.org (last visited July 9, 2002).

[13] Chris Chamberlain, Public Access to Information: The State of Disclosure at the Multilateral Development Banks (1998), *available at* www.bicusa.org/publications/stateofdisclosure.htm (last visited July 9, 2002).

[14] The World Bank's Disclosure Policy applies to the IBRD and IDA as well as to the disclosure of documents prepared for projects financed or co-financed from trust funds under the Global Environment Facility (GEF) and administered by the Bank, including the Global Environment Trust Fund.

[15] *Available at* www1.worldbank.org/operations/disclosure (last visited 22 July 2002) [hereinafter World Bank Disclosure Policy]. Note that, as of July 4, 2002, the revised Disclosure Policy, which entered into force on January 1, 2002, was not available on the World Bank's website.

[16] *Available at* www.ifc.org/enviro/enviro/Disclosure_Policy/disclosure.htm (under "POLICY") (last visited July 9, 2002) [hereinafter IFC Policy on Disclosure of Information].

[17] *Available at* www.adb.org/Documents/Policies/Confidentiality_Disclosure/default.asp (under "General Policy in Disclosure") (last visited July 9, 2002) [hereinafter ADB Confidentiality and Disclosure of Information].

[18] In 1994, the ADF produced the Confidentiality and Disclosure of Information Policy Paper. It is not clear from the ADB website whether the proposed policy has entered into force. However, according to an ADB staff contact, the policy took effect Jan. 1, 1995. Also according to the contact, there are no formal plans for a review of the policy. However, in light of the general lack of understanding of the ADB's disclosure policy, the ADB is preparing an education campaign. The Bank will prepare a listing of all documents at the ADB, their disclosure status, who is in charge of the disclosure, and who to contact if there is a problem. A brochure will be prepared for staff, NGOs, libraries, schools, etc.

[19] *Available at* www.afdb.org/about_adb/disclosure.htm (under the title "Policy") (last visited July 9, 2002) [hereinafter AFDB Disclosure of Information Policy].

[20] *Available at* www.ebrd.com/about/index.htm (last visited July 7, 2002) [hereinafter EBRD Public Information Policy].

Most of the information disclosure policies at the various MDBs are similar in form, although the standards for disclosing some types of documents vary. While all policies set out a presumption in favor of disclosure,[22] in practice there is no such presumption. In part this is because the disclosure policies all identify lists of specific documents that are to be disclosed. As a result, MDB staff tend to presume that documents not on the list may not meant be disclosed.[23] The presumption in favor of disclosure also runs counter to a deep-seated culture of secrecy at the Bank, in which staff are used to designing their projects in consultation with only a relatively small group of members of the borrowing country's finance ministry.

1. Availability of Documents

The disclosure policies specify which categories of information are, and which are not, available to the general public or to interested individuals and groups.[24] The types of information that are listed as available to the public are subject to explicit confidentiality and sensitivity exceptions. Private sector financing, such as by the IFC, for example, is generally (but not always) subject to more restrictive information disclosure than public sector lending.[25] Currently, the only project information available at the IFC is a brief Summary of Project Information (SPI) released only thirty days prior to the Board meeting[26] and, where applicable, Environmental Assessments (released 60 days prior to the Board meeting) or Environmental Review Summaries (released 30 days prior to the Board meeting).[27] In contrast, the World Bank also releases, among other things, an initial Project Information Document (PID) in the early identification phase of a project as well as monthly operational summaries and Impact Evaluation Reports prepared after the project is closed.[28] The Annex indicates which documents are available during World Bank and IFC project cycles.[29]

To varying degrees amongst the different MDBs, the availability of documents—under pressure of civil society—is gradually increasing.[30] However, among the wide range of documents now available from certain MDBs, most are released only after the project commitments have been made, that is, generally after approval of the Boards of Directors. This calls into question the timeliness of the access to information. All of the disclosure policies examined here, including the World Bank's most recent policy,[31] generally provide access to final documents, rather than documents in draft form. This denies the public access to information in time for meaningful participation in bank decisions, including project design and policymaking.

For transparency to be effective, denials of access to information should only be possible on the basis of a list of clearly defined exceptions. All of the MDBs' policies examined here include a list of well-defined types of information that are not publicly available.[32] However, in addition to the list of exceptions to disclosure, the policies also set out less clearly defined derogations. The World Bank's policy, for example, states that if documents, which are publicly available according to the policy, include confidential or sensitive information or information that may adversely affect relations between countries and the Bank, such information may remain confidential. In case of "extensive issues of confidentiality, sensitivity or adverse relations with the Bank," the Bank may restrict the release of the entire document.[33] Elsewhere, the same policy also provides that "[p]ublic availability of some information may be precluded on an ad hoc basis when, because of its content, wording, or timing, disclosure would be detrimental to the interests of the Bank, a member country or Bank staff . . . , for example, because of the frankness of views expressed,

[21] IADB, Disclosure of Information, OP-102, *available at* www.iadb.org/cont/poli/OP-102E.htm (under "POLICY") (last visited July 9, 2002) (last visited May 23, 2002) [hereinafter IADB Disclosure of Information].

[22] *See* World Bank, Policy on Disclosure of Information, supra note 15; ADB Confidentiality and Disclosure of Information, *supra* note 17; AFDB Disclosure of Information Policy, *supra* note 19, para. 1; EBRD Public Information Policy, *supra* note 20, para. 1(a).
The IADB does not explicitly refer to the "presumption in favor of disclosure." However, by stating that "[i]nformation of the Bank's operational activities will be made available to the public in the absence of a compelling reason for confidentiality," the policy also sets such a presumption, at least with respect to operational information; IADB Disclosure of Information, *supra* note 21.

[23] *See* GRAHAM SAUL, THE ONGOING STRUGGLE FOR WORLD BANK POLICY – THE OUTCOME OF THE INFORMATION DISCLOSURE POLICY REVIEW 4 (2001), *available at* www.bicusa.org/mdbs/wbg/Info%20Disclosure/infodiscupdate.htm (last visited July 9, 2002).

[24] *See*, *e.g.*, World Bank Disclosure Policy, *supra* note 15, para. 2 and pt. III.

[25] *See* IFC Policy on Disclosure of Information, *supra* note 16, at 3; *see also* Inter-American Investment Corporation (IIC), Policy on Disclosure of Information, CII/GN-129-3 (1999), *available at* www.iadb.org/iic/english/policy/gn1293.htm (last visited July 9, 2002).

[26] *See* IFC Policy on Disclosure of Information, *supra* note 16, at 3.

[27] This will depend on whether the project is classified as a Category A or B project. *See infra* section II.B.2.

[28] *See* World Bank Disclosure Policy, *supra* note 15, paras. 15, 17.

[29] This table was prepared with the assistance of Esther Seng and is based on a table by the World Bank, available at www.worldbank.org/html/pic/projectcycle.htm, and on an overview by the IFC, available at www.ifc.org/proserv/apply/cycle/cycle.html.

[30] See, for example, a matrix of the Disclosure Policy Revisions (Aug. 2001), *available at* www1.worldbank.org/operations/disclosure/ (last visited July 9, 2002).

[31] On the World Bank's new disclosure policy, see *World Bank Agrees to Further Disclosure but Stops Short of Public Board*, WALL ST. J., Sept. 6, 2001; *Critics Get World Bank to Ease Disclosure Policy*, WASH. POST, Sept. 6, 2001; *World Bank Set to Allow Some Public Access*, FIN. TIMES, Aug. 31, 2001.

[32] *See*, *e.g.*, World Bank Disclosure Policy, *supra* note 15, paras. 82-89.

[33] *Id.* para. 52.

or it might be premature."[34] Similarly, the AFDB, excludes from disclosure, "information concerning the Bank Group's operations, including proposed projects, whose public disclosure might prove prejudicial to the interests of the Bank Group or relations between the Bank Group and a member state."[35] 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.

Perhaps most disturbingly, the IFC excludes from disclosure all confidential business information, which is defined to be any information provided by the business and labeled confidential.[36] Incredibly, businesses are able to exempt any information from disclosure by citing confidentiality reasons without any independent assessment whether the information should in fact be classified as confidential. This exemption has been used to keep critical information about the IFC's operations out of the public's hands and should be narrowed to include only information that is proprietary or could otherwise provide an unreasonable business advantage.

2. Board Meetings

The meetings of the Boards of Directors of the MDBs examined here are closed to the public and to journalists. Moreover, neither transcripts of these meetings nor minutes are disclosed. At the World Bank, the chairman's summaries of "Concluding Remarks" are made available, but only in restricted areas[37] and subject to the executive directors' approval.[38] The summaries are very brief and do not include detailed information. Moreover, they do not attribute comments to specific executive directors, making it impossible for citizens to know how they are being represented. Some governments release the written statement of their executive directors, but little can be learned about the discussions at the Bank.

3. Effectiveness of Access to Information

Under the disclosure policies examined here, access to information is available to any individual, public interest organization, or business group, with no necessary demonstration of interest in the information and regardless of nationality or the reasons for the request. However, the policies lack the precision of procedures and timeframes for responding to requests for information.[39] In addition, none of the policies require that refusals to provide information be in writing nor that they state the reasons for the refusal.[40]

In addition, insufficient attention has been paid by MDBs to the importance of the language in which documents are available. According to a recent World Bank press release, "[f]urther work will investigate options for increasing translation of documents to ensure outreach to affected people …."[41] Currently, none of the disclosure policies address the issue of language requirements except in the context of environmental impact assessments.[42] Moreover, despite being asked for nearly ten years, the World Bank has yet to translate all of its safeguard policies as well as its information disclosure policy into the official UN languages.

Access to information is incomplete so long as the public is not informed about its rights of access to information. Banks should inform the public of its rights to information and how to exercise those rights. The exercise of rights should be facilitated through the creation of easily accessible points of contact. To address this problem, MDBs have established central and country-based points of contact. Relying on its 1993 Disclosure Policy, the World Bank, for example, established the Washington-based InfoShop and in-country Public Information Centers (PICs) as central contacts for persons seeking to obtain Bank documents. Documents can be obtained electronically or in hard copy at these centers as well as field offices. Certain documents can be obtained free of charge; for others, a standard charge is required for hard

[34] *Id.* para. 90.

[35] AFDB, Disclosure of Information Policy Paper, *supra* note 19.

[36] *See* IFC Policy on Disclosure of Information, *supra* note 16, annex 1.

[37] *See* World Bank Disclosure Policy, *supra* note 15, para. 66 (setting forth a list of concluding remarks and summaries subject to disclosure).

[38] *Id.* paras. 9, 14, 28.

[39] *See* CHAMBERLAIN, *supra* note 13 (examining practices of disclosure at various MDBs).

[40] The AFDB's Disclosure of Information Policy is the only policy to address the issue of giving reasons in case of restrictions to disclosure. It states: "It is intended that in all cases of restriction or non-disclosure, Bank Group staff explain to those seeking information the reasons for non-disclosure to the extent necessary, in light of the restriction on disclosure, to avoid the appearance of evasion." *See* AFDB Disclosure of Information Policy, *supra* note 19, para. 2. The AFDB's Policy, like all other policies examined here, does not require that denials be in writing.

[41] *See* lnweb18.worldbank.org/news/pressrelease.nsf/673fa6c5a2d50a67852565e200692a79/f54075ef30ebe01285256ac000708f8a? OpenDocument (last visited July 9, 2002) ("Further work will investigate options for increasing translation of documents to ensure outreach to affected people, strengthening Public Information Centers, and involving communications experts more effectively in the dissemination and outreach elements of the new policy.").

[42] While MDB disclosure policies are silent, the environmental policies of some MDBs explicitly include language requirements. *E.g.*, World Bank Environmental Assessment Policy, para. 16, *available at* lnweb18.worldbank.org/essd/essd.nsf/Safeguard/EnvironmentalAssessment (last visited July 23, 2002).

copies. Regional MDBs have followed the World Bank's example.[43]

4. Review

As of July 2002, none of the Banks have established a specific review mechanism to ensure compliance with their duties to provide access to information.[44] However, as will be further elaborated below, some of the banks have established broader inspection mechanisms which can be used to review compliance with policies on the access to project-related information. The banks should actively inform the public of the availability of such a review mechanism in case of denial of access to information.

5. Recent Developments

Although none of the MDBs discussed here are currently conducting a formal review of their information disclosure policies, most are in the process of informally reviewing a range of issues. The World Bank, for example, is considering the review of its translations policies as well as procedures for releasing certain documents in draft form before Board consideration.[45] The World Bank will also be conducting "pilot" disclosure programs in a number of countries that agree to release a greater amount of information than required under the new disclosure policy.[46]

B. Participation and Consultation

In the past fifteen years, MDBs have begun to acknowledge the importance of engaging civil society in the development process and in policy dialogues as an essential precondition for effective poverty alleviation and sustainable development. The recognition that local participation enhances development effectiveness is reflected in a host of the MDBs' internal documents, ranging from internal policies and guidelines to resource books and handbooks.[47] However, none of the MDBs have adopted an overarching mandatory policy on participation. Public consultation is only assured in those projects that are covered by standards in other policies —i.e., in projects that significantly affect the environment, involuntarily resettle people, or affect the interests of indigenous peoples. Thus, consultation practices have generally developed ad hoc, designed at the discretion of the staff in response to the specific demands being made by outside critics. As a consequence, public participation processes have been inconsistent and their success has varied accordingly.

1. Lack of General Consultation Procedures

The broad range of MDB activities calls for different approaches in structuring public participation. Bank activities that significantly affect the lives of people in borrowing countries could be clustered into the following four groups: investment loans; policy-based loans; country programming and sector strategies; and Bank strategies, policies, and procedures.[48] In the past, con-

[43] The AFDB's public information center (PIC), for example, started its operations in 1998 in Abidjan, Ivory Coast. *See* Aboubacar Fall, *Implementation of Public Participation in African Development Bank Operations*, in this volume.

[44] Such a mechanism has been established by the United Nations Development Programme (UNDP), for example. In addition to providing for information disclosure, UNDP's disclosure policy creates a Public Information and Documentation Oversight Panel. The Oversight Panel's functions are both to ensure full implementation of the policy and to reconsider denials of requests for information. *See* UNDP Public Information Disclosure Policy, paras. 20-23, *available at* www.undp.org/disclose/info-new.htm (last visited July 23, 2002).

[45] For detailed information on that process, see www.bicusa.org/mdbs/wbg/info.htm (last visited July 9, 2002).

[46] For more information, see www.worldbank.org/html/extpb/annrep97/research.htm (last visited July 9, 2002). For information on the pilot disclosure program in Vietnam, see www.worldbank.org.vn/wbivn/tf_ta_idf/tf_ta_idf001.htm (last visited July 9, 2002).

[47] *See* World Bank, Consultations with Civil Society Organizations (CSOs): General Guidelines for World Bank Staff, *available at* wbln.0018.worldbank.org/Networks/ESSD/icdb.nsf/D4856F112E805DF4852566C9007C27A6/E4BC2886DC664564852568D2006D0D5A/$FILE/4271Consultations.pdf (last visited May 20, 2002); World Bank, Civil Society Participation in World Bank Country Assistance Strategies – Lessons from Experience, FY97-98, *available at* wbln0018.worldbank.org/essd/essd.nsf/d3f59aa3a570f67a85256cf00695688/ba289d4bcea17e2a852567ed004c4d9a?OpenDocument (last visited May 20, 2002); World Bank, GP 14.70 – Involving Nongovernmental Organizations in Bank-Supported Activities, *available at* wbln0018.worldbank.org/Institutional?Manuals/OpManual.nsf/toc1/1DFB2471DE05BF9A8525671C007D0950 (last visited May 20, 2002); World Bank, World Bank Operational Policies, Guidelines, and Good Practices, *available at* wbln0018.worldbank.org/essd/essd.nsf/d3f59aa3a570f67a852567cf00695688/c55320488d4562ac852567ed004c48d4?OpenDocument (last visited May 20, 2002); IFC, Doing Better Business Through Effective Public Consultation and Disclosure, Work with NGOs and Community-based Organizations, *available at* www.ifc.org.enviro/Publications/Practices/sectionb.pdf (last visited May 20, 2002); ADB, Cooperation Between the ADB and NGOs, *available at* www.adb.org/Documents/Policies/Cooperation_with_NGOs/default.asp?p=coopng (last visited July 9); AFDB, Cooperation with Civil Society Organizations (not available on AFDB website); AFDB, Handbook on Stakeholder Consultation and Participation in ADB Operations (2001) (not available on AFDB website); AFDB Good Governance Policy, at 17-20, *available at* www.afdb.org/projects/polices/pdf/governance.pdf (last visited May 21, 2002).

[48] *See* Kari Hamerschlag, Putting Participation into Practice at the Inter-American Development Bank 2-6 (Bank Information Center, 2000), *available at* www.bicusa.org/lac/idb/eng_putting.pdf (last visited July 11, 2000).

sultation has taken place primarily in the context of lending for investment projects, such as infrastructure, agriculture, education, and health. By contrast, policy-based loans in which MDBs finance macroeconomic policymaking, sector reforms, and privatization programs are generally designed without the participation of the public.

In recent years, external demands for consultation further "upstream" in the setting of development strategies has led some MDBs to open up the country programming process and sector strategies. For example, the World Bank is requiring broad based public participation for developing a country's Poverty Reduction Strategy Paper (PRSP), which provides the framework for all lending operations in a given borrowing country.[49] Finally, most MDBs now increasingly consult the public for the adoption and revision of internal bank policies, strategies, and procedures.[50]

The Inter-American Development Bank is currently preparing a new draft of its Participation Policy Document,[51] which seeks to mainstream citizen participation in Bank operations and activities.[52] The policy does not appear to cover internal bank policies and strategies, focusing on three other categories as the "major spheres of the Bank's activity, whose scope and complexity call for different approaches to citizen participation." In the IADB's draft policy, these are the definition of the development agendas of the countries, sectoral strategies, and lending operations and technical cooperation. The IADB management will prepare an action plan that will include, among other things, operational guidelines and procedures for public participation in each of the three spheres identified. These will be advisory procedures only, but deviations from them are supposed to be provided in writing.[53] These guidelines may introduce some predictability, consistency, and accountability to the consultation processes.

2. Environmental Assessment and Consultation

While MDBs lack general mandatory standards or processes of consultation, they do have several specific operational policies and guidelines that include provisions requiring stakeholder participation in the design and implementation of development policies and plans. Such operational policies or guidelines include, among others, environmental assessment policies, indigenous peoples policies, and resettlement policies.

Environmental Assessment policies provide the most detailed framework for public consultation.[54] MDBs usually distinguish between at least three types of projects based on the scale of impact on the environment. Each category is subjected to different requirements. The category of projects likely to have the most severe environmental[55] impact (usually referred to as "Category A" or "Category 1" projects) requires full environmental impact assessments. For these projects, the consultation processes for the preparation of environmental impact assessments are outlined in a reasonably detailed manner across the various MDB environmental policies and guidelines. However, the language used tends to be dis-

[49] *See* WORLD BANK, POVERTY REDUCTION STRATEGY SOURCEBOOK, vol. 1, ch. 2.1, *available at* www.worldbank.org/poverty/strategies/chapters/particip/orgpart.htm (last visited July 11, 2002).

[50] See, for example, the ongoing revision of the Indigenous Peoples Policy at the World Bank. A summary of the consultations with external stakeholders lists some of the critiques of the stakeholders with respect to the consultation process. World Bank, A Summary of Consultations with External Stakeholders regarding the World Bank Draft Indigenous People Policy, DRAFT OP/BP 4.10 (Apr. 2002, updated July 2002), *available at* lnweb18.worldbank.org/ESSD/essd.nsf/1a8011b1ed265afd85256a4f00768797/c4a768e4f7c935f185256ba5006c75f3/$FILE/SumExtConsult-4-23-02.pdf (last visited July 11, 2002). *See also* www.bicusa.org/policy/IndigenousPeoples/index.htm (last visited July 11, 2002). Another example is the revision of the Inspection Function at the ADB. *See* www.adb.org/inspection/review.asp (last visited July 11, 2002) (regarding external consultations).

[51] *See* IADB, Citizen Participation in the Activities of the Inter-American Development Bank, Document for Discussion (2000), *available at* www.iadb.org/sds/doc/scs%2DSantodomingoE.pdf (last visited July 11, 2002). For a critique of an earlier draft, *see* HAMERSCHLAG, *supra* note 48.

[52] The discussion document states that "the Bank's Strategic Framework on Participation will define the spheres of action in which participation is to be promoted and will set *forth clear principles and defined responsibilities* to ensure the integrity of the process." IADB, Citizen Participation, *supra* note 51, at 5 (emphasis added).

[53] *Id.* at 11. The document also enumerates participation standards for which it will "encourage adherence". These include: inclusiveness, pluralism, timeliness, openness, efficiency, and cultural sensitivity. *Id.* at 7, 8.

[54] *See*, World Bank, Policy on Environmental Assessment, BP 4.01, *available at* lnweb18.worldbank.org/essd/essd.nsf/Safeguard/EnvironmentalAssessment (last visited July 23, 2002); IFC, Policy on Environmental Assessment (1998), OP 4.01, *available at* http://www.ifc.org/enviro/EnvSoc/Safeguard/EA/ea.htm (last visited July 23, 2002); AFDB, Environmental and Social Assessment Procedures (June 2001), not found on the AFDB website; EBRD, Environmental Procedures (1996), *available at* www.ebrd.com/about/policies/enviro/procedur/main (last visited July 23, 2002); IADB, Procedures of the Committee on Environment and Social Impact, *available at* www.iadb.org/sds/doc/env.CESIprocedE.pdf (last visited July 23, 2002). The ADB still lacks an environment policy, but a draft will be submitted to the Board of Directors in September 2002. Currently, the ADB's environmental framework is included in guidelines that are subject to Board approval. Personal communication, Nurina Widagdo, Bank Information Center to Nathalie Bernasconi-Osterwalder (July 10, 2002).

[55] Most of the Banks' environmental policies also address social impacts. For example, the AFDB uses the term "Environmental and Social Assessment Procedures (ESAP)" in its Environmental and Social Assessment Procedures for African Development Bank's Public Sector Operations (2001). IADB, Procedures of the Committee on Environment and Social Impact, para. 4.08, *available at* www.iadb.org/sds/doc/env.CESIprocedE.pdf (last visited July 11, 2002).

cretionary in many instances. For example, the AFDB's environmental policy, while giving quite clear guidance, states that "for Category 1 projects, the Borrower is required to conduct meaningful consultation with relevant stakeholders . . . . These consultations shall take place according to the country's legal requirements, if they exist, but *should* at least meet the minimal requirements described hereafter."[56] The language indicates that the borrowing country remains free to adopt its own consultation standards. Similarly, under the EBRD's Environmental Procedures, the "Project Sponsor *will be requested* to provide the affected public and interested nongovernmental organizations (NGOs) with notification about the nature of the operation for which financing is sought from the EBRD. . . . If there has been no previous notification by the Project Sponsor then notification *should* be made no later than four weeks after the operation passes Initial Review."[57] The language in this document is of also discretionary nature. Moreover, these provisions require only notification, not consultation.[58]

Additionally, some environmental policies and procedures do not appear to give sufficient guidance with respect to the process of consultation. For example, the IADB's procedures provide only that "[t]he Bank *expects* borrowers to consult affected communities and other local parties" and that the Bank "requires that borrowers: (i) employ *reasonable* consultation procedures to elicit the informed opinion of concerned local groups, and take their views into account during project preparation and implementation, especially during the scoping and draft phases of an impact assessment."[59]

The second category of projects (usually referred to as Category B), which comprises projects likely to have detrimental environmental impacts that can be minimized, do not require a full impact assessment.[60] None of the MDB documents require public consultation regarding these projects.[61]

Analysis of the various environmental policies and guidelines indicate that many MDBs do not provide sufficient minimum substantive standards for effective public consultation. An exception is the IFC's 1998 environmental policies which are more specific than the other policies and guidelines of most other MDBs. IFC policies specifically require that project-affected people be consulted at least twice for Category A projects: (1) in the scoping period, shortly after environmental screening and before the terms of reference for the environmental impact assessment are finalized, and (2) once a draft environmental assessment has been prepared.[62] This explicit requirement, particularly the requirement that the public be consulted during the scoping phase, is widely regarded as the minimum consultation necessary for any environmental assessment process.

Another issue is the timing of the release of information. For Category A projects,[63] the environmental impact assessment is generally released 120 days before Board consideration for public sector projects and 60 days before Board consideration for private sector projects. For Category B projects, the document is generally released 60 days before Board consideration for public sector projects and only 30 days for private sector projects. Thus, in some cases, the public has only 30 days to review the assessment and prepare comments. This has proven to be too short, so that the public consultation requirements for private sector projects has become almost worthless.

3. Internal MDB Policies and Procedures

In the past five years, the IFC and the World Bank have regularly consulted the public during the adoption or revision of policies. It is now routine that draft policies or strategies are released on an MDB's website with a specific amount of time provided for public comment. This form of "notice and comment" rulemaking is frequently complemented by public meetings held either in the Bank's headquarters or, in some cases, in regional offices. Although the timelines and processes for these consultations are ad hoc and, thus, not subject to any set standards, there is, nonetheless, developing a consistent practice of open and participatory rulemaking.

The primary shortcomings of current approaches are that deadlines for submitting comments are often too short and that MDB staff almost never provide meaningful responses to the comments. Although civil society does not expect all of their issues to be accepted or directly addressed, it does expect some evidence that their comments are taken seriously and considered in finaliz-

[56] *See* AFDB, Environmental and Social Procedures, *supra* note 54, paras. 5.1-5.8. (emphasis added).

[57] EBRD, Environmental Procedures, *supra* note 54, annex 1 (emphasis added).

[58] For a detailed analysis of the EBRD's consultation policies, *see* CLAUDIA SALADIN ET AL., IMPLEMENTING THE PRINCIPLES OF THE PUBLIC PARTICIPATION CONVENTION IN INTERNATIONAL ORGANIZATIONS (1998).

[59] *See* IADB, Procedures of the Committee on Environment and Social Impact, *supra* note 55, para. 4.14 (emphasis added).

[60] The scope of the environmental assessment for Category B projects may vary from project to project, but is narrower than that of a Category A assessment. For an overview of the content of a Category A and B assessments, *see, e.g.* World Bank, Policy on Environmental Assessment, *supra* note 54, para. 8.

[61] *See, e.g.*, AFDB Environmental and Social Assessment Procedures, *supra* note 54, para. 5.9 (stating that "OPs *may* determine that some special issues such as small scale resettlement may require the Borrower to consult with potentially affected stakeholders early in the project cycles … .") (emphasis added).

[62] Standards for consultation for Category B projects are also lacking under the IFC procedures.

[63] Note that the language for categorizing projects varies among the different banks.

ing the policies.[64] In addition, the process of internet notice and comment may not reach the vast majority of the people in developing countries who are most likely affected by the policies. MDBs have relied too heavily on electronic consultation, neglecting to seek input via additional alternative avenues for people who lack access to the internet.

The IFC has been at the vanguard of this notice and comment rulemaking, setting the precedent in 1999 with the release on the web of its draft environmental and social policies. The IFC also compiled and analyzed the comments it received on that policy. In 2001, the IFC conducted a substantial review of its environmental and social safeguard policies, using both the internet and a series of regional meetings throughout the world to solicit comments on the existing policy framework. Similarly, the ADB is conducting a six-month consultation process relating to revisions to its accountability mechanism. That process will involve at least two draft versions of the paper released for comment on the web, and no fewer than nine public consultations in both donor and borrowing countries.

4. Setting Mandatory Standards for Consultation in Project Lending

Consultations with project-affected communities are carried out by the MDB, the borrowing Government, or both, depending on the activity involved. Where the MDB is responsible, clear mandatory standards should guide MDB staff. Where it is the role of the borrower to consult, MDB rules and procedures should require the implementation of the borrower's domestic consultation processes. In addition, the MDB should oblige the borrower to respect minimum consultation standards set out by the MDB. In the context of disclosure, experience shows that this is possible: pursuant to some MDB disclosure policies, the bank discontinues project processing if the borrowing government objects to the disclosure of an environmental assessment.[65] A similar mechanism should be considered to guarantee meaningful consultation. MDBs should adopt mandatory minimum standards of consultation that must be followed, with the MDB discontinuing the project if the standards are not met.

[64] See discussions elsewhere in this volume requiring decisionmakers to give "due account" to public input. *E.g.*, Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia* in this volume.
[65] World Bank Disclosure Policy, *supra* note 15, para. 34.

C. Access to Justice and the Accountability Mechanisms

After the environmental and social policy frameworks were adopted at the various development banks, concerns began to arise regarding whether and how these policies would be enforced. The MDBs enjoy immunity under international law and are not subject to the jurisdiction of national courts. Additionally, there was no mechanism in international law where citizens could press their concerns relating to the activities of MDBs. In this respect, the MDBs were "lawless" institutions with no accountability either to affected communities or to the member countries that had established the environmental and social policies. At the same time, a number of controversial cases (most notably the Narmada dam in India[66]) highlighted major policy violations and led civil society to call for international fact-finders into the impacts of MDB-financed projects.

The World Bank was the first international organization of any kind to provide a mechanism for citizens to bring claims regarding policy violations without going through their respective national governments. The World Bank's Inspection Panel was created in 1993. It covered projects financed by the IBRD and the IDA and was followed in subsequent years by accountability mechanisms at several other MDBs. Table 2 highlights the subsequent evolution of MDB accountability mechanisms.

This section briefly reviews the experience with the World Bank Inspection Panel and the IFC/MIGA Compliance Advisor and Ombudsman. There is significantly greater experience with these two mechanisms than with the mechanisms of the other MDBs. Moreover, the ADB is in the process of revising its mechanism, and both the AFDB[70] and the EBRD[71] are currently developing background papers on accountability mechanisms.

1. World Bank Inspection Panel

The World Bank Inspection Panel was created in 1993 "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 proce-

[66] *See* www.narmada.org/sardarsarovar.html (last visited July 12, 2002).

TABLE 2: ACCOUNTABILITY MECHANISMS AT THE MULTILATERAL DEVELOPMENT BANKS

IBRD/IDA	World Bank Inspection Panel established 1993
IFC/MIGA	Compliance Advisor/Ombudsman established 1999[67]
AFDB	Draft prepared in 1994 but never adopted; mechanism expected 2003
ADB	Inspection Function established in 1995; revision planned for 2002[68]
EBRD	Mechanism expected in 2003
IADB	Investigation Mechanism created 1994[69]

dures."[72] The Panel officially opened for business in 1994 and over the past eight years has received twenty-seven claims. By comparison, the IADB's Independent Investigation Mechanism, established in August 1994 and amended in 2001, has had only one full investigation since its establishment. The IADB has recently received a second request, but the Board has yet to consider whether to authorize an investigation. In contrast to the World Bank's Inspection Panel, the IADB's Independent Investigation Mechanism also applies to private sector operations.

The World Bank's Inspection Panel is comprised of three permanent members, each of whom serves for five years. Panel members are nominated by the President and approved by the Board. To ensure the independence of the Panel, Panel members cannot have served the Bank in any capacity for the two years preceding their selection to the Panel. More importantly, Panel members are forbidden from ever working at the Bank again. The Panel also has a permanent Secretariat with five staff.[73]

The Panel receives and investigates claims from project-affected people alleging that they have been harmed by the Bank's violations of its policies and procedures. Any affected group of more than one person residing in the borrower's territory can file a claim to the Inspection Panel.[74] Claims must be in writing but can be in any language. As of July 1, 2002, the Inspection Panel has received twenty-six formal requests for inspection, which are listed at the Inspection Panel's website.[75] A majority of the requests have cited violations of the World Bank's environmental assessment, indigenous peoples, and involuntary resettlement policies. Also frequently cited are the World Bank's policies on information disclosure and project supervision.[76] A number of claims have involved the failure to screen the projects correctly under the environmental assessment or indigenous peoples policy (which then has implications for consultation requirements), as well as the failure to extend the rights of consultation to all of the project-affected people who should be consulted according to the norms within the policy. Thus far, the Inspection Panel has recommended an investigation of twelve claims, and the Board has approved investigation of eight.

Some general conclusions can be drawn from the Panel's history thus far. The Panel is widely respected as credible and independent by civil society organizations around the world. The Panel has also clearly strengthened the Board's ability to review staff compliance with World Bank policies, and placed a greater emphasis on consistency in applying the safeguard policies internally. On the other hand, the Panel's lack of authority to provide recommendations for resolving the problems of affected people and to monitor the implementation of remedial actions adopted in light of Panel claims has meant that Panel decisions have not necessarily benefited project-

[67] *See* www.cao-ombudsman.org/ev.php?URL_ID=1249&URL_DO=DO_TOPIC&URL_SECTION=201&reload=1026503671 (last visited July 12, 2002).

[68] *See* www.adb.org/Inspection/default.asp (last visited July 12, 2002).

[69] *See* www.idb.org (last visited July 12, 2002).

[70] The African Development Bank (AFDB) developed and circulated a proposal for an inspection panel in 1994. That proposal would have included a three-member, part-time panel patterned substantially after the World Bank Inspection Panel. The AFDB's Board of Directors never voted on the proposal, but beginning in June 2002, the AFDB hired a consultant to begin designing a new accountability mechanism.

[71] The EBRD has recently begun to develop a compliance and appeals mechanism and plans to create such a mechanism during the next year. In February 2002, EBRD held its first meeting with civil society organizations aimed at discussing the future EBRD accountability mechanism.

[72] World Bank Inspection Panel, Operating Procedures 1 (Aug. 19, 1994).

[73] For more information, see the Inspection Panel website at wbln0018.worldbank.org/ipn/ipnweb.nsf (last visited July 12, 2002).

[74] Resolution No. IBRD 93-10 (Sept. 22, 1993), para. 12; Resolution No. IDA-93-6 (Sept. 22, 1993), para. 12 ("The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank … provided in all cases that such failure has had, or threatens to have, a material adverse effect.").

[75] *Supra* note 73.

[76] *See* World Bank, The World Bank Inspection Panel, Annual Reports 1994-2001, *available at* wbln0018.worldbank.org/ipn/ipnweb.nsf/Wannual?openview&count=500000 (last visited July 12, 2002).

[77] For more information see, the CAO webpage, *supra* note 67.

affected people on the ground. The Panel's mandate to "inspect" the performance of the Bank has also created strong dissent among staff and some developing country members, creating a polarized atmosphere around Inspection Panel claims. The Panel is also marginalized within the World Bank, with its findings and policy interpretations largely ignored by staff as soon as a specific case is over.

2. IFC/MIGA Compliance Advisor/Ombudsman

When the Inspection Panel was created, neither the IFC nor MIGA had any environmental or social policies. Accordingly, the Panel's jurisdiction did not extend to their operations. In 1999, after the IFC adopted its safeguard policies, World Bank President James Wolfensohn announced the creation of an office of the Compliance Advisor and Ombudsman (CAO). In an interesting example of public participation, the CAO was selected by the President based on the recommendation of an external steering committee that included both civil society and private sector representatives. In addition, the CAO has established an external Reference Group of independent stakeholders from the private sector, the NGO community, academia, and other institutions which meets annually to provide advice regarding CAO's activities.[77]

The CAO has two goals: "first, to help the IFC and MIGA address—in a manner that is fair, objective, and constructive—complaints made by people who have been or may be affected by projects in which the IFC and MIGA play a role; and second, to enhance the social and environmental outcomes of those projects."[78] To achieve those goals, the CAO has three related roles:

> (i) Responding to complaints by persons who are affected by projects and attempting to resolve issues raised using a flexible, problem solving approach (the ombudsman role);
> (ii) Providing a source of independent advice to the President and the management of IFC and MIGA. CAO provides advice both in relation to particular projects and in relation to broader environmental and social policies, guidelines, procedures, and systems (the advisory role);
> (iii) Overseeing audits of IFC's and MIGA's social and environmental performance, both overall and in relation to sensitive projects, to ensure compliance with policies, guidelines, procedures, and systems (the compliance role).[79]

Any individual, group, community, entity, or other party affected or likely to be affected by the social or environmental impacts of an IFC or MIGA project may make a complaint to the Ombudsman's office.

The Ombudsman process tries to resolve the concerns raised by the affected communities through a variety of possible conflict resolution methodologies, including, for example, consultation, dialogue, or mediation. The focus is not necessarily on determining whether the IFC or MIGA have been at fault in the design or implementation of the project. Because IFC and MIGA projects involve private sector companies, the Ombudsman can more easily play an intermediary role using IFC/MIGA leverage with the project sponsor to address legitimate concerns of affected people.

The CAO may bring the complaint process to a close either when a settlement agreement has been reached or when it has determined that further investigation or problem-solving efforts are not going to be productive. At that point, the CAO will inform the complainant and report to the President of the World Bank Group. The report to the President may include specific recommendations the CAO believes could help to solve problems raised by the complaint. The CAO may also decide to conduct a compliance audit to address non-compliance issues identified in the course of responding to the complaint or may refer any policy issues to the advisory role of the CAO's office.

The CAO's compliance role may be triggered through the ombudsman's process, at the request of management or on the CAO's own initiative. The purpose of a compliance audit is to determine whether IFC, MIGA, or in some cases the project sponsor have complied with the environmental and social safeguard policies of the respective institution. The compliance report may also contain specific recommendations for improving compliance both in the specific project and more generally. A report from each compliance audit is provided to the President.

As of April 2002, the Ombudsman had received eleven claims, resolving or closing four of them. The CAO has identified a number of projects for which it expects to conduct a compliance audit pending finalization of its compliance procedures and the selection of the senior specialist for compliance. In its advisory role, the CAO's office is managing the review of the IFC's environmental and social safeguard policies, contributing several case

[78] International Finance Corporation/Multilateral Investment Guarantee Agency, Compliance Advisor/Ombudsman, 2000-01 Annual Report, at 2.

[79] International Finance Corporation/Multilateral Investment Guarantee Agency, Compliance Advisor/Ombudsman, Operational Guidelines (Apr. 2000), at 6, *available at* www.ifc.org/cao/english/guidelines/ENGLISH_09-20-00_.pdf (last visited July 12, 2002).

[80] *See* CAO webpage, *supra* note 67; *see also* Marcos A. Orellana,

studies to the extractive industries review, and participating in the preparation of the IFC's sustainability agenda.[80]

Given the relatively short period of time in which the CAO has been operating, there is insufficient experience to determine its long-term success in resolving the problems of project-affected people or in improving the IFC's and MIGA's policy compliance. In several cases, however, the affected people have been satisfied with the outcomes of the process or at least the preliminary assessments that have validated their concerns.

III. CONCLUDING REMARKS

Governance needs to be improved at all international institutions, particularly with respect to the orientation of international institutions toward the public. The MDBs discussed here are a good example where some progress in expanding participation and transparency has been made. However, that progress reflects an ad hoc system formed mostly by the respective Banks' various reactions to outside pressure from civil society and member governments. There is no systematic or consistent approach to the issues of transparency, participation, and access to justice. As a result, the MDBs do not adequately disclose information, consider the public's views, or provide effective means for redress. Yet, the MDBs may be the most advanced of all international institutions in their governance orientation toward the public (precisely because they have felt the most pressure for democratization over the longest time).

What is needed is a systematic set of minimum citizen-based rights to information, participation, and independent review that covers all international institutions. This could take the form of an International Administrative Procedures Treaty. Such a treaty would set minimum criteria for how international institutions operate, how they promulgate policies and procedures, what information they release, and how they shape their relationship with citizens around the world.

Such minimum standards could be developed through an examination of the policies and procedures of the MDBs as well as other institutions, and of standards common to many different countries or regions. Establishing such a treaty would also improve the efficiency of international governance and would save civil society from having to repeat the same battles for transparency, participation, and accountability at every organization. It would bring international institutions out of the dark ages and into a transparent era of governance that responds more directly to the concerns and aspirations of the people.

Unearthing Governance: Obstacles and Opportunities for Public Participation in Minerals Policy, sec. IV.C, in this volume (discussing the extractive industries review).

ANNEX:

CHART PROJECT CYCLE

[1] Note that these documents are generally disclosed but are subject to exceptions in accordance with the World Bank's Disclosure Policy. *See supra* note 16. The documents listed here include only documents relating to individual projects. Not listed are documents relating to structural or sectoral lending.

[2] Note that these documents are generally disclosed but are subject to exceptions in accordance with the IFC's Disclosure Policy. *See supra* note 17.

[3] *See* World Bank Disclosure Policy, *supra* note 15, para. 17.

[4] *Id.* para. 15.

[5] *Id.* para. 30.

[6] *Id.* para. 31. If required, the following documents would be disclosed with the EA: Resettlement Instrument (RI), Indigenous Peoples' Development Plan (IPDP). *See* para. 34.

[7] The project category (A, B, C or FI—for types of environmental assessment instruments), rationale for categorization, and environmental and social issues and any policy concerns are briefly stated in the PDS-ER.

[8] *See* World Bank Disclosure Policy, *supra* note 15, para. 36.

[9] *See* IFC Policy on disclosure of information, *supra* note 16, under the heading "Environment-related documents". These documents could be available at an earlier or a later stage. Unlike World Bank projects, EAs are not required to be released before appraisal. The EA report includes an Environmental Action Plan (EAP).

[10] *Id.* These documents could be available at an earlier or a later stage. Unlike World Bank projects, ERSs are not required to be released before appraisal.

[11] *Id.*, under the heading "Summary of Project Information". These documents could be available at a later stage.

[12] *See* World Bank Disclosure Policy, *supra* note 15, para. 18.

[13] *Id.* para. 26.

[14] *Id.* para. 47.

[15] *Id.* para. 48.

[16] *Id.*

Project Cycle of Public Sector Projects / World Bank	**Documents Disclosed Pursuant to the World Bank's Disclosure Policy**[1]	**Project Cycle of Private Sector Projects / IFC**	**Documents Available Pursuant to the IFC's Disclosure Policy**[2]
Identification During identification, both the Borrower and the Bank are involved in analyzing development strategies. At this point, the project would undergo an environmental screening to determine whether or not an environmental assessment is required.	Monthly Operational Summary (MOS)[3] Initial Project Information Document (PID)[4]	Identification The Investment Officer (IO) is responsible for project identification. Once the IO receives authorization from Investment Department management to proceed to the next phase, the IO requests assignment of a project team, including environmental and social specialists as appropriate.	No documents disclosed
Preparation The Borrower is responsible for project preparation, which normally lasts 1 to 2 years. The Bank often provides technical and financial assistance. During preparation, a country's project team has to determine all the technical, institutional, economic, environmental, and financial conditions required for the project to succeed. The team must also compare possible alternative methods for achieving the project's objectives. If required, an environmental assessment is undertaken.	Integrated Safeguards Data Sheet (ISDS)[5] Environmental Category A and B projects would disclose the Environmental Assessment (EA)[6]	Preparation / Early Review The purpose of the Early Review is for IFC to give a quick decision to a project sponsor on whether the Corporation is interested in engaging in the project. As a basis for an early management decision the Investment Department prepares the Project Data Sheet Early Review (PDS-ER), which contains a project description, details of potenital investment, highlights any policy issues and potential dealbreakers, reviews IFC's role in the project, assigns the project category and issues the Environmental and Social Information Memorandum (ESIM). The ESIM provides environmental and social language for the PDS-ER[7] and the Monthly Operations Report (MOR).	No documents disclosed
Appraisal The Bank is solely responsible for project appraisal, which is usually conducted by Bank staff, sometimes in cooperation with consultants, who spend three to four weeks in the client country. The appraisal team reviews all the work conducted during identification and preparation. The team prepares a Project Appraisal Document (released to the public after Approval).	Revised PID Major contract award decisions[8]	Appraisal An appraisal team, consisting of an investment officer with financial expertise and knowledge of the country in which the project is located, an engineer with the relevant technical expertise and an environmental specialist evaluates the technical, financial, economic and environmental aspects of the project. This process entails visits to the proposed site of the project and extensive discussions with the project sponsors. After returning to headquarters, the team submits its recommendations to senior management of the relevant IFC department. If financing of the project is approved at the department level, IFC's legal department, with assistance from outside counsel as appropriate, drafts appropriate documents.	Environmental Category A projects would disclose the EA report (released 60 days prior to Board Meeting)[9] Environmental Category B projects the Environmental Review Summary (ERS) (released no later than 30 days prior to the Board Meeting)[10] Summary of Project Information (SPI), released no later than 30 days prior to the Board Meeting. No disclosure requirement.[11]

Negotiations During negotiations, the Bank and Borrower endeavor to agree on the measures required to assure project success. The Borrower reviews final documents and both sides come to agreement on the terms and conditions of the loan.	No documents disclosed.	Negotiations Outstanding issues are negotiated with the company and other involved parties such as governments or financial institutions.	No documents disclosed
Approval The Project Appraisal Document and loan documents are submitted to the Bank's Board of Executive Directors for approval.	Project Appraisal Document (PAD)[12] Technical Annex (TA)	Approval The Board Report is submitted to IFC's Board of Directors, who reviews the proposed investment. If the investment is approved by the Board, and if stipulations from earlier negotiations are fulfilled, IFC and the company will sign the deal, making a legal commitment. Funds are disbursed under the terms of the legal commitment signed by all parties.	No documents disclosed
Effectiveness Following approval, the loan or credit agreement is submitteed to whatever final process is required by the borrowing government. If the outcome is positive, the loan or credit is declared effective, or ready for disbursement, and the agreement is made available to the public.	Loan or Credit Agreement		No documents disclosed
Implementation and Supervision Implementation is the responsibility of the Borrower, with agreed technical assistance from the Bank. The supervision of the project is the responsibility of the Bank. The Borrower prepares the specifications and evaluating bids for the procurement of goods and services related to the project. Once the Bank reviews this work and determines that the Bank's procurement guidelines have been followed, funds will be disbursed. Once funds have been disbursed, supervision entails monitoring, evaluating, and reporting on project progress.	Status of IBRD/ IDA Projects in Execution[13]	Implementation and Supervision IFC monitors the performance of all active projects in its portfolio to ensure compliance with environmental, social and other conditions. The project compmay provides annual environmental monitoring reports to IFC at the end of each of its fiscal years. In addition, Project Supervision Reports (PSRs). which IFC prepares at least annually, include a section on environmental and social compliance. In the case of non-compliance, an appropriate course of action is determined by IFC, and the project company is notified as to required follow-up actions.	No documents disclosed
Evaluation At the end of the disbursement period (anywhere from 1-10 years), a completion report identifying accomplishments, problems, and lessons learned is submitted. This report is not available to the public.	Implementation Completion Report (ICR)[14] Project Performance Assessment Report (PPARs)[15] Impact Evaluation Reports (IERs)[16]		No documents disclosed

IMPLEMENTING PUBLIC PARTICIPATION IN AFRICAN DEVELOPMENT BANK OPERATIONS

Aboubacar Fall *

Good governance is central to creating and sustaining an environment that fosters strong and equitable development, and it is an essential prerequisite for sound economic management. Toward this end, the African Development Bank[1] (AFDB) adopted a Vision statement in 1999[2] that stressed the promotion of good governance as one of its primary areas of intervention and public participation as one of its main pillars to achieve poverty reduction and sustainable development.[3]

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[1] The African Development Bank Group is comprised of the African Development Bank, the African Development Fund, and the Nigeria Trust Fund. For the purposes of this paper, AFDB refers to the entire African Development Bank Group.

[2] African Development Bank, Vision, *available at* www.afdb.org/knowledge/documents/The_Banks_Vision.htm (last visited July 30, 2002). After broad-based consultations, AFDB has crystallized its operational focus around the following key areas of intervention: "(i) at the country level, three broad sectoral themes, namely agriculture and rural development, human resource development, and private sector development (ii) *one generic theme, namely good governance* (iii) at the regional/continental level, economic integration and cooperation and (iv) two cross-cutting issues, namely *environment* and gender, which permeate all aspects of the development effort, both at the national and regional levels." *Id.* (emphasis added).

[3] For the AFDB, good governance is defined to include "respect for the rule of law and human rights, enhanced accountability and transparency in the management of public resources as well as credible legal and regulatory system. In addition the Bank would sensitize and encourage Regional Member Countries (RMCs) to not only decentralize the decision-making and investment program process, but also give local stakeholders and targeted beneficiaries the means to effectively participate in the development process." *Id.*

Participatory approaches have been shown to enhance project quality, ownership, and sustainability; empower targeted beneficiaries; and contribute to long-term capacity building and self-sufficiency. Accordingly, most of the Bank documents refer to the importance of "stakeholder participation" and encourage staff to utilize a "participatory approach" in their day-to-day operations.[4] For example, the Bank's Vision emphasizes the importance of a "bottom-up," "participatory approach" and a "client-responsive approach to ensure stakeholder commitment and ownership."[5] Further, the Bank developed a document entitled Operationalizing the Vision which calls for a shift to an approach where "all stakeholders, including targeted beneficiaries of civil society, the donor community and borrower countries are involved from the outset of program design through to implementation."[6]

This chapter focuses on experiences in developing and implementing mechanisms to ensure public access to information, decisionmaking processes, and justice in AFDB operations. Section II examines public involvement in AFDB strategies, and section III analyzes how public involvement has been incorporated into AFDB projects, with a case study on the Bani Plains development project in Mali. However, before addressing implementation of public participation in AFDB development strategies and funded-projects, it is useful to define two concepts which are often used interchangeably: "consultation" and "participation."

I. PARTICIPATION AND CONSULTATION

Participation can take various forms, depending on the breadth of stakeholders involved and the depth of their participation. While most AFDB documents on social and environmental review and assessment procedures for public and private sector operations imply the necessity of including public participation, the documents still only refer to the term "consultation." However, "consultation" and "public participation" are, in

[4] African Development Bank, Handbook on Stakeholders Consultation and Participation in AFDB Operations by Environment and Sustainable Development Unit (OESU), sec. 1.2 (2001) [hereinafter AFDB Handbook].

[5] AFDB Handbook, *supra* note 4, sec 1.2.

[6] *Id.*

practice, very different. Below are explanations of the meanings of consultation and public participation, as defined by the World Bank and adopted by AFDB:

CONSULTATION:

1. **Information-sharing**: dissemination of documents, public meetings, and information seminars.
2. **Listening and learning**: field visits, interviews, and consultative meetings.
3. **Joint assessment**: particpatory needs and assessments and beneficiaries assessment.

PARTICIPATION:

1. **Shared decisionmaking**: public review of draft documents, participatory project planning, workshops to identify priorities, conflict resolution, etc.
2. **Collaboration**: joint committees or working groups with stakeholder representatives and stakeholder responsibility for implementation.
3. **Empowerment**: capacity-building activities and stakeholder initiatives.

[Adapted from AFDB, Handbook on Stakeholder Consultation and Participation in ADB Operations (2001)]

It is important to note that in March 2000, the AFDB and the World Bank signed a Memorandum of Understanding for a Strategic Partnership to reduce poverty and promote sustainable development through activities that strengthen opportunities for public participation.[7] For the AFDB, public "participation in development" is defined as:

> the process through which people with an interest (stakeholders) influence and share control over development initiatives and the decisions and resources that affect them. In practice this involves employing measures to: identify relevant stakeholders, share information with them, listen to their views, involve them in processes of development planning and decision-making, contribute to their capacity building, and ultimately, empower them to initiate, manage and control their own self-development.[8]

However, even though the AFDB has adopted the World Bank's definitions differentiating consultation and public participation, most policies and guidelines still refer to "consultation" alone.

Although the AFDB aims to involve all stakeholders in the entire design and implementation process for development strategies and projects, the use of the term "consultation" in its documents blurs its intent. While through consultation, stakeholders receive information and are able to voice their opinions and concerns, the process stops short of actually involving all of them in designing, managing, and monitoring development projects.

In contrast, public participation processes—including those set forth by the World Bank[9]—allow for an exchange of information and input from all stakeholders that will ultimately result in better project design, strategy, and implementation. Most importantly, all stakeholders are involved in the decisionmaking process, which improves the sense of ownership in the project and minimizes conflicts that may arise among the affected parties. By incorporating public participation into a project, there is a greater likelihood that all stakeholders will be satisfied by the ultimate project formulation, while consultation alone does not necessarily lend itself to the same result.

The rest of this chapter examines the extent to which access to information, decisionmaking, and access to justice are incorporated into AFDB operations. In some cases, public involvement is promoted through consultative processes, while increasingly the AFDB may be seen to be transitioning to processes that ensure broader public participation.

[7] AFDB World Bank Strategic Partnership Window, *available at* www.afdb.org/about_adb/worldbank.htm (last visited July 30, 2002).

[8] AFDB Handbook, *supra* note 4, sec. 2.1.1; *see also* Donald N. Zillman, *Introduction to Public Participation in the 21st Century*, *in* Human Rights in Natural Resources Development: The Law of Public Participation in the Sustainable Development of Mining and Energy Resources 1 (Donald N. Zillman et al. eds., 2002) (recognizing that "This 'participation explosion' (whether called 'public participation,' 'citizen involvement', 'stakeholder engagement,' 'indigenous people rights,' 'local community consultation,' 'NGO intervention,' 'access to information,' 'Aarhus rights' or any of a number of other names) promises to define and redefine sustainable development in the 21st century.").

[9] *See, e.g.*, Samuel Paul, Community Participation in Development Projects: The World Bank Experience, World Bank Discussion Paper No. 6 (1987) (observing that the World Bank views community participation (CP) as "an active process whereby beneficiaries influence the direction and execution of development projects rather than merely receive a share of project benefits. For the purposes of this study, the objectives of CP as an active process are: (a) empowerment, (b) building beneficiary capacity, (c) increasing project effectiveness, (d) improving project efficiency, and (e) project cost sharing.").

II. IMPLEMENTING PUBLIC PARTICIPATION IN AFDB DEVELOPMENT STRATEGIES

This section examines how public participation is currently implemented on-the-ground in AFDB's development strategies. The main AFDB documents in which the public may participate are Poverty Reduction Strategy Papers (PRSPs) and Country Strategy Papers (CSPs).

A. Poverty Reduction Strategy Papers (PRSPs)

A PRSP, which individual countries submit every three years to the International Monetary Fund (IMF) and the AFDB, sets forth comprehensive, self-defined, and multi-authored strategies for poverty reduction. In recent years, there has been a growing consensus among national governments in Africa, civil society, bilateral development partners, and other stakeholders that effective public participation is vital to ensure broad support and ownership of the PRSP. This means that the public needs to be engaged in the design, implementation, and monitoring of poverty reduction strategies.[10]

Generally, the PRSP's purpose is to ensure that debt relief provided under the Highly Indebted Poor Countries Initiative (HIPC) and concessional loans from multilateral financial institutions actually help reduce poverty in the poorest countries. Therefore, a meaningful PRSP must incorporate a broad spectrum of stakeholders including government, at the national, regional, and local levels; political parties; nongovernmental organizations (NGOs); scholars; the media; donor agencies; and other relevant parties.[11] The inclusion of a wide range of stakeholders in the PRSP process, particularly those from poor communities targeted by development projects, results in a better diagnosis of solutions to poverty and the improvement of policy instruments to promote sound development.

For example, Guinea's 2002 final PRSP—which highlighted strategies to reduce poverty—was the result of a broad consensus of stakeholders. This particular document illustrates how, in preparing the development strategy, the government consulted the private sector, civil society organizations, and grassroots communities, all of which subsequently became active contributors to the PRSP. A new national policy for poverty reduction emerged from this broad consensus, which emphasized transparency, access to justice, and incorporated recommendations from all sectors to improve public resource management.

In another example, the government of the Republic of Djibouti consulted with the private sector and civil society organizations (CSOs)[12] in March 2002 on developing Djibouti's PRSP. They identified three major good governance issues considered to be vital in promoting economic growth and reducing poverty. These governance issues are:

- public financial resource management,
- legal and judicial reforms, and
- legal and institutional framework of public participation.

Subsequently, the government requested and obtained financial and technical assistance from AFDB to conduct on-the-ground studies with multistakeholder involvement. These studies will feed into the national PRSP process. Two of the studies focusing on legal and judicial reforms and the legal and institutional framework of public participation have been finalized, having integrated comments and suggestions from individual people and from CSOs. This process has been welcomed by the Djibouti government, the private sector, and civil society as a new way to build a strong partnership based on trust, dialogue, and consensus, thus enabling all parties to agree on common goals to reduce poverty. This participatory approach is expected to help ensure a broad country ownership of the PRSP.[13]

B. Country Strategy Papers (CSPs)

Each Country Strategy Paper (CSP) is prepared by the AFDB Group in consultation with the relevant national government and other public and private stakeholders, including the major aid agencies active in that country.[14] The CSP describes the AFDB's strategy for project lending based on an assessment of its priorities in the country, and indicates the level and composition of assistance to be provided based on the PRSP and the country's portfolio performance. As part of its Vision to ensure public participation in development strategies and projects, the AFDB management mandated that the new generations of CSPs be prepared in a participatory man-

[10] Jalal Abdel Latif, *Participatory Monitoring and Evaluation, Perspectives on Monitoring Process and Outcomes of PRS: The Civil Society Perspective*, *in* AFDB/World Bank/UN Economic Commission for Africa Workshop Proceedings on Participation and Civic Engagement in Poverty Reduction Strategies 47, 49 (July 10-13, 2000) [hereinafter Commission for Africa Workshop].

[11] Commission for Africa Workshop, *supra* note 10, at 13 (overview of the PRSP process).

[12] For the purposes of this chapter, the term "civil society organization" encompasses formally registered nongovermental organizations (NGOs), community-based organizations (CBOs), and less formally constituted bodies. Generally speaking, the AFDB utilizes the term "civil society organization."

[13] The author participated in the preparation mission of the Djibouti PRSP and is currently involved in the supervision of the three good governance-related studies.

[14] African Development Bank, Disclosure of Information Policy Paper, *available at* www.afdb.org/about_adb/disclosure.htm (last visited July 30, 2002).

ner. According to the AFDB's guidelines on Cooperation with Civil Society Organizations,

> In accordance with guidelines governing CSP processes, the Bank is committed to involve representatives of national CSOs in meaningful consultations during CSP formulations and revisions. As appropriate, the [local] media can also be involved to publicly disseminate information regarding the content of CSP and the consultation process. Participatory aspects of the policy preparation process are normally described in the final CSP document.[15]

As a result of the AFDB's new policies and guidelines, almost all CSPs prepared by the AFDB for the 1999-2001 period involved consultations with CSOs and other stakeholders.[16] This trend demonstrates a marked improvement of previous CSPs conducted from 1996 to 1998 in which no formal consultations with stakeholders outside of government were recorded. While consultation alone is not sufficient to ensure effective involvement of all stakeholders, this represents a significant step forward.

Despite the increased use of participatory approaches, experiences in preparing CSPs under the new policy varied greatly due to the lack of specific guidelines for AFDB staff. In some cases, consultations were limited to individual interviews, while in other cases, workshops and meetings involving several hundred stakeholders were organized. In some cases, professional facilitators were used, but in most cases consultations were designed and led by AFDB staff and their government counterparts.[17]

For example, in Benin, a team of resource people collaborated with the government to organize a two-day workshop, made up of five thematic commissions and involving about 120 stakeholders from different sectors. Similarly, in Morocco, an additional participatory approach mission was conducted, where two one-day workshops were held, involving a total of approximately forty participants from different professional fields.[18] This new approach of incorporating consultation into the process of preparing a CSP resulted in a broader consensus on key constraints and priorities in both countries regarding human resource development and rural development.[19] Still, incorporating public participation, in addition to consultation, is critical to ensure a sound socioeconomic development strategy in which there is a broad sense of ownership and more effective implementation of poverty reduction strategies.

III. IMPLEMENTING PUBLIC PARTICIPATION IN AFDB PROJECTS

In addition to strategies, the AFDB has taken a number of formal and informal steps to ensure consultation and public participation in AFDB projects. In order to understand the opportunities for the public to obtain information about and participate in the various stages of an AFDB project, this section first summarizes the phases of the project cycle. Subsequently, it reviews CSO involvement in specific AFDB projects, including a case study of involvement in the Middle Bani Plains Development Project in Mali.

A. Description of the AFDB Project Cycle

Public participation can occur in many different phases of the project cycle. These phases include project identification, preparation, appraisal, implementation and management, supervision, monitoring and evaluation, completion, and portfolio review.

First, in the project identification phase, primary stakeholders have the opportunity to influence fundamental decisions regarding the type of development project (e.g., education, health, or infrastructure) and the general objectives and goals. This phase also helps to clarify the potential role and contribution of stakeholders throughout the life of the project.[20]

Next, while formal responsibility for the project preparation lies primarily with the government, AFDB staff assists the government in carrying out background studies and using participatory approaches in designing the project.[21]

During the appraisal phase, the project design is finalized and operational details and procedures are developed and agreed to by all parties. Therefore, it is crucial at this stage to ensure that the specific project components and strategies that will be implemented are acceptable to all stakeholders and follow participatory processes.[22]

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[15] African Development Bank Group, Environment and Sustainable Development Unit, Cooperation with Civil Society Organizations, Policy and Guidelines, sec. 7.1-7.2.

[16] AFDB Handbook, *supra* note 4, at 12, box 2 ("Bank Experience with Participatory CSPs").

[17] *Id.*; *see also* Paul, *supra* note 9, at ix ("Governments have an important resource in their networks of training institutions which could be used not only to disseminate the lessons learned and methodologies or guidelines but also to encourage public servants to play a proactive role in CP. Government training strategies could thus complement the training efforts of NGOs and other micro level organizations at the grassroots.").

[18] AFDB Handbook, *supra* note 4, at 12, box 2.

[19] *Id.*

[20] *Id.* sec. 3.3.

[21] *Id.* sec. 3.4.1, box 4 ("Promoting the Participation of Primary Stakeholders"); *id.* sec. 3.4.3, box 5 ("Promoting Women's Participation in Project Planning").

[22] *Id.* sec. 3.5.1.

For the implementation and management phase, responsibility for promoting public participation lies mainly with the staff of the project implementation unit (PIU), relevant government ministries, and implementing agencies. While the AFDB does not play a direct role in project implementation, AFDB staff provides support, advice, and monitoring through field missions, as well as convening dialogues between project staff and other stakeholders throughout the life of the project.[23] For example, in April 2002 in Djibouti, the launching mission of the "Pro-Women Advocacy Project" has provided all parties the opportunity to reiterate the project's participation-related goals with government counterparts and to renew contacts with key stakeholders groups in target districts and villages.[24]

In the project supervision phase, missions carried out by AFDB staff provide an opportunity to collect feedback from project beneficiaries and other stakeholders and for monitoring the extent of public participation in the project's implementation and management. Supervision missions also allow AFDB staff to identify problems or issues affecting overall project performance.[25]

In the monitoring and evaluation phase, public participation allows primary stakeholders (those directly affected by development projects) and secondary stakeholders (such as government officials and NGOs) to work together to assess the project's successes and shortcomings. Monitoring is undertaken as an ongoing process throughout the project cycle, while evaluations are usually conducted at the project mid-term, at the end of the project, or both.

One example of a project that incorporated public participation into the monitoring and evaluation (M&E) process is the Mali Poverty Reduction Project.[26] During the project preparation phase, bilateral funds were used to recruit a public participation specialist to assist the project team in designing a participatory M&E system. The completed project implementation document called for the system to chart the progress of physical works (such as dams and power plants), monitor overall project implementation, and evaluate the project's impact on reducing poverty.[27] In this system, many stakeholders, including citizens and community groups, play an active role in identifying indicators of project progress and impact, as well as in monitoring these indicators throughout the life of the project. As the project proceeds into the next phases, a Community Development Agent (CDA) will collect baseline data from each participating community and progress monitoring forms, which will be completed by stakeholders every three months. The CDA will then submit the reports to local authorities and the PIU. The PIU will also receive regular progress reports from participating CSOs and other project intermediaries and will incorporate this information into its progress reports to the AFDB. In this phase, regular stakeholder meetings at the local, regional, and national levels serve as fora in which to examine overall progress and address any persistent problems.[28]

In the project completion phase, a project completion report (PCR) assesses the degree to which the project objectives were achieved and considers plans for future project operations. Lessons learned from all aspects of the implementation phase are also identified and included in the PCR. Public participation is essential when obtaining a complete picture of a project's overall quality and success at its completion. [29]

Finally, in the portfolio review, the AFDB collects feedback from all stakeholders in order to assess the level of public participation on the Bank's operations in the country. The portfolio review also provides all stakeholders the opportunity to discuss with the country's government the importance and benefits of incorporating public participation in the national development process.[30]

B. CSO Involvement in AFDB-Supported Projects

To strengthen public participation in development projects, governments must collaborate, and cooperate with, CSOs. However, many CSOs in Africa feel that they lack the necessary expertise, knowledge, and resources to play a decisive role in shaping the development strategy.[31] In addition, but CSOs often express the desire to be viewed as partners, CSOs find that government agencies and officials often view CSOs as a source of potential or actual opposition.[32] In order to be able to play an integrated role in development projects, many CSOs have sought to strengthen their institutional capacity and expand collaboration with other organizations. In addition, many CSOs are seeking to expand the role of the media in monitoring and reporting on the PRSP process. While the political and legal freedoms vary within African countries, the PRSP process can be one factor in facilitating civil society participation without

[23] *Id.* sec. 3.6.
[24] The author participated in the launching mission of this project.
[25] Afdb Handbook , *supra* note 4, sec. 3.7.1.
[26] *Id.* at 28, box 8 ("Participatory M&E in Mali Poverty Reduction Project).
[27] *Id* at 28.
[28] *Id.*
[29] *Id.* sec. 3.9.1.
[30] *Id.* sec. 3.10.1.
[31] Alieu Jeng, Constituency-Based Discussions, *in* Commission for Africa Workshop, *supra* note 9, at 52. Also, one of the major recommendations of the Djibouti PRSP study on public participation advised capacity building of local CSOs, both in terms of expertise and knowledge, to help them cooperate effectively in the project cycle.
[32] *Id.*

necessarily challenging the legal and political framework. For example, in Gambia, umbrella NGOs have been organized to take part in specific participatory processes.[33]

Like many of its sister international financial institutions in recent years, the AFDB has sought to improve and expand its relations with CSOs.[34] In 1990, the AFDB adopted an official policy on cooperation with NGOs; in 1991, the Bank issued guidelines and procedures related to that policy; and in 2000, the AFDB Board revised the new Policy and Guidelines on Cooperation with Civil Society Organizations.

An operational study conducted in 2000 revealed that 57 AFDB-supported projects in 26 countries had involved CSOs.[35] A total of 350 community-based organizations, 250 national NGOs, and 55 international NGOs participated in these projects. According to the study, from 1986 to 1996, an average of only 2 projects per year involved CSOs; however, from 1997 to 1999, the average increased to 13 projects per year. While many CSOs have been well-integrated into the implementation of project activities (88 percent), CSOs were only involved in project identification in two-thirds of the projects. Subsequently, only in one-half of the projects did they participate in project design, and one-third in project management.[36] While these results show a marked improvement from previous years, in order for public participation to be truly effective, it must be exercised during all phases of development projects.

To improve public access to information regarding the Bank's operations, AFDB has recently set up a Public Information Center (PIC) at its headquarters in Abidjian. This Center is designed to make available to the public all project documents, policies, and guidelines, in accordance to the AFDB's Disclosure of Information Policy.[37] This Center is open to the public from Monday through Friday during regular business hours. Finally, at the time of this writing, AFDB is recruiting a "Principal NGO Liaison Officer" to strengthen the Bank's cooperation with CSOs. The main tasks of this liaison officer will include:

- Define and coordinate Bank Group's involvement in setting the international agenda for participatory approaches and CSO involvement.
- Develop projects which promote the use of participatory development approaches by promoting country consultation regarding Bank Group-financed projects and lending in identification, preparation, and appraisal missions.
- Monitor progress in adopting participatory approaches and the impact of poverty on the participation of stakeholders in Bank Group-fi nanced projects.
- Mobilize resources to strengthen CSO-AFDB relations for institutional support, technical assistance, and consultancy requirements.[38]

C. Case Study of the Middle Bani Plains Development Project (Mali)

This subsection examines the controversy surrounding the construction of a hydroelectric dam project near the village of Talo in Mali. This controversy highlights lessons in public participation in AFDB decisionmaking processes and in access to justice for AFDB-funded projects.

Approved by the AFDB Board of Directors on December 1997, this project, which cost 26.89 million Units of Account (approximately US$28 million), sought to place a low dam, or weir, across the Bani River at the Middle Bani Plains. The Bani River is a tributary of the Niger River. The primary purpose of this proposed dam is to raise the level of the river to flood the plains, thereby increasing agricultural production through recreating natural flooding conditions. The project also aims to benefit the environment by regenerating lost vegetation cover and improving long-term soil fertility, replenishing groundwater tables, and resettling aquatic fauna in the region. Moreover, it seeks to improve the health conditions of people in the project zone by eliminating the consumption of contaminated surface water by generating a potable water supply by drilling of wells.[39]

Until recent decades, the Middle Bani Plains have been a focal point for both farmers and pastoralists. The planned irrigation areas have typically been subject to seasonal flooding with wide changes in annual variation of rainfall and flood depth, thus permitting extensive cultivation of crops, especially rice and bourgou (a fast-growing plant favored by cattle that graze seasonally).[40] However, since 1972, due to successive years of drought, the Bani River's average annual flow has fallen by 25 percent and its average depth at peak flood is approximately 40 percent lower. This has severely affected agriculture. As a result, the plains were abandoned and a significant proportion of the labor force left the region. Therefore, the return to flooded cropping, to be achieved through the construction of the dam, is critical to revitalizing the zone.

1. Environmental Issues in the Project

Pursuant to AFDB policies, developing an Environmental Monitoring Plan is a mandatory precondition

[33] *Id.*

[34] Afdb Handbook, *supra* note 4, at 21.

[35] *See id.*, at 21, box 6 (discussing study).

[36] *Id.* at 21.

[37] *See supra* note 13.

[38] *See* www.afdb.org ("Vacancies," Job ref.VN ADB/02/55) (last visited July 30, 2002).

[39] African Development Bank, Country Department West Region, Appraisal Report Middle Bani Plain Development Programme, Phase I, Doc. No. ADF/BD/WP/97/188 (Nov. 26, 1997), para. 4.8.3.

[40] *See id.* para. 4.1.2.

for loan disbursement. Since this project was classified under Category I of the Environmental Assessment Procedures in the AFDB project cycle (significant environmental impacts likely),[41] the probable negative environmental impacts were identified and described in the EIA summary, which also set forth provisions for mitigating the impacts. The AFDB requires environmental monitoring to be carried out by the development and monitoring committee, set up within the framework of the new decentralization policy, and include all regional government departments and representatives of local development committees.[42]

The AFDB first undertook identification and preparation missions of the Bani dam project in 1989 and 1994. In 1995, the AFBD, with the government of Mali, carried out an environmental impact assessment (EIA), pursuant to the Bank's new policy requirements.[43] The EIA could not precisely assess the impact of the flood level and the risk of flooding certain villages upstream, mostly owing to the absence of up-to-date topographical data. The appraisal mission, which took place in October 1996, recommended that additional optimization studies on the dam be carried out on the basis of new surveys and hydrological, topographical, environmental, and socio-economic data analyses. Completed in July 1997, the optimization studies concluded that the dam construction would not amplify the risk of flooding for villages located along the nearby Talo River's headwaters.[44] The program was again appraised in September 1997. However, throughout the entire EIA process, the government of Mali did not inform local villages of the project until May 1997. While at the time the population was practically unanimous in supporting constructing a dam in order to return to flooded cropping, further events, as discussed below, starkly illustrate project pitfalls when not all stakeholders are informed and included in from the beginning of project planning and implementation.

2. The Controversy over the Implementation of the Project

Despite the project's good intentions, opposition to the construction of the Bani River dam erupted, largely due to the lack of public participation in the project from its inception. While many stakeholders in the region supported the project because it would generate more agricultural production and help relieve the area of drought through increased irrigation, one group in particular—comprised of retired government officials from Djenne, but now residing in Bamako—voiced its opposition. The group claimed that the dam would imperil a World Heritage site with an agricultural civilization that went back thousands of years and, therefore, requested that the project be reviewed and ultimately cancelled. The group recommended that the Bani River be allowed to continue its normal behavior, in both good and bad flood years, despite the declining rainfall.

In contrast, traditional chiefs of villages near the site fully supported the project and expressed impatience for it to begin. In addition, younger leaders from Djenne feared that if the project were cancelled, Djenne would not benefit from increased irrigation, and therefore made a plea that if that were to occur, that another weir be installed upstream from Djenne.

As the controversy grew, a U.S.-based NGO called Cultural Survival filmed a documentary entitled *Dam Nation: Water is Life*, in which it took a public stand

[41] The AFDB's Environmental Assessment Procedures in the project cycle are as follows:

> An environmental assessment system will be utilized through all the stages of the Project cycle—identification, preparation, appraisal, implementation, and post-evaluation. Prior to the application of the environmental assessment process, an initial environmental examination will be carried out on all projects to determine whether an Environmental Impact Assessment (EIA) study or environmental mitigation measures are required. This initial examination will categorize projects based on potential Environmental Impacts into four types:
>
> (i) Category I: Projects with the potential for significant environmental impacts requiring detailed field review and in most cases an EIA.
>
> (ii) Category II: Projects with limited environmental impacts that can be routinely resolved through application of mitigation measures and design changes.
>
> (iii) Category III: Projects not anticipated to result in adverse environmental impacts that would not require detailed environmental review.
>
> (iv) Category IV: Projects with beneficial environmental impacts.
>
> This initial examination is considered as an important checkpoint in the project review process. No project will be allowed to continue until it has gone past this initial environmental examination, and every appraisal report will therefore contain an environmental statement based upon the above categorization.

AFDB Group, Environmental Policy Paper 48-49 (June 1990)

[42] Commission for Africa Workshop, *supra* note 10, sec. 4.8.6 ("The priority task of the local development committees grouped under the regional development committee is to coordinate farmers to allow for the correct implementation of the flooding plan prepared by the technical departments in collaboration with the farmers. It serves as an interface between the traditional villages structures, farmers associations, decentralized local authorities and the relevant technical services.").

[43] Environmental Policy Paper, *supra* note 41, at 48-49.

[44] These studies all cover the Bani Basin from just upstream of the dam to 100 kilometers downstream. *See also* Richard S.D. Hawkins, Regional Environmental Officer, U.S. Embassy, Abidjan, Talo Dam Project Recommendations, Unclassified Memorandum, Embassy of the United States of America (July 23, 2001).

against the construction of the Bani River dam.[45] In addition, Cultural Survival sponsored faculty members from Clark University in Worcester, Massachusetts to examine previous feasibility studies of the project, which were conducted by the Malian government and AFDB. Ultimately, the Clark University report called for

> a new EIA and socio-economic study focusing on the downstream area of the dam site to Mopti, another EIA of the dam's impact on the greater Niger Inland Delta, a revised cost-benefit analysis including upstream and downstream costs and losses, as well as project benefits, and a comprehensive hydrological study taking into account for water to be diverted, evaporation, and climatic variability.[46]

The African Development Bank responded vehemently to these claims. First, the AFDB reminded the villagers from the Bani River who opposed the project, as well as Cultural Survival, that an EIA of the project had been carried out in 1995. Since there were no specific background studies to which it could refer, the EIA could not determine the shape of the future storage lake. But based on preliminary surveys, the AFDB claimed that provisions had been made for the construction of a dyke across the Bani River to protect villages upstream from the dam. The Bank also stressed that in July 1997 the EIA was supplemented by topographical, hydrological, and socio-economic studies that precisely assessed the impact of the dam's construction and operation on the environment, especially the risk of flooding upstream induced by these activities. Potential negative impacts of the project on the environment were identified and described in the EIA, which also contains mitigating measures. For example, it was foreseen that the risk of villages being flooded could be contained through the construction of a dyke that would protect areas most vulnerable to flooding. Project managers also insisted that previous technical studies were adequate and indicated that additional studies demanded in the Clark University report would impose years of delay on building the dam, which would be due largely to a lack of hydrological data on the Djenne flood plain, the confluence of the Bani and Niger Rivers at Mopti, and the Inland Delta downstream of Mopti.

However, since Cultural Survival's opposition to the dam generated international attention for the project, the U.S. delegation to the AFDB called on the President of the Bank to postpone the implementation of the project until further review. In February 2001, the Bank decided to postpone the project, alarming the Malian government and villagers and farmers in the Middle Bani Plain who supported the project. The U.S. Executive Director and Head of Delegation to the AFDB requested that the U.S. State Department Regional Environmental Officer (REO) in Abidjan visit both Bamako and the dam site in the Bani region in an independent mission to evaluate the project and make recommendations on whether the project should proceed.

In order to assess the controversy, the REO met with a wide range of the stakeholders in July 2001, including two civil society groups representing Djenne (a neighboring village), Ministry officials, local project managers, and village spokesmen. The REO also visited the Middle Bani region to view the dam site. In his meeting with the Ministry chief of staff, the REO discovered that the government had been withholding certain information regarding development projects. According to the Ministry, a new dam project in Djenne was indeed being planned, and the Terms of Reference (TOR) had already been sent to the AFDB to seek funding. Surprisingly, none of the young leaders in Djenne, those who wanted a dam alternative in Djenne if the Bani dam were cancelled, were ever informed of the Ministry's plans. After the REO revealed this plan to the leaders in Djenne, the government of Mali agreed with the local leaders that a public forum be organized. This forum would allow for a public discussion regarding the project and seek consensus on key issues. In another meeting, a mid-level official acknowledged that original technical studies of the project should have looked at potential impacts farther downstream. Project managers also admitted to the REO that the Ministry had been more secretive than forthcoming in informing the local population of its plans. They agree with the REO's urgings to create a public relations campaign and suggested holding a public forum to broaden the public debate.

The fact that the government of Mali withheld information from so many stakeholders in designing the TOR, as well as informing the public of its intent to develop certain projects, highlights the need for capacity building of many government officials on public participation. It also illustrates some of the misperceptions regarding the role of the public in conceiving, developing, and implementing projects. Only when the government was prompted to do so, did it agree to convene public forums to generate debate and solicit feedback. The Middle Bani Plains Development Project provides a cautionary tale in short-circuiting public involvement: in order for all stakeholders to feel as though they possess ownership of a project, public participation must be incorporated into the beginning phases, and not post-

[45] *Id.* With the assistance of an American resident in Djenne, Cultural Survival prepared a documentary film called "Dam Nation: Water is Life." The film highlighted the opposition of numerous Djenne citizens to the Talo project, citing their belief that the dam will prevent flood waters from reaching Djenne's expansive and fertile rice fields, and thus result in starvation and abandonment of the city, a World Heritage site.

[46] *See* Hawkins, supra note 44, sec. II.

poned until the project is already in the planning or implementation stages.

The REO concluded that the Bani dam project should continue because further delay or cancellation would impede the project's benefits.[47] Despite the recommendations from the Clark University report, the REO believed that it was most important to increase water availability in the Bani basin and regulate seasonal flows to capture more water for agricultural and other purposes. Additional delay could exacerbate the agricultural crisis, as rainfall and surface and ground water supplies remained severely diminished. However, in order for the dam project to proceed with minimal conflict, the REO recommended that the AFDB continue to encourage the Ministry to communicate openly with the public and to cooperate with other Ministries to educate citizens in their roles in water management. The REO also encouraged Cultural Survival to monitor the project closely and, if they have concerns, to meet with government officials and project managers. Finally, the REO recommended the creation of a forum in which all involved Malian interest groups could voice their opinions and concerns so that consensus could be developed. The REO suggested that such participants include farmers, traditional chiefs, herders, fishermen, religious leaders, government representatives, and other stakeholders in Djenne's water resources.

Since the U.S. mission was an independent and informal fact-finding mission, the AFDB found it necessary to conduct its own formal assessment of the project in order to determine whether to postpone, reactivate, or cancel the project. The AFDB accordingly sent a mission to the site from September 21 to October 5, 2001. The main objectives of the mission were to conduct large consultations with all stakeholders, particularly the villagers affected upstream by the construction of the dam; to meet with the government of Mali, local associations, and all parties concerned with the issues raised by Cultural Survival; and to identify and address concerns of the local population. The AFDB released a preliminary report on October 8, 2001, recommending that a large number of workshops and seminars be organized to increase awareness among the population and other stakeholders on the general purposes of the Bani dam project and improve their involvement in its implementation. At the time of this writing, the AFDB has decided to suspend the construction of the dam until further notice.

3. Lessons Learned from the Bani River Project

The Bani River project demonstrates how a development project can be impeded or even threatened with cancellation when there is limited access to information and public participation in the decisionmaking process,[48] as well as a lack of administrative or judicial forum to hear, investigate, and resolve controversies. As noted previously, the AFDB does not play a direct role in project implementation and the responsibility for promoting public participation lies mainly with the staff of the project implementation unit and relevant government bodies.[49] However, even though a government has the primary responsibility in the identification, preparation, and appraisal phases of the project, the AFDB staff should have made sure that all stakeholders were adequately consulted and effectively involved in the overall process. The failure to do so has resulted in a serious conflict, in which groups of villagers have demanded that the project be canceled. This conflict could have been averted had they received information about the project earlier and had an opportunity to provide feedback.

Another issue raised by the Bani dam case study was the lack of mechanisms set up by the AFDB to carry out thorough fact-finding missions before a controversy became highly polarized, and to prevent, mitigate, and resolve disputes in Bank-supported projects through an independent body. Although the AFDB has an Ombudsman in its internal governance structure, the AFDB lacks a permanent and independent forum to ensure accountability in Bank operations with respect to its policies, procedures, and implementation. Such a forum is also critical in providing a link between the Bank and the people who are likely to be affected by the projects that it supports. For example, if the stakeholders of the Bani dam project had been able to present their concerns to an independent forum through a request for inspection, controversy over the dam may have been greatly reduced.

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[47] *Id.* at sec. VI.

[48] Paul, *supra* note 9, at 4 ("it is useful to distinguish between four levels of intensity in CP, though different levels of CP may co-exist in the same project. (1) Information-sharing: project designers and managers may share information with beneficiaries in order to facilitate collective or individual action … (2) Consultation: when beneficiaries are not only informed, but consulted on key issues at some or all stages in a project cycle, the level of intensity of CP rises. There is an opportunity here for beneficiaries to interact and provide feedback to the project agency which the latter could take into account in the design and implementation stages … (3) Decision making: a still higher level of intensity may be said to occur when beneficiaries have a decision making role in matters of project design and implementation … (4) Initiating action: … Initiative implies a proactive capacity and the confidence to get going on one's own … [But] in planning project, governments and donors often tend to pre-empt the initiatives that beneficiaries might have taken. In such cases, the latter can play only a reactive role.").

[49] AFDB HANDBOOK, *supra* note 4, sec. 3.6; Paul, *supra* note 9, at ix ("Even if governments and donors are persuaded that CP is appropriate to their projects, they are unlikely to incorporate CP in project methodologies … The approaches and methods for operationalizing CP may vary by sector and sub-sector. There is a need, therefore, to develop and disseminate sector-related guidelines or at least advice on the use of CP in projects relevant to specific country contexts.").

Following its experiences with the Bani River Project and recognizing emerging institutional arrangements in other international financial institutions, the AFDB is considering the creation of an Independent Inspection Panel which could address the effects of environmental damages in development projects.[50] Like the World Bank and other international financial institutions, such as the Asian Development Bank and the Inter-American Development Bank, the proposed AFDB Independent Inspection Panel would be composed of independent individuals selected for their expertise by the Bank President and Board.[51] It would be empowered to consider claims brought by citizens whose environment has been or could be negatively impacted by an AFDB-supported project due to the Bank's failure to follow its own policies or procedures.

After receiving a claim, the proposed Panel would initiate a two-stage fact-finding investigation to determine whether AFDB policies or loan covenants were violated. The Panel would first conduct a preliminary assessment, including a site visit and a review of the claim and the Bank's response. Based on this preliminary assessment, the Panel would recommend to the Bank's Board of Executive Directors whether a full inspection is warranted. The Board would retain sole power to authorize a full inspection. If a full inspection is authorized, the Panel would enjoy broad investigative powers including access to all Bank Management and staff. Following the investigation, the Panel would issue a report with its recommendation to Bank Management and the Board of Executive Directors. It is likely that in most cases, the Panel process would result in the Bank adopting some form of an action plan to address the underlying harms alleged in the claims.[52]

IV. CONCLUSION

Drawing upon the AFDB's experiences in implementing public participation policies and guidelines into its development strategies and projects, the effectiveness of the Bank's Vision may be improved on the ground in a number of ways. First, currently the term "consultation" is used exclusively to denote participatory approaches in AFDB procedures, such as its Environmental Review and Social Assessments Procedures. Instead, the term "public participation" should be incorporated into document language in order avoid confusion as to the extent to which all stakeholders can be involved and develop ownership of AFDB strategies and projects. This distinction may seem to be a matter of semantics, but it is necessary to have this distinction in AFDB documents so that project managers and Bank staff know that from the outset a project must involve the public and they should identify the major phases of the project cycle in which to bring ensure genuine participation.

Second, as evidenced by the case study of the Bani dam in Mali, public participation must begin at the earliest possible stage in a project, so as to minimize conflicts and misunderstandings between stakeholders and project designers. To a large extent, the AFDB has the capacity to control whether or not development strategies and projects incorporate public participation: it can make public participation a precondition for loan disbursement. However, the Bank could take this concept one step further by, for example, only accepting Terms of Reference for feasibility studies that incorporate the perspectives of all stakeholders, particularly those most affected by the proposed development project.

In following these recommendations, the AFDB will strengthen environmental governance by ensuring that all people have access to information, participate in the decisionmaking process, and have access to effective administrative and judicial proceedings. Public participation is a key component to achieving sustainable development because it empowers people by ensuring they have a voice in decisions that could affect their health, livelihood, and environment, and thus have ownership of their future.

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[50] It should be stressed that the AFDB is still at an early stage in setting up an independent inspection panel, and that no final draft has been produced yet.

[51] World Bank Inspection Panel, IBRD Resolution No. 93-10 (Sept 23, 1993); World Bank Inspection Panel, Operating Procedures (August 1994); Dana Clark & Michael Shu, A Citizen's Guide to the World Bank Inspection Panel (1997), *available at* www.ciel.org/Publications/citizensguide.pdf (last visited July 30, 2002).

[52] Center for International Environmental Law, Effective Dispute Resolution: A Review of Options for Disputes Resolution Mechanisms and Procedures, Document prepared for the fifth session of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific 26 (Sept. 1999), *available at* www.ciel.org/Publications/effectivedisputeresolution.pdf (last visited July 30, 2002).

PUBLIC PARTICIPATION AND TRANSPARENCY AT OFFICIAL EXPORT CREDIT AGENCIES

Bruce Rich and Tomás Carbonell [*]

Export credit agencies (ECAs) are now the world's largest source of official finance for developing countries, supporting major infrastructure projects, industrial installations, and resource extraction schemes in almost every corner of the globe. Despite their prominent role in facilitating international trade and investment, and despite the significant environmental and social impacts of their activities, ECAs have resisted measures to improve the transparency of their operations and increase public participation in their projects. This chapter makes the case for increased transparency and public participation in this critical, but frequently neglected, class of financial institutions. Specific policy recommendations in this area are presented, and objections to ECA reform are identified and rebutted. While not a principal focus of this chapter, the need for access to justice with respect to ECA-backed projects is also highlighted and addressed in the policy recommendations section.

I. THE NATURE AND SCALE OF ECA SUPPORT

Official export credit agencies[1] are publicly supported financial institutions, established by national governments to promote exports and investments in risky overseas markets. While every ECA offers a slightly different suite of financial services, most fulfill their mandate by extending direct loans, issuing guarantees on loans by private financial institutions, and providing insurance against political and commercial risks. As official agencies, ECAs are called upon to finance transactions that are too risky for private sector financial institutions—usually capital-intensive operations in politically and economically volatile emerging markets. Often, ECAs support projects with significant environmental, social, and economic consequences: from dams, roads, power plants and other infrastructure projects, to plantations, paper and pulp mills, oil refineries, gas pipelines, mines, and chemical facilities.

By almost any measure, official export credit agencies have come to exert considerable influence on global patterns of trade and investment. In fact, ECAs now provide more finance in the developing world than any other official institutions. In 2000 alone, the latest year for which reliable data is available, ECAs provided about $504 billion in export credit and investment insurance,[2] equal to roughly 8 percent of total world exports.[3] The bulk of this total consisted of short-term trade finance,[4] which often supports shipments of less capital-intensive commodities and equipment. However, medium- and long-term finance accounted for some $50 billion of official ECA support in 2000, down from an average of about $75 billion in the early and mid-1990s[5] but still almost twice as high as the World Bank Group's total lending and guarantee volume of $20.8 billion.[6] This medium- and long-term ECA finance also exceeded commitments of bilateral official

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[1] While the majority of export credit agencies are owned and operated by governments, there are a few private firms that offer trade finance and insurance without the full faith and credit of the state. This chapter focuses on official, publicly supported institutions.; unless otherwise noted, the term "export credit agencies" in this chapter refers only to official ECAs.

[2] *See* INTERNATIONAL UNION OF CREDIT AND INVESTMENT INSURERS (BERNE UNION), THE BERNE UNION 2002 YEARBOOK 200-01 (2002). These numbers include only business covered by the 51 members of the Berne Union, a handful of which are private ECAs.

[3] WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 2001 2 (2001).

[4] Short-term instruments have a repayment period of six months to two years.

[5] WORLD BANK, GLOBAL DEVELOPMENT FINANCE: ANALYSIS AND SUMMARY TABLES 2002 107 (2002).

[6] WORLD BANK, THE WORLD BANK ANNUAL REPORT 2001 26 (2001), table 1.1; INTERNATIONAL FINANCE CORPORATION, 2000 ANNUAL REPORT 2-3 (2000) ("Financial and Portfolio Highlights"); MULTILATERAL INVESTMENT GUARANTEE AGENCY, MIGA REVIEW 2000 8 (2000).

development assistance in 2000 by $4.5 billion, according to OECD figures.[7]

These figures, as impressive as they are, actually understate the real economic importance of ECA finance. ECA support often serves as a linchpin of major finance packages, and leverages substantial additional capital from private sources. While there are no reliable figures on the leveraged value of ECA finance, research by Environmental Defense suggests that every dollar of ECA finance can attract as much as five additional dollars of private capital.[8] The importance of ECA support in drawing private investment to developing countries is also reflected in debt statistics: on average, about 27 percent of the external debt of the largest recipients of export credits (including major economies like Brazil, Mexico, India, Indonesia, China, Russia, and Nigeria) was held by ECAs in 1999. Export credits represent more than half of the external debt of some countries, including Nigeria, Iran, Algeria, and several of the Caspian states.[9]

The World Bank estimated in 1998 that roughly half of the medium- and long-term business covered by ECAs supported large infrastructure projects in developing countries.[10] ECAs have the dubious distinction of having facilitated some of the decade's most controversial infrastructure projects. When the Chinese government approached official creditors to request finance for the infamous Three Gorges Dam, European ECAs rushed in to help the project go forward.[11] When President Suharto of Indonesia wanted to enrich his cronies through overpriced power purchasing agreements, ECAs were complicit participants.[12] When Enron decided to build a gas pipeline through the heart of Bolivia's pristine rainforest, it turned to a U.S. ECA for help.[13] These cases and many others[14] have prompted NGOs from both developed and developing countries to call for a variety of environmental and social reforms to ECA lending practices, which some agencies have grudgingly begun to adopt.

II. PUBLIC PARTICIPATION AND TRANSPARENCY AT OFFICIAL ECAS

Two of the more crucial measures demanded by civil society are (1) increased public involvement in the design and implementation of ECA policies and ECA-backed projects, and (2) increased access to environmental information pertaining to ECA activities. Public participation and transparency have long been recognized within the Organisation for Economic Co-operation and Development (OECD), the United Nations, and other international institutions as fundamental principles of good development practice. Mechanisms designed to promote public participation and transparency, such as required consultations with stakeholders and mandatory public comment periods for some environmental assessments, have become standard procedure in the World Bank Group, the regional development banks, and many bilateral development programs.[15] Even some ECAs—namely, the export credit agencies of the United States, Australia, and Japan—have adopted elements of public participation and transparency as part of broader environmental reforms.

These agencies notwithstanding, the vast majority of official ECAs continue to operate in a closed and secretive fashion. Most ECAs do not release basic financial or environmental data on projects prior to approval, thereby precluding public input on financing decisions. Even after a transaction has been approved, some ECAs (such as Germany's HERMES and Austria's OeKB) refuse to disclose this information without the consent of their clients. Few ECAs make clear to the public what environmental standards they use to evaluate projects. Consultations with local people are frequently not required even for high-impact projects, and these same communities have no official channel or recourse at any ECA through which they can seek redress for damages stemming from ECA-backed projects.

The failure of many ECAs to adopt even rudimentary reforms with respect to public participation and transparency is alarming, especially given these agencies' global reach and scale.

III. THE CASE FOR INCREASED PUBLIC PARTICIPATION AND TRANSPARENCY

More open and consultative procedures can benefit official ECAs in a number of ways. First, there is a

[7] OECD Development Assistance Committee Online Database, "Disbursements and Commitments of Official and Private Flows," *available at* www.oecd.org/htm/M00005000/M00005347.htm (last visited Aug. 2, 2002).

[8] Stephanie Fried & Titi Soentoro, Export Credit Agency Finance in Indonesia 8 (2000).

[9] Doris C. Ross & Richard T. Harmsen, Official Financing for Developing Countries 14-17 (2001).

[10] World Bank, Global Development Finance: Analysis and Summary Tables 1998 58 (1998).

[11] John Pomfret, *A Rising Tide of Opposition: Chinese Press Voices Rare Criticism of Massive Dam Project*, Wash. Post, Mar. 18, 1999, at A15; Bruce Rich et al., Export Credit Agencies in Bolivia, Brazil, Ecuador, Peru, and Venezuela 3 (2000).

[12] Fried & Soentoro, *supra* note 8, at 14-15; *see also* Peter Waldman & Jay Solomon, *Power Deals With Cuts for First Family in Indonesia are Coming Under Attack*, Wall St. J., Dec. 23, 1998.

[13] James V. Grimaldi, *Enron Pipeline Leaves Scar on South America; Lobbying, US Loans Put Project on Damaging Path*, Wash. Post, May 6, 2002, at A01.

[14] A number of case studies, along with other NGO literature on ECAs and their activities, are available on the website of the international NGO campaign for export credit agency reform: www.eca-watch.org.

[15] *See, e.g.*, Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*, in this volume.

strong moral case to be made in favor of public participation and transparency in large-scale projects. Policies on public consultation recognize that individuals and communities have a right to take part in major decisions that affect their lives. When a government decides to build a dam that displaces a large number of families and affects settlements downstream, or when a company decides to locate a power plant or refinery near a community, the individuals and groups affected by those decisions should have some say as to how that project should be implemented. And in order to make a meaningful contribution to such decisions, these individuals and groups must have access to environmental and financial information that may be relevant to the deliberations. Hence, transparency is a corollary to public participation. Both principles help democratize the economic development process.

The preamble to the Aarhus Convention clearly states this rights-based argument for public participation and transparency, especially in environmental issues, when it recognizes that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty … to protect and improve the environment for the benefit of present and future generations." Moreover, the Aarhus Convention recognizes

> that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters … citizens may need assistance in order to exercise their rights.[16]

On a more practical level, there is strong evidence that public participation and transparency improve project design.[17] Jannik Linkbaek, former Executive Vice President of the International Finance Corporation (IFC), cites three major reasons why project sponsors in the private sector benefit from developing "management structures and skills to ensure long-term dialogue with communities."[18] First, "consultation and disclosure with affected people and groups brings local knowledge to a project's design, construction, and operation, thereby increasing efficiency and avoiding future costs." Second, "candid, two-way communication can help to identify and solve problems and conflicts while they still can be resolved in an atmosphere of trust between the sponsor and other interested parties, such as community groups, NGOs, and government agencies." Lastly, "the long-term sustainability of investments is critically dependent on good relations with all stakeholders." Linkbaek's strong support for public participation and transparency is particularly pertinent to ECAs, since the IFC deals exclusively with private sector projects and provides services similar to those offered by many export credit agencies.

A. Public Participation and Transparency Are Accepted Good Practices for Official Development Institutions

The growing body of multilateral declarations, guidelines, and statements supporting public participation and transparency in matters of environment and development reflects increasing public demand for information about and involvement in decisions that affect their lives. The few examples selected here are intended to illustrate the broad consensus among governments and civil society that access to environmental information and consultation with stakeholders are fundamental to the proper administration of public authorities, including public financial support for private sector trade and investment.

1. Rio Declaration

Principle 10 of the 1992 Rio Declaration explicitly calls for increased access to environmental information and participation in decisions related to the environment, as well as access to justice to ensure people's rights. States are to play an active role in this process:

> 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 communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available….[19]

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[16] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, pmbl., adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention]; *see also* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

[17] The preamble to the Aarhus Convention recognized this in noting that "in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions."

[18] International Finance Corporation Environment Division, Doing Business Better Through Effective Public Consultation and Disclosure: A Good Practice Manual III-IV (Oct. 1998) [hereinafter IFC Good Practice Manual].

[19] Rio Declaration on Environment and Development, prin. 10, UN Doc. A/CONF.151/26 (vol. I) (1992), 31 I.L.M. 874 (1992).

The focus of Principle 10 on the national level is not inconsistent with opening up ECAs. First and foremost, Principle 10 recognizes that "all concerned citizens, at the relevant level" should participate in addressing environmental issues. Moreover, ECAs are national agencies that function at the national level, albeit often supporting activities in other nations.

2. Regional Initiatives

Recent regional declarations and agreements have expanded upon the importance of public participation and transparency in environmental protection and development. Among these are the Aarhus Convention (ratified by 22 European and Central Asian states); the East African Memorandum of Understanding on Environment Management (adopted by the 3 member states of the East African Community); the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development, (adopted by the 34 member countries of the Organization of American States); and the Draft Document on Towards Good Practices for Public Involvement in Environmental Policies now being developed by EU members and ten Asian states.[20]

3. OECD Development Assistance Committee

The 22 member states of the OECD Development Assistance Committee (DAC) have made public participation and transparency integral elements of numerous guidelines for development practitioners. According to the DAC guidelines on strategies for sustainable development, published in 2001, "[b]road participation in strategic planning is necessary for ensuring commitment, and for ensuring that key information is brought to bear in planning processes."[21] Accordingly, the DAC called for more "bottom-up" development approaches that emphasize the inclusion of all relevant stakeholders and the involvement of local NGOs and community authorities. "Individuals and communities," observed the DAC, "are best placed to identify local trends, challenges, problems and needs, to agree on their own priorities and preferences, and to determine what skills and capacities are lacking."[22]

The DAC Guidelines on Aid and the Environment make specific recommendations for common policies on involving individuals and communities in the development process.[23] Under the DAC's guidelines on Good Practices for Environmental Impact Assessment of Development Projects, local agencies, community groups, and NGOs are to be consulted in the scoping phase of an environmental impact assessment. NGOs and members of the affected population, including women, should also be involved in the design and implementation of development projects.[24]

The DAC's guidelines on involuntary displacement and resettlement include similar provisions, stating that "community participation in planning and implementing resettlement is essential" and also emphasizing the involvement of women in the process.[25] Project managers have a responsibility to inform affected groups of resettlement policies and guidelines, and make provisions for community consultations in the resettlement planning process. The feasibility of resettlement itself is to be determined through such consultations, which should also include "host communities" that accept resettlers.[26] Since their adoption ten years ago, both of these DAC guidelines have been widely regarded as "best practice" principles by OECD governments and by development practitioners.

4. Jakarta Declaration

The Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies, drafted in May 2000 and endorsed by 347 NGOs from over 47 countries, directly addresses the need of public participation and transparency at ECAs. The first point of the Jakarta Declaration calls for public disclosure and the involvement of stakeholders in project-related decisions in the design of new ECA policies and in international negotiations on export credit practices.[27]

5. International Finance Corporation

Public participation and transparency are also part of the operational policies of major multilateral and bilateral development institutions, including those that work with private sector clients. For example, the IFC's "Good Practice Manual" on public consultation and disclosure, published in late 1998, provides very specific, step-by-step guidance for private sector clients on how to carry out public consultation and information disclosure activities in connection with IFC guidelines on environmental assessment and information disclo-

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[20] *See* pt. II, in this volume.

[21] Organisation for Economic Co-operation and Development (OECD), The DAC Guidelines: Strategies for Sustainable Development: Guidance for Development Co-operation 39 (2001)

[22] *Id.* at 39-41.

[23] OECD Development Assistance Committee, Guidelines on Aid and Environment: Good Practices for Environmental Impact Assessment of Development Projects (1992).

[24] *Id.* at 10, 12.

[25] OECD Development Assistance Committee, Guidelines on Aid and Environment: Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects (1992).

[26] *Id.* at 7-9.

[27] Jakarta Declaration for Reform of Official Export Credit and Investment Insurance Agencies, done May 14, 2000, *available at* www.eca-watch.org/goals/jakartadec.html (last visited Aug. 1, 2002).

sure.[28] In addition to consultation and disclosure requirements pertaining to projects in specific sectors, the IFC's Operational Policy 4.01 requires public consultation and information disclosure for all high-impact "Category A" projects and for some medium-impact "Category B" projects.[29] Moreover, the IFC requires that consultations with affected communities continue after the approval of the environmental assessment, during the project's construction or operational phase. Clients must inform the IFC of their compliance with this requirement in the annual reports they submit to the corporation.[30]

6. National ECAs: OPIC, EXIM, JBIC, and EFIC

Four ECAs—the US Overseas Private Investment Corporation (OPIC), the Export-Import Bank of the United States (EXIM), the Japan Bank for International Cooperation (JBIC), and Australia's Export Finance and Insurance Corporation (EFIC)—have policies requiring some disclosure of environmental information and consultation with affected parties. OPIC informs the public through its website when it receives an application for a Category A project or subproject, guarantees a 60-day comment period on the environmental assessment associated with that project, and lists major transactions in its annual report.[31] OPIC also explicitly adheres to World Bank policy as a term of reference.[32]

The Export-Import Bank releases project names, locations, and descriptions, as well as environmental assessment information, prior to approval.[33] EXIM also evaluates environmental assessments according to an explicit and quantitative set of standards developed in consultation with the World Bank.

JBIC commits to releasing environmental information for Category A and B projects before approving funding, and requires consultations for projects with potentially large impacts.[34] Lastly, EFIC provides a comment period of 45 days on environmental information prior to making a decision, applies World Bank standards as a term of reference, and requires consultations with affected parties for Category A projects.[35]

7. ECA Policies Lag Behind International Agreements and Official Development Institutions

The opposition of most ECAs to incorporating transparency and public participation, then, is inconsistent with development guidelines that govern public support for private sector projects. This includes guidelines that have been articulated by numerous international fora, practiced by a variety of international financial institutions, and incorporated by some key national ECAs.

Yet, many ECAs strongly resist the move to greater transparency and public participation. ECAs frequently maintain that as export promotion programs, they should not have to follow guidelines in force at development institutions. This argument makes a distinction without a difference. Export credit agencies use the full faith and credit of their parent governments to facilitate the construction of roads, dams, telecommunications networks, refineries, factories, and other facilities. In an increasing number of cases, the same companies receive support for the same or similar projects from multilateral and bilateral development agencies. Presumably, many of these projects would not proceed without the risk-management services that official ECAs provide. To say that this kind of activity does not constitute development, and to argue on this basis that ECAs should meet none of the public participation and transparency requirements that apply to development institutions doing similar work, is disingenuous.

B. European Legal Context for Public Involvement in ECAs

There are no international covenants or agreements dealing explicitly with public participation and transparency at export credit agencies. Nonetheless, two major European agreements—the Maastricht Treaty and the Aarhus Convention—may have implications for export credit policy within European governments.

1. The Maastricht Treaty

Signed in 1992, the Treaty of Maastricht established the European Union (EU) and specified certain areas in which EU members would seek to harmonize or coordinate their policies.[36] Article 130v of the Maastricht Treaty calls for coherence between the development assistance policies of EU member states and the export credit activities of member states. As a practical matter, almost all of EU member states have development assistance policies that include environmental assessment

[28] IFC Good Practice Manual, *supra* note 18.
[29] IFC Operational Policy 4.01 (Oct. 1998), para. 12.
[30] IFC Good Practice Manual, *supra* note 18, at 4.
[31] *Public Consultation and Disclosure*, *in* OPIC, Environmental Handbook (Apr. 1999), *available at* www.opic.gov/Publications/envbook.htm (last visited Aug. 2, 2002).
[32] *Environmental Standards*, *in id.*
[33] Export-Import Bank of the United States, Environmental Procedures, Introduction, para. 8 (2001), *available at* www.exim.gov/envproc.html (last visited Aug. 2, 2002).
[34] Japan Bank for International Cooperation, Guidelines for Confirmation of Environmental and Social Considerations (Provisional Translation) (2002), pt. 1, sec. 5; pt. 2, sec. 1.
[35] EFIC's Environment Policy, *available at* www.efic.gov.au/environment/environstd.asp (last visited Aug. 2, 2002).
[36] Treaty of Maastricht, done at Maastricht on Feb. 7, 1992, *available at* www.uni-mannheim.de/users/ddz/edz/doku/vertrag/engl/m_engl.html (last visited Aug. 2, 2002).

and ecological sustainability in their broad policy goals and procedures. With respect to their development policies, EU member states have approved the guidelines of the OECD Development Assistance Committee on, for example, environmental assessment of development projects and guidelines concerning forcible resettlement (both of which include specific provisions on public participation and transparency). Outside of the EU context, Switzerland amended a law in 1980 requiring a loosely defined coherence between its export credits and development assistance policies.[37]

To date, harmonization of ECA policies in Europe has been a failure. Since 1960, members of the European Community and then the EU have attempted, and failed, several times to harmonize the terms of their export credit activities, with a relatively recent attempt failing in 1995. Although a progressive harmonization of EU export credit criteria was called for by the 1957 Treaty of Rome, the EU Commission noted in 1994 that "the experience of the past thirty years teaches that states are extremely reluctant to renounce even a small part of their independence in matters of export credit insurance."[38]

The time is long overdue for the EU to implement the coherence commitments of the Maastricht Treaty, which would include policies and procedures for greater public participation and transparency at ECAs. The EU through its Rio Earth Summit, Agenda 21, and Maastricht Treaty obligations has clearly committed itself to harmonizing its export credit policies with its development assistance goals.

2. The Aarhus Convention

The UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, better known as the Aarhus Convention, could dramatically change how ECAs operate. The Aarhus Convention entered into force on October 30, 2001 and establishes minimum standards and practices for states to ensure public access to information, participation in decision-making processes, and access to judicial and administrative mechanisms (also referred to as "access to justice").[39] Of the 22 countries that were parties to the Convention on August 1, 2002, twelve have official ECAs.[40]

As public agencies of national government, official ECAs are "public authorities" under Article 2(2)(a) of the Convention. Accordingly, they are subject to the information, participation, and justice provisions of the Convention.

Under Article 4 of the Convention, public authorities must release in a timely fashion any environmental information requested by citizens, without regard to race, gender, nationality or other criteria. "Environmental information" includes information in any form on three related matters. The first is

> The state of elements of the environment, such as air and atmosphere, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.[41]

The second category of information regards "activities and measures . . . affecting or likely to affect the elements of the environment" set forth in Article 2(3)(a). And the third category of information pertains to "[t]he state of human health and safety, conditions of human life, cultural sites and built structures" as they relate to the elements, activities, and measures set forth in the two preceding paragraphs.

As described above, the projects supported by ECAs frequently affect environmental elements (such as air, water, and land) as well as human health and cultural sites. Accordingly, information about ECA-supported projects is "environmental information," and must be produced upon request.

Under the Convention, people may request information without stating or proving their interest in the information.[42] If the ECA has the information, the ECA must make it available promptly, no later than one month from the submission of the original request.[43] Article 4(4) sets forth specific exemptions for disclosure. The two exemptions that are the most likely to be invoked with respect to ECAs are "proceedings of public authorities, where such confidentiality is provided for under national law" and "confidentiality of commercial and industrial information, where such confi-

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[37] Richard Gerster, *Official Export Credits and Development Policy: The Case of Switzerland*, 13 SWISS COALITION NEWS 2 (Sept. 1997). The language was that "the government shall take the principles of Swiss development cooperation into account when considering exports to low income developing countries."

[38] Proposal for a Council Directive on Harmonization of the Main Provisions Concerning Export Credit Insurance for Transactions With Medium- and Long-Term Cover, EU Commission Proposal 297(94) 1994/0166/ACC (July 13, 1994).

[39] Aarhus Convention, *supra* note 16.

[40] The twelve parties to the Convention with official ECAs are Denmark, Estonia, France, Hungary, Italy, Kazakhstan, Latvia, Lithuania, Malta, Poland, Romania, and Ukraine. *Cf.* DELIO E GIANTURCO, EXPORT CREDIT AGENCIES: THE UNSUNG GIANTS OF INTERNATIONAL TRADE AND FINANCE 155-59 (2001). Information on the ratification status of the Aarhus Convention may be found at www.unece.org/env/pp/ctreaty.htm (last visited Aug. 2, 2002).

[41] Aarhus Convention, *supra* note 16, art. 2(3)(a).

[42] *Id.* art. 4(1)(a).

[43] *Id.* art. 4(2) (also providing the possibility of an extension of one month).

dentiality is protected by law in order to protect a legitimate economic interest."[44]

The Convention does not elaborate on what constitutes "proceedings of public authorities," so its scope is unclear. Similarly, the confidential business information exemption does not provide much further guidance except to say that emissions information that is "relevant for the protection of the environment" must be disclosed. All exemptions, though, are to be "interpreted in a restrictive way."[45] Moreover, any potential ground for refusing to disclose information must be weighed against "the public interest served by disclosure and whether the information requested relates to emissions into the environment."[46]

As a practical matter, confidential business information could be construed broadly to include essentially everything relating to a proposed project.[47] However, such an interpretation would be anathema to the letter and spirit of the Aarhus Convention. Instead, this exemption (and all others) must be construed narrowly. A more rational approach for most ECAs would be to adopt practices consistent with those that have long been in place at EXIM and OPIC. Both agencies have implemented disclosure guidelines that respect their clients' commercial confidentiality while allowing the public access to important environmental and financial information concerning their projects.

To the extent that information is exempt from disclosure, authorities should excise the confidential information and provide the remainder of the requested information.[48] Refusals must be in writing, state the reason for the refusal, and explain the channels through which the refusal may be challenged under Article 9.[49] The public authority may charge a reasonable amount for supplying the information, and the charges may be waived in specific instances.[50]

Article 5 requires public authorities to collect the environmental information they need and to make it publicly available. ECAs therefore need to inform the public about the "type and scope of environmental information" they hold and how the public can obtain it, including practical arrangements for making information available free of charge.[51] Electronic databases are promoted, and should include ECA legislation, plans, programs, and policies relating to the environment.[52] This would then require electronic disclosure of, among other things, ECAs' environmental, resettlement, and public involvement policies. ECAs must also disseminate various international documents on environmental issues within their purview.[53]

Under Article 6, ECAs need to ensure public participation when they make decisions with significant environmental impacts. Specifically, Article 6(1)(a) provides that public participation must be provided in decisions regarding whether to permit activities listed in Annex I to the Convention. This Annex includes many of the same types of infrastructure projects that ECAs support: oil and gas refineries and other energy-sector installations, facilities for producing and processing metals, chemical facilities, paper and pulp facilities, dams, and so forth. If there is any question about the relevance of Article 6(1)(a)—that is, do ECAs "permit" the activities or simply make decisions to fund them—Article 6(1)(b) extends the public participation provisions to "decisions on proposed activities . . . which may have a significant effect on the environment." Unlike Article 4, governing public access to information, there is no exception to the public participation provisions for commercial enterprises, so long as those enterprises have significant environmental effects (which, in the parlance of the Aarhus Convention, includes effects on human health, cultural sites, and "human life").[54]

The public must be notified early in the process and ensured an opportunity to participate while "options are open and effective public participation can take place."[55] This notice must include a description of the proposed activity, the decision to be made, the authority making the decision, how the public can participate (including by submitting comments), and a description of available information relating to the proposed project.[56] The public must be given sufficient time to participate effectively, and they should be allowed open access to the underlying documents free-of-charge, although some of this information may be withheld if it would be exempt under Article 4(4).[57] Even if certain

[44] *Id.* art. 4(4)(a), (d). A third exemption provides that information that is submitted voluntarily to a public authority cannot be released without the permission of the submitter. *Id.* art. 4(4)(g). However, this does not apply to the bulk of documents that applicants are obliged to submit to the ECA.

[45] *Id.* art. 4(4).

[46] *Id.*

[47] *See* Bernasconi-Osterwalder & Hunter, *supra* note 15 (discussing broad CBI exemptions in the International Finance Corporation).

[48] Aarhus Convention, *supra* note 16, art. 4(6).

[49] *Id.* art. 4(7).

[50] *Id.* art. 4(8).

[51] *Id.* art. 5(2).

[52] *Id.* art. 5(3).

[53] *Id.* art. 5(5).

[54] Art. 6(1)(c) does allow parties to decide not to apply public participation provisions to "proposed activities serving national defence purposes" if such a process would adversely impact national defense. The presence of this provision – and the concomitant lack of a comparable business-oriented provision – reinforces the applicability of Article 6 to ECAs.

[55] *Id.* art. 6(4).

[56] *Id.* art. 6(2). The notice must also state whether "the activity is subject to a national or transboundary environmental impact assessment procedure." *Id.* art. 6(2)(e).

[57] *Id.* art. 6(3), (6).

information is exempted, an ECA would still need to provide:

> (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
> (b) A description of the significant effects of the proposed activity on the environment;
> (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
> (d) A non-technical summary of the above;
> (e) An outline of the main alternatives studied by the applicant; and
> (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed ….[58]

Thus, even when all the confidential business information is excluded, the public has a right to obtain a good assessment of the potential environmental impacts of an ECA-supported project, its alternatives, and the relevant mitigation measures.

The public has a right to submit written comments on the proposed decision, as well as an opportunity for a public hearing.[59] When reaching the final decision, an ECA must take "due account" of the outcome of public participation.[60] In the United States, one way to do this is through a "response to comments" document, in which an agency summarizes all the comments it received (it may group similar comments together) and responds to the various comments. In some cases, the agency may have agreed and incorporated the comments. In those cases where the agency disagreed with the comments, the response to comments document indicates the basis for the disagreement, such as reliance on different data, feasibility of alternatives, and a different interpretation of the relevant statutory requirements. When a public authority has reached a decision, it must promptly inform the public of the decision, and make the decision available along with the basis for the decision.[61]

Articles 7 and 8 encourage parties to ensure public participation in the preparation of plans, programs, policies, and regulations relating to the environment. These provisions are much more brief and hortatory, though. To clarify the scope of these requirements of the Aarhus Convention, a Strategic Environmental Assessment (SEA) Protocol is being negotiated under the auspices of the Convention on the Environmental Impact Assessment in a Transboundary Context (the Espoo Convention).[62] While the precise scope of public involvement in these contexts currently remains vague, the Aarhus Convention does require that public participation in developing plans and programs be fair, within a reasonable timeframe, and be given due account by the decisionmaker.[63] Largely similar provisions are encouraged for public participation in developing regulations.[64] Ultimately, particularly upon the conclusion of the SEA Protocol, this could mean that citizens and NGOs in borrower countries could have the right to participate in the development of policies, regulations, and guidelines for ECAs in countries that are parties to the Aarhus Convention.

Article 9 of the Aarhus Convention establishes that "any person" may seek access to justice "before a court of law or another independent and impartial body established by law" when that person believes that his or her request for information has been wrongfully denied or when a public authority has inadequately provided for public participation.[65] Moreover, members of the public (including NGOs) have the ability to challenge violations of any "national law relating to the environment" by a private party or public authority.[66] Access to justice must include effective remedies such as injunctive relief; access must be fair, timely, and affordable; and decisions must be in writing and publicly accessible.[67]

As mentioned earlier in the context of information disclosure, all public involvement under the Aarhus Convention must be nondiscriminatory. That is to say, access to information, public participation, and access to justice under the Convention must be granted to all regardless of "citizenship, nationality or domicile."[68] This nondiscrimination requirement extends the benefits of the Aarhus Convention to all citizens and nationalities, not only to those from other parties to the Aarhus Convention. Accordingly, citizens, nationals, and those simply residing in countries in which an ECA-supported project takes place can all seek information regarding the project from the ECA. They also have equal rights to participate in decisions regarding proposed ECA-supported projects. Finally, they have equal rights to seek access to justice if their procedural rights are not followed. The Article 9(3) provision on access to justice for environmental violations would seem to apply to violations of the national law of the ECA, so this might be rather limited as few environmental laws are deemed to operate extraterritorially.

[58] *Id.* art. 6(6).
[59] *Id.* art. 6(7).
[60] *Id.* art. 6(8).
[61] *Id.* art. 6(9).
[62] *See* Kravchenko, *supra* note 16.
[63] Aarhus Convention, *supra* note 16, art. 7.
[64] *Id.* art. 8.
[65] *Id.* art. 9(1), (2).
[66] *Id.* art. 9(3).
[67] *Id.* art. 9(4).
[68] *Id.* art. 3(9).

This raises one final issue with regards to applying the Aarhus Convention to ECAs. Are official ECAs exempt in any way due to the international nature of the projects that they fund? Should there be any concerns with extraterritorial jurisdiction? This has yet to be squarely addressed by the parties to the Convention, however, there are many reasons to believe that official ECAs are subject to the provisions of the Aarhus Convention.

The terms of the Convention do not limit public access to people with a party's jurisdiction. People in other jurisdictions have the right to obtain information, participate, and seek justice on an equal basis regardless of their citizenship, nationality, or domicile. Similarly, the definition of "environmental information" is not confined to information relating to the domestic environment. Indeed, the parties of the Aarhus Convention are urged to promote the Aarhus Convention in "international environmental decision-making processes and within the framework of international organizations in matters relating to the environment."[69] At the national level, all public authorities (such as ECAs) must adhere to the Aarhus Convention to the extent that they have information that relates to the environment, broadly defined, or have significant environmental impacts. Finally, any interpretation that did not apply the Aarhus Convention to ECAs would be inconsistent with the rights-based approach and recognition of the fundamental human rights of "every person of present and future generations to live in an environment adequate to his or her health and well-being."[70]

C. Public Participation and Transparency are Essential for Responsible Risk Management

Risk management is the principal function of official export credit agencies, and the principal reason why clients pay for ECA services. There is convincing evidence that the disclosure of environmental information, and meaningful consultation with affected communities and NGOs, can actually reduce the political and reputational risks associated with certain projects. By failing to require consultations and disclosure as part of their due diligence, ECAs do a disservice to their clients and to taxpayers, who ultimately bear the consequences when an ECA-backed project fails.

1. Lack of Transparency and Consultation Increases Political Risk

Large-scale, capital-intensive infrastructure and resource extraction projects—the types of projects that frequently require ECA support—often have significant impacts on local communities. These impacts can stem from resettlement plans and jobs that are destroyed (displacing people) or created (bringing other people into the region). Impacts to public health and food security can also arise from the project's environmental effects. Lack of transparency and public consultation heighten the project's political risks—specifically, the risk that the community will organize to delay, stop, or even sabotage the project.

Some examples, quoted here from the investment magazine *Project Finance*, underscore the serious potential consequences of political risk:

> Consider this: Phuket, Thailand, a tantalum smelter was due to be developed. Bankers were happy with the economics, good project partners were in place, even the IFC was willing to make a direct loan. One problem though—the locals did not share this enthusiasm. Worried about the smelter's impact on the local environment they burned the plant to the ground.
> Or this: construction of the world's largest nickel mine, at Voisey Bay in Canada, is held back for a year because of an injunction lodged against the project by Inuit tribespeople.
> Or this: US oil firm, Occidental Petroleum, given the go-ahead by the Colombian government in March [1997] to conduct exploratory drilling in northeast Colombia is now threatened with blood on its hands. The U'wa Indians, native to the disputed area, are threatening to commit mass suicide from a nearby cliff if drilling proceeds.[71]

The IFC's good practice manual reports another case in which a company building a pipeline through communal forests failed to inform the resident indigenous population.[72] Community leaders immediately protested, prompting the central government to suspend the project until the company had negotiated a compensation plan with the affected group. This led to a costly eight-month construction delay, and the unwanted interference of the central government in negotiations between the indigenous community and the company. In another similar example, a company building a manufacturing facility neglected to negotiate land acquisitions directly with the affected community, preferring to leave the task to the government. When these negotiations ground to a halt, the company was forced to make its own, more costly, compensation plan at the last minute in order to avoid construction delays.[73]

Meaningful community involvement in project design, and the public disclosure that such involvement

[69] *Id.* art. 3(7).
[70] *Id.* art. 1.
[71] Philip Carter, *The Environment Strikes Back*, Project Finance, No. 11 (Nov. 1997).
[72] IFC Good Practice Manual, *supra* note 18, at 8.
[73] *Id.*

implies, can reduce the likelihood of such undesirable outcomes in two ways. First, fair and inclusive public consultation can create a valuable sense of certainty and trust among all parties, especially if the consultation results in legally binding agreements. This trust and certainty reduces the local tensions that contribute to political risk. Second, public consultation can improve the design of the project, mitigating the disruptions to public health, food security, and culture that provoke local backlash and derail projects.

2. Lack of Public Participation and Transparency Increases Reputational Risk

Reputational risk is a byproduct of the direct political risks associated with a project, and it refers to the potential for damage to a firm's public image, credibility, and capacity to continue doing business. Projects that create political unrest due to a failure to engage stakeholders can generate negative publicity and sour relationships with the host government. These outcomes, in turn, can adversely affect the sponsor's ability to continue doing business both in the host country and abroad. The reputational risk of Turkey's notorious Ilisu Dam project, heightened by intense pressure from the public and the NGO community, may explain why Balfour Beatty, Impregilo, Skanska, and UBS all withdrew their support for the project between 2000 and 2002.[74]

IFC's good practice manual reports another instance in which a company building a power installation conducted late and "culturally inappropriate" consultations, leading to fierce public protests, a concerted NGO campaign, and withering criticism from the press. Four years later, the company had yet to win another government contract in the country. The IFC concluded that "a culturally appropriate program of public consultation that maximized the involvement of the affected population in planning their own future would have helped allay local hostility."[75] By reducing political risk, public consultation and transparency also mitigate reputational risk. In fact, these practices not only can help a project sponsor avoid losing business they may actually help the sponsor gain business through positive publicity.

Given the number of well-documented cases in which a failure to disclose project information or consult with affected communities led to delays, additional costs, and even the demise of the project, it seems clear that public participation and transparency constitute responsible risk management on the part of ECAs and their clients. ECAs that neglect to take these measures to reduce the political and reputational risks of their transactions needlessly place taxpayer funds in peril.

D. ECAs Can Strengthen Democratic Processes in Developing Countries

ECAs are often active in countries where democratic governance mechanisms are nonexistent or poorly developed. Some of these countries, such as Mexico and Brazil, have otherwise functional democratic governments, but have been slow to enforce their own laws on environmental assessment, which frequently provide for information disclosure and public consultation. Public participation and transparency mechanisms are most important for ECAs under these conditions, as they may represent the only channels through which average citizens can influence the development process. By providing mechanisms for public participation and information disclosure where none exist, and by complementing the efforts of host governments trying to implement such mechanisms, ECAs can play an important role in improving the quality of governance in developing economies.

E. ECAs Undermine Other Development Institutions

The lack of meaningful public participation and transparency at most ECAs is symptomatic of a gulf between the lending policies at most ECAs and the relatively more stringent standards at other institutions. In practice, this policy incoherence means that ECAs often undermine the work of development institutions with stronger policies. There are two major ways in which this happens.

1. ECAs Create a "Race to the Bottom"

By facilitating projects that do not meet the standards of other development institutions, ECAs render those standards meaningless and create a "race to the bottom" in official finance. The fierce competition among agencies that provide official export credits only aggravates the tendency to undermine development institutions. As early as 1969, the Commission on International Development (better known as the Pearson Commission) warned of a "race to the bottom" between export credits and development institutions, noting that "[m]ore than one project rejected for financing by the World Bank Group on economic grounds has been promptly financed by an export credit."[76]

Although the Pearson Commission was referring to the economic performance of ECA-backed projects,

[74] Leyla Boulton, *Contractors Withdraw After Protests*, Fin. Times, Mar. 26, 2002, at 2

[75] IFC Good Practice Manual, *supra* note 18, at 8.

[76] Patricia Adams, Odious Debts 84-85 (1991) (quoting Lester B. Pearson, Partners in Development: Report of the Commission on International Development (1969)).

the same phenomenon is readily observed with respect to environmental and social performance. A famous example is the Three Gorges Dam, which was rejected by both the World Bank, because of its severe environmental and social impacts, and by EXIM, because of a lack of information regarding the dam's expected environmental and social consequences. Undeterred, ECAs from Germany, Switzerland, Sweden, and Canada quickly stepped in to finance the project.[77] Turkey's Ilisu Dam, also rejected by the World Bank, won provisional approvals for export credit support from the ECAs of Britain, Italy, and Switzerland, which only withdrew after the project's private sponsors lost interest because of increasing international protest.[78] Yet another example was the proposed Aginskoe gold mine in Russia's Kamchatka Peninsula, which would have adversely affected a Natural World Heritage Site and thus was ineligible for World Bank funding. The US OPIC and Export Development Canada both considered financing the project,[79] but were only dissuaded after a vigorous NGO campaign.

2. ECAs Undermine Commitments to Sustainable Development

ECAs undermine international commitments to sustainable development in a number of ways. One of the best examples was highlighted in a 2000 study by the World Resources Institute, which argued that generous ECA support for energy-intensive projects was undermining commitments by developed countries to combat climate change under the UN Framework Convention on Climate Change.[80] The study found that a disproportionate amount of ECA finance supported projects in energy-intensive sectors, especially oil and gas production and power generation, and that ECA finance for these sectors greatly outstripped the volume of development aid directed at reducing greenhouse gas emissions. The study also identified a "policy perversity" in which "industrialized countries are asking developing countries for one thing (action to address emissions increases) while their ECAs do quite another in those countries (facilitate energy-intensive development)."[81] Significantly, the study recommended that ECAs "institutionalize consultation and information disclosure," citing the positive effects such a move would have on accountability and the quality of decisionmaking within these agencies.[82]

The lack of public participation and transparency at ECAs is just part of a general disconnect between the lending policies of ECAs and those of other development institutions. While ensuring greater access to information and requiring consultative procedures might not by itself be sufficient to prevent ECAs from undermining the World Bank and other institutions, it could provide the public with the means necessary to hold ECAs accountable for respecting international commitments on sustainable development.

IV. DIRECTIONS FOR CHANGE

This chapter has already alluded to a few measures that would improve public participation, transparency, and accountability at official ECAs. A more detailed discussion of these policy and standards reforms follows. This list is not intended to be exhaustive or definitive.

A. Policy Prescriptions

ECAs can improve public access to information through developing and implementing environmental impact assessment (EIA) procedures for pending projects, developing clear criteria for environmental review and decisionmaking that is publicly available, and improving public access to monitoring information. ECAs can also follow the example of other financial institutions to involve the public who may be affected by a project with significant environmental impacts in the EIA process. Finally, ECAs should consider establishing an ombudsman to provide an initial avenue for affected people to seek redress.

1. Public Involvement in Assessing Environmental Impacts of ECA Projects

A critical principle embodied in all good practice documentation on preparing EIAs[83] calls for consultation with affected and interested stakeholders, and release of environmental information, including the draft

[77] Rich et al., *supra* note 11, at 3.

[78] Ilisu Dam Campaign, www.ilisu.org.uk/compsum.html (last visited Aug. 1, 2002); Boulton, *supra* note 74.

[79] Friends of the Earth et al., A Race to the Bottom: Creating Risk, Generating Debt and Guaranteeing Environmental Destruction (Mar. 1999), at 11, *available at* www.foe.org/international/ecareport.pdf (last visited Aug. 2, 2002).

[80] Crescencia Maurer & Ruchi Bhandari, The Climate of Export Credit Agencies, WRI Climate Notes (May 2000).

[81] Id. *at 5-6.*

[82] Id. *at 10.*

[83] This chapter uses the internationally accepted term "environmental impact assessment," although some countries use slightly different terms. For example, Finland refers to "environmental assessment" and the United States to "environmental impact statements" and "environmental assessment." The use of EIA here does not necessarily connote a full-fledged comprehensive EIA, as environmental assessments may constitute a more modest assessment process. Whether the assessment is modest or comprehensive, the public should have access to information and be able to be involved in the assessment. Finally, EIA processes often consider a broad range of impacts beyond those to the natural environment, such as social and cultural impacts.

EIA, before any decision is made to proceed with the project or investment. The IFC and other international financial institutions require an environmental impact assessment for projects with significant environmental impacts, often termed "Category A" projects. These projects are required to have public consultation and information disclosure at least twice: first, during the "scoping" process, in which terms of reference are established and environmental and social issues likely to be important are identified; and second, after the draft EIA is prepared and before project approval.

A Finnish Ministry of Foreign Affairs study on environmental assessment as it relates to export finance reiterated this principle, the *sina qua non* of credible and effective environmental assessment: "effective and credible application of EA requires consideration" of whether the "EA includes effective information disclosure and stakeholder participation."[84] Specifically, the Finnish study summarized the following elements as inherent in "effective information disclosure and stakeholder participation":

> [the] EA must be an open and informative interactive process which aims at transmitting and considering the stakeholders views. *Does the institution inform about the projects under consideration? Is the information produced in the EA process publicly available? Is stakeholder participation included in the process? How and at what stage of the process is participation organized? Are the financing decisions and the environmental conditions included in the contracts made public?*[85]

The issues of stakeholder consultation (and who the stakeholders are), transparency, and disclosure of information are of outstanding and indispensable importance for the success of environmental assessment. Indeed, they lie at the heart of the whole EIA process, the purpose of which is to generate needed information from diverse sources to improve the design and outcome of the investment decision.

2. Clear, Publicly Available Criteria for Environmental Review and Decision

There must be clear, unambiguous criteria for evaluating environmental assessments and for incorporating their findings into ultimate decisionmaking process for determining whether to approve a proposed investment or project. An *ad hoc*, project-by-project approach, an approach with vague terms, or one that leaves undefined, unconstrained discretion with the financing agency is not credible international good practice. A lack of clear, publicly available criteria reduces the accountability of the financing agency, and may also create costly confusion in ECA clients as to what environmental due diligence is required.

If environmental guidelines and environmental assessment are not to be rendered meaningless, there must be clear and transparent criteria for approving projects, requiring modifications of projects, or rejecting them based on environmental guidelines. The Finnish Ministry of Foreign Affairs study quoted above included a series of potential decision criteria such as adequacy of information and its use, environmental standards, and the inclusion of environmental terms in the financing contract.[86]

Additional examples of such clear decision criteria include the categorical exclusions of the IFC, OPIC, and other agencies,[87] and the procedural requirements of the EIA process. Still other possible criteria include the requirements of meeting specific standards, carrying out environmental corrective measures, and implementing action plans. Existing good practice, such as that of the IFC, would allow ECAs some flexibility in determining how standards are applied on a project-by-project basis.

3. Monitoring

Information disclosure and public consultations should not end with the approval of a project. Indeed, the IFC requires a monitoring plan and reporting as part of the Environmental Action Plan required for a full EIA. The Finnish Ministry of Foreign Affairs study set forth criteria related to monitoring:

> Is the developer given sufficient monitoring and reporting obligations? Does the financing institution actively and systematically monitor the projects? Does the financing institution interfere with the neglect of environmental obligations, if necessary? Does the institution take into account learning from experience with the view to making improvements in the application of the EA process?[88]

Monitoring reports should include consultations with affected communities to ensure that compensa-

[84] Ministry of Foreign Affairs, Finland, Environmental Assessment in Public Promotion of Export and Investments to Developing Countries (Sept. 15, 1998), at 56.
[85] *Id.* at 35 (emphasis in original).
[86] *Id.* at 36.
[87] For example, OPIC's environmental policy forbids the agency from funding, *inter alia*, projects involving the resettlement of more than 5,000 persons, projects in or impacting World Heritage sites, and infrastructure/extraction projects located in primary tropical forests. OPIC, ENVIRONMENTAL HANDBOOK, *supra* note 31, app. F.
[88] Ministry of Foreign Affairs, *supra* note 84, at 37.

tion, resettlement, and other issues have been resolved according to prior agreements. These reports should also be made available to the public, so as to increase the accountability and credibility of the process.

4. Establishing Ombudsman Offices

The IFC and the World Bank Group's insurance arm, the Multilateral Investment Guarantee Agency (MIGA), established the Compliance Advisor/ Ombudsman's office (CAO) in 1998 in part to hear complaints and concerns from communities affected by IFC and MIGA projects.[89] The CAO is an additional forum for negotiations between project sponsors and affected communities, as well as a mechanism for investigating IFC and MIGA's adherence to their own policies.[90] ECAs should follow the lead of IFC and MIGA by establishing formal channels through which affected individuals and communities can file complaints and arrange consultations with project sponsors. One way to reduce costs and ensure fairness could be for the OECD to designate an advisor or ombudsman to monitor all OECD export credit programs, rather than asking individual ECAs to create their own offices. Making this process transparent to the public, while respecting the confidentiality of complainants and project sponsors, would be necessary to ensure its integrity.

B. Achieving Common Standards

The policies to improve public involvement in ECAs that are listed above are just part of a broader package of environmental and social reforms that NGOs from across the globe have been advocating for ECAs over the past several years. Until December 2001, it was hoped that these reforms would become part of an OECD agreement on common environmental standards for ECAs, being negotiated within the OECD's Working Party on Export Credits and Credit Guarantees. Despite a G8 mandate to complete the agreement by July 2001 and an OECD mandate to finish by the end of 2001, negotiations broke down last December and show no sign of reviving. Many NGOs believe that the failure of these negotiations is partly due to the cloistered and secretive nature of the Working Party, whose members are almost entirely drawn from the ECAs and the trade and finance ministries of OECD countries.[91]

Five months after the collapse of the OECD negotiations, a group of 24 NGOs from 13 OECD countries sent a joint letter to the Secretary-General of the OECD and the chairpersons of the OECD Trade Committee; the Education, Employment, Labor, and Social Affairs Committee; the Development Assistance Committee; and the Environmental Policy Committee.[92] That letter called for a new round of negotiations, to be held within a proposed "Joint Working Party on Export Credits and Sustainable Development." This new working party would include representatives from the OECD Trade, Environment, Development Cooperation, and Labor and Employment Directorates, as well as representatives from the European Commission and non-OECD countries with ECAs. It would also consult with relevant international organizations such as the WTO, IMF, World Bank Group, UNEP, UNCTAD, ILO, and the UN High Commission for Human Rights. The Joint Working Party would thus be more comprehensive, inclusive, and receptive to reform than its predecessor. This Joint Working Party would seek to reach agreement on a set of legally binding environmental standards for ECAs by the end of 2003. It would also encourage non-OECD members to adopt these guidelines, and establish a review mechanism to ensure compliance with the agreed standards.

The Deputy Secretary-General of the OECD rejected the NGO proposal for a Joint Working Party, claiming that "a more *ad hoc* and decentralized approach is more responsive and yields better results."[93] The Deputy Secretary-General maintained that "all work on export credits in the OECD has traditionally benefited from strong cooperation between different parts of the Secretariat and between the various committees of the OECD with related interests." The OECD's counterproposal was to hold a possible workshop on the subject and to discuss it in the OECD Round Table on Sustainable Development. It should be noted that over the past decade there have been numerous round tables, workshops, and other meetings in the OECD on sustainable development which have not had substantive impact on the past five years of OECD negotiations on a draft environmental agreement for ECAs.

There is a compelling need to reach some kind of accord specifying sound common standards: because of the competitive dynamic that governs ECAs, only a uniform set of environmental policies will avert a "race to the bottom." Individual ECAs will continue to resist strong environmental reforms as long as they can point to the absence of action at rival agencies. Because of the failure of the negotiations to date in the OECD

[89] *See* Bernasconi-Osterwalder & Hunter, *supra* note 15.

[90] Center for International Environmental Law, A Handbook on the Office of the Compliance Advisor Ombudsman of the International Finance Corporation and the Multilateral Investment Guarantee Agency: Discussion Draft 4-5 (Sept. 2000), *available at* www.ciel.org/Publications/CAOhandbook.pdf (last visited Aug. 2, 2002).

[91] The annex to this chapter summarizes the numerous, and mostly unsuccessful, attempts by the NGO community to make this process more transparent, participatory, and accountable.

[92] Letter from Les Amis de la Terre, France, and other NGOs to Mr. Donald Johnston, Secretary General, OECD (May 17, 2002).

[93] Letter from Herwig Schlögl, Deputy Secretary-General, OECD, to Les Amis de la Terre, France, and other NGOs (June 27, 2002).

Export Credits Group, the negotiations must be broadened not only within the OECD, but should be taken up more intensively in other international fora such as the G8 and in the WSSD.

V. OBJECTIONS TO REFORM

One argument frequently advanced by opponents of ECA reform—that ECAs are not development institutions and thus do not have to abide by best practice guidelines—was raised and addressed earlier in this chapter. This subsection analyzes other objections that ECA officials frequently raise with respect to environmental reforms, including measures to improve transparency and increase public participation in ECA-backed projects.

A. Disclosure and Public Consultation Requirements Threaten the Commercial Confidentiality of Private Sector Clients

Disclosure and public consultation requirements, as they have been drafted and implemented at the IFC and other development institutions, require only the release of information needed for environmental decisionmaking. This information can be, and has been, gathered and reported in such a way as to protect confidential or commercially sensitive information. Furthermore, the experience at the IFC and certain ECAs yields little evidence that disclosure and public consultation requirements hinder agencies that promote private sector development. The IFC has not seen declines in its volume of lending over the past decade, despite the adoption of sound measures on transparency and public participation. Similarly, those ECAs that have introduced some reforms along these lines have not experienced any deterioration in their ability to do business.

B. Public Consultations Will Introduce Needless Costs and Delays

Disclosure and public consultation need not be an expensive or time-consuming process, as long as it is planned for in advance. Moreover, as the anecdotes mentioned above illustrate, ignoring public consultations can result in even greater costs down the road, heightening the reputational and political risks of certain transactions. In fact, the IFC states in its good practice manual that "the risks of failing to consult adequately outweigh the risks of consultation and disclosure."[94]

[94] IFC Good Practice Manual, *supra* note 18, at 8.

C. Clients Who Wish to Evade Requirements on Public Involvement Will Seek Finance from Non-OECD ECAs

Ironically, this objection implicitly acknowledges the need not just for OECD harmonization of strong environmental guidelines but for an overall international harmonization. If all ECAs do not harmonize upward at the same time, the lack of a level playing field provides an advantage to those with the lower standards outside the OECD. In this case, a number of the considerations mentioned earlier in this paper apply.

First, to protect themselves and their clients, ECAs have a duty to disclose environmental information and seek public participation in project design. Non-OECD ECAs that finance projects without performing adequate public consultations or operating with sufficient transparency do so at their own peril. Second, the public, NGOs, and major political parties in OECD countries are increasingly interested in seeing that government-supported export credits and guarantees do not work at cross purposes with sustainable development goals espoused by their development assistance agencies and by the multilateral financial institutions that they support, regardless of what non-OECD ECAs do. Third, the behavior of non-OECD parties has not posed obstacles to the negotiation in the OECD of other common agreements on export credits, for example on bribery, premia, and interest rates. Fourth, OECD countries account for the greater part of world exports, world economic production, and export credits and guarantees. Developing countries rightly expect the industrialized countries to lead the way in the area of sustainable development and in integrating economic, environmental, and social concerns. The OECD Secretary-General himself recently has emphasized OECD's future role in facilitating this leadership. The alternative is a race to the bottom with globally pernicious consequences.

D. ECAs Lack the Technical Capacity to Implement These Reforms

Lack of capacity is a significant issue, but its importance as an obstacle is sometimes exaggerated. First, the experience of ECAs that have instituted environmental assessment procedures and guidelines shows that a large technical staff is not required. Second, in most OECD countries, environment ministries and development cooperation ministries and agencies already have the requisite technical staff. Moreover, in difficult cases, the advice and input of this staff could be utilized through an inter-ministry consultative process. In several OECD countries, both development and environment ministries have expressed an interest in, or support for, improved environmental review of ECA op-

erations. Third, within the OECD, directorates and committees dealing with the environment and development assistance could help to facilitate access to technical advice on how capacity can be built, or borrowed, in a cost-effective, efficient matter.

Lack of capacity *per se* is not a valid rationale for inadequate attention to critical operational and risk assessment issues. It would not be acceptable, for example, for a government agency to continue inadequate accounting and audit procedures for its financial transactions based on the claim that it did not have enough accountants.

E. ECAs in Different Countries Have Quite Different Procedures and Approaches for Reviewing Export Credits and Guarantees, and These Different Export Support Systems Are Not Amenable to Common Policies, Guidelines, and Standards

There is a growing international consensus on the need to better integrate economic, environmental, and social policies to achieve sustainable development. Accordingly, modifications in some ECA procedures may be necessary to achieve these goals. To date, a combination of increasing interest by OECD governments and the evolving perceptions of the self-interest of ECAs has already led to progress toward harmonization and coherence on a variety of issues such as premia, interest rates, tied aid, and bribery, all of which apply to these notedly different export finance systems. While the development assistance (i.e., foreign aid) systems of many OECD countries are also quite heterogeneous, this has not proven to be an insurmountable obstacle to achieving greater coherence in their environmental policies. Certainly common guidelines can be developed that can be applied in a flexible manner, so long as the ultimate environmental due diligence that is required remains the same.

F. More Rigorous, Comprehensive Environmental Guidelines, and Standards Will Interfere Unjustly with the Internal Affairs of Developing Nations

The response of Richard Gerster, the former Executive Director of the Swiss Coalition of Development Organizations, is worth citing in this regard:

> This view ignores the fact that every undertaking is subject to certain conditions. In addition to operational standards, this might also include economic, social and environmental standards. The need for governments and private enterprises (e.g. chemical concerns and banks) to take responsibility for the transboundary impacts of their activities has been recognized since the 1992 Rio Earth Summit. Low-income countries are frequently not in a strong enough position to enforce their own laws, so external standards can partially compensate for this deficiency.[95]

Information disclosure and public consultation can, in many countries, compensate for weaknesses in existing democratic mechanisms or provide ways of democratizing development where none currently exist. These measures do not constrain the ability of host governments to promulgate and enforce their own environmental laws, and thus should not be construed as "environmental imperialism."

Moreover, when one speaks of a nation, it is important to recognize that the degree of environmental and social concern is not homogeneous and monolithic, or fully represented in many cases by the position of a particular government agency or local project sponsor. The growth over the past ten years of grassroots and national NGOs concerned with environment and development in many developing countries has been explosive. The willingness of local populations in many countries adversely affected by some projects to protest the impacts has also dramatically increased.

Without better transparency or public participation, ECAs might themselves be guilty of interfering unjustly in the internal affairs of developing nations. Indeed, NGOs in many developing nations would argue that ECAs' relative lack of attention to public participation and transparency in giving financial support for exports and investments, however unintentionally, constitutes an influence on the internal affairs of developing country societies. Only by involving affected populations in project design and implementation can ECAs have any assurance that their activities are consistent with the wishes of the countries in which they operate.

VI. CONCLUSIONS

Official export credit agencies are the principal public financiers of trade and investment in the developing world. The support these agencies provide for major infrastructure and resource extraction projects, far surpasses other official institutions.

Nevertheless, many ECAs have yet to adopt sound policies on transparency and public participation. Such policies have long been regarded as critical elements of responsible development practice, including support for private sector projects. Additionally, they are now standard procedure at the World Bank Group, regional de-

[95] Richard Gerster, *Official Export Credits and Development: International Harmonization as a Challenge to NGO Advocacy*, 31(6) J. World Trade 127 (1997).

velopment banks, bilateral aid agencies, and, to a degree even in several ECAs.

Requiring a transparent ombudsman position, public monitoring of projects, explicit terms of reference for project evaluation, and consultation during environmental assessment would begin to correct this policy incoherence. These measures ultimately would serve the interests of ECAs and their clients. They would also help democratize development; ensure that ECAs complement, rather than contradict, the efforts of other development institutions; and help fulfill international commitments to sustainable development.

ANNEX:

BRIEF SUMMARY OF NGO REQUESTS FOR EXPANDED, MORE TRANSPARENT OECD CONSULTATIONS ON EXPORT CREDITS AND ENVIRONMENTALLY SUSTAINABLE DEVELOPMENT (JULY 1997-JUNE 2002)

The proposal of nongovernmental organizations to the OECD to establish a Joint Working Party on Export Credits and Sustainable Development occurs in the context of five years of NGO requests to the OECD for a more open, regularized, transparent and substantive consultative process than the approach of the Export Credit Group (ECG—Working Party on Export Credits and Credit Guarantees). Substantive action to address the concerns of these requests has been almost totally absent. The following summary is illustrative rather than exhaustive.

On July 8, 1997, EURODAD—the European Network on Debt and Development—wrote to the ECG on behalf of numerous NGOs in 16 OECD European countries requesting a broad, full-day NGO hearing and presentation (including civil society representatives from affected, buyer developing countries) on sustainable development issues with the ECG and its members. The letter cited the language of the 1997 Denver G7 Summit Communiqué, which stated that "private sector financial flows from industrial nations have a significant impact on sustainable development world-wide. Governments should help promote sustainable practices by taking environmental factors into account when providing financing support for investment in infrastructure and equipment. We attach importance to the work on this in the OECDE and will review progress in our meeting next year." No action was taken on this request.

In November, 1997, representatives of the Swiss Development Coalition, the Berne Declaration, and the Environmental Defense Fund met in Berne with OECD officials responsible for export credits, including the head of the OECD ECG and the Head of the Arrangement and of the Division of Financing and Other Export Questions of the OECD Trade Directorate. The NGOs representatives traveled to Berne to raise in person with OECD ECG officials the proposal for a full-day consultation with civil society representatives on social and environmental issues set forth in the July 8, 1997 EURODAD letter. OECD officials told civil society representatives that the matter would have to be discussed by ECG members since OECD officials could not make the decision and that sustainable development was much too ambitious a subject. They suggested that perhaps a modest request for a one-hour NGO appearance before the ECG would be acceptable, but NGOs would have to demonstrate what "value added" would be brought to the ECG by such a presentation.

In April, 1998, 163 NGOs from 46 different countries sent a declaration to the OECD foreign ministers in preparation for the OECD Council Meeting at Ministerial Level on April 27-28, 1998. This declaration urged adoption of sustainable development criteria in the financing of export credits. The declaration, entitled "Call of National and International Non-governmental Organizations for the Reform of Export Credit and Investment Insurance Agencies," was also sent to the G7 heads of state, finance ministers and sherpas in preparation for the 1998 Birmingham G7 Summit. The Declaration called for greater transparency and public participation in ECA decisionmaking, environmental assessment and screening of ECA commitments, social sustainability (equity and human rights concerns) in appraisal of ECA commitments, and for an international agreement in the context of the OECD and/or G7 and Berne Union on common environmental and social standards.

NGOs were not allowed to appear before the ECG until November, 1998, when two representatives from the Berne Declaration and the Environmental Defense Fund were, on behalf of numerous other NGOs, allowed to give an "informal," "ad hoc" presentation for ninety minutes at the end of one day's regularly scheduled ECG meetings.

On January 9, 1999 representatives of the Berne Declaration and the Environmental Defense Fund, again on behalf of numerous other groups as well as their own, wrote the head of the ECG requesting broad consultations on environmental and social aspects of ECA operations, including meetings with ECG Members to discuss specific projects to "help to prevent social and environmental problems and conflicts early in the process." The letter cited Donald Johnston's July 1998 remarks on "OECD's Work on Sustainable Development" as well as other OECD statements calling for cross-sectoral work on sustainable development. The new head of the ECG responded more than six months later on July 13, 1999, rejecting the requests in the letter stating that "whilst agreeing that an appropriate approach for NGOs to make known their views is at the national level in capitals through established channels, the ECG Members agreed to continue, on an informal and *ad hoc* basis, a dialogue with the NGOs."

At the Third OECD Round Table on Sustainable Development held in Oslo, Norway August 30-31, 1999, the President of World Resources Institute (WRI), a leading interna-

tional environmental research organization that has worked in partnership with various United Nations organizations, raised the need for a broader-based, open, and transparent consultation process in OECD deliberations on common approaches to the environment for ECAs. An illustrative WRI "Stakeholder Map for ECA Environmental Guidelines Consultation," accompanied by an outline of "Critical Elements of a Public Consultation Process," was shared with the ECG. But little changed in the ECG or the OECD to reflect international good practice with respect to public stakeholder consultation in this area.

The ECG refused in correspondence dated February 11, 2000 to meet with NGOs on February 24-25, 2000 during a special session on the environment even in an "informal, ad hoc" session outside the official meetings. In response, 37 NGOs from 18 countries wrote the ECG on February 21, 2000 protesting the continued lack of progress in the OECD towards a more transparent and substantive consultative process and the lack of progress in the ECG negotiations on reaching any meaningful agreement on common standards and guidelines for environmental assessment and public transparency and access to information. Street protests followed outside the OECD headquarters on February 25.

A second "informal ad hoc consultation" with NGOs was held before the official beginning of the day's business for the ECG on October 26, 2000. NGO representatives delivered a technical, detailed presentation on good practice in international environmental assessment of private sector projects; only about half of the ECG Member delegations attended. A letter on behalf of 64 NGOs in 23 countries was delivered to the ECG the day before, reiterating the need for a more transparent, accountable, and open consultation process in the OECD and the need for public transparency in environmental assessment guidelines for ECAs as well as for a commitment to common environmental standards based on the standards of the World Bank or EBRD.

In May 2000, 347 NGOs from 45 countries reiterated the call for environmental and social reform of ECAs, including binding common environmental standards and public access to information on ECA projects and operations, in the "Jakarta Declaration." The text of the Declaration was sent to OECD Ministers. The Declaration criticized, *inter alia* "the lack of transparency and meaningful public consultation in the OECD Working Party on Export Credits and Credit Guarantees." It called for "transparency, public access to information and consultation with civil society and affected people in both OECD and recipient countries at three levels: in the assessment of ongoing and future investments and projects supported by individual ECAs; in the preparation within national ECAs of new procedures and standards; and in the negotiation within the OECD and other fora of common approaches and guidelines."

In June, 2000, hundreds of e-mail and fax protests from the United States and other countries were sent to OECD Secretary-General Donald Johnston protesting the lack of substantive progress and lack of transparency in the discussions in the OECD concerning common environmental approaches and guidelines for Export Credit Agencies. The protest letters criticized the lack of transparency of ECG deliberations and the fact that millions of dollars and years of meetings had been expended on detailed study of environmental procedures and guidelines in other parts of OECD, such as the Environment Policy Committee (EPOC) and the Development Assistance Committee (DAC), with little effect on the deliberations of the ECG, which appears to conduct its discussions in semi-isolation from other parts of the organization.

On April 10, 2001 the ECG invited NGOs to a 90-minute consultation, finally including, after nearly four years of repeated NGO requests dating back to the EURODAD letter of July 8, 1997, civil society representatives from affected populations in non-OECD buyer countries. The consultation sought to obtain input from NGOs on the negotiations of the ECG Members on common environmental approaches, but the ECG refused to share or release the substantive text which was to be the subject of discussion, sharing only an incomplete and imprecise summary. NGOs were only able to provide informed, technical comments because they obtained an illicitly leaked copy of the negotiating text. (Given the fact that NGOs were able to obtain leaked copies of the negotiating text, the ECG subsequently posted on its website earlier draft revisions of the text). As in past "consultations," attempts were made on the part of the ECG Secretariat, representing the views of some ECG Members, to forestall and forbid any discussion of specific ECA investment projects, but specific impacts of specific ongoing projects of course were the main concern of affected populations and groups from developing countries.

Subsequent letters to the ECG by NGOs commenting on the negotiating texts of Revision 5 of the draft Agreement on Common Approaches to the Environment (letter of June 6, 2001), and on Revision 6 (letter of August 24, 2001), reiterated that the draft negotiating text was totally inadequate in terms of essential elements of minimal good practice in international environmental assessment of publicly supported private sector projects. Of particular concern were the lack of specific commitments to transparency, public access to environmental information, and stakeholder consultation prior to project approval; as well as the lack of a commitment to predictable, common environmental standards and operational policies based on international best practice (the failure of the "benchmarking" approach).

The letters reiterated, at the time four years after the original request of EURODAD, the request for improved, broader-based, meaningful consultations in the ECG's deliberations which would bring in other elements of the OECD as well as civil society in a more transparent and accountable negotiating process.

NGOs were invited to what the ECG characterized as an "annual consultation" with the ECG on May 28, 2002. The ECG scheduled the NGO presentation to take place during the last two hours of the second and last day of its May 2002 meetings, making it impractical for ECG members to fully discuss at the semi-annual meeting issues and measures civil society organizations raised. (Although some of the same ECG representatives subsequently met to discuss issues related to the OECD Arrangement on ECA interest rates, premia, tied aid, and related issues, no time was allotted to any further discussion on environmental issues.)

The most important issue presented by NGOs to ECG members in their May 28, 2002 ECG presentation was raised by 24 NGOs from 13 OECD countries in a May 17, 2002 joint letter to the Secretary-General of the OECD and the chairpersons of the OECD Trade Committee; the Education, Employment, Labor, and Social Affairs Committee; the Development Assistance Committee; and the Environmental Policy Committee. That letter called for a new round of negotiations, to be held within a proposed "Joint Working Party on Export Credits and Sustainable Development." This new working party would include representatives from the OECD Trade, Environment, Development Cooperation, Labor and Employment Directorates, as well as representatives from the European Commission and non-OECD countries with ECAs. It would also consult with relevant international organizations such as the WTO, IMF, World Bank Group, UNEP, UNCTAD, ILO, and the UN Human Rights Commission. The Joint Working Party would thus be more comprehensive, inclusive, and receptive to reform than its predecessor.

NGOs suggested that the proposed Joint Working Party should seek to reach agreement on a set of legally binding environmental standards for ECAs by the end of 2003. It would also encourage non-OECD members to adopt these guidelines and establish a review mechanism to ensure compliance with the guidelines.

In a June 27, 2002 letter, the Deputy Secretary-General of the OECD rejected the NGO proposal for a Joint Working Party, claiming that "a more *ad hoc* and decentralized approach is more responsive and yields better results." The Deputy Secretary-General maintained that "all work on export credits in the OECD has traditionally benefited from strong cooperation between different parts of the Secretariat and between the various committees of the OECD with related interests." The OECD's counter-proposal was to hold a possible workshop on the subject and to discuss it in the OECD Round Table on Sustainable Development. It should be noted that over the past decade there have been numerous round tables, workshops, and other meetings in the OECD on sustainable development which have not had substantive impact on the OECD negotiations over the past five years on a draft environmental agreement for ECAs.

PUBLIC PARTICIPATION AND ACCESS TO JUSTICE IN THE WORLD TRADE ORGANIZATION

Nicholas Gertler and Elliott Milhollin [*]

The World Trade Organization (WTO) is the only international organization of global reach dealing with the rules of trade between nations. The WTO was created in 1994 by the Uruguay Round (1984-94) of the General Agreement on Tariffs and Trade (GATT)[1] and, on January 1, 1995, became the successor to the GATT process of successive rounds of trade negotiations. The WTO Secretariat is located in Geneva, Switzerland, and has a 2002 budget of 143 million Swiss francs (US$92 million) and a staff of 550. The WTO has more than 140 member nations, accounting for over 97 percent of world trade. More than 30 others are negotiating membership.

The primary purpose of the WTO is to reduce barriers to global trade and increase the transparency, predictability, and consistent enforcement by member countries of rules regarding imports and exports of goods and, increasingly, services. In this capacity, the WTO fulfills two basic but related roles. In its policymaking role, the WTO serves as a forum in which member nations negotiate multilateral trade agreements. In this capacity, the Organization also conducts periodic reviews of member country trade policies. In its dispute settlement role, the WTO serves as a forum for resolving disputes between member nations that arise under existing trade agreements. While the policymaking role is largely member-driven, the dispute settlement role delegates significant responsibility to independent, ad hoc panels.

The WTO's policymaking role centers on the development of trade agreements and the monitoring of member country trade policies. The WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments, form the backbone of the international trading system. The agreements are essentially contracts, designed to provide member countries with reciprocal trading rights. They also bind governments to keep their trade policies within agreed limits. These agreements include the GATT itself—an agreement that dates from 1947—as well as several other "covered agreements" that relate to particular aspects of trade. The covered agreements are designed, broadly speaking, to prevent discrimination against foreign products, while other agreements administered by the WTO address intellectual property rights, government procurement, and trade in services. In this context, the WTO's primary role is to provide a forum for trade liberalization and to provide the rules for how liberalization can take place.

To fulfill its second function, the WTO provides a forum—the Dispute Settlement Body (DSB)—for member nations to resolve disputes arising under the WTO agreements. Governed by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),[2] the system encourages countries first to try settling their differences through a process of consultation. Failing that, they can turn to the DSB for a ruling that encompasses both factual determinations and legal interpretations of trade agreements. The significant difference between the WTO's policymaking and dispute settlement functions is that, while the covered agreements themselves are negotiated by nations through their representatives, the task of interpreting these agreements in the context of a specific trade dispute falls on panels of trade experts appointed for the occasion on a case-by-case basis and their identities remain concealed from the public. Because the decisionmaking power is substantially different for these two roles, we address access to information and participation rights separately in the context of each. But first, we provide an overview of the WTO's approach to these issues.

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[1] *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done Apr. 15, 1994, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS vol. 1 (1994), 33 I.L.M. 1125 (1994); Marrakech Agreement Establishing the World Trade Organization, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS vol. 1 (1994), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

[2] Understanding on Rules and Procedures Governing the Settlement of Disputes, done Apr. 15 1994, WTO Agreement, annex 2, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS vol. 1 (1994), 33 I.L.M. 1226 (1994) [hereinafter DSU].

I. THE WTO AS A FORUM FOR MEMBER GOVERNMENTS

The WTO has only limited formal mechanisms in place for facilitating transparency and access to its decisionmaking processes for civil society groups and other stakeholders.[3] During its brief lifetime, however, the WTO has taken some small steps toward openness and has made limited acknowledgment that entities other than member governments may have a role to play in the development and administration of the global trade regime. For example, Article V.2 of the Agreement Establishing the WTO specifies that "[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." Guidelines established in July 1996 recognize "the role NGOs can play to increase the awareness of the public in respect of WTO activities and [the General Council] agree[s] in this regard to improve transparency and develop communication with NGOs."[4]

Fundamental to the manner in which the WTO approaches transparency and public participation is the Organization's self-conception as an organization of member nations. For example, the WTO states on its website that "[i]ndividuals can participate, not directly, but through their governments."[5] This view is perhaps best expressed in the WTO's Guidelines for Arrangements on Relations with Non-Governmental Organizations:

> Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policymaking.[6]

The WTO's struggles with attempts to accommodate the views of civil society reflect the sense that any mechanism for civil society participation in the workings of the WTO is in tension with the organization's self-conception as a forum for member nations.

II. PUBLIC INVOLVEMENT AND THE WTO'S POLICYMAKING ROLE

With the significant exception of the DSB, the WTO is run by its member governments. Major decisions are made by the membership as a whole, either by ministers (who meet every two years) or by lower-level government officials (who meet regularly at the Geneva Secretariat). Decisions normally are taken by consensus. In this respect, the WTO is unlike some other international organizations such as the World Bank and International Monetary Fund. In the WTO, power is not delegated to a board of directors, and the bureaucracy has no influence over individual countries' policies (although WTO staff do offer comments through the regular trade policy reviews, discussed below).

The WTO's top level decisionmaking body is the Ministerial Conference, which meets at least once every two years. The day-to-day work of the organization is carried out by the General Council (normally member nations' ambassadors and heads of delegation in Geneva, but sometimes officials sent from members' capitals), which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body. Numerous councils, specialized committees, working groups, and working parties deal with the individual agreements and other areas such as the environment, development, membership applications, and regional trade agreements.

The WTO's approach to transparency and participation is geared toward promoting public understanding of the WTO's operating and the Organization's goals, rather than actively engaging the public. The WTO's foundational documents evince a view of transparency primarily as a vehicle for disseminating the Organization's message of global prosperity through trade liberalization. In the WTO's "Guidelines for Arrangements on Relations with Non-Governmental Organizations," the Members "recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communications with NGOs."[7] This vision was carried forward to the 2001 Ministerial at Doha, Qatar. The resulting Ministerial Declaration confirmed the WTO's

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[3] The term "civil society" is generally used to embrace not-for-profit non-governmental organizations (NGOs), business associations, labor unions, academia, and the media. The WTO, however, uses the term NGOs as a catchall term to describe all such entities, while sometimes discussing the private sector separately.

[4] Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162, para. 2 (July 18, 1996) [hereinafter NGO Guidelines].

[5] World Trade Organization, 10 Common Misunderstandings About the WTO, at 1 (1999), *available at* www.wto.org/english/res_e/doload_e/10mis_e.pdf (last visited July 19, 2002).

[6] NGO Guidelines, *supra* note 4, para. 6.

[7] NGO Guidelines, *supra* note 4, para. 2.

> collective responsibility to ensure internal transparency and the effective participation of all members. While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public.[8]

The WTO has approached access to information through a number of mechanisms, such as publishing WTO and other trade-related documents on the Organization's website,[9] conducting symposia, and briefing the press, as well as performing trade policy reviews of member nations. The WTO also has a "reverse environmental impact assessment" mechanism, which evaluates the trade impact of member-country environmental policies (discussed below).

A. Access to Information in the Context of WTO Policymaking

The WTO has developed a number of mechanisms for providing public access to information in the context of its policymaking role. These include: (1) the public availability of WTO documents, (2) the holding of symposia and briefings for NGOs, (3) the Trade Policy Review Mechanism for assessing the trade policies of member nations, and (4) a mechanism for assessing the trade impacts of member country environmental policies. We review each of these mechanisms below.

1. Passive Access to Information: Publication of WTO Documents

Through successive measures, the WTO has been seeking gradually to improve its transparency by enhancing the speed and extent of public access to documents related to the workings of the Organization. While some documents, such as trade policy review reports and dispute settlement panel reports, are made public almost immediately upon adoption, most WTO internal documents are initially restricted. In 1996, the WTO adopted the presumption that its documents would become "derestricted" and available to the public, including through the Internet,[10] but the procedure for derestriction was cumbersome and slow.

In May 2002, WTO members agreed on new procedures for the derestriction of Organization documents, in order to expedite the pace at which such documents are made available to the public.[11] Although in 2001, 65 percent of the more than 21,000 WTO documents became publicly available, the derestriction procedure was often criticized as taking too long. The new procedures are expected to reduce the time period for derestriction to an average of six to 12 weeks from the previous eight to nine months. This does not allow non-members to follow negotiations in real time, but does at least allow an after-the-fact reconstruction of trade negotiations and other events.

In particular, the default assumption under the new procedures is that all WTO documents are unrestricted.[12] However, any WTO member still may submit a document as restricted. Such a document is automatically derestricted after its first consideration by the relevant WTO body, or 60 days after the date of circulation to other members, whichever comes first.[13] In the latter case—*i.e.*, if the document is not considered for 60 days or more following submission—the member nation may extend the period of restriction for renewable periods of 30 days.[14] Once the WTO considers the document, however, the member cannot block its derestriction. When a document is prepared by the WTO Secretariat at the request of a WTO body, the requesting body has the option of having it issued as restricted or unrestricted.[15] A document issued as restricted is automatically derestricted 60 days after the date of circulation among members, although it can be held for an additional 30 days before derestriction at the request of any member.[16] Minutes of meetings (including records, reports, and notes) are initially restricted but are automatically derestricted 45 days after the date of circulation among members.[17]

2. Active Access to Information: Symposia and NGO Briefings

The WTO provides for interaction with NGOs through symposia on specific WTO-related issues. For example, the WTO Secretariat has since June 1994 organized four annual symposia with representatives of civil society on trade and sustainable development issues. In September 1997, two dozen NGOs from four continents participated in a Joint WTO/United Nations Conference on Trade and Development (UNCTAD)

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[8] Ministerial Declaration, para. 10, done at Doha, Qatar on Nov. 20, 2001, WT/MIN(01)/DEC/1.

[9] *See* www.wto.org (last visited July 19, 2002).

[10] Procedures for the Circulation and Derestriction of WTO Documents, WT/L/160/Rev.1 (July 26 1996); NGO Guidelines, *supra* note 4. The documents are available at www.wto.org/english/docs_e/docs_e.htm (last visited July 19, 2002).

[11] Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452 (May 16, 2002).

[12] *Id.* para. 1.

[13] *Id.* para. 2(a).

[14] *Id.*

[15] *Id.* para. 2(b).

[16] *Id.*

[17] *Id.* para. (2)(c).

Symposium on Trade-Related Issues Affecting Least-Developed Countries. At the end of April 2002, the WTO hosted over 800 government and NGO officials, academics, and other stakeholders at a symposium on the Doha Development Agenda. On a smaller scale, the WTO has held more frequent NGO briefings in which NGOs make presentations to member and observer governments or participate in technical seminars.

The NGO experience with symposia thus far has been positive, with NGO representatives indicating that the post-Doha symposium was quite constructive.[18] A symposium on trade in services also has received favorable reviews from NGOs. In addition, the United Nations Environment Programme (UNEP) routinely organizes symposia around the meetings of the WTO's Committee on Trade and Environment and reports on the results to WTO members at the Committee. Thus, while much more could be done to enhance NGO access to the WTO, these initial steps are promising.

3. Active Access to Information: Trade Policy Reviews

Increasing the transparency and predictability of trade rules at the national level is one of the core missions of the WTO. To this end, the WTO conducts regular reviews of individual countries' trade policies under the rubric of the Trade Policy Review Mechanism (TPRM). The TPRM was established (on a provisional basis) in 1989 as part of the GATT and later was permanently incorporated into the WTO. It provides for the monitoring of the trade-related policies of the WTO Members. In practice, the reviews have two broad results: they enable outsiders to understand a country's policies and circumstances, and they provide feedback to the reviewed country on its performance in the trade regime administered by the WTO.[19]

Over a period of time, all WTO members are subject to the TPRM, with larger trading members such as the European Union, United States, Japan, and Canada being reviewed more frequently than nations with a smaller share of world trade. For each review, two documents are prepared: a policy statement by the government under review and a detailed report written independently by the WTO Secretariat. These two reports, together with the proceedings of the Trade Policy Review Body's meetings, are published and made publicly available shortly after completion.[20] While the TPRM provides information not on the workings of the WTO itself but on the policies of member nations, it gives rise to a level of transparency that likely would be lacking in the Organization's absence.

4. "Reverse" Environmental Impact Assessment

The WTO undertakes what may be characterized with some degree of jest as environmental impact assessment in reverse. While admittedly an oversimplification, the WTO views member countries' efforts to protect the environment with a jaundiced eye, as potential protectionist trade measures in disguise. This view is evidenced in the Doha Ministerial Declaration:

> We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.[21]

To this end, the WTO—through its Committee on Trade and Environment—conducts what is essentially a trade impact assessment of domestic environmental measures.[22] That said, the CTE process also has served as a laboratory for opening up WTO internal processes to the public. The CTE's secretariat was the first to create a section of the WTO website providing relatively timely and detailed reporting of a WTO committee's deliberations,[23] and has published the results of CTE meetings prior to the meetings' official minutes being made public. It has worked with states toward expeditiously making all CTE submissions, whether state proposals or CTE secretariat analyses, publicly available. In addition, the CTE was among the first WTO committees to make all submissions—

[18] The information herein was gathered through personal communications with United States Trade Representative (USTR) staff.

[19] The TPRM entails a general assessment of a country's trade policies. WTO staff do not have a mandate to identify whether policies violate the WTO agreements, nor does the process center on specific cases or issues that are of concern to the private sector and might become the subject of future negotiations or disputes.

[20] In addition, several covered agreements contain provisions whose purpose is to increase the transparency of domestic policies related to or affecting trade. These include agreements pertaining to trade and competition policy, government procurement, technical barriers to trade, and rules of origin and pre-shipment inspection.

[21] Ministerial Declaration, *supra* note 8, para. 6.

[22] The initial mandate of the CTE's predecessor was to examine upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment.

[23] *See* www.wto.org/english/tratop_e/envir_e/envir_e.htm (last visited July 19, 2002).

whether from WTO members or the secretariat—available on the WTO website.[24]

B. Public Participation in WTO Policymaking

As noted above, the Marrakech Agreement that brought the WTO into being contained abstract calls for integrating civil society into the functioning of the new Organization. The WTO's 1996 Guidelines for Arrangements on Relations with Non-Governmental Organizations similarly acknowledges that NGOs, "as a valuable resource, can contribute to the accuracy and richness of the public debate."[25] The Guidelines contemplate an ad hoc process for engaging the public through symposia and the exchange of information among NGOs, member delegations, and the WTO. These aspirations are in tension with the WTO's self-conception as a forum for member nations, which largely defines its stance on public participation in the Organization's policymaking:

> The WTO is an organization of governments. The private sector, non-governmental organizations and other lobbying groups do not participate in WTO activities except in special events such as seminars and symposiums. They can only exert their influence on WTO decisions through their governments.[26]

As a result, with limited exceptions, the primary avenues for participation in WTO policymaking remain largely at the national level.

One exception is provided in the context of Ministerial Conferences. Since 1996, NGOs that work in areas relevant to trade have been able to gain accreditation to WTO Ministerials, which provide for limited access to plenary sessions. The Singapore Ministerial Conference in December 1996 (the WTO's first Ministerial) represented the first experience with NGO attendance at a major WTO meeting. In total, 159 NGOs registered to attend the Conference. The 108 NGOs (235 individuals) that made it to Singapore included representatives from environment, development, consumer, business, trade union, and agricultural interests. The NGO Center in Singapore provided the NGOs with meeting rooms, computer facilities, and documentation from the official event.

The 1998 Geneva Ministerial Conference and 50th Year Celebration of the multilateral trading system was attended by 128 NGOs (362 individuals). The NGO Center, several meeting rooms, and a computer facility were also reserved for NGOs in the Palais des Nations. Throughout the three-day event, NGOs were briefed regularly by the WTO Secretariat on the progress of the informal working sessions.

While the symposia organized by the WTO Secretariat and side events at Ministerial Conferences are the only formal channels of communication between civil society groups and trade diplomats in policymaking, WTO staff has shown some willingness to meet with NGOs informally. In addition, the WTO website includes an area dedicated to NGO issues, which includes a schedule of briefings to be held for NGOs, chatrooms, the posting of NGO position papers, and logistics information for NGOs attending Ministerial Conferences.[27]

III. PUBLIC INVOLVEMENT IN DISPUTE SETTLEMENT AT THE WTO

The WTO Agreement has revolutionized the manner in which trade disputes are settled between nations. In contrast to the GATT's consensus-based dispute settlement model,[28] the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[29] provides formal, binding dispute settlement procedures for its member countries. Under the DSU, disputes between member countries may be brought before panels of trade experts whose decisions are binding on the parties.

The WTO's binding dispute settlement procedures are available only to member countries. Non-WTO members, which include NGOs, business interests, private individuals, the general public and nations not party to the WTO (collectively referred to as "non-members") have no right to participate in the settlement of disputes, nor to initiate proceedings on their own. Moreover, the WTO's dispute settlement proceedings are confidential; non-members have no right of access to the materials submitted by member countries until after the dispute has been settled. Indeed, non-members do not even have the right to know the identity of the panelists who author DSU decisions.

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[24] *Id.*

[25] NGO Guidelines, *supra* note 4, para. 4.

[26] WTO, 10 Common Misunderstandings, *supra* note 5, at 9.

[27] *See* www.wto.org/english/thewto_e/minist_e/min01_e/min01_ngo_activ_e.htm (last visited July 19, 2002).

[28] The settlement of disputes under the GATT was governed by GATT Articles XXII and XXIII. Under the GATT's dispute settlement procedures, disputing parties were first required to enter into consultations with one another to resolve their disputes. If that consultation failed, they could bring their dispute before the contracting parties to the GATT (i.e., the GATT membership), who referred the disputes to panels. Adoption of the panel reports was subject to the approval of all of the Contracting Parties. This consensus-based decisionmaking effectively gave each contracting party a veto over the adoption of any panel report. *See* Ronald A. Brand, *Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement*, 27 J. World Trade 117, 119-22, 126-35 (1993) (*excerpted in* Raj Bhala, International Trade Law Cases and Materials 109-119 (1996)).

[29] DSU, *supra* note 2.

The DSU is incorporated into the WTO Agreement as Annex 2. It acts as a comprehensive dispute settlement system for disputes that arise under the covered agreements included in the Annexes to the WTO Agreement and is administered by the Dispute Settlement Body (DSB). The DSB has the authority to establish decisionmaking panels, adopt panel and appellate decisions, and administer the enforcement of decisions, including authorization of the suspension of concessions and other obligations under the WTO Agreements.

Under the DSU, member countries are encouraged as a first step to use good offices,[30] conciliation, or mediation to settle their disputes. Member countries are required under the DSU to enter into consultations with other members within 30 days of a request for consultations regarding a dispute. If consultations fail after 60 days, the complaining member may request the DSB for a panel to hear the dispute. The panels are normally made up of three individuals selected from a list of approved experts in international trade maintained by the DSB. Under the DSU rules, panelists may not be from countries that are parties to the dispute, unless the parties agree otherwise.[31]

All panel deliberations and the opinions of the individual panelists must be kept confidential under the DSU.[32] After the panel has deliberated, it submits a panel report to the DSB that is intended to settle the dispute between the parties. The panel report contains findings of fact and conclusions of law but is not allowed to be used as precedent in other cases, nor is it allowed to reduce or enlarge the rights of the parties under any of the WTO agreements. Panel reports are automatically adopted by the DSB unless all of the WTO members agree to set it aside. Because it is unlikely that the prevailing party would agree not to adopt a panel report in its favor, the adoption of a panel report by the DSB is virtually automatic unless it is appealed.

Losing parties have the right to appeal adverse panel reports to the DSU's Appellate Body.[33] The Appellate Body is made up of seven members who each serve four-year terms. It is a standing body that hears all appeals that arise during its tenure, and in that regard it is a more stable and permanent institution than the ad hoc DSB panels, which are assigned only to a single case. The members of the Appellate Body, like the panelists, are required to be recognized expert authorities in international trade. As is the case with the DSB panels, the deliberations of the Appellate Body are confidential, as are the individual opinions of its members.[34] Similarly, the decisions of the Appellate Body are adopted by the DSB unless there is a consensus by all of the WTO members not to adopt a decision.

The recommendations and decisions of the DSU panels and Appellate Body are binding. Should a losing party fail to comply with a decision, the prevailing party may ask the DSB to intervene to ensure that the losing party complies within a reasonable period of time. Should the losing party fail to comply within a reasonable period of time, the prevailing party may temporarily impose suspension of trade concessions or demand compensation from the losing party, but only to the extent of the nullification or impairment that led to the dispute, and only for so long as the losing party does not comply with the WTO Agreement or the recommendations of the panel or Appellate Body report.

A. Access to Information in DSB Proceedings

The DSU generally requires DSB proceedings to be treated as confidential. Under the DSU, documents submitted to panels and the Appellate Body are confidential and hearings are closed. Only member countries have a right to access the legal briefs, supporting factual documents, and transcripts submitted in WTO disputes, and only members party to a dispute may attend hearings. As a result, it is difficult, if not impossible, for non-members to obtain information about ongoing DSB proceedings.

1. Confidentiality of the DSU Process Precludes Public Access to Information

The written submissions to the panels and the Appellate Body are required to be treated as confidential under Article 18.2 and Appendix 3 of the DSU. Member countries must treat the submissions by other members as confidential, but retain the right to disclose their own statements of position in DSB proceedings to the general public. As a result, non-members of the general public have no right of access to the information submitted to the panels and the Appellate Body, and may only obtain that information if a member country party to the dispute chooses to make its submissions publicly available. Even if one member country party to a dis-

[30] The term "good offices" refers to the "involvement of one or more countries or an international organization in a dispute between other countries with the aim of contributing to its settlement or at least easing relations between the disputing countries." Black's Law Dictionary 701 (7th ed. 1999).

[31] DSU, *supra* note 2, art. 8.3. Once a panel has been established, third-party member countries not originally parties to the dispute may join the dispute if they can demonstrate a substantial interest in the proceedings. These are referred to as "third parties" in the DSU, and have the right to receive and make submissions and to be heard by the panel. *Id.* art. 10.

[32] *Id.* art. 14.

[33] Losing parties may only appeal the panel's conclusions of law, however. The Appellate Body cannot overturn findings of fact made by the panels.

[34] DSU, *supra* note 2, art. 17.10.

pute chooses to make its submissions public, however, there is no guarantee that the other member countries that are party to the dispute will do so.

All other aspects of disputes are generally treated as confidential under the DSU as well. This includes: all consultations of the parties regarding a dispute[35] and all proceedings involving good offices, conciliation, and mediation;[36] the deliberations of the panels;[37] and the proceedings of the Appellate Body.[38] The duty of confidentiality also extends to panelists, the Appellate Body, and experts under the Rules of Conduct for the DSU.[39] As a result, the proceedings are shielded from public review until a final, binding decision is a *fait accompli*.

As shown by the public demonstrations during the Seattle ministerial and subsequent meetings of various international economic institutions, the cloak of secrecy surrounding the DSU has weakened the public's faith that the DSU's proceedings will be conducted impartially. More important than public perception, however, is how the DSU's confidentiality requirements actually affect its accountability. As several legal experts have noted, the confidentiality requirements of the DSU are remnants of the GATT diplomatic dispute resolution model, in which secrecy was required to allow diplomacy to work and encourage compromise.[40] In moving away from this diplomatic model and adopting the binding judicial model of resolving disputes in the DSU, the WTO has failed to incorporate several procedural safeguards that are usually considered hallmarks of an effective and impartial court.[41] These include, at a minimum, open hearings and a public docketing system for written submissions that can be readily accessed by the public.[42]

2. Potential Reforms

There are several ways in which transparency can be increased in DSB proceedings. First, member countries can provide access to their own written submissions in accordance with Article 18.2 and Appendix 3 of the DSU. The Office of the United States Trade Representative (USTR) provides a good example of this practice. The USTR not only makes all of its submissions to the DSB public,[43] it also seeks public comment on every dispute settlement proceeding in which the United States is a party through a notice published in the Federal Register, and routinely requests the parties to all WTO disputes to provide it with a copy of their submissions.

Second, the WTO itself can be encouraged to amend the DSU to allow for increased public access to written submissions to the DSB panels and Appellate Body as well as open hearings. The WTO currently is considering increasing transparency both internally and externally. The Doha Ministerial's mandate includes a commitment to make "the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public."[44] To further this and other goals, the WTO agreed to a Work Programme that includes negotiations on "improvements and clarifications to the Dispute Settlement Understanding,"[45] that is being implemented through a Special Session of the Dispute Settlement Body.

It remains to be seen to what extent the "improvements and clarifications" being considered will include measures to increase public access to DSB hearings and submissions. Initial results are not encouraging. For example, in its Report on the First Formal Meeting of the Special Session, the Chairman of the Trade Negotiations Committee noted that "regarding the issue of participation and observership in the negotiations … requests for observer status from organizations [except for the World Bank and the International Monetary Fund] shall not be considered for meetings of the DSB," and "that the issue would be reverted to at a subsequent meeting."[46]

Interestingly, the United States and Europe have contrasting views on increasing public access to DSB proceedings. The United States has been pushing the WTO to institutionalize transparency in the DSB, having observed that the lack of transparency and public access to information in DSU proceedings "fuels public suspicion of the dispute settlement process and undermines confidence in the WTO."[47] The United States has called for the following reforms to the DSU: (1) that it be amended to allow public access to all documents as soon as they are submitted;[48] (2) that it require the DSB to maintain all submissions in a public docket at the secretariat or an internet publication of submis-

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[35] *Id.* art. 4.6.
[36] *Id.* art. 5.2.
[37] *Id.* art. 14.1.
[38] *Id.* art. 17.10.
[39] *See id.* art. 18.2, app. 4.5.
[40] *See, e.g.*, John Ragosta, *Unmasking the WTO – Access to the DSB System: Can the WTO DSB Live up to the Moniker "World Trade Court?"*, 31 LAW & POL'Y INT'L BUS. 739, 750-54 (2000).
[41] *Id.*
[42] *Id.*
[43] The United States' submissions are made available on the USTR website: www.ustr.gov/enforcement/dispute.shtml (last visited July 19, 2002).
[44] *See* Ministerial Declaration, *supra* note 8, para. 10.
[45] *Id.* para. 30.
[46] Report on the First Formal Meeting of the Special Session of the DSB, TN/DS/1, para. 4 (Apr. 23, 2002).
[47] Preliminary Views of the United States Regarding Review of the DSU, para. 7 (Oct. 31, 1998), *available at* www.ustr.gov/pdf/uspaper1.pdf (last visited July 18, 2002).
[48] *Id.* para. 8. Confidential business information would be kept confidential, however.

sions on the secretariat website; and (3) that members consider amending the DSU to require all panel and Appellate Body proceedings to be open to the public.[49] According to the United States, allowing such observers to be present at the proceedings would not divert time or resources from the panel's work, or have any effect on the panel's decorum or seriousness.[50]

In contrast, the European Community[51] (EC) continues to oppose permanently opening all DSB proceedings to the public. Under the European Community's proposal, the "general public would as a general rule be allowed to attend proceedings of the panel or appellate body,"[52] but each party would have the right to close the proceedings at their discretion. According to the European Community, the DSU "should provide sufficient flexibility for parties to decide whether certain parts of proceedings before [a] panel or the Appellate Body should be open to the public for attendance," and each party should have the right to insist that the proceedings remain confidential.[53] In light of the EC position as well as opposition from India,[54] it does not appear that the wider WTO membership is ready to take measures to open DSB proceedings to the public.

B. Public Participation in DSU Proceedings

The debate over public participation in DSU proceedings centers on the ability of non-parties to submit *amicus* briefs in trade disputes. As discussed above, only the member nations of the WTO have the right to participate in DSB proceedings. Individuals, NGOs, and corporations have no rights to intervene as parties to DSU, nor do they have the right to initiate their own DSU proceeding. The lack of participatory rights for non-members in the DSU not only prevents those economic sectors with a real interest in the proceedings from directly protecting their interests, it also prevents environmental groups from bringing to the attention of the DSB the potential effects of its decisions on non-trade related issues such as the environment and sustainable development.

In what may represent a modest change to the exclusive nature of the DSB, however, the Appellate Body recently has allowed non-member parties to submit *amicus curiae* briefs to several panels.[55] In its watershed ruling in the *United States—Shrimp-Turtle* case, the Appellate Body overruled a panel report that rejected several *amicus curiae* briefs submitted on behalf of environmental NGOs.[56] In so doing, the Appellate Body noted that, while there is no explicit provision that gives non-member parties the right to submit *amicus* briefs in a DSU proceeding, Article 13 of the DSU grants panels "the right to seek information and technical advice from any individual or body it may consider appropriate, or from any relevant source…."[57] According to the Appellate Body, this authority grants panels the "discretionary authority either to accept and consider, or to reject information and advice submitted to it, *whether requested by a panel or not.*"[58] This decision suggests that non-members may submit *amicus* briefs either directly to the panels or as part of a member country's submission. However, the panels retain the discretion to reject non-member submissions if they are submitted directly, or to give them no weight if they are part of a member's submission.[59]

The Appellate Body similarly held in its *United States—British Steel* decision that the Appellate Body's broad authority to adopt procedural rules gives it the authority to accept submissions from non-members in appeals "in which we find it pertinent and useful to do so,"[60] while noting that individuals and organizations who are not members of the WTO have no legal right to be heard. Thus, while it appears that non-members may submit briefs in future proceedings of the Appellate Body, the Appellate Body has no obligation to consider them.[61]

Non-member parties have filed *amicus* briefs in a number of DSB proceedings in the wake of these two

[49] *Id.* para. 10.

[50] *Id.*

[51] This chapter uses the term "European Community," which is more commonly used than the more formal term "European Communities" used in the documents filed by the EC with the WTO.

[52] The European Communities' Replies to India's Questions, TN/DS/W/7, at 6 (May 30, 2002).

[53] Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, sec. III (Mar. 13, 2002).

[54] In a list of questions posed to the EC, India suggested that giving the public participatory rights might prejudice the proceedings. India's Questions to the European Communities and its Member States on their Proposal Relating to Improvements to the DSU, TN/DS/W/5, at 4 (May 7, 2002).

[55] For a comprehensive overview of WTO decisions regarding the rights of non-WTO members to make written submissions to DSB proceedings, see Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. Int'l & Comp. L. Rev. 235 (2002); Ragosta, *supra* note 40, at 750-54.

[56] *See* United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998).

[57] *Id.* para. 104.

[58] *Id.* para. 108 (emphasis in the original).

[59] *Id.* paras. 104-110.

[60] *See* United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R, paras. 41, 42 (May 10, 2000).

[61] It is important to note that the decisions of the panels and the Appellate Body have no precedential value under the DSU. As a result, subsequent panels and the Appellate Body are not bound by the rulings of previous decisions.

decisions. In the majority of these cases, the DSB panels and Appellate Body have allowed *amicus* briefs to be submitted, but then invoked their discretionary authority to ignore them.[62] This trend may be indicative that the willingness of panels to accept non-party submissions confers no real benefit or power on non-members who wish to have their voices heard.

Even this limited ability of the general public to make submissions in DSB proceedings has recently been dealt a setback from the majority of the WTO membership. In its *European Community—Asbestos* case, the Appellate Body sought to formalize certain procedures for the submission of non-member *amicus* briefs that would have required non-members to first apply for leave to file a brief by describing, among other things, their interest in the proceeding and demonstrating that their submission would be helpful to the resolution of the dispute and would not be repetitive of the parties' submissions.[63] With the exception of the United States, New Zealand, and Japan, the reaction of the WTO membership to the Appellate Body's adoption of procedures for granting leave to file such briefs was overwhelmingly negative,[64] and a special session of the DSB was invoked to discuss the procedures. Some opponents argued that the Appellate Body had exceeded its authority under the DSU when it established the *amicus* procedures, while others argued that issues regarding non-member participation in DSB proceedings should be decided by the WTO membership, and not the Appellate Body.[65] In response to this chorus of objection, the General Council recommended that "the Appellate Body exercise extreme caution in future cases until Members had considered what rules were needed."[66] The Appellate Body subsequently abandoned the procedures and rejected all seventeen of the pending requests to file *amicus* briefs.[67]

The issue of the right to submit *amicus* briefs is the subject of ongoing discussions in the Special Session invoked to reform the DSB. According to the USTR, the United States intends to continue its call for allowing non-members to be able to do so. The European Community has taken a similar position, indicating support for the two-pronged approach adopted in the *British Steel* decision, i.e., "an application for leave and an effective submission."[68] The EC also supports increased reliance on NGOs submissions, stating that "[t]he EC and its member States are indeed of the view that recourse by panels to the expertise of competent international organizations is of utmost importance for the proper functioning of the WTO dispute settlement system."[69]

At least one developing nation is actively opposing these efforts. India opposes accepting non-member *amicus* briefs because, in its view, allowing non-members to participate would increase the burden on the panels and would only advantage relatively wealthy NGOs from developed nations that have the resources to make *amicus* submissions while disadvantaging developing countries such as India that would have to respond such submissions,[70] a view contested by the European Community.[71]

That the debate centers around the mere opportunity of non-members to submit *amicus* briefs demonstrates that the DSU remains a predominantly closed process with authority vested in anonymous trade experts who lack accountability. The "star chamber"[72]

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[62] *See*, *e.g.*, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Panel, WT/DS141/R, para. 6.1, n.10 (Oct. 30, 2000) (accepting an *amicus curiae* submission by a doctor on behalf of Foreign Trade Association but declining, without explanation, to "take the submission into account" in reaching its decision); United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R, para. 42 (May 10, 2000) (accepting the *amicus curiae* briefs from two steel industry associations and rejecting the EC argument that *amicus curiae* briefs are "inadmissible" in appellate review proceedings, but concluding that, in the case at bar, it was not necessary to take the two amicus curiae briefs into account in rendering its decision); Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R, para. 78 (Mar. 12, 2001) (rejecting a brief from a coalition of United States companies and trade associations, stating only that "we did not find the brief filed by CITAC to be relevant to our task").

[63] *See* Hollis, *supra* note 55, at 251; European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, paras. 50-57 (Mar. 12, 2001). The Appellate Body received seventeen submissions from environmental groups, victims rights groups, chemical trade groups, professional health societies, and academics.

[64] Hollis, *supra* note 55, at 252.

[65] *Id.* at 250 nn. 78-79.

[66] *Id* at 250.

[67] *Id.* USTR maintains that the fallout from this political intervention by the WTO membership has not altered the status quo under the *Shrimp-Turtle* rule for submission of amicus briefs. While the Appellate Body has dropped its efforts to develop procedures for the submission of amicus briefs, it has continued to accept them on an ad hoc basis, in accordance with its ruling in *Shrimp-Turtle*.

[68] *See* Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, sec. IV (Mar. 13, 2002).

[69] *Id.* The EC's position in favor of NGO submissions stands in marked contrast to its position on opening DSB hearings, in which it favors retaining members' rights to close any portion of a hearing.

[70] *See* India's Questions to the European Communities and its Member States on their Proposal Relating to Improvements to the DSU, TN/DS/W/5 (May 7, 2002).

[71] *See* The European Communities' Replies to India's Questions, TN/DS/W/7 (May 30, 2002).

[72] The Star Chamber was an English court with "broad civil and criminal jurisdiction at the king's discretion and noted for its secretive, arbitrary, and oppressive procedures ...." It was abolished in 1641 because of its abuses of power. *See* BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

nature of DSU proceedings strains the WTO's stated self-conception as a forum for nations—the panelists are selected from an international pool without formal affiliation—and perpetuates popular resentment toward to WTO as an insular body with global reach.

IV. CONCLUSION

The relative dearth of mechanisms for public involvement and public participation in the WTO is rooted in the WTO's genesis as a policymaking body for determining the rules of trade between nations. Under this conception of the Organization's function, the WTO has channeled calls for greater civil society participation largely—though not entirely—into the realm of domestic politics. This channeling of civil society participation into domestic politics has some appeal in this context, because, in the arena of foreign policy, it is important for nations to be able to speak with one voice. However, the WTO could—and should—increase greatly the transparency of its proceedings without wresting the ultimate power of decision from the representatives of its member nations. Moreover, domestic participation models are based on certain assumptions regarding access and representation at the national level that are generally associated with liberal democracies. However, these assumptions simply do not hold true for a non-trivial segment of the WTO's membership, and certainly the model breaks down with respect to member governments that are not democratic. NGOs can fill important gaps in representation before the WTO by speaking for cross-sectional interests such as protection of the environment, social welfare, and protection of minorities.

The WTO's characterization as merely a forum for member governments further fails to account for the duality of the Organization's roles. In particular, the delegation of dispute resolution authority to ad hoc panels lacking in transparency and clear standards to apply belies this limited portrayal, because here the power of decision is not in the hands of the member governments. Under the rubric of the WTO, the key function of making factual judgments and interpreting trade agreements in the context of trade disputes thus is administered with little to no public involvement or accountability. The recent trend in which dispute panels have shown willingness to accept *amicus* briefs from non-parties is a favorable development, but so far has provided no procedural or substantive rights to the submitters and has failed to influence the outcome of the disputes.

Given the substantial animosity that has been expressed toward the Organization in recent years, reform of the WTO dispute process will likely be necessary to foster broader acceptance of the WTO and its goals. Suggestions for increasing transparency and public involvement abound, but without consensus among WTO members or the political will to open up, little progress is likely to be made in the foreseeable future.

PUBLIC PARTICIPATION IN THE CLEAN DEVELOPMENT MECHANISM OF THE KYOTO PROTOCOL

Nathalie Eddy and Glenn Wiser [*]

The Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)[1] is the first multilateral environmental agreement of global reach to establish a market-based mechanism allowing state parties to comply in part with their treaty obligations by investing in mitigation projects in developing countries. Since this mechanism—the Clean Development Mechanism (CDM)—will rely on international, national, and private-sector institutions to facilitate foreign investment and sustainable development and since these mitigation projects could significantly impact many stakeholders, the CDM poses novel questions of how stakeholders can adequately participate in its decisionmaking processes.

The Kyoto Protocol was adopted in 1997 by UNFCCC parties after they concluded that the Convention's largely aspirational commitments were too weak to accomplish its goal of stabilizing "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[2] The Protocol establishes binding greenhouse gas emissions ceilings, or targets, for Annex I parties, which include developed countries and most economies in transition of eastern Europe and the former Soviet Union.[3] However, the Protocol gives these Annex I parties significant flexibility in the means by which they may comply with their targets. This includes the ability to receive CDM credit for reducing emissions in developing countries, where the marginal cost of reductions may be markedly less than at home.[4] CDM projects may include a broad range of activities that produce net decreases in greenhouse gas levels compared to the existing baseline, including fuel-switching projects that convert coal-fired power plants to natural gas, the installation of solar panels in villages without access to electric grids, and planting and growing trees in areas that have previously been deforested (thus removing carbon from the atmosphere and sequestering it in the trees and soil of the new forest).

While opportunities for vigorous public participation in CDM governance and project planning and implementation will likely prove essential for the CDM's long-term success, neither the Convention nor Protocol texts provide much indication of what these public participation rights and mechanisms should entail. Under the Convention, all developed and developing country parties agreed to "promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations."[5] Implementation of these provisions has been left to the discretion of individual parties, with effectively no oversight from the Convention's Conference of the Parties (COP). Article 12 of the Protocol, which defines the CDM, contains no mention of any role for the public.

Accordingly, neither the Convention nor the Protocol contains provisions that properly can be described as creating "rights" to public participation in CDM processes. Instead, the CDM public participation rights that presently exist were established as part of the "Marrakech Accords," which were adopted by the COP

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[1] United Nations Framework Convention on Climate Change, May 9, 1992, entered into force Mar. 21, 1994, 31 I.L.M. 849 [hereinafter UNFCCC or Convention]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 [hereinafter Kyoto Protocol or Protocol].

[2] UNFCCC supra note 1, art. 2.

[3] For a complete list of these states, see Kyoto Protocol, annex B.

[4] The Protocol also establishes two other trading mechanisms. Joint implementation allows Annex I parties and companies to receive credit for mitigation projects in other Annex I countries. *See* Kyoto Protocol supra note 1, art. 6. For example, a Japanese company might receive credit for investing in an emissions reducing project in Russia. International emissions trading allows Annex I Parties and their private entities to trade parts of their "assigned amount," or emissions allocation, among themselves. *See id.* art. 17.

[5] Convention, supra note 1, art. 4.1(*i*); *see also* art. 6. (slightly elaborating on the art. 4.1(*i*) text).

in November 2001.[6] Based upon prior experience under the Convention, one can anticipate that the COP, the Protocol's "Conference of the Parties serving as the meeting of the Parties" (COP/MOP), and the CDM executive board may agree to additional opportunities for public participation in the CDM.[7] This may be through either formal decisions or by allowing informal practices to develop under the guidance of the secretariat.

This chapter first provides an overview of the main actors who will supervise, develop, or oversee CDM projects, and who in turn bear some responsibility under the rules for facilitating public participation. Next, the chapter reviews the CDM rules created under the Marrakech Accords that provide for access to information and public participation in decisionmaking. These sections also identify gaps in the current rules and include some of the recommendations that nongovernmental organizations (NGOs) have made to fill these gaps. Finally, the chapter discusses the limited opportunities for access to justice that presently exist under the rules and identifies those additional procedures that may or should be formally adopted soon.

Before proceeding it is important to bear two things in mind. First, CDM rules established at the international level under the auspices of the Protocol generally pertain either to CDM governance (e.g., the CDM executive board) or to the setting of minimum performance standards for projects. Since all CDM projects must be approved by both the "home" (investor/developer's) country and the "host" (project site) country,[8] Protocol parties that participate in the CDM will have an opportunity under their domestic laws to establish and enforce more liberal standards for public participation, if they wish.

Second, at the time of this writing, neither the Protocol nor the CDM are yet operational. The Protocol will enter into force 90 days after not less than 55 Convention parties, including Annex I parties that accounted for at least 55 percent of the total Annex I carbon dioxide emissions in 1990, have deposited their instruments of ratification, acceptance, approval, or accession.[9] While the CDM's executive board has been elected and has met several times, it has not yet completed—and neither the COP nor COP/MOP has approved development of the detailed procedures that will allow the appointment of the CDM's various "operational entities" or the approval of actual CDM projects. Accordingly, there is currently no actual CDM practice beyond that established in this preliminary planning and rulemaking phase.

I. OVERVIEW OF CDM ACTORS

The CDM rules require the following four key CDM actors to make information publicly accessible or to invite public participation in their activities:

- *Project participants* are government or private entities who submit the initial project proposal and develop and implement the project.
- The *CDM executive board* is the primary supervisor of all CDM activities and is directly accountable to the Protocol's COP/MOP. The executive board is comprised of ten governmental representatives, who are elected on the basis of United Nations regional representation.[10]
- The *UNFCCC secretariat (secretariat)* provides administrative and logistical support to the Convention and Protocol parties and serves the CDM executive board in a similar capacity.
- *Designated operational entities (operational entities)* are contractors hired by project participants to validate, monitor, verify, and certify CDM projects. The executive board must approve operational entities.

In addition, *designated national authorities* selected by each Protocol party intending to participate in the CDM will provide the requisite national governmental endorsement of proposed CDM projects.[11]

As discussed below, these actors are obligated to provide stakeholders with access to information about CDM projects, CDM databases and registries, and some as-

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[6] *See* Report of the Conference of the Parties on its Seventh Session, *held at* Marrakech on 29 Oct. 29-Nov. 10, 2001, add., pt. 2: Action taken by the Conference of the Parties, vol. II, FCCC/CP/2001/13/Add.2 (2001), Decision 17/CP.7 [hereinafter Marrakech Accords, CDM rules].

[7] The Conference of the Parties (COP) is the governing body of the Convention. UNFCCC, supra note 1, art. 7.2. Since adopting the Protocol in 1997, the COP has been developing its implementing rules and institutions and will continue to do so until the Protocol enters into force. After that time, the members of the COP that have ratified or otherwise acceded to the Protocol will serve as the meeting of the Parties to the Protocol, the COP/MOP, which will generally be the supreme decisionmaking body of the Protocol. *See* Protocol, supra note 1, art. 13. The Convention secretariat will serve as the Protocol secretariat when the Protocol enters into force. *See* Id. art. 14. The secretariat will also "service the [CDM] executive board" and perform any other functions related to the CDM assigned to it under the Marrakech Accords. *See* Marrakech Accords, CDM rules, supra note 6, para. 18; *Id.* annex, para. 19.

[8] Kyoto Protocol, supra note 1, art. 12.5(a).

[9] *Id.* art. 25.1. As of July 12, 2002, 75 countries had ratified or acceded to the Protocol, including 22 Snnex I countries accounting for 36% of 1990 Snnex I emissions. The UNFCCC secretariat maintains and regularly updates a list of ratifications and accessions. *See* Kyoto Protocol Status of Ratification, *available at* unfccc.int/resource/kpstats.pdf (last visited July 12, 2002).

[10] For a complete list of executive board members and their terms, see UNFCCC, *Executive Board Members*, *available at* www.unfccc.int/cdm/members.html (last visited July 16, 2002).

[11] Marrakech Accords, CDM rules, supra note 6, annex, paras. 29, 40(a).

pects of CDM governance and policymaking. Additionally, they must allow for access to decisionmaking by inviting public comment on a limited number of CDM documents. There are presently no requirements that they provide stakeholders with any legal recourse when required procedures have not been properly followed, nor are there provisions for stakeholder-triggered review of CDM projects.

II. ACCESS TO INFORMATION

The CDM rules created under the Marrakech Accords require designated operational entities, the executive board, and the UNFCCC secretariat to make certain information "publicly available."[12] This information can be classified into three general categories: (1) information that is related to a specific project; (2) information contained in a database or registry; and (3) information that is related to CDM governance, procedures, or policy. While this information must be made publicly available, the manner and timeframe for making specified CDM documents "publicly available" remain unelaborated.

Throughout the negotiations of the CDM rules, the Climate Action Network (CAN)—a coalition of more than 300 NGOs throughout the world committed to limiting human-induced climate change to ecologically sustainable levels—called on parties to clarify how and when CDM project information would be made publicly available.[13] CAN urged parties to require public CDM documents to be translated into the necessary relevant languages and communicated in a medium appropriate for the local communities that may be affected by a project. CAN also suggested that "making publicly available" should be defined to include capacity building, if necessary, to allow for meaningful participation.[14] To date, the executive board has not discussed any guidelines for making CDM documents "publicly available," although environmental NGOs continue to highlight the issue.[15]

A. PROJECT-SPECIFIC INFORMATION

The CDM rules require operational entities to "make information obtained from CDM project participants publicly available, as required by the executive board."[16] No clear rules have been established that define the types of information the executive board will require to be made publicly available under this provision. CDM rules do, however, call for public access to several specific documents at the various stages or phases of a project, including the project proposal and validation phase, registration phase, verification phase, and certification phase.[17] The first of these, the project proposal and validation phase, includes rules regarding environmental impact assessments (EIAs).

1. Project proposal and validation phase

The initial project proposal phase of the CDM is the least defined with respect to access to information and public participation. This gap is particularly troublesome because adequate access to information and public participation during the initial development phases are crucial to the long-term success and credibility of a CDM project. Project participants are required to invite input from local stakeholders during the preparation of the project design document.[18] However, there are no rules or standards regarding the information that should be provided to local stakeholders prior to the invitation for their informed comments or the manner or timeframe for providing the information.

Validation is defined as "the process of independent evaluation of a project activity by a designated operational entity against the requirements of the CDM."[19] During the validation phase of a CDM project, the rules require the validating operational entity to make three types of information publicly available: the project design document, any public comments received in response to it, and the validation report.

The validating operational entity hired by the project participants must make the project design document publicly available, subject to confidentiality limitations (discussed below).[20] The CDM executive board has not yet elaborated the manner or timeframe for making the project design document publicly available. The validating operational entity is also required to make public all comments that it receives during the 30-day validation comment period.[21]

The project design document requires information on environmental impacts to be addressed in one of two ways. At a minimum, the design document must include "documentation on the analysis of the environ-

[12] *Id.* para. 27(h).

[13] CAN non-paper, *Definition of "Publicly Available" in the CDM* (Nov. 2, 2001) (distributed to parties attending COP7 in Marrakech, Morocco).

[14] *Id.*

[15] CAN non-paper, *Key Public Participation Points for Consideration at EB4* (June 9, 2002) (distributed to CDM executive board members and parties attending SB16 in Bonn, Germany), *available at* www.climnet.org/sbsta16/CDMpp.pdf (last visited July 16, 2002). *See also Elaborate, don't Renegotiate*, ECO, vol. CVIII, Special CDM EB Edition (June 10, 2002), *available at* www.climnet.org/sbsta16/ECO_Issue_EB.pdf (last visited July 16, 2002).

[16] Marrakech Accords, CDM rules, supra note 6, annex, para. 27(h).

[17] *Id.* paras. 40, 41, 62, 63.

[18] *Id.* para. 37(b) and app. B, para. 2(g).

[19] *Id.* para. 35.

[20] *Id.* para. 40(b).

[21] *Id.* para. 40(c).

mental impacts, including transboundary impacts."[22] However, "if impacts are considered significant by the project participants or the host party [then] conclusions and all references to support documentation of an environmental impact assessment" must also be included. Accordingly, a complete EIA must be performed for a project only when the project participants or the host party believe that the project's environmental impacts will be "significant."[23]

Even when project participants do believe the impacts will be significant, the rules do not establish standardized EIA requirements for CDM projects. Instead, EIAs are to be performed according to "procedures as required by the host party."[24] The detail or extent of an EIA will thus vary depending on the domestic laws of the host country.

In the negotiations leading up to adoption of the Marrakech Accords, the parties failed to agree upon guidelines for establishing what types of environmental impacts should be considered "significant." This omission from the CDM rules continues despite repeated concerns voiced by the international environmental community. CAN urged parties to adopt detailed guidelines for the assessment of environmental and social impacts of CDM projects that are at least as strong as project guidelines required by international financial institutions implementing comparable projects.[25] At the latest round of climate negotiations in Bonn, Germany in June 2002, Greenpeace reiterated the need to clearly define EIA procedures and the qualifying term "significant" and called upon the CDM executive board to make the elaboration of EIA rules a priority.[26]

If the validating operational entity finds that the project design document meets the CDM requirements, it must submit a request for registration of the project to the executive board in the form of a validation report.[27] This validation report must be made publicly available.[28] The manner in which the validation report becomes publicly available remains undefined, though it must become public at the same time that the report is transmitted to the executive board. The validating operational entity is required to include an explanation in the report of "how it has taken due account of comments received."[29]

[22] *Id.* app. B, para. 2(e)(i).
[23] *Id.* para. 2(e)(i)-(ii).
[24] *Id.*
[25] *The Closed Development Mechanism: Don't Call Us, We'll Call You*, ECO, vol. CVII, no. 2 at 1 (Oct. 30, 2001), *available at* www.climatenetwork.org/eco/CoP7/en/ECO2.pdf (last visited July 16, 2002).
[26] Greenpeace, *Key Opportunities to Strengthen Public Participation in the CDM*, SB16 Briefing Paper 3-4 (June 2002), *available at* www.climnet.org/sbsta16/GPsb16-cdmpubpart.pdf (last visited July 16, 2002).
[27] Marrakech Accords, CDM rules, supra note 6, annex, para. 40(f).
[28] *Id.* para. 40(g).
[29] *Id.*

2. Registration phase

If the validating operational entity finds that a CDM project meets all the requirements of validation, the registration phase follows immediately thereafter. The registration of a CDM project results in the official recognition by the executive board of the proposed project activity as a validated CDM project.[30] If a review of the validation of the CDM project activity is requested by one of the project participants or by at least three members of the executive board, the results of the board's review and reasons for its decision to confirm or decline the registration of the project must be made publicly available.[31]

3. Verification phase

During the verification phase, the verifying operational entity conducts independent reviews of a CDM project to determine whether the project has achieved reductions in greenhouse gas emissions that would not have occurred in the absence of the project.[32] Two reports must be made publicly available during this phase: the monitoring report and the verification report.[33]

Prior to conducting the complete verification, the verifying operational entity must make the monitoring report publicly available.[34] Project participants must prepare the monitoring report according to the monitoring plan set out in the CDM rules. The CDM rules require project data, such as the amount of greenhouse gas emissions reduced, the manner by which the project baseline was determined, any potential sources of leakage (in which emissions reduction activities of the project result in additional emissions being produced somewhere else), and information pertaining to environmental impacts and the EIA (if required).[35]

The verifying operational entity will then complete the verification report, which must also be made publicly available upon completion.[36] The verification report will reflect the operational entity's findings in determining whether the project has met CDM requirements at each of its stages of development. The verifying operational entity must check if the project documentation and implementation were conducted according to the project design document and must review the monitoring results, methodologies, and documentation to confirm that the emissions reduced or sequestered

[30] *Id.* para. 36.
[31] *Id.* para. 41(b).
[32] *Id.* para. 61.
[33] *Id.* paras. 62, 63.
[34] *Id.* para. 62.
[35] *Id.* para. 53.
[36] *Id.* para. 62(h).

would not have occurred in the absence of the CDM project.[37]

4. Certification phase

Based on the findings of the verification report, the verifying designated operational entity will inform the project participants, the parties involved, and the executive board of its certification decision in writing and make this certification report publicly available.[38] The CDM rules currently provide no timeframe or manner in which the certification report should be made publicly available.

The certification report leads to the issuance of certified emission reductions (CERs), internationally tradable units representing emissions reductions accomplished by a project.[39] The parties involved in the project activity or three or more executive board members may request within 15 days a review of the proposed issuance of certified emission reductions.[40] If such a review is required, the executive board will perform it and then make its decision publicly available.[41] As with other CDM documents that are to be made publicly available, the process and timeframe under which the executive board will make its review of CER issuance remains undefined.

In addition to information that is related to, or required at, specific phases of a project, there are information access rules that apply more broadly to projects. These include rules related to confidentiality and the channels and timing of communication or notice to the public.

5. Confidentiality

CDM information that is marked as proprietary or confidential "shall not be disclosed without the written consent of the provider of the information, except as required by national law."[42] As with the situation regarding EIAs discussed above, this provision could allow project developers arbitrarily to withhold important information from public scrutiny, depending on the country in which the project is sited. This opportunity may induce some project developers to seek out those potential host countries with the weakest confidentiality laws.

Three types of information may not be considered proprietary or confidential and must instead always be made publicly available. These are information used to determine additionality,[43] information to describe the methodology for assessing the baseline for emissions,[44] and information to support an environmental impact assessment.[45] The rules place no other limitation on the types of information that CDM project participants may designate as confidential, nor is there presently any requirement that a project developer explain why it has designated information as confidential or provide notice that it has done so. Each operational entity is responsible for making all information obtained from project participants publicly available, subject to the confidentiality rules.[46]

6. Media, notice, and timing

The internet will likely serve as the primary channel of communication for all CDM project information. In January 2002, the UNFCCC secretariat launched a CDM website that presently features mainly executive board agendas and meeting reports, along with some information on baseline and additionality methodologies.[47] Since CDM rules do not specify the means by which project participants, operational entities, the executive board, and the secretariat must provide information, it is unclear whether other media will also be required for communications to stakeholders. The rules have not yet addressed how or whether culturally appropriate means of communication will be required to ensure that local communities without easy access to the internet will remain informed of CDM project development and implementation.

The rules also lack provisions for notification to stakeholders (including NGOs) when CDM documents become publicly available for informational or review purposes. Since almost all CDM information will become publicly available only after most decisionmaking has taken place, stakeholders may be unaware of, or excluded from, key stages of CDM policymaking and project development.

At the start of the 7th Conference of the Parties (COP7) climate negotiations in Marrakech, CAN con-

[37] *Id.* para. 62(a)-(h).
[38] *Id.* para. 63.
[39] *Id.* para. 64.
[40] *Id.* para. 65.
[41] *Id.* para. 65(c).
[42] *Id.* para. 27(h).

[43] Additionality is the difference in greenhouse gas emissions between a scenario with the CDM project and business as usual, i.e., without the project. Thus, additionality represents the reduction in emissions resulting from the CDM project, which may then offset excess emissions by another party.
[44] A baseline establishes or estimates what emissions would be in the absence of the CDM project, taking into consideration economic, political, and technical trends in the CDM host country.
[45] Marrakech Accords, CDM rules, supra note 6, annex, para. 27(h).
[46] *Id.*
[47] The UNFCCC CDM website is www.unfccc.int/cdm. More project-specific CDM documents are expected to be posted to the site once CDM projects are actually under way.

tinued to encourage parties to address the issue of confidentiality in the CDM in a manner that would ensure the public adequate access to information while also maintaining appropriate standards of business confidentiality. CAN presented suggested draft text that defined the term "publicly available" to mean not just availability on the UNFCCC website, but also "other methods that are consistent with the social and cultural context of the affected communities, including translation into the six UN languages and the appropriate local languages for the project site."[48] To date, neither the parties nor the executive board have explicitly addressed the manner and timeframe by which CDM documents must be made publicly available under the CDM rules.

B. Databases and Registries

CDM rules require the executive board, secretariat, and each operational entity to maintain various databases and registries that will be available to the public.

1. Executive board

The executive board is required to develop and maintain a CDM registry that tracks the issuance, holding, transfer, and acquisition of "certified emission reductions."[49] All non-confidential information must be publicly available through the CDM registry maintained by the executive board. As in other parts of the rules, the terms "confidential" and "publicly available" are not elaborated for the CDM registry, and therefore leave room for confusion and inconsistency in their interpretations. The CDM registry provides an internet interface by which the public may query and view registry information and track the trading of CDM-certified emissions reductions.[50] The registry will use unique serial numbers to enable public identification of each account and certified emission reduction. These serial numbers will identify the CDM project activity, the party for which the registry account is maintained, the commitment period for which the certified emission reduction is issued, and the party that hosted the CDM project.[51] The CDM registry is currently the most well-defined of the publicly available information databases being created for the CDM.

The executive board must also maintain a registry of CDM projects.[52] While the CDM registry will track the trading of CDM-certified emissions reductions, the database of CDM projects is intended to include more detailed information on individual CDM projects. For each CDM project, the CDM project database will include information on the project design document, public comments received during the design and validation stage, the verification report, executive board decisions as applicable, and information on CDM credits issued.[53] Presumably the public will be able to query the CDM project database in a similar manner to the CDM registry. However, unlike the CDM registry, the rules do not explicitly provide for a publicly accessible query function for the database.

The executive board must also maintain a publicly accessible list of all designated operational entities it has accredited.[54]

2. Secretariat

The CDM rules mandate the UNFCCC secretariat to make two types of CDM information publicly available. First, the secretariat must maintain lists containing the names of those countries that are eligible to participate in CDM projects. These lists will include a list of developing countries that are party to the Protocol and a list of Annex I parties that have failed to meet the requirements for, or have been suspended from, CDM participation.[55]

Second, the secretariat must publish the recommendations by the executive board and the decision by the COP/MOP regarding the suspension or withdrawal of a designated operational entity's accreditation.[56] While the UNFCCC CDM website may be the most likely place for such information to be posted, the CDM rules offer no specific guidance on the timing, the manner, or the language in which such information will be made publicly available.

3. Designated operational entity

In addition to the project phase-specific documents discussed above, each designated operational entity must maintain a publicly available list of all the CDM projects for which that operational entity has carried out validation, verification, or certification.[57] The CDM rules are unclear as to the extent of information to be included in this list. Moreover, the relationship and potential interface between the CDM information provided on the UNFCCC CDM website and that of the operational entity's list have not yet been defined. The most effi-

[48] CAN non-paper, *Definition of "Publicly Available" in the CDM* (Nov. 2, 2001) (distributed to parties attending COP7 in Marrakech, Morocco).
[49] Marrakech Accords, CDM rules, supra note 6, annex, para. 5(*l*); *id.* app. D, para. 2.
[50] *Id.* app. D, para. 9.
[51] *Id.* paras. 5, 7.
[52] *Id.* para. 5(m).
[53] *Id.*
[54] *Id.* para. 20(c).
[55] *Id.*, annex, para. 34.
[56] *Id.* para. 21.
[57] *Id.* para. 27(f).

cient use of resources and most user-friendly presentation of the data would be realized by maintaining the various lists as separate pages on the UNFCCC CDM website and including numerous hyperlinks or other references between them and/or the individual data entries.

C. Information Related to CDM Governance, Procedures, or Policy

In addition to maintaining the CDM registry and the CDM project database, the executive board must also publicly post and maintain a repository of CDM rules, procedures, methodologies, and standards once they are approved.[58] CDM rules do not yet elaborate detailed guidelines or requirements for the repository. Presumably, it will be available on the UNFCCC CDM Web site. Distributing it in CD-ROM format might also help expand availability of the information to stakeholders who have computer access but lack an adequate internet connection with which to download long documents.

Specifically with respect to the CDM rules that require the executive board to publish any new methodologies for baseline determination or monitoring that it has reviewed and approved, the full text of these and all other board decisions must be made publicly available in the six official UN languages.[59] This is the only provision in all of the CDM rules that requires any information to be made publicly available in any language other than English. While publication of executive board decisions in the six UN languages may be an important way to enable non-English speaking stakeholders to follow the CDM process, it will not ensure any meaningful participation at the early stages of project development or in the executive board's decisionmaking processes because the rules do not give stakeholders any opportunity to provide further comment on, or request a review of, the issue at hand once the executive board has taken its decision.

There are also several general provisions that require the executive board to report on its work and that call on the Convention's COP or the Protocol's COP/MOP to review the CDM. The executive board must "report on its activities" to each session of the annual COP/MOP.[60] The CDM rules do not define the executive board's report as an official UN document requiring translation into the six UN languages or as a less formal submission to be publicly released in English only. The scope of information presented in the executive board's reports is unclear because the board's reporting requirements deal with process only; they do not yet specifically refer to content or time frames.

As the previous sections have illustrated, the CDM rules for transparency and access to information are currently inadequate to ensure meaningful participation of stakeholders. It is therefore even more important that the overall reporting and review procedures for the CDM be clearly defined and appropriately disseminated. While such general CDM reporting is not, by itself, an adequate means of providing information to stakeholders, it could help inform interested members of the public who are unaware of the implementation of a particular CDM project.

In the CDM decision taken in Marrakech, the COP assigned itself the duty to assess "progress made regarding the [CDM] and to take appropriate action, as necessary."[61] The parties in Marrakech agreed upon a draft decision to be adopted at the first COP/MOP that convenes after the Protocol enters into force. This draft COP/MOP decision provides that the first review of the modalities and procedures for the CDM "shall be carried out no later than one year after the end of the first commitment period" (2008-2012), and that "further reviews shall be carried out periodically thereafter."[62] The COP/MOP will also be responsible for reviewing the executive board's annual reports and the geographic distribution of operational entities and CDM projects.[63]

The CDM rules as they currently stand risk excluding stakeholders from the CDM process by failing to make key information available, making it available too late, and using culturally inappropriate modes of communication to notify and inform stakeholders of CDM governance developments. The CDM rules make no mention of how project information will be communicated to local stakeholders early during a CDM project. As the World Resources Institute (WRI) has observed, a number of international financial institutions, such as the members of the World Bank Group, have come to appreciate the value that public access to information and public involvement at the early stages of project development add to the overall success of a project.[64] WRI suggests measures such as translating project documents into local languages, holding meetings in communities that may be affected by the project, and giving stakeholders an opportunity to provide their input orally or in writing.[65] However, the CDM does not require project participants to translate documents into local languages or convene community meetings to gather feedback from stakeholders.

Rather than encourage local stakeholder engagement during the early stages of project development and dur-

[58] *Id.* para. 5(k).
[59] *Id.* para. 17.
[60] *Id.* para. 5(c).
[61] Marrakech Accords, Decision 17/CP.7, para. 19.
[62] Marrakech Accords, Draft decision -/CMP.1 (Article 12), para. 4.
[63] *Id.*
[64] *See id.* paras. 2-3.
[65] *Id.*

ing CDM policymaking processes, all CDM documents become publicly available only after CDM decisionmaking has taken place. The only exceptions are the project design document and the validation report, which could potentially be revised in response to public comments received.

At the June 2002 climate negotiations in Bonn, Germany, CAN urged the CDM executive board to address public participation proactively by including it as an official agenda item for the next board meeting.[66] Though the executive board has not, at the time of this writing, agreed to add public participation to its next meeting agenda, the board chairman offered to raise CAN's points for discussion at the next meeting.

III. PUBLIC PARTICIPATION IN DECISION-MAKING

While the CDM rules relating to access to decisionmaking begin in a broad, promising way, they ultimately allow only a limited role for the public to influence how a project will be developed. The rules define "stakeholders" as "the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity."[67] This definition of stakeholder does not encompass as wide a spectrum of individuals and organizations as does the Aarhus Convention or other international instruments;[68] nevertheless, it potentially creates a significant platform from which the public may gain access to, and participate in, the development and implementation of CDM projects.

The rules pertaining to public participation in decisionmaking, however, currently contain numerous gaps that could leave that potential unrealized. These gaps include a failure to specify how or when stakeholder comments on projects should be solicited; a lack of clarity as to what standards validating operational entities should apply in deciding whether project participants satisfy the notice and comment provisions under the rules; no guidance as to where, when, or how the validating operational entity must make the project design document publicly available; uncertainty about the applicability of EIA requirements; and confusion regarding how the executive board will comply with the requirement that its meetings be open to attendance by NGO observers.

A. Project-Specific Opportunities for Participation

CDM rules establish two mandatory and two optional opportunities for stakeholders to comment on projects. The mandatory opportunities occur early in the development phases of a CDM project, namely the project proposal and validation phases. If stakeholders miss these initial opportunities for comment, there may be no other chance to provide input into a CDM project at a later stage.

1. Mandatory public comment periods

The first mandatory public comment period occurs during the preparation of the CDM project design document.[69] Project participants must invite local stakeholders to provide comments on the proposed CDM project.[70] The rules do not specify how project participants should extend this invitation; however, the project design document must include a brief description of the process by which the comments were solicited.[71] The project design document must also include a summary of the comments received and a report on "how due account was taken of [them]."[72] While this latter provision is important, the lack of any clear guidelines on how the invitation to local stakeholders should be extended could result in few, if any, local stakeholder comments being received, which would render moot the requirement to take "due account" of them.

The validating designated operational entity must review the project design document to confirm that the project participants complied with these requirements and invited the local stakeholders to comment. If the operational entity finds that the project design document fails to include any of the requirements, the document cannot be validated.[73] The manner in which each operational entity implements this validation rule may thus be critical in determining how effective the public com-

[66] CAN Non-paper, *Key Public Participation Points for Consideration at EB4* (June 9, 2002) (distributed to CDM executive board members and parties attending SB16 in Bonn, Germany), *available at* www.climnet.org/sbsta16/CDMpp.pdf (last visited July 16, 2002). *See also Elaborate, don't Renegotiate*, ECO, *supra* note 15.

[67] Marrakech Accords, CDM rules, supra note 6, annex, para. 1(e).

[68] Article 2, Paragraph 5 of the Aarhus Convention (relating to public participation in decisionmaking) reads: "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, nongovernmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest." *See also* Svitlana Kravchenko, *Aarhus, Espoo, and London: Promoting Public Involvement In the UN/ECE Region*, in this volume.

[69] Marrakech Accords, CDM rules, supra note 6, annex, app. B. (As discussed earlier in this chapter, the project design document is a detailed technical description of the proposed project, prepared by the project participants and reviewed by the validating operational entity as part of the project validation process).

[70] *Id.* para. 34(b).

[71] *Id.* app. B, para. 2(g).

[72] *Id.* para. 37(b).

[73] *Id.* para. 40(f).

ment period is in providing a genuine opportunity for local stakeholder involvement. For example, if the operating entity is willing to sign off on the project design document so long as it includes any description of how the project participants solicited and took comments into account, then project participants could circumvent the intent of these rules. On the other hand, the operational entity could give the rules teeth by requiring participants not only to supply the information but also by requiring the information to demonstrate substantively that the project participants took steps to ensure that local stakeholders had a meaningful opportunity to provide their opinions and comments on the project. Moreover, the operational entities could make the rules stronger by taking steps to verify with local stakeholders that the information supplied does, in fact, reflect what the project participants actually did.

The second mandatory public comment period occurs when the validating operational entity releases the project design document. The validating operational entity must make the design document publicly available for comment prior to submitting it to the executive board for final validation and registration.[74] Stakeholders, UNFCCC-accredited NGOs,[75] and parties have 30 days after the release of the design document to provide their comments.[76] The CDM rules offer no guidance on where, when, or how the validating operational entity must make the project design document publicly available.

The validating operational entity must make all of the comments it receives publicly available.[77] Again, the term "publicly available" is not defined to explain how, when, or where the documents must be made available. There are no rules yet regarding how stakeholders will be notified of the start of this comment period, and there are also no details on how the project design document will be made available to interested stakeholders and parties. The most likely medium will be by posting it on the internet. However, it is unclear whether the validating operational entity will post the design document on its own website, and whether the executive board or UNFCCC will provide a tracking database or schedule to help stakeholders stay informed of current public comment periods.

At the close of the validation public comment period, the validating operational entity must decide whether to propose to the executive board that it validate the CDM project, based upon the information in the project design document and taking into account the comments that have been received.[78] In submitting its validation report to the executive board, the validating operational entity must also explain how it took due account of all the comments it received.[79]

2. Additional Public Comment Opportunities Potentially Available

Additional public participation may be required if an environmental impact assessment (EIA) is performed or if the verifying operational entity elects to include interviews with local stakeholders when conducting an on-site inspection.

As discussed earlier in this chapter, an EIA is required in the initial development stage of a CDM project only if the environmental impacts "are considered significant by the project participants or the host party."[80] It is difficult to assess at this point how much additional information and input stakeholders may gain through this rule. First, the EIA requirement depends upon a finding of "significant" environmental impacts by interested parties, rather than an independent third party. The rules provide no guidance on what types or scale of environmental impacts should be deemed "significant." Second, the procedures for public input into the EIA process may vary depending on where the proposed project is sited. If the project participants or host party decide that an EIA is warranted, they must undertake it "in accordance with procedures as required by the host party."[81] Climate Action Network members have interpreted this provision to require a standard EIA procedure according to the host country's national laws. However, the CDM rules offer no alternative in situations in which the host country lacks mandatory EIA procedures. Moreover, the rules do not establish any process to ensure that the CDM project participants comply with the required host party's EIA procedures. The national EIA laws of CDM host countries can and should be an important safeguard of the right of local stakeholders to participate in project decision-making. However, the failure of CDM rules to provide some consistent, minimum EIA standards could create an incentive for some project developers to seek CDM host countries with the weakest EIA laws or practices.

The remaining potential public comment period occurs during the verification phase of a CDM project. The verifying operational entity may conduct on-site inspections of a CDM project during the process of verification. As part of the on-site inspections that a verifying operational entity may or may not elect to under-

[74] *Id.* para. 40(a).

[75] The UNFCCC secretariat grants accreditation to NGOs generally working on climate change issues. Accreditation also requires approval by parties, although parties rarely object to the accreditation of a requesting NGO. *See* Glenn Wiser, *Transparency in 21st Century Fisheries Management*, 4 J. INT'L WILDLIFE L. & POL'Y 95, 109 (2001).

[76] Marrakech Accords, CDM rules, supra note 6, annex, para. 40(c).

[77] *Id.*

[78] *Id.* para. 40(d).

[79] *Id.* para. 40(f).

[80] *Id.* para. 37(c).

[81] *Id.*

take, the operational entity may conduct interviews with local stakeholders.[82] The CDM rules offer no additional guidance on the process for such interviews nor suggestions for criteria in determining when they might be appropriate. There is also no notification procedure to alert the public that a CDM project is being verified. The only public notification currently required during the verification phase regards the release of the project monitoring report that the verifying operational entity is required to publish sometime during the verification stage.[83]

B. Opportunities for Participation at the Programmatic Level

Opportunities for direct public participation in the further elaboration of CDM policies and procedures are extremely limited. Subject to the authority of the COP/MOP, the CDM executive board will be the primary entity responsible for CDM-rulemaking.[84] Though the executive board is required to make all of its decisions publicly available in the six UN languages, minimal public participation or input is invited into the CDM decision-making process under the CDM rules as currently elaborated.[85] In particular, no public participation is required prior to executive board decisionmaking. Accordingly, the only opportunity available for interested stakeholders to try to influence the development of new CDM rules may be through their informal contacts with national government officials before the COP/MOP ratifies the executive board decision. However, because the COP/MOP's approval of these board decisions will likely be pro forma in most instances, this participation opportunity may generally be ineffective.

The CDM rules do require CDM executive board meetings to be "open to attendance" by parties and NGO observers, unless the executive board decides otherwise.[86] At the last two executive board meetings in April and June 2002, observers were provided space in a separate room where they were allowed to watch the executive board meetings on a closed-circuit broadcast that was also webcast simultaneously. That represented a marginal improvement over the earlier executive board meeting in January, in which no space was provided on-site for any observers. The only option for observers then was to view the webcast, which requires advanced viewing software and a high-speed internet connection and thus is not practically available to many interested stakeholders, especially those in developing countries.

There is one public comment period that relates to executive board decisionmaking. Public comment is required for all technical reports that the board commissions. The public will have at least eight weeks to provide input on draft methodologies and guidance before documents are finalized or recommendations are put forward to the COP/MOP for their consideration.[87] There are no provisions yet for notification of this public comment period on technical reports. However, it is likely the executive board will post the draft technical report on the secretariat's CDM website for comment, as other executive board-commissioned papers have recently been posted.

While the Climate Action Network was initially encouraged when this provision was added to the CDM rules in Marrakech, recent elaboration on the details of the technical reports indicates that the executive board may, in fact, attempt to avoid opening technical reports up to public comment. The draft rules of procedure for the executive board define "technical reports" as all reports commissioned by outside experts, except reports of the CDM technical panels.[88] Since a sizeable percentage of technical reports could be prepared by the CDM technical panels, the Climate Action Network urged the executive board to consider the valuable input from stakeholders and parties who do not have representatives on the executive board, which would be excluded if this provision of the draft rules of procedure is adopted as currently written.[89]

IV. Access to Justice

The CDM currently does not provide stakeholders any opportunities to seek redress if authorities fail to comply with their duties to provide access to information or participation in decisionmaking. Moreover, unlike the World Bank Inspection Panel or the Compliance Ombudsman of the International Finance Corporation and the Multilateral Investment Guaranty Agency, the CDM has no mechanism allowing local stakeholders to register complaints about the procedures or impacts of specific projects.

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[82] *Id.* para. 62(b).
[83] *Id.* para. 62.
[84] *Id.* para. 5.
[85] *Id.* para. 17.
[86] *Id.* para. 16.
[87] *Id.* para. 5(j).
[88] "Draft rules of procedure of the executive board of the Clean Development Mechanism" (version 21-01-02, 10:58), § II, para. 12.
[89] *Elaborate, don't Renegotiate*, ECO, *supra* note 15. The ten members and ten alternates of the executive board are nominated by parties from each of the five United Nations regional groups and the small island developing states. Marrakech Accords, CDM rules, supra note 6, annex, para. 7. Though the rules stipulate that they will serve in their personal capacities, most parties view the members as de facto representatives of their respective governments, so that Protocol parties who do not have an executive board member, or governments that are not party to the Protocol, will have participatory rights in executive board decisionmaking that are closer to those of NGO observers than to parties who have representatives on the board.

Nevertheless, the CDM rules adopted in Marrakech do include a few placeholders for the possible, future adoption of procedures that could provide stakeholders with varying rights of redress.

One of the most important placeholders could enable stakeholders to trigger—indirectly or possibly even directly—a review of a CDM project. CDM rules presently do not provide for any stakeholder-triggered review of projects during their development or implementation. Yet the executive board (at the request of three or more members) or a state party involved in a CDM project may demand project reviews either at the time a project is registered or when certified emissions reductions are issued.[90] At COP7 in Marrakech, parties inserted an important placeholder into the rules that requires the executive board to elaborate procedures to include stakeholder input into these two review options: the executive board shall "elaborate and recommend to the COP/MOP for adoption at its next session procedures for conducting the [two] reviews, including *inter alia*, procedures to facilitate consideration of information from Parties, stakeholders and UNFCCC accredited observers."[91] At the very least, the board could recommend that stakeholders be able to provide relevant information after a review is triggered. The board could bring the CDM closer to accord with the practices of international financial institutions, such as the World Bank Group, by recommending that stakeholders have the right to provide information that could directly trigger a review or commence a process that ultimately leads to a review.

Another access-to-justice placeholder may be found in the rule that permits a verifying operational entity to seek input from local stakeholders if it conducts an on-site inspection of a CDM project. The rules provide that the verifying operational entity shall conduct on-site inspections, "as appropriate," that may include interviews with project participants and local stakeholders.[92] Depending on how these rules are interpreted and the practices that emerge under them, local stakeholders could use this opportunity to register substantive or procedural complaints about a project. However, it will be important that operational entities receive detailed guidance regarding when, exactly, it is "appropriate" for them to conduct the on-site inspections and interview stakeholders. Without such guidance, the opportunities for local stakeholders to express their views on a project could depend on the whim of whatever operational entity has jurisdiction over it.

The rules for reviewing the accreditation of an operational entity also fail to allow for stakeholder input. Given the central role that operational entities will play in the different phases of CDM projects, their performance will have significant impacts on the integrity of projects. The executive board has prepared a draft technical paper that details procedures for accreditation of operational entities. Significantly, in the section addressing unscheduled surveillance, or spot-checks, of operational entities that may be initiated by the executive board, the current draft would allow spot-checks to be triggered by "a written complaint regarding the failure of a designated operational entity to comply with its terms of accreditation by another designated operational entity and/or NGOs accredited with the UNFCCC."[93]

V. CONCLUSION

The CDM decision from Marrakech outlines a work plan for the executive board to complete by COP8, which will be held in Delhi in November 2002. This work plan includes specific tasks such as accrediting designated operational entities and developing draft rules of procedure. However, the work plan also includes a catch-all paragraph mandating the board to "prepare recommendations on any relevant matter … for consideration by [COP8]."[94] This broad provision gives the executive board the flexibility to add the issues of transparency and public participation to its agenda and to ensure that the CDM lives up to its potential as an instrument for environmental protection and sustainable development that can bring long-term benefits for people throughout the Global South.

This chapter has identified gaps in the existing CDM rules that could result in a significant narrowing of opportunities for local stakeholders, NGOs, and other interested members of the public to be informed of, and participate meaningfully in, CDM decisionmaking processes. While it may be understandable that these gaps exist at this early stage of CDM implementation, they are worrisome because project developers and governments are planning and initiating CDM projects now[95] and because the Protocol allows back-dated crediting of emissions reductions accomplished by projects beginning in the year 2000.[96]

[90] Marrakech Accords, CDM rules, supra note 6, annex, paras. 41, 65.
[91] *Id.* para. 5(*o*).
[92] *Id.* para. 62(b).
[93] Technical Paper (Revision 1), *Detailed Procedures to Operationalize the Accreditation of Operational Entities* (Version: 25-03-02, 4:09), para. 59(c), *available at* www.unfccc.int/cdm (last visited July 16, 2002).
[94] *Id.*
[95] For example, the World Bank's "Prototype Carbon Fund" has already completed preparations for two planned CDM projects, including the negotiation of "emissions reductions purchase agreements" with the host governments. *See* Prototype Carbon Fund, "List of Projects," *available at* http://prototypecarbonfund.org/router.cfm?Page=ProjList (last visited July 10, 2002).
[96] Protocol, supra note 1, art. 12.10.

Moreover, the lack of any opportunities for stakeholders to initiate complaints about a project (beyond any existing procedures under the national law of the host country) render the CDM out of step with emerging principles of international law as exemplified by the Aarhus Convention and with established practices of international financial institutions, such as the World Bank Group.

To remedy these shortcomings, we recommend that the CDM executive board develop, and the COP (or Protocol's COP/MOP) approve, a "Good Practice Manual for Public Consultation and Disclosure." This good practice manual would optimally address the gaps we have identified as well as others that may emerge and would provide project participants, operational entities, the executive board, the UNFCCC secretariat, and the general public with specific guidance on how to incorporate effective public involvement in all phases of CDM project development and implementation. The executive board should commit to developing the good practice manual immediately to minimize the number of CDM projects that are developed without its guidance. During the time when the manual is being developed, the executive board should address the CDM public participation gaps on an interim basis. Such steps should include providing clarification to operational entities that, when verifying the project design document, they should ensure not only that project participants have supplied the required information about public participation and comments, but also that the information demonstrates that stakeholders were given a genuine opportunity to participate meaningfully and that their concerns were in fact taken into account.

Additionally, the executive board should immediately begin to study and consider the establishment of a watchdog mechanism for CDM projects analogous to the World Bank's Inspection Panel or the Compliance Ombudsman of the International Finance Corporation and the Multilateral Investment Guaranty Agency. While neither of these bodies has a direct enforcement mandate, they do provide important fora in which stakeholders may seek redress if they believe they are being harmed by a project participant's failure to abide by the rules. The CDM, which is dedicated to assisting developing countries in their quest to achieve sustainable development, should offer an opportunity to stakeholders that is at least as vigorous as the bodies of these international financial institutions. The establishment of such a body would improve the quality of CDM project decisionmaking by increasing incentives for project participants to take the needs and views of stakeholders into account. Of equal importance, by fostering an expectation that CDM project participants may be held accountable for ensuring adequate involvement by the public, it would strengthen overall public support for the CDM and increase its prospects for success.

PUBLIC INVOLVEMENT IN THE MANAGEMENT OF INTERNATIONAL WATERCOURSES

Carl Bruch and Dorigen Fried *

Citizens, nongovernmental organizations (NGOs), universities, and other members of civil society have played an essential role in developing and implementing environmental and natural resource laws and institutions at the local and national levels over the past decades. This role has extended more recently into the international arena.[1] This chapter examines the emerging norms and practices that guarantee transparency, public participation, and accountability in the management of international watercourses. Particular attention is paid to how these norms may be implemented to improve the management of transboundary watercourses in regions around the world.

While there currently is no definitive statement under customary law on the topic, this chapter demonstrates that participation provisions are incorporated increasingly into water body-specific instruments with benefits for communities, governments, and project implementation alike. This increasingly widespread practice suggests that norms on public involvement are not only emerging but are also rapidly crystallizing. Regional context and variation can often help this process; for example, in Africa, evolution of these norms has the added benefit of a "rich tradition of participation in water management" at the local level,[2] which can form the basis for similar development at the international level.

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I. OVERVIEW

This chapter analyzes various ways in which the public can become involved in the management of international rivers and lakes. These mechanisms range from making information available to the public to consulting the public to empowering the public to file complaints, and they are available in both domestic and international fora.[3]

A. BENEFITS OF PUBLIC INVOLVEMENT IN WATER MANAGEMENT

Public involvement builds awareness.[4] This insight can in turn build the public's capacity to participate and also their respect and support for the decisionmaking process. Public involvement also improves the quality of decisions because public input can supplement scarce government resources for developing norms and standards, as well as for monitoring, inspection, and enforcement.[5]

Decisions affecting international watercourses frequently are made by government officials who sit far from the waters in question. As a result, these decisions rarely reflect the interests of the border residents, who frequently are far from the sources of power. Expanding on this theme, Milich and Varady

> observed that international agreements that depend on internal political processes may fall short of achieving goals precisely because they do not sufficiently consider the local interests that ulti-

[1] *See, e.g.*, Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994); Chiara Giorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 COLO. J. INT'L. ENVTL. L. & POL'Y 115 (1998); Celia R. Taylor, *The Right of Participation in Development Projects*, 13. DICK. J. INT'L L. 69 (1994). *See also* part III, in this volume. For a history of international instruments incorporating public participation, *see* STEPHEN STEC & SUSAN CASEY-LEFKOWITZ, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 10-14 (Regional Envtl. Center, Budapest 2000) *available at* www.unece.org/env/pp/acig.htm (last visited June 27, 2002).

[2] NARENDRA SHARMA ET AL., AFRICAN WATER RESOURCES: CHALLENGES AND OPPORTUNITIES FOR SUSTAINABLE DEVELOPMENT 53, World Bank Tech. Paper No. 331 (1996).

[3] *Id.* at 65.

[4] *See* CAROLY A. SHUMWAY, FORGOTTEN WATERS: FRESHWATER AND MARINE ECOSYSTEMS IN AFRICA 86-87 (1999).

[5] *See* SHARMA ET AL., *supra* note 2, at 27-30 (detailing the lack of governmental capacity and the need for civil society to supplement the scarce governmental resources in managing water).

> mately determine the extent to which laws are implemented. National and international institutions rarely have incentive to heed realities of the field. Instead high-level policymakers are rewarded for setting ambitious goals without providing the appropriate understanding, tools, and capacity at the local level to implement the measures needed to achieve those goals.[6]

They conclude that "transnational linkages that permit national agencies to speak to each other but remain deaf to local interests are destined to fail."[7]

Similarly, decisions made in the interest of national governments do not necessarily reflect the interests of the transboundary ecosystems that are intricately connected to transboundary watercourses.[8] Thus, the public has a critical role to play in "represent[ing] an ecosystem over and above their national loyalties."[9] By involving the public in the management of these waters, it is more likely that the decisions will respect the long-term ecological interest of transboundary ecosystems.[10]

Public involvement can identify and address potential problems at an early stage. When the public is not provided an opportunity to participate, negative public reaction to unaddressed (and unresolved) issues can lead to large and sometimes violent protests that stall or halt projects and add significantly to the overall cost of the project. For example, the construction of the Pak Mun Dam on a tributary to the Mekong River in Thailand did not include public participation in the assessment process. Although the dam was completed in 1994, the communities affected by the dam have objected to the compensation that they view as inadequate and the unexpected costs associated with the protests have increased the dam's overhead, altering the cost-benefit analysis.[11]

Similarly, when the public is not involved in decisions that could affect them, the simple lack of public support can impede implementation. For example, the World Bank-funded Kampong Improvement Program lacked public participation, which led to apathy on the part of the intended beneficiaries and a failure to maintain the project.[12]

In contrast, involving the public in managing international watercourses can improve the credibility, effectiveness, and accountability of governmental decisionmaking processes. Initiatives by nongovernmental organizations can also facilitate the decisionmaking process. When negotiations over international watercourses become polarized as governments become locked into their positions, nongovernmental organizations (NGOs) with a regional focus can, "by highlighting regional and ecosystem-related perspectives, assist in breaking through barriers associated with traditional diplomacy."[13]

Involvement also builds public ownership of the decisions and improves its implementation and enforcement as the public is more likely to respect and abide by the final agreements.[14] Citizens and NGOs can also improve the monitoring of potential violations, particularly when they understand their rights and the standards that apply.[15] For example, an increasing number of rivers and bays in the United States and in other countries have "Riverkeepers" and "Baykeepers"—individuals who investigate and report potentially illegal actions that harm the waters, such as illegal discharge of wastes.[16]

A number of these different reasons for public involvement in the management of international waters were explicitly cited in the 1999 London Water and Health Protocol to the 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes.[17] Moreover, a wide range of conventions and international institutions have also sought to advance public involvement, as discussed in the next subsection.

B. Watercourses, Conventions, and International Institutions Considered

In recent years, an increasing number of international conventions and institutions have strengthened the role of the public in the development, implementation, and

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[6] Lenard Milich & Robert G. Varaday, *Managing Transboundary Resources: Lessons From River-Basin Accords*, 40 Env't 10, 32 (1998).

[7] *Id.* at 34.

[8] Siri Eriksen, Shared River and Lake Basins in Africa: Challenges for Cooperation (1998).

[9] Protecting the Gulf of Aqaba: A Regional Environmental Challenge 470 (Deborah Sandler et al. eds., 1994).

[10] Catherine Ferrier, *Towards Sustainable Management of International Water Basins: The Case of Lake Geneva*, 9 Rev. Eur. Community & Int'l Envtl. L. 52, 61 (2000) (noting that environmental organizations do not face the same political and administrative constraints that bind governments and thus "have a flexible enough structure to carry on transboundary campaigns").

[11] Mingsarn Kaosa-ard et al., Towards Public Participation in Mekong River Basin Development, at 29 (1998); *see also* Taylor, *supra* note 1 at 72-73 (1994) (highlighting the numerous problems in the Sardar Sarovar water project in India that lacked public involvement).

[12] Taylor, *supra* note 1, at 73.

[13] Sandler et al., *supra* note 9, at 470-71 (discussing the role of Great Lakes United in facilitating discussions on the North American Great Lakes).

[14] *See* Milich & Varady, *supra* note 6, at 37.

[15] *See, e.g.*, Shumway, *supra* note 4, at 85-86.

[16] For a history of the Hudson Riverkeepers, the first such organization, see John Cronin & Robert F. Kennedy Jr., The Riverkeepers (1997).

[17] Water and Health Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done at London on June 18, 1999, U.N. Doc.E/ECE/MP.WAT/AC.1/1998/10, *available at* www.unece.org (last visited June 27, 2002) [hereinafter London Protocol]; *see also* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

enforcement of international commitments. Some of these have been general (relating to public involvement in environmental matters), while others have specifically incorporated public involvement into the management of international watercourses. These initiatives are briefly introduced here and discussed in more detail later.

1. Watercourse-Specific Instruments and Institutions

The Mekong River has been a leader in promoting public involvement in international watercourse management. The 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin established the Mekong River Commission (MRC) to managing river-related activities in the lower basin.[18] Cambodia, Lao People's Democratic Republic, Thailand, and Viet Nam are parties to the MRC, which replaced earlier committees dating back to 1957. The authority to develop water allocation rights on the Mekong and its tributaries is one of the major strengths of the Agreement. The MRC is drafting and reviewing a public participation strategy.[19]

Along the United States-Mexico border, two organizations seek to manage the shared natural resources, including the Rio Grande and the Colorado River. The International Boundary and Water Commission (IBWC) was established in 1889 to implement the boundary and water treaties between the United States and Mexico,[20] and the Border Environment Cooperation Commission (BECC)[21] was established in 1993 in response to the North American Free Trade Agreement (NAFTA). The BECC must certify that proposed projects before the North American Development Bank that are located within 100 km of the border satisfy all the applicable environmental laws and have adequately incorporated community participation. Many of the projects that the BECC certifies can affect the transboundary river that forms much of the boundary between the United States and Mexico.

Along the Canada-United States border, the North American Great Lakes constitute the largest inland freshwater ecosystem in the world.[22] In 1909, the International Boundary Waters Treaty established the International Joint Commission (IJC) to prevent and resolve disputes over water quality and quantity in waters along the U.S.-Canada border.[23] With time, the IJC has also come to address transboundary air pollution as well as actually operating hydropower projects that impact transboundary water flows.[24] The original 1909 treaty also established detailed provisions for public participation and access to information that have been actively implemented.

In Europe, management of the Danube and Rhine Rivers has incorporated public involvement. The 1994 Danube River Protection Convention,[25] signed by 11 states, has particularly strong provisions for public access to information. In 1999, the European Community and the nations of Germany, France, Luxembourg, the Netherlands, and Switzerland concluded the Convention on the Protection of the Rhine.[26]

The 1990s saw the rapid rise of international commitment to involving the public in the management of Lake Victoria. The Lake Victoria Environmental Management Project, funded by the Global Environment Facility,[27] incorporates public participation in the development of projects and policies. In anticipation of the treaty establishing the East African Community, Kenya, Tanzania, and Uganda adopted a Memorandum of Under-

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[18] Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, entered into force on Apr. 5, 1995, *available at* www.mekongforum.org/95agree.html (last visited June 24, 2002).

[19] Personal Communication from Susan Novak, Mekong River Commission, to Carl Bruch, Environmental Law Institute (June 21, 2002) (on file with authors).

[20] Convention between the United States of America and the United States of Mexico to Facilitate the Carrying out of the Principles Contained in the Treaty of November 12, 1884 and to Avoid the Difficulties Occasioned by Reason of the Changes which take Place in the Beds of the Rio Grande the Colorado Rivers, done Mar. 1, 1889, T.S. 232, 26 Stat. 1512, *available at* www.ibwc.state.gov/FORAFFI/body_synopsis.HTM (last visited July 31, 2002) (establishing the International Boundary Commission, the predecessor to the IBWC); Treaty between the United States of America and Mexico, Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, done Feb. 3, 1944, entered into force Nov. 8, 1945, T.S. 944, 59 Stat. 1219, *available at* www.ibwc.state.gov/FORAFFI/body_1944_treaty.HTM (last visited July 31, 2002) (establishing the IBWC).

[21] *See also* North American Agreement on Environmental Cooperation, arts. 14, 15, done Sept. 8-14, 1993, 32 I.L.M. 1482 (1993) [hereinafter NAAEC].

[22] THE WORLD ALMANAC AND BOOK OF FACTS (Robert Famighetti et al. eds., 1993).

[23] Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, done Jan. 11, 1909, 36 Stat. 2448 [hereinafter IBWT]; Agreement Between Canada and the United States of America on Great Lakes Quality, done Nov. 22, 1978.

[24] For an assessment of the IJC, see ENVIRONMENTAL LAW INSTITUTE, AN EVALUATION OF THE EFFECTIVENESS OF THE INTERNATIONAL JOINT COMMISSION (1995).

[25] Convention on Cooperation for the Protection and Sustainable Use of the Danube River, entered into force Oct. 22, 1998, *available at* ksh.fgg.uni-lj.si/danube//envconv/index.htm (last visited June 27, 2002) [hereinafter Danube River Protection Convention].

[26] Convention on the Protection of the Rhine, done at Bern on Apr. 12, 1999.

[27] GLOBAL ENVIRONMENT FACILITY, KENYA, TANZANIA, UGANDA: LAKE VICTORIA ENVIRONMENTAL MANAGEMENT PROJECT, PROJECT DOCUMENT, Report No. 15541-AFR (1996).

standing on Environment Management that relies on public involvement and specifically addresses Lake Victoria.[28]

Despite millenia of human use of the Nile River to meet residential, industrial, and agricultural needs, it is only recently that the international instruments governing its management have explicitly incorporated public involvement. In 1999, ten of the eleven Nile basin nations (all but Eritrea) commenced the Nile Basin Initiative, an informal, interim agreement to facilitate basin-wide and sustainable international management of this shared resource.[29] The Nile Basin Initiative's Policy Guidelines provide the framework for regional cooperation and incorporate transparency and participation to varying degrees. While practice has yet to emerge from these recent Nile instruments, it is notable that even in a context that is as sensitive as the discussions regarding allocation of Nile Basin waters that the riparian nations have committed to making the process more open and participatory.

2. Water-Related Instruments and Institutions

The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses[30] represents the culmination of decades of international dialogue on the management of international watercourses. It sets forth basic principles for deciding how to allocate water as well as other non-navigational uses. The Convention also includes a few norms that promote public involvement.

The 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and its 1999 London Protocol establish norms for public involvement in the management of international watercourses in the United Nations Economic Commission for Europe (UN/ECE) region, which consists of Europe, the states of the former Soviet Union, Canada, and the United States. The Convention seeks to reduce, control, and prevent transboundary water pollution and the release of hazardous substances into aquatic environments.[31] The Protocol focuses on health-related issues associated with international waters.[32]

Progressively, Southern Africa has adopted a series of legal and institutional initiatives that rely on public involvement in developing and managing transboundary watercourses in the region. The 1987 Action Plan for the Common Zambezi River System (ZACPLAN), which recognized not only the environmental aspects of international waters but also the need for transparency and public participation in their management. Difficulties in implementing the ZACPLAN[33] led to a more comprehensive 1995 Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region. Thirteen countries have signed or acceded to this protocol.[34]

II. ACCESS TO INFORMATION

Broad access to information is the cornerstone of public involvement. It ensures that the public is able to know the nature of environmental harms and threats. This knowledge allows members of the public to decide whether a response is necessary, and if so what would be the most appropriate and effective action. In an increasingly connected world, where actions in one nation can impact people and the environment in other nations downstream or downwind, states have recognized the need not only to make information available to their citi-

[28] Memorandum of Understanding Between the Republic of Kenya and the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environment Management, done at Nairobi on Oct. 22, 1998 [hereinafter East African MOU]; *see also* Godber Tumushabe, *Public Involvement in The East African Community*, in this volume.

[29] Press Release, World Bank, Nile Basin Initiative Launches Secretariat Group to Develop and Manage Nile Waters Sustainability 22-24 (Sept. 21,1999) (noting that this effort is a precursor to a more formal legal and institutional structure); NILE BASIN INITIATIVE SECRETARIAT, THE NILE BASIN INITIATIVE BACKGROUND (2000).

[30] Convention on the Law of the Non-Navigational Uses of International Watercourses, done May 21, 1997, UNGA Res. 51/229, UN Doc. A/RES/51/229, 31 I.L.M. 700 (1997) [hereinafter Convention on the Non-Navigational Uses of International Watercourses]. As of June 27, 2002, 16 states had signed the Convention, and twelve had ratified, accepted, acceded to, or approved it. *See* untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty31.asp (last visited June 27, 2002).

[31] UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (entered into force 6 Oct. 1996), U.N.T.S. 33207, 31 I.L.M. 1312 (1992) *available at* www.unece.org/env/water (last visited June 27, 2002) [hereinafter Helsinki Convention]. As of June 27, 2002, 34 states and the European Community have ratified, accepted, approved, or acceded to the Convention. *See* www.unece.org/env/water/status/lega_wc.htm (visited June 27, 2002).

[32] *See supra* note 17. As of June 27, 2002, 36 states have signed the Protocol, and 7 states have ratified it. *See* www.unece.org/env/water/status/lega_wh.htm (last visited June 27, 2002).

[33] Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, done at Harare, Zimbabwe on May 28, 1987, 27 I.L.M. 1109 (1988) [hereinafter ZACPLAN]. *See* Mikiyasu Nakayama, *Politics Behind Zambezi Action Plan*, 1 WATER POL'Y 397 (1999); Mikiyasu Nakayama, *Success and Failures of International Organizations in Dealing with International Waters*, 13 WATER RES. DEV. 367 (1997).

[34] 1995 Protocol on Shared Watercourse Systems in the Southern Africa Development Community (SADC) Region, art. 2(5), done at Johannesburg on Aug. 1995, entered into force Sept. 1998, *available at* www.sadc.int/english/protocols/p_shared_watercourse_systems.html (last visited June 27, 2002) [hereinafter SADC Protocol]. *See also* ERIKSEN, *supra* note 8, at 25.

zens but also to share information between nations.[35] This section sets forth the discuss what type of information about international watercourses that is publicly available, how the public can access it, and how water management authorities have sought to institutionalize access to information processes.

A. Information and International Watercourses

Recognizing that information is essential to the sound management of international watercourses and that states historically have been reluctant to compromise their negotiating positions by sharing information with other states or their own citizens,[36] international instruments and institutions increasingly facilitate or even require states to share information. This includes information on the status of a transboundary watercourse (such as water availability in the catchment area, rainfall data, simulated stream flows, and evaporation data, as well as water quality data) and on factors that could affect the quality or quantity of water in the watercourse (such as ongoing or proposed projects).

The 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses unambiguously mandates information sharing among states, although public access to that information is less clear. Thus, under Article 9, states must regularly exchange hydrological, meteorological, hydrogeological and ecological data (including information related to water quality and to forecasts). Article 11 requires states to exchange information on planned measures, and Article 12 requires prior notification to states that could be affected by proposed actions (including technical data and an environmental impact assessment).

A number of water basins have committed to sharing information.[37] In Southern Africa, the 1995 SADC Protocol on Shared Watercourse Systems requires member states to "exchange available information and data regarding the hydrological, hydrogeological, water quality, meteorological and ecological condition of such watercourse system."[38] In order to monitor and develop shared water courses, River Basin Management Institutions are required by Article 5(b)(i) to "Collect[], analys[e], stor[e], retriev[e], disseminat[e], exchang[e] and utilis[e] data relevant to the integrated development of the resources within shared watercourse systems and assist member States in the collection and analysis of data in their respective States." None of the Protocol's information-sharing provisions limit the obligations to interstate exchanges, and one article specifically commands the River Basin Management Institutions to promote public awareness and participation in environmental matters.[39]

The SADC Protocol also recognizes that governments and international institutions frequently lack the financial resources, technical infrastructure, and personnel to manage shared watercourses effectively.[40] This lack of reliable data has impeded the development, implementation, and enforcement of international agreements for transboundary watercourses.[41] To supplement scarce resources and reduce political difficulties, international instruments and institutions frequently rely on civil society to generate, review, and utilize information necessary to the management of transboundary watercourses.[42]

Non-governmental organizations are also finding fertile ground to promote access to information on transboundary watercourses in the absence of an international mandate. For example, the International Nile Basin Association (INBA) is a voluntary, non-profit organization that disseminates knowledge, shares experiences, and provides information relating to the development of Nile water resources.[43] The INBA constitutes an independent, alternative forum that complements the governmental forum and facilitates the generation and exchange of environmental information.

B. Information on Status of Watercourses

Knowledge about the quality and quantity of water in transboundary watercourses forms the foundation from which all decisions are made: is there enough water? is there enough water of sufficient quality? could a particular environmental or public health harm have been caused by the condition of the watercourse? is there any need to be concerned about proposed projects that might

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[35] *See, e.g.*, Asia-Europe Meeting (ASEM), Towards Good Practices for Public Involvement in Environmental Policies (Draft June 28, 2001), art. 1, *available at* www.vyh.fi/eng/intcoop/regional/asian/asem/asem.htm (last visited June 27, 2002) [hereinafter Draft ASEM Good Practices Document]; NAAEC, *supra* note 21, art. 10(7).

[36] *See* Valentina Okaru-Bisant, *Institutional and Legal Frameworks for Preventing and Resolving Disputes Concerning the Development and Management of Africa's Shared River Basins*, 9 Colo. J. Int'l Envtl. L. & Pol'y 343 (1998).

[37] *See, e.g.*, Treaty for Amazonian Cooperation, done at Brasilia on July 3, 1978, 17 I.L.M. 1045 (1978), arts. 9 (collaborative research), 11 (joint studies).

[38] SADC Protocol, *supra* note 34, art. 2(5).

[39] *Id.* art. 5(b)(ii) ("stimulat[e] public awareness and participation in the sound management and development of the environment including human resources development.").

[40] *Cf.* ZACPLAN, *supra* note 33, annex I, para. 14 (identifying as a primary problem in managing the Zambezi the "[i]nadequate information on environmental impacts of water resources and related development projects, e.g. hydropower, irrigation, etc." and "inadequate dissemination of information to the public").

[41] *See* Okaru-Bisant, *supra* note 36, at 341.

[42] *See* Sharma et al., *supra* note 2, at 33-34; Eriksen, *supra* note 8, at 39-40; Okaru-Bisant, *supra* note 36 at 343; ZACPLAN, *supra* note 33, annex I, paras. 20-28 (recommending environmental assessments).

[43] INBA, Mission Statement, 1, *available at* www.tecconile.org/t1-4-1.htm (last visited July 31, 2002).

reduce the quantity of or impair the quality of available water?

Increasingly, international instruments establish what information needs to be made available, how frequently, and in what medium. For example, the 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes requires parties to sample and evaluate both ambient water quality and effluent into transboundary waters.[44] This information must be publicly available "at all reasonable times," inspection shall be free of charge, and the public can obtain copies of the information "on payment of reasonable charges."[45] The 1999 London Health Protocol to this convention expanded the information that states needed to collect and make available to the public, including *inter alia* drinking water quality, discharge of untreated waste water and storm water overflow, and source water quality.[46] Furthermore, "in the event of any imminent threat to public health from water-related disease, [the state must] disseminate to members of the public who may be affected all information that is held by a public authority and that could help the public to prevent or mitigate harm."[47]

Some of the most promising developments in access to information about the status of transboundary watercourses occur through the growing practice of public and private institutions to collect and make this information publicly available. In addition to indigenous African initiatives,[48] a number of global efforts are helping to build technical and institutional capacity to collect, store, and disseminate information on the status of fresh water resources in Africa. For example, the Southern Africa Flow Regimes from International Experimental and Network Data (FRIEND) program is working to establish an international database on river flows, assemble data that can assist in determining flow regimes, analyze and estimate flood and drought frequency, integrate national inquiries into water resources, and model rainfall and runoff.[49]

Along the United States-Canada border, the Great Lakes Water Quality Agreement mandates the collection of information on water quality and quantity of the boundary waters and the tributaries.[50] This information is to be made publicly available, unless it is proprietary under domestic law.[51] The Great Lakes Information Network's (GLIN) Geographic Information Systems Section provides online digital data and maps for the region. Users can search by topic, geographic regions, organizations such as the U.S. Army Corp of Engineers, or the GLIN Data Access (GLINDA) Clearinghouse.[52] Information available through GLIN includes links to information on daily stream flows of rivers feeding into the Great Lakes, annual reports by the U.S. Army Corp of Engineers on water quality along the Great Lakes and for waters feeding into them,[53] and the Great Lakes Environmental Research Laboratory Real-Time Great Lakes data, which includes information on the Detroit River's daily-averaged flows.[54]

In comparison, along the United States-Mexico border, citizens and local officials had had difficulties obtaining information on transboundary watercourses from the IBWC. So when there were questions regarding groundwater pollution in Nogales, Mexico, university researchers collaborating across the border conducted their own groundwater testing rather than relying on the IBWC to do it.[55] In more recent years, the IBWC has established an internet site that posts the daily and historical flow conditions at different points along the Rio Grande.[56]

The Mekong River provides another approach for ensuring public access to information on the status of a watercourse. Since 1985, the Mekong River Commission has undertaken baseline studies of water quality and resources in the basin through its Water Quality Monitoring Network. As of 1999, the network consists of 103 stations.[57] Discharge measurement and sedimentation sampling studies also have been conducted in Cambodia.[58] Flow information is made publicly available in various media, and some commercial organizations have, in fact, established a business of publishing water flow data (originally appearing in news reports) for their members.[59]

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[44] Helsinki Convention, *supra* note 31, arts. 11(3)(c), 16(1)(c).

[45] *Id.* art. 16(2).

[46] London Protocol, *supra* note 17, arts. 6(2), 7(1)-(2); *see also* ECE/UNEP Network of Experts on Public Participation and Compliance, Guidance on Public Participation in Water Management and Framework for Compliance With Agreement on Transboundary Waters 21 (2000) (also specifying information on floods and ice drifts).

[47] London Protocol, *supra* note 17, art 8(1)(iii).

[48] Article 5(d)(iv) of the SADC Protocol requires states to collect monitoring data on shared watercourses, but there is no specific requirement that this information be made publicly available.

[49] *See* Eriksen, *supra* note 8, at 31.

[50] Great Lakes Water Quality Agreement of 1972, amended in 1978 and 1983, annex 11, sec. 3, *available at* www.ijc.org/agree/quality.html (last visited July 31, 2002) [hereinafter GLWQA].

[51] *Id.* art. 9(3), (4).

[52] *See* www.great-lakes.net/ (last visited June 27, 2002).

[53] *See* www.lrd.usace.army.mil/gl/wq_rpt.htm (last visited June 27, 2002).

[54] *See* www.glerl.noaa.gov/data/now/ (last visited June 27, 2002).

[55] Helen Ingram et al., *Managing Transboundary Resources: Lessons from Ambos Nogales*, 6 Env't 33, 34 (1994).

[56] Rio Grande Flow Conditions; Historical Mean Daily Discharge Data, *available at* www.ibwc.state.gov/wad/flowdata.htm (last visited June 27, 2002).

[57] Mekong River Commission, Annual Report 14 (1999) [hereinafter MRC].

[58] *Id.* at 15.

[59] *See, e.g.,* www.mekongsources.com (last visited June 27, 2002).

C. Information on Factors that Could Affect a Watercourse

The public also needs to learn about proposed and ongoing activities that could affect transboundary watercourses. These activities could be developments such as water diversion programs that affect the quantity of water or industrial facilities that affect water quality. Environmental impact assessment (EIA) is an important mechanism for assessing the potential impacts of a project and deciding whether and how to proceed.

The SADC Protocol on Shared Watercourses specifically requires river basin management institutions to promote EIAs for development projects in a shared basin,[60] and the East African MOU on Environment Management recommends the use of EIA. Considering the shared concern expressed in these documents for the joint management of Lake Victoria,[61] it is foreseeable that the public will eventually have access to information about development projects that could affect Lake Victoria, whether the proposed project is in their country or another one.

Outside the context of EIA, organizations may obtain information on activities adversely affecting a transboundary watercourse. The Rhine River Commission must "exchange information with non-governmental organisations insofar as their fields of interest or activities are relevant."[62] Furthermore, the Commission must inform NGOs when decisions have been made that could have an "important impact" on the organizations.[63] Similarly, the 1909 International Boundary Water Treaty commits the IJC to making publicly available official records, including applications, response statements, records of hearings, decisions, and reports.[64] The public may obtain copies of this information upon payment of reproduction costs.[65]

In addition to those factors that negatively affect a watercourse, the public frequently has access to information on activities that seek to redress impacts on transboundary watercourses. Thus, for example, the 1992 Helsinki Convention makes publicly available information on "the effectiveness of measures taken for the prevention, control and reduction of transboundary impact."[66] Specifically, water-quality objectives, issued permits (including the permit conditions), and the compliance assessment results must be made "available to the public at all reasonable times for inspection free of charge, and [states] shall provide members of the public with reasonable facilities for obtaining from the Riparian Parties, on payment of reasonable charges, copies of such information."[67]

The International Boundary Water Agreement provides that the annual inventory of pollution abatement requirements is publicly accessible.[68] These pollution abatement inventories include the monitoring and effluent restrictions and compliance schedules, so that the public can review who is in compliance.

D. Information on the Development of Watercourse Norms, Policies, and Management Plans

Building on the information regarding the status of a transboundary watercourse and information on factors affecting the watercourse, the public usually is guaranteed access to basic information on the institutional processes that relate to the development of policies and norms governing actions within the basin. These include draft policies, standards, management plans, and meetings, although internal documents reflecting the deliberative process are not always made available.

Many organizations—including the BECC and the IJC—require the public to be notified of upcoming meetings of regional bodies.[69] This notice normally states the time and place of the meeting, as well as the agenda or items to be discussed and how the public may participate.

The public frequently has the right to obtain information on proposed standards, management plans, and other means of implementing goals for the management of transboundary watercourses, so that they can review and comment on the proposals. The 1999 London Water and Health Protocol establishes a transparent framework in setting standards and levels of performance regarding protection against water-related disease.[70] The European Water Framework Directive Proposal provides that the public must have access to river basin management plans, as well as the opportunity to submit written comments on the plans.[71]

In addition to notifying the public of proposed standards, institutions managing transboundary waters may

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[60] SADC Protocol, *supra* note 34, art. 5(d)(iii).

[61] *See, e.g.,* East African MOU, *supra* note 28, art. 8.

[62] Agreement of 29 April 1963, Concerning the International Commission for the Protection of the Rhine Against Pollution, *done* at Berne [hereinafter Rhine Convention]; Additional Agreement to the Agreement Signed in Berne, 29 April 1963, Concerning the International Commission for the Protection of the Rhine Against Pollution, art 14(3), done at Berne on Dec. 3, 1976.

[63] *Id.*

[64] IBWT, *supra* note 23, III Rules of Procedure, sec. 11(1)-(3).

[65] *Id.* sec. 11(6).

[66] *Id.* sec. 11(3).

[67] *Id.* sec. 16.

[68] *Id.* sec. 6(c).

[69] *See* Milich & Varady, *supra* note 6, at 39-40; IBWT, *supra* note 23, III Rules of Procedure, sec. 11(1). In fact, the Great Lakes Regional Office "provid[es] a public information service for the programs, including public hearings, undertaken by the Commission and its Boards." Terms of Reference for the Joint Institutions and the Great Lakes Regional Office, art. 3(b)(ii).

[70] London Protocol, *supra* note 17, art. 6(2).

[71] Ferrier, *supra* note 10, at 58 (citing art. 17).

establish a transparent process for making decisions regarding the policies and standards governing activities that affect the watercourse, so that the public can review the bases for the decisions made.[72]

E. Institutionalizing Access

Some international institutions have established units tasked with facilitating public access to information on transboundary watercourses. For example, the Public Relations and Co-ordination Unit of the Mekong River Commission Policy and Planning Division disseminates information through press releases, policy papers, annual reports, and monitoring and evaluation reports.[73]

To facilitate public dissemination of information, some transboundary water institutions have established resource centers. The 1972 Great Lakes Water Quality Agreement established a Great Lakes Regional Office to assist the IJC in disseminating information on the North American Great Lakes.[74] The Mekong River Commission also established centralized resource centers as well as centers near an impacted area, and the countries around Lake Victoria agreed to establish environmental resource centers.[75]

Increasingly, institutions charged with the management of transboundary watercourses rely on electronic dissemination both through e-mail and websites. The IJC website (www.ijc.org) is an example of the capacity of websites to disseminate information. The website allows one to search past and present projects, reports, and decisions of the IJC; look up current notices of public hearings and reports; investigate the status of projects and issues the commission is dealing with; and access interim and final reports. The IJC also uses the site as a source for public comment by supporting what are known as "discussion rooms." Other transboundary watercourse websites include the Nile Basin Initiative (www.nilebasin.org), the Mekong River Commission (www.mrcmekong.org), and the BECC (www.cocef.org). The UN/ECE, which serves at the secretariat for the 1992 Helsinki Convention on Transboundary Watercourses and its 1999 London Protocol also has an extensive website (www.unece.org).

Civil society organizations can provide a key element in generating and disseminating information on transboundary watercourses. Thus, the Mekong Forum has acted as a clearinghouse of information for the lower Mekong basin, and universities along the United States-Mexico border have monitored and sampled contaminated groundwater in the Nogales area.

In spite of the developments at the national[76] and supranational levels, there remain challenges in ensuring public access to information on transboundary watercourses as a practical matter. For example, in Cambodia, access to information on hydropower development projects prior to construction is not commonplace, despite policies to the contrary.[77] One of the reasons for this in Cambodia is the lack of access to radio, televisions, and newspapers, particularly in rural areas.[78] Another complication is language barriers due to the fact that many of the EIA documents in Cambodia are printed in English.[79]

It is precisely because of the challenges posed by multiple languages, illiteracy, few technical resources, and a chronic lack of financial resources that public involvement is necessary. Citizens and NGOs can complement governmental and supranational efforts in generating, reviewing, and utilizing data relating to the management of transboundary watercourses.

III. PUBLIC PARTICIPATION

If access to information is the predicate, participation of civil society in decisionmaking processes is the centerpiece of public involvement. Participation ensures that decisionmakers have the opportunity to consider the diversity of interests at stake, and guarantees that citizens and organizations have an opportunity to submit information and arguments on decisions that could affect them.

A. Public Participation in Decisions Relating to Activities

One common method of including the public in decisionmaking is through the EIA process. With the development of EIA as a standard tool in environmental management, international agreements on transboundary

[72] *See e.g.*, IBWT, *supra* note 23, III Rules of Procedure, sec. 11.
[73] *See* Kaosa-ard et al., *supra* note 11, at 10-11.
[74] GLWQA, *supra* note 50, art. VIII(3).
[75] MRC, *supra* note 57, at 5; East African MOU, *supra* note 28, art. 16(2)(b).
[76] At the national level, constitutions, laws, regulations, and policies can provide an enabling environment and ensure that citizens have access to information held by their government (or even by other governments or private actors). *See, e.g.*, Kaosa-ard et al., *supra* note 11, at 31 (for countries in the Mekong River Basin); Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 Colum. J. Envtl. L. 131 (2001).
[77] NGO Forum on Cambodia, Mekong People: The Role of Local Communities in Hydro-Power Planning; Towards Public Participation in S/EIA, Cambodia, UN/ESCAP/E7 Regional Workshop on EIA for Hydropower Development Emphasizing Public Participation, held Nov. 20-24, 1997 in Bangkok, Thailand, Conference Proceedings, at 3, 7, 31.
[78] *Id.* at 16.
[79] *Id.* at 15-16.

watercourses increasingly incorporate EIA.[80] As mentioned earlier, in Africa, EIA is evolving as a key tool in environmental management, and institutions charged with managing transboundary watercourses are incorporating and promoting EIA.[81]

For Lake Victoria, EIA is emerging as a key tool in protecting the shared water and ensuring that the public has an opportunity to participate in its management.[82] The MOU committed states to "initiate, develop, implement and harmonize policies, laws and programmes to strengthen regional coordination in the management of the resources of the Lake Victoria ecosystem …."[83] Considering the future of EIA as a component of Lake Victoria management, a group of experts recommended that procedures regulating the use of EIAs must be, "adopted, harmonized and coordinated," within the three countries. In particular, this would have to include the right of residents of one country to access information and participate in EIA processes of other member countries.[84]

Since 1909, the IJC has guaranteed public participation in decisions on specific activities that could affect the North American Great Lakes.[85] When a party or a person seeks to use, obstruct, or divert waters falling within the IJC's jurisdiction, they must submit an application to the IJC to do so.[86] The IJC notifies the public of the application by publishing a notice in the Canada Gazette and the U.S. Federal Register and once a week for three weeks in newspapers that are circulated "in or near the localities which . . . are the most likely to be affected" by the proposed activity.[87] The notice must include information on the application, the "nature and locality of the proposed" activity, and the opportunity for the public to submit written or oral comments.[88] Within 30 days of the filing of the application, any "interested person" other than the project applicant may submit a statement supporting or opposing the proposed activity.[89] Furthermore, "persons interested in the subject matter of an application, whether in favour of or opposed to it" are entitled to speak or have an attorney speak on their behalf at an open hearing before the ICJ.[90] The verbatim transcripts of the hearings, exhibits filed, briefs and formal statements, and the IJC decisions and orders are all available to the public.[91]

In practice, the IJC has utilized a variety of types of public hearings. For example, the IJC has conducted mini meetings, large public forums, virtual conferences via the internet, conference calls, and video conferences.[92] IJC public hearings have addressed issues ranging from management of water levels, large-scale aquaculture on the water quality of the Great Lakes, and bulk removals of Great Lakes water.[93]

NGOs have had an important role in convening dialogues on the management of transboundary watercourses. For example, twice in the past decade, Great Lakes United invited government and industry representatives to a series of approximately 20 public hearings around the North American Great Lakes region for citizens to voice concerns about the management of the Lakes.[94] When the U.S. government developed a draft management for Lake Superior, the NGO again convened a series of hearings on the topic. Government officials attended these public hearings, "and this time they decided that these meetings were so effective that

[80] *See, e.g.,* Danube River Protection Convention, *supra* note 25, art. 7(5)(f). National EIA laws also frequently provide a framework for guaranteeing that the public has access to information about proposed projects that could affect the quality or quantity of water in transboundary watercourses. *See, e.g.*, KAOSA-ARD ET AL., *supra* note 11, at 32-33, 35 (Mekong River Basin countries)

[81] *See, e.g.,* Policy Guidelines for the Nile River Basin Strategic Action Program, at 2-4; SADC Protocol, *supra* note 34, art. 5(d)(i).

[82] Article 112(2)(b) of the Treaty Establishing the East African Community commits the partner states to "develop[ing] capabilities and measures to undertake environmental impact assessment of all development project activities and programmes." Under Article 7(1)(b) of the East African MOU, *supra* note 28, nations agreed to "develop[], enact[] and harmoniz[e]" EIA processes and procedures in national laws, regulations, and guidelines. Article 14 expanded on the commitments for harmonizing EIA in the region, and mandates that the public is to be involved "at all stages of the process."

[83] East African MOU, *supra* note 28, art. 8(a).

[84] UNITED NATIONS ENVIRONMENT PROGRAMME/UNITED NATIONS DEVELOPMENT PROGRAMME (UNEP/UNDP)/DUTCH JOINT PROJECT ON ENVIRONMENTAL LAW AND INSTITUTIONS IN AFRICA, DEVELOPMENT AND HARMONIZATION OF ENVIRONMENTAL LAWS, REPORT ON THE LEGAL AND INSTITUTIONAL ISSUES IN THE LAKE VICTORIA BASIN 63 (1999) [hereinafter UNEP/UNDP/DUTCH JOINT PROJECT].

[85] In North America, the BECC includes affected communities in the process for certifying proposed environmental infrastructure projects along the United States-Mexico border. *See* BECC, Procedures Regarding Public Notice, arts. 2 (applications for project certification), 3 (technical assistance requests), 4 (projects pending for certification); *see also* Milich & Varady, *supra* note 6, at 39-40.

[86] IBWT, *supra* note 23, III Rules of Procedure, sec.12.

[87] *Id.* sec. 15(2).

[88] *Id.*

[89] *Id.* sec. 16(1).

[90] *Id.* sec. 20.

[91] *Id.* sec. 11(1)-(2).

[92] Personal Communication from Frank Bevacqua, Public Information Officer, U.S. Section of the IJC, to Seth Schofield, Environmental Law Institute (Nov. 22, 1999).

[93] Press Release, IJC, IJC to hold Public Hearings on Orders for Rainy and Namakan Lakes (May 11, 1999) *available at* www.ijc.org/news/rr11051999e.html (last visited June 27, 2002); Press Release, IJC, Public Meeting Provides Report and Recommendations on Great Lakes Aquaculture (Sept. 21, 1999), *available at* www.ijc.org/news/wqb21091999ce.html (last visited June 27, 2002); Press Release, IJC, IJC to Visit 12 Cities for Public Hearings on IJC's Interim Report on the Uses, Diversions, and Bulk Exports of Great Lakes Water (Sept. 3, 1999), *available at* www.ijc.org/news/cde03111999e.html (last visited June 27, 2002).

[94] Personal Communication from John Jackson, Great Lakes United, to Molly McKenna, Environmental Law Institute (Mar. 17, 2000) (on file with authors).

they should hold some themselves."[95] These experiences highlight the unique role that NGOs can have in bridging political boundaries to focus on the watershed and the shared interests of those who depend on transboundary watercourses.

In the Mekong River Basin, Vietnamese university academics and newspaper reporters held a series of public seminars on a government proposal to dike the major river banks in the Mekong Delta to control flooding. As a result of the consultations, the "government accept[ed] an alternative proposal which suggested flood evacuation to the Western Sea, as opposed to the original plan of absolute flood control."[96] More generally, MekongForum, an NGO with an academic and student membership base, has been providing the public with information on development proposals along the Mekong River and its tributaries in order to raise public participation and awareness of the impacts of development.[97]

B. Public Participation in Setting Norms, Policies, and Plans

In participating in the establishment of norms, policies, and plans, the public can efficiently avoid an interminable series of piecemeal battles and go to the root of the issue. The watercourse institutions, in turn, are able to benefit from the on-the-ground experience and expertise of civil society members.[98]

Citizens have served on commissions, boards, and task forces for transboundary watercourses. For example, people from NGOs, business, and state and local governments have served on the BECC,[99] and citizens who were both specialists and non-specialists have served on IJC boards and task forces.

For most citizens and NGOs, the priority simply is to submit information and arguments, rather than actually serving on the decisionmaking body. The Mekong River Commission has affirmed that all Mekong riparian states, project supporters, project opponents, national Mekong committees, and representatives of indigenous populations should take part in developing sustainable policies for the basin. In addition to resource users and occupational groups in the basin, people living outside the Mekong River Basin who may be affected by the impacts of a project may participate.[100] This stakeholder participation is to occur in all aspects of MRC activities, including project and program planning, implementation, monitoring, and evaluation.[101]

Public participation can compel transboundary institutions to comply with their own stated policies and procedures. For example, the internet discussion group BECCnet

> has influenced decisionmaking about a half-dozen times [by early 1998]. When the [BECC] commission failed to adhere to self-imposed guidelines for a forthcoming meeting, for instance, e-mail protests were so numerous that the directors rescheduled the meeting. Similarly, at another meeting attended by about 200 people, the chairman gaveled the proceedings closed before allowing public comment; the cascade of protests on BECCnet led to a public apology and a binding modification of procedures for such comment.[102]

Similarly, the public can help to review compliance by parties to an agreement on a transboundary watercourse.[103] The transparency of this review can encourage compliance and strengthens the credibility of the institution.

C. Public Participation in the Development of Transboundary Watercourse Agreements

Civil society organizations have participated in the development of a number of international environmental agreements. For example, NGOs played a key role in negotiating the 1987 amendments to the Great Lakes Water Quality Agreement.[104] NGO representatives served on the national delegations, reviewed draft position statements, and participated in decisionmaking at the national and bilateral levels. Through the process, they helped to establish trust between the governments and civil society. The NGO representatives complemented the government representatives, as the NGO representatives had technical knowledge that often exceeded that of their counterparts, particularly the official delegations representing the foreign ministries of Canada and the United States. Follow-

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[95] *Id.*

[96] Kaosa-ard et al., *supra* note 11, at 196.

[97] *Id.* at 41; Trond Inge Kværnevik, *The Mekong Region*, *in* Association for International Water and Forest Studies, Power Conflict (1994), *available at* www.solidaritetshuset.org/fivas/pub/power_c/k7.htm (last visited June 27, 2002).

[98] *See, e.g.,* Rhine Convention, *supra* note 62, art. 14 (empowering the Rhine Commission to recognize NGOs as observers, to exchange information with NGOs, to invite NGOs to participate in Commission meetings, and to consult specialists).

[99] Milich & Varady, *supra* note 6, at 39.

[100] Mekong River Commission Secretariat, Public Participation in the Context of the MRC 2-3 (1999), *available at* www.mekonginfo.org/mrc_en/doclib.nsf/ (last visited June 27, 2002). Nations have committed to similar participation provisions in other regional initiatives. *See* East African MOU, *supra* note 28, art. 7(1)(i); Council of Ministers of Water Affairs of the Nile basin States, Policy Guidelines for the Nile River Basin Strategic Action Program, sec. 6 ("Subsidiary Action Programs"); London Protocol, *supra* note 17, art. 6(2).

[101] MRC Secretariat, *supra* note 100, at 8-9.

[102] Milich & Varady, *supra* note 6, at 40.

[103] *See* London Protocol, *supra* note 17, art. 15.

[104] *See* Sandler et al., *supra* note 9, at 468-70.

ing the adoption of the Agreement, the NGO representatives worked to implement the agreement.[105]

D. Implementing Public Participation

Full public participation involves all sectors of society. In order to accomplish this, it is necessary to address challenges posed by historical, geographical, and financial constraints. For example, along the Mexico-United States border, the BECC holds quarterly meetings in different cities. Although these meetings are open to the public, the large distances associated with the border region hinder public attendance.[106]

In Cambodia, there is a distrust of public participation since "'public participation' was used during the Khmer Rouge regime to gather villagers in coercive activities."[107] Attempts to adopt a "participatory approach" have been more successful, but this may require a different approach than is often used, particularly since "during the Khmer Rouge era, people attending public meetings could be killed or forced into hard labour."[108]

Education and training of the public and of public officials are essential to establishing trust in the value of public participation and in understanding how to participate in the management of water resources.[109] Reliable enforcement mechanisms are also necessary to ensure that public participation is given its full due.[110]

IV. ACCESS TO JUSTICE

Citizen access to administrative and judicial review mechanisms—commonly termed "access to justice"—provides a third pillar in the governance of international watercourses.[111] Access to information and public participation depend on enforcement and review mechanisms for their guarantee. Additionally, these review mechanisms can help to ensure that substantive norms are complied with, for instance that there is not undue degradation of water quality or illegal extraction of water.

Over the last decade, governments have made significant strides toward involving citizens in the enforcement procedures relating to international watercourses. This section discusses proceedings initiated by citizens in many fora, including domestic courts and international factfinding and investigatory bodies such as the North American Commission on Environmental Cooperation and the World Bank. In addition, although sometimes not able to bring cases on their own behalf in certain venues, citizens may be able to participate in proceedings between countries before such international bodies as the World Trade Organization and International Court of Justice through the submission of *amicus curiae* ("friend of the court") briefs.

A. Access to National Courts and Agencies

Citizens may be able use their domestic laws, courts, and administrative bodies to challenge activities that are resulting in international watercourse degradation. This can provide a familiar venue for aggrieved parties, although there might be difficulties associated with the extraterritorial application of domestic law.

In addition to utilizing their own domestic venues, citizens may also be able to participate in the judicial or administrative proceedings of another country as intervenors or affected parties (plaintiffs). Cases involving transboundary harm often entail complicated procedural and political issues to be addressed, such as sovereignty, the presumption against the extraterritorial application of national laws, jurisdiction, and *forum non conveniens*.

Cases in Europe and North America have established precedents for affected people to seek redress in domestic courts of another country.[112] Building on these cases

[105] *Id.* at 470 (quoting the IJC as noting that "[NGOs] are instrumental in encouraging governments to provide the resources necessary to implement the agreement and actively promoting environmentally conscious behavior among their own membership and the public at large….").

[106] Milich & Varady, *supra* note 6, at 40.

[107] Kaosa-ard et al., *supra* note 11, at 98.

[108] *Id.* at 39.

[109] *See* Adoption of Agreements on Environment and Development, U.N. Conf. On Econ. Dev., 47th Sess., Agenda 21, U.N. Doc. A/CONF.151/4 (1992), secs. 18.19, 18.34; *see also* Draft ASEM Good Practices Document, *supra* note 35, art. 35.

[110] *E.g.,* London Protocol, *supra* note 17, art. 5(i).

[111] Ferrier, *supra* note 10, at 62 (in the context of Lake Geneva, asserting that "Private individuals should have access to courts in the event of violation of water legislation.").

[112] Two good examples of national cases are the *Rhinewater Case* and the *High Ross Dam Controversy*. *See* Bruch, *supra* note *, at 11406. The Rhinewater Case involved a suit in 1976 by an NGO from the Netherlands on behalf of individuals suffering from chloride pollution against a French mining company. The European Economic Community Court of Justice held that the plaintiffs could sue either where the damage occurred or where the damaging act took place; the plaintiffs chose the Netherlands. The case caused both countries to conduct new chloride studies and ratify a modified Chloride Convention by 1985. *See, e.g.*, Alexandre Kiss, *The Protection of the Rhine Against Pollution*, 25 Nat. Resources J. 629-35 (1985); Carel H.V. de Villeneuve, *Western Europe's Artery: The Rhine*, 36 Nat. Resources J. 441 (1996); Andrew H. Darrell, *Killing the Rhine: Immoral, But Is It Illegal?*, 29 Va. J. Int'l. L. 421, 457-58 (1989).

The High Ross Dam Controversy arose from a proposal by the City of Seattle to increase the height of a dam on the Skagit River by over 120 feet in 1970. A Draft Environmental Impact Statement was prepared, and environmental groups in the United States and Canada were involved in the hearings. Ultimately, the courts upheld the EIS, but the IJC encouraged British Columbia and Seattle to reach a negotiated settlement, which they did in 1984. While the EIS was ultimately upheld, this established a precedent for allowing citizens and organizations from another country to intervene in a U.S. case dealing with transbourndary water management. *See* Swinomish Tribal Community v. Federal Energy Regulatory Comm'n, 627 F.2d 499, (D.C. Cir. 1980); Paul M. Parker, *High Ross Dam: The IJC Takes a Hard Look at the Environmental Consequences of Hydroelectric Power Generation*, 58 Wash. L. Rev. 445, 454-64 (1983).

and the growing recognition of the role that private parties can have in the management of international waters, recent conventions have incorporated access to justice principles.

Several cases in the United States have also dealt with foreign aid to projects that could affect an international watercourse.[113] Contrasting these cases, U.S. courts appear to be more willing to entertain claims by alien or international parties who have been or will be directly and clearly affected by a proposed project in the United States.[114] This is evident in cases such as the *High Ross Dam Controversy*, as well as ones along the United States-Mexico border.[115]

International treaties, conventions, and protocols increasingly seek to ensure fair, equitable, and effective access to courts and administrative agencies. These provisions build upon national experiences of empowering citizens to protect international watercourses through domestic fora.

Some of the conventions simply call for non-discrimination in providing access to justice, particularly at the national level. Thus, Article 32 of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses provides:

> Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.

While states can agree otherwise (in specific instances), the general rule is that citizens and organizations must have non-discriminatory access to legal recourse. This principle represents the culmination of three decades of negotiation and agreement among legal experts and decisionmakers around the globe, and as such it may represent an emerging norm of customary international law that is being codified in the convention.

Under the East African MOU, Kenya, Tanzania, and Uganda are obligated to ensure public access to their administrative and judicial proceedings. The MOU commits partner states to build capacity for access to justice by developing broad policies and laws for people affected by environmentally harmful activities within the sub-region.[116] Article 16(3) further expands the non-discrimination principle by providing that "[t]he Partner States agree to grant rights of access to the nationals and residents of the other Partner States to their judicial and administrative machineries to seek remedies for transboundary environmental damage."

Considering these two provisions in the context of managing and protecting Lake Victoria (Article 8), the MOU lays out a normative framework for ensuring open, non-discriminatory access to justice in the management of this shared waterbody. In fact, the MOU both builds on previous domestic experience and presages subsequent recognition of public involvement in enforcing environmental laws.[117] In considering ways to develop and harmonize the environmental laws and institutions governing Lake Victoria, a UNEP/UNDP joint project recommended that "[b]road principles of *locus standi* should be adopted to allow private suits as a tool for the enforcement of environmental obligations."[118]

In the UN/ECE region, a number of conventions provide for access to justice in environmental matters generally and specifically for international watercourses.[119] The Aarhus Convention contains explicit and exhaustive provisions for access to courts and adminis-

[113] *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (dismissing a case brought by a U.S. conservation organization that sought to require the U.S. Agency for International Development to consult with the Secretary of the Interior regarding potential impacts of a dam project on endangered species along the Nile and Mahaweli Rivers; holding that the plaintiffs lacked standing because they did not prove that they would be injured by the construction of the dam or that their injury would be redressed if USAID did not fund the project.); *see* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992)

[114] *See, e.g.*, Wilderness Soc'y v. Morton, 463 F.2d 1261 (D.C. Cir. 1972) (allowing a Canadian environmental organization and a non-resident Canadian citizen to intervene in a case asserting that the U.S. Secretary of the Interior had not complied with the environmental impact assessment requirements when it issued a permit for the Alaskan oil pipeline).

[115] *See* Secretariat of the North American Commission for Environmental Cooperation, Background Paper on Access to the Courts and Administrative Agencies in Transboundary Pollution Matters 64 (1999) (citing an unpublished 1996 decision in which a U.S. court allowed the Mexican city of Juarez and Greenpeace Mexico to intervene in a proceeding relating to a permit for a low-level radioactive waste disposal facility).

[116] East African MOU, *supra* note 28, art. 16(2)d.

[117] *See, e.g.*, [Kenya] Forests Act, Cap. 385, sec. 12 (providing a bounty system for people to supply information to the government which leads to the conviction of a person violating the Forests Act).

[118] UNEP/UNDP/DUTCH JOINT PROJECT, *supra* note 84, at 80 (in the context of Kenya), 130 (Tanzania).

[119] *E.g.*, UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention]. In addition to the Aarhus Convention and the London Protocol, the Espoo Convention, addressing transboundary EIA in the UN/ECE region, provides for the option of making institutional and administrative arrangements relating to EIA open "on a reciprocal and equivalent basis." *See* Kravchenko, *supra* note 17.

trative remedies to ensure access to information, public participation, and compliance with national environmental laws.[120] The Convention even calls on the public to supplement the enforcement role that is traditionally the realm of governments. Access to justice is required to be fair, effective, and open, and decisions must be in writing and made available to the public. To facilitate the use of administrative and judicial review, the Convention requires each state party to endeavor to "remove or reduce financial and other barriers" and to provide information on the procedures.[121]

The 1999 London Protocol to the 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes specifically extends many of the provisions of the Aarhus Convention to international watercourse management. Despite the extensive access to information and public participation provisions discussed above, the Protocol has only a few general provisions urging parties to ensure access to justice. For example, Article 5(i) provides that "access and participation should be supplemented by appropriate access to judicial and administrative review of relevant decisions," but it does not clarify the nature of the review.

The Aarhus Convention represents the most detailed elaboration of access to justice by an international treaty, but, as discussed elsewhere in this volume, other global and regional instruments have also recognized the importance of broad access to environmental justice.

B. Access to International Courts

In addition to the national bodies, aggrieved citizens and organizations increasingly find that international courts are willing to entertain their briefs on the matter before the court. By the terms of their organic statutes, the International Court of Justice (ICJ), the World Trade Organization (WTO), and other international tribunals usually are empowered to entertain cases brought by nations and occasionally by international organs such as the United Nations and its subsidiary bodies.[122] Increasingly, these bodies allow civil society organizations to provide separate briefs that lay out additional facts and legal arguments.

In a dispute between Hungary and Slovakia over the proposed Gabcikovo-Nagymaros dam, the ICJ for the first time accepted a position paper or "Memorial" from a coalition of NGOs, including the Natural Heritage Institute, Greenpeace, International Rivers Network, Sierra Club, and WWF.[123] The ICJ recognized the NGO coalition as "amicus curiae," or friends of the court. The coalition's memorial demanded the restoration of the Danube ecosystem and argued that the planet's natural treasures deserve international protection.[124] More than two years later, the ICJ ruled that the proposed dam was illegal.[125]

In another high-profile case, the WTO allowed NGOs to submit *amicus curiae* briefs for the first time.[126] In the *Shrimp-Turtle Dispute*, the Center for International Environmental Law and the Center for Marine Conservation submitted an *amicus* brief to the WTO panel in support of the U.S. conservation measures.[127] The panel rejected the NGOs' brief, but the Appellate Body accepted the NGO brief and reversed the panel's ruling that submissions by civil society could not be considered.[128] The Appellate Body held that the panel may, but need not, consider non-party submissions such as *amicus* briefs.[129]

Regional human rights commissions and courts provide civil society with a venue for vindicating fundamental human rights. In the Americas and Europe, these commissions and courts can accept and investigate petitions filed by citizens and organizations alleging abuses

[120] Aarhus Convention, *supra* note 119, arts. 9(1) (redress when a request for information has been wrongfully ignored or refused), 9(2) (when any decision or act has failed to meet public participation requirements), 9(3) (environmental violations by private persons and public authorities), 9(4) (fair, effective, and open access to justice that is not prohibitively expensive), 9(5) (decision in writing and available to public).

[121] *Id.* art. 9(5)

[122] *E.g.,* Statute of the International Court of Justice, art. 34(1), done at San Francisco on June 26, 1945, entered into force Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993. In a step toward including non-state actors as complainants under international law, Article 15 of the Rome Statute of the International Criminal Court allows the prosecutor to initiate investigations on the basis of information provided by NGOs and other "reliable sources."

[123] Okaru-Bisant, *supra* note 36, at 345, n. 105 (citing to NGO Memorial on Legal and Scientific Issues (Hung. v. Slovk.), 1997 I.C.J. 92).

[124] Bela Liptak, Precedent for the 21st Century: The Danube Lawsuit (1997), *available at* www.hartford-hwp.com/archives/63/005.html (last visited June 27, 2002)).

[125] Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 3 (Sept. 25), 37 I.L.M. 162 (1998); *see also* Phillipe Sands, *International Environmental Litigation and Its Future*, 32 U. Rich. L. Rev. 1619 (1999); Afshin A-Khavari & Donald R. Rothwell, *The ICJ and the* Danube Dam *Case: A Missed Opportunity for International Environmental Law?*, 22 Melb. U. L. Rev. 507 (1998).

[126] *See* Nicholas Gertler & Elliott Milhollin, *Public Participation and Access to Justice in the World Trade Organization*, in this volume; *see also* Lakshman Guruswamy, *The Annihilation of Sea Turtles: World Trade Organization Intransigence and U.S. Equivocation*, 30 Envtl. L. Rep. 10261 (2000); Suzanne Pyatt, *The WTO* Sea Turtle *Decision*, 26 Ecology L.Q. 815 (1999).

[127] An Introduction: The Shrimp-Turtle Dispute and CIEL's Amicus Brief, *available at* www.ciel.org/Tae/shrimpturtle.html (last visited July 31, 2002) (a copy of the *amicus* brief may be downloaded from this site).

[128] World Trade Organization, Report of the Appellate Body, United States-Import Prohibition of Certain Shrimp Products, Oct. 12, 1998, adopted Nov. 6, 1998, WT/DS58/AB/R, 38 I.L.M. 118, 121 (1999).

[129] *See* Pyatt, *supra* note 126, at 835-36.

of human rights.[130] While these bodies have yet to be utilized in the context of international watercourses, significant alteration of the quantity or quality of water by an upstream actor could impinge on the rights to life, health, and environments to such a degree as to establish a basis for jurisdiction by one of these bodies. The moral suasion of a public decision by a human rights commission or court could embarrass a state into complying with its international legal obligations.

C. Factfinding and Investigative Bodies

In addition to international courts and tribunals, the public increasingly can gain access to international bodies with the authority to investigate alleged violations. In fact, a number of these bodies were established precisely to ensure that citizens and NGOs have the ability to review actions of nations and international bodies (such as the World Bank) and file complaints when actions violate procedural or substantive norms. While these bodies generally lack the authority of a legal body, they have been moderately effective in promoting compliance through its publicly findings.

1. World Bank (IBRD/IDA) Inspection Panel

The World Bank Group consists of four separate institutions that seek to promote development.[131] The International Bank for Reconstruction and Development (IBRD) loans money to governments to develop typically large-scale infrastructure projects, such as hydroelectric power projects.[132] In 1993, the IBRD and the IDA created the Inspection Panel to increase transparency and accountability, as well as to respond to complaints regarding the environmental and social impacts of its projects.[133] The panel is not a judicial or enforcement body, but it can influence and improve compliance with Bank policy.[134]

The Inspection Panel Operating Procedures authorize the Panel entertain "Requests for Inspection" in which a claimant has been or will be affected by the failure of "the Bank to follow its own operational procedures during the design, appraisal and/or implementation of a Bank financed project."[135] These requests may be made by a group of two or more people from the country of the Bank-financed project, or by other specified individuals.[136] Two examples highlight the opportunities (and limitations) for citizens to invoke the Inspection Panel to protect their interests in an international watercourse.

In October 1999, RECONCILE (Resources Conflict Institute), a Kenyan NGO, submitted a Request for Inspection to the Panel concerning the Lake Victoria Environmental Management Project. The requesters claimed that the individuals whom they represent were likely to suffer harm as a result of the failures and omissions of IDA and the IBRD (the implementing agency of the GEF) in the design and implementation of the water hyacinth management component of the project.[137]

The requesters alleged that this method was chosen without conducting an EIA or adequate community consultation, would cause environmental degradation, and endangered the lake's communities.[138] The request cited violations of several World Bank Policies and Procedures, particularly those dealing with environmental assessment and economic evaluation of investment projects.[139] The World Bank management responded to the request by stating that, while it disagreed with the claims in the request, it believed that it should more thoroughly inform

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[130] Danièle M. Jean-Pierre, *Access to Information, Participation and Justice: Keys to the Continuous Evolution of the Inter-American System for the Protection and Promotion of Human Rights*, in this volume; Burns H. Weston et al., International Law and World Order 718-20 (2nd ed. 1990); Inara Scott, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection*, 19 Va. Envtl. L.J. 197 (2000). While the African Commission on Human and Peoples' Rights has not been as active in addressing human rights violations as the other regional bodies, it recently found that the former government of Nigeria had the rights to health and clean environment of the Ogoni people arising from human rights violations in oil exploitation in the region. The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, Case No. 155/96, Doc. ACHPR/COMM/A044/1 (May 27, 2002), *available at* www.cesr.org/ESCR/africancommission.htm (last visited July 31, 2002).

[131] *See* Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*, in this volume; *cf.* Aboubacar Fall, *Implementing Public Participation in African Development Bank Operations*, in this volume (discussing the development of the AFDB inspection panel).

[132] For example, in Africa, the IBRD has been involved with the Lake Victoria Environmental Management Project and the Lake Malawi/Nyasa Biodiversity Conservation Project (both financed through International Development Association (IDA) credits and Global Environment Facility (GEF) trust fund grants). *See* World Bank, Inspection Panel Administrative Procedures (adopted Aug 1994), *available at* www.worldbank.org (last visited June 27, 2002) [hereinafter Inspection Panel]; Okaru-Bisant, *supra* note 36, at 354-55.

[133] Inspection Panel, *supra* note 132, at 2, 5 (citing to Resolution No. 93-20 of the Bank's Board of Directors and Resolution No. 93-6 of the International Development Association; the Inspection Panel Operating Procedures (adopted Aug. 19, 1994); and the Inspection Panel Administrative Procedures (adopted Aug . 19, 1994)).

[134] Lori Udall, Review of World Bank Inspection Panel, Submitted to the World Commission on Dams for Thematic Review, Institutional and Governance Issues, Regulation, Compliance, and Implementation (1999); International Bank for Reconstruction and Development and International Development Association, World Bank Inspection Panel, Resolution Nos. 93-10, IDA 93-6 (1993), *available at* www.worldbank.org (last visited June 27, 2002).

[135] Inspection Panel Operating Procedures, *supra* note 133, art. 1.

[136] *Id.* art. 4.

[137] Inspection Panel, *supra* note 132. This component entails mechanical shredding of water hyacinths and allowing the shredded material to sink to the lake bottom to decay.

[138] Press Release, World Bank, Kenya Lake Victoria Environmental Management Project: Inspection Panel Investigation to Begin (May 8, 2000), *available at* www.worldbank.org (last visited June 27, 2002).

[139] Inspection Panel, *supra* note 132.

the public about its chosen management plan. In reviewing the request, the Panel visited the site and met with representatives from RECONCILE, other NGOs, community-based organizations, and fishermen. As a result of its review, the Panel recommended that an investigation be approved, and on April 10, 2000, the Bank's Board of Executive Directors approved the recommendation. On May 14, 2001, the World Bank Management accepted the Panel's findings and recommended six actions, including continued monitoring, heightened community participation, and cross-country participation in supervision missions. Notwithstanding the Lake Victoria case, the Board of Directors has allowed very few investigations to proceed.

In another instance, the World Bank did authorize an Inspection Panel investigation regarding a transnational watercourse.[140] In 1996, the NGO Sobrevivencia (Friends of the Earth-Paraguay) filed a Request for Inspection for the Yacyretá Dam, a dam on the Paraná River between Paraguay and Argentina that was financed primarily by the World Bank and Inter-American Development Bank (IDB). The request was based largely on the fact that 25 years after the dam was constructed, the required environmental mitigation and resettlement plans had still not been fully executed.[141] Sobrevivencia's request noted significant environmental, social, and cultural impacts of the dam.[142] It also cited ways that the project had violated many of the Bank's policies, including those on hydroelectric projects, environmental assessment, project monitoring and evaluation. An Inspection Panel visited the dam site, met with local citizens and organizations, and ultimately recommended to the Bank's Board of Directors that an investigation of the allegations be conducted. The board approved a limited review of Sobrevivencia's claims and an assessment of the project's management.[143]

2. IFC/MIGA Office of the Compliance Advisor/Ombudsman

In contrast to the IBRD which loans money to governments, the International Finance Corporation (IFC) is the arm of the World Bank that is responsible for making loans to the private sector, and the Multilateral Investment Guarantee Agency (MIGA) provides investment guarantees against certain non-commercial risks to foreign investors in member countries. In 1999, the IFC and MIGA established the position of Environmental and Social Compliance Advisor/Ombudsman (CAO) to "respond to complaints by persons who are affected by projects and attempt to resolve the issues raised using a flexible, problem solving approach."[144]

The Operational Guidelines allow "any individual, group, community, entity or other party affected or likely to be affected by the social and/or environmental impacts of an IFC or MIGA project" to file a complaint with the CAO.[145] This may be done directly or through a representative.[146] The complaints must be in writing but can be in any language.[147] The guidelines allow complaints that address the "planning, implementation or impact of projects," including the adequacy and implementation of social and environmental mitigation measures and the "involvement of communities, minorities and vulnerable groups in the project."[148] To resolve the complaints, the CAO can investigate, convene a dialogue, or pursue more formal arrangements such as conciliation, mediation, and negotiated settlements.[149]

3. North American Commission for Environmental Cooperation

The North American Commission for Environmental Cooperation (CEC) promotes access to justice at the national and regional levels. Through the CEC's organic statute, the North American Agreement on Environmental Cooperation (NAAEC), member states have committed to ensuring that interested persons may petition national authorities to investigate alleged violations of environmental legislation, providing persons who have legally cognizable interests with access to judicial, quasi-judicial, or administrative bodies in order to enforce the environmental legislation, and ensuring that proceedings are "fair, open and equitable.[150]

At the regional level, citizens and organizations can file complaints alleging that a member state is not en-

[140] Udall, *supra* note 134, at 17 (noting approval of only two investigations and two more limited reviews by 1999); Francis Fragano & Christie Jorge, Access to Process in International Organizations: The Yacyreta' Hydroelectric Dam Project and the World Bank Inspection Panel 6-8 (1999)

[141] Fragano & Jorge, *supra* note 140, at 2.

[142] Yacyreta Inspection Panel, Request for Inspection Argentina/Paraguay: Yacyreta Hydroelectric Project (1996).

[143] The review and assessment attracted significant media attention to the project and increased the level of involvement in the project by the Yacyretá Bi-national Entity, as well as World Bank and IDB supervision. *See* Udall, *supra* note 134, at 3; Fragano & Jorge, *supra* note 140, at 9.

[144] IFC/MIGA, Operational Guidelines for the Office of the Compliance Advisor/Ombudsman 5 (2000); *see also* Bernasconi-Osterwalder & Hunter, *supra* note 131.

[145] IFC/MIGA, Operational Guidelines, *supra* note 144, at 14.

[146] *Id.*

[147] *Id.* at 15.

[148] *Id.*

[149] *Id.* at 21-25.

[150] NAAEC, *supra* note 21, arts. 6.1, 6.2, 7.1; *see also* Elizabeth Dowdeswell, *The North American Commission for Environmental Cooperation: A Case Study in Innovative Environmental Governance*, in this volume.

forcing its environmental laws.[151] The decisions adopted by the CEC are not binding, but the independent third-party review can help to compel governments to comply with and enforce their environmental laws.

One citizen submission has involved a shared watercourse, the Great Lakes. CEC submission SEM-98-003 was filed by Canadian and U.S. environmental and public health groups and a Canadian individual who were concerned about the effects from the fallout of persistent toxic substance emissions from incinerators on Great Lakes water quality. The complainants alleged that the United States violated both U.S. domestic laws and United States-Canada treaties, including the Great Lakes Water Quality Agreement of 1972. Specifically, they alleged that the United States was violating its laws governing airborne emissions of dioxin/furan, mercury, and other persistent toxic substances falling into the Great Lakes from solid waste and medical waste incinerators.

The initial complaint was submitted on May 27, 1998. The Secretariat reviewed the complaint and determined that SEM-98-003 did not meet the standards set forth, stating that, "Article 14(1) reserves the Article 14 process for claims that a Party is 'failing to effectively enforce its environmental law…,'"[152] and concluded that the underlying issue did not qualify as "enforcement" because it related to standard-setting and not to a failure to enforce an environmental law. The CEC determined that standard-setting is outside the range of Article 14, and the U.S. inaction was not subject to review.

In response, a revised submission was filed in January 1999. In this second attempt, the submitters were more successful in obtaining Article 14 review. The Secretariat's review found that the revised submission required Article 14 review on two issues: the asserted inspection-related failures and failure to effectively enforce the Clean Air Act (CAA). The Secretariat noted that the CAA require the EPA Administrator to

> notify the Governor of the State in which such emission originates, whenever the Administrator receives reports from any duly constituted international agency such as the IJC or CEC, that air pollution or pollutants emitted in the United States can "be reasonably anticipated to endanger public health or welfare in a foreign country."[153]

The Secretariat's response on this issue is notable because it involves the adverse impacts of an action by one party (the United States) on another country (Canada).

The Secretariat received the U.S. Government's response to the submission. On March 24, 2000, the Secretariat requested additional information from the United States to complete its determination regarding whether preparation of the factual record was warranted, generating to a two-part response from United States under Article 21(1)(b).[154] The Secretariat determined not to recommend the preparation of a factual record and the case was terminated on October 5, 2001.[155] The decisions to-date suggest that it would be difficult, although not impossible, for a future submission to successfully raise issues in respect of a party's international obligations that would meet the criteria of Article 14(1).[156]

4. Border Environmental Cooperation Commission (BECC)

The BECC certifies projects along the United States-Mexico border to ensure that the projects comply with all applicable environmental laws and involve the public. As part of the process, the BECC Board of Directors holds quarterly public meetings, where it is authorized to receive complaints from groups affected by BECC-assisted or certified projects. In order to file a complaint, two or more of the complainants "must reside in the area where the project(s) causing the effects is(are) located or in an area where the project(s)' effects are manifested or

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[151] NAAEC, *supra* note 21, art. 14; NACEC, Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Protection, sec. 5.4, *available at* www.cec.org/citizen/guide_submit/index.cfm (last visited June 27, 2002). For a review of the citizen submission process, see John H. Knox, *A New Approach to Compliance with International Environmental Law:The Submissions Procedure of the NAFTA Environmental Commission,* 28 ECOLOGY L.Q. 1 (2001); Jay Tutchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, But Does It Work?*, 26 ENVTL. L. REP. 10018 (Jan. 1996). Of note is a recent precedent allowing environmental NGOs to intervene in trade disputes under the NAFTA Arbitration Panel. *See* The Tribunal Decision on Petitions from Third Persons to Intervene as "Amici Curiae," (2001), *available at* www.iisd.org/pdf/methanex_tribunal_first_amicus_decision.pdf (last visited June 27, 2002).

[152] Determination Pursuant to Article 14(1), SEM-97-005 (May 26,1998), in Registry of Submissions on Enforcement Matters, *available at* www.cec.org/citizen/guides_registry/index.cfm?varlan=english&orderBy=sub_ID&party= (last visited June 27, 2002).

[153] Secretariat's Determination under Article 14(2) (1999), at 6.

[154] First Response from the United States under Article 21(1)(b), SEM 98-003 (2000), *available at* www.cec.org/files/english/1st-resp.pdf (last visited June 27, 2002); Second and Final Part of the United States response under Article 21(1)(b), SEM 98-003 (2000), *available at* www.cec.org/files/english/fin-resp.pdf (last visited June 27, 2002).

[155] *See* www.cec.org/citizen/index.cfm?varlan=english (last visited June 27, 2002).

[156] SEM-98-003 (27 May 1998), at 4; SEM-97-005, *supra* note 152, at 4. Both determinations were careful to note that the Secretariat had not foreclosed the possibility of such a claim being successfully raised.

likely to be manifested based on the evidence."[157] Substantively, the complaint "must be based on the health or environmental effect(s) of a project(s)" or on a threat of such effects that is supported by evidence.[158]

If the BECC Board of Directors accepts the complaint, the board may request additional information from "the complainant, the [BECC] Advisory Council, [or] any other public or private institution it deems appropriate."[159] The advisory council then prepares a report, "provid[ing] its recommendations regarding the complaint and the basis for such recommendations."[160] The Board makes the final determination in writing, providing "a clear statement of the conclusion," "a full statement of the reasons supporting the conclusion," and "steps, if any, the Board intends to take as a result of the complaint, including a timetable for undertaking such steps."[161] The determination must be made publicly available.[162] Since no complaints have been yet to be filed on certified projects, the effectiveness of this mechanism remains uncertain.

The BECC also has developed procedures by which certain interested parties may obtain an Independent Assessment to determine whether the provisions of chapter I of the agreement (dealing with BECC operations and project certification) or the procedures adopted by the board of directors pursuant to that chapter have been observed.[163] A request can be made by any NGO, group, or border community "through a duly appointed representative," or a state or local authority along the border.[164] The complaint must be in writing, promptly follow the noncompliance, and contain sufficient information and arguments to evaluate the claim.[165] The process for assessing the merits of the complaint and whether to proceed are open to public scrutiny, and the eventual report is also publicly available.[166] Again, this mechanism remains largely dormant.

D. Implementing Access to Justice

Recent years have seen great strides in developing international norms on access to justice and enshrining them in domestic and international institutions. Nevertheless, as a practical matter, access to justice remains very much an emerging norm. As a general rule, many conventions, declarations, and commentators highlight the importance of access to justice in environmental management generally, and in the management of transboundary watercourses in particular. However, the specific requirements remain lacking in many instances.

V. ADVANCING PUBLIC INVOLVEMENT IN THE MANAGEMENT OF TRANSBOUNDARY WATERCOURSES

Access to information, public participation, and access to justice are now included in several international and regional agreements concerning transboundary watercourses. These experiences may help to determine how other watercourses may involve the public in decisionmaking. However, the success and full implementation of such provisions depend on several factors.

A. Factors Affecting the Transferability of Experiences

In developing and implementing norms and mechanisms for public involvement in the management of transboundary watercourses globally, it is important to look at the context of the watercourse. This can include an analysis of the bordering countries, local legal systems, and existing national or regional initiatives on public participation.

Experiences in transboundary watercourses vary greatly depending on a range of geopolitical, historical, and social factors. When there are only a few riparian nations, agreements on transboundary watercourses are more likely to include the public. For example, a 1909 agreement between Canada and the United States on the management of their boundary waters and the North American Great Lakes included public participation provisions that remain unmatched in many contemporary agreements.[167] Conversely, rivers with numerous riparian nations (such as the Nile) are likely to raise more conflicts. Similarly, where communities straddle a watercourse, there frequently is more incentive to develop a management system that accounts for the interests of the counterparts on the other side of the watercourse.[168]

A related factor is the degree to which nations share a cultural, historical, and social background. With this common basis, there is greater trust not only at the government level, but also at the popular level. As a result, one notices that the United States-Canada and Kenya-

[157] BECC, General Procedures Regarding Complaints from Groups Affected by Projects, art. 1 (2000), *available at* www.cocef.org/antecedentes/quejasingles.html (last visited June 27, 2002).
[158] *Id.* art. 2(b).
[159] *Id.* art 5(c).
[160] *Id.* art. 5(d).
[161] *Id.* art. 5(f)-(g).
[162] *Id.* art. 5(f) (requiring the board to send the determination to the complainant).
[163] NAAEC, *supra* note 21, ch 1; *see also* BECC, Procedures for Independent Assessments (2000), *available at* www.cocef.org/antecedentes/evalindepeing.html (last visited June 27, 2002).
[164] *Id.* art 3(a).
[165] *Id.* art. 3(b)-(c).
[166] *Id.* arts. 6, 7(b).
[167] The BECC agreement between the United States and Mexico is another such agreement.
[168] Milich & Varady, *supra* note 6, at 30, 32, 34.

Tanzania-Uganda agreements evolve more rapidly and include stronger provisions for public participation.

A highly sensitive international context can make international agreements harder to reach and governmental officials more reluctant to open the door to third parties whom they perceive as posing a danger of either compromising their own position or of confusing the relationship. A context can become sensitive through economic or political instability, including warfare.[169] The international context could also become sensitive due to actual, imminent, or prospective overburden of the available water, particularly where there is a historically dominant water user.[170] In contrast, areas such as Southern Africa generally present a more stable economic and political environment and the general demand for available water is not yet as severe as with the Nile River. As a result, there is more room to negotiate and to involve the public.

Existing regional initiatives on public involvement can also be of assistance in furthering participation in transboundary watercourse management. Although some of these initiatives are non-binding, they may provide nations with a framework for addressing the governance of water policies. These initiatives promote several specific tools that advance public participation. The initiatives recommend practices such as EIA, public meetings early on in a project, free access to public records, regular reports by the government on the status of projects that may affect the public, and access to environmental information by citizens of neighboring countries that may be affected by local decisions. These tools have been accepted widely for public participation domestically and may significantly increase public involvement, and ultimately the success of projects, in international watercourses.

B. Measures to Promote Public Involvement

Eriksen suggests a general strategy when starting cooperative management of transboundary watercourses that also applies to the context of public involvement:

> focus[ing] on water quality issues avoids contention around water allocation. Water quality is also usually a concern shared by all riparians in some way. Co-operation on scientific assessments on a drainage basin and processes within it has been a starting point for basinwide co-operation.[171]

It might also be prudent to start with transboundary watercourses that flow between two (or perhaps three) nations only and are not politically sensitive.

Access to information can be promoted through a number of discrete mechanisms, many of which are relatively low cost. Making information available upon request obviates the need for a sizeable staff and infrastructure, and the imposition of a reasonable fee (to cover copying, for example) can further reduce the burden on the authority. Establishing a resource center is a more expensive endeavor, but it might form a project that foreign donors would support. Another, more inexpensive, option is developing a website. Producing a periodic "state of the river" report poses certain difficulties, however these can be overcome. For example, since it is expensive, the report could be kept brief. There is also the possibility of publishing the report every two years rather than annually, again reducing the production and printing costs. Such a report could focus on water quality issues, draw upon a modest number of sampling points, and grow from there.

As a first step to developing public participation in the management of international watercourses, EIA can be developed at the national level and harmonized through the region or along watercourses. As it is unlikely that the river management bodies will have the funds necessary to conduct detailed EIAs or lengthy public hearings on them, the river body could require project proponents to conduct an EIA for projects likely to have a significant environmental impact and then open the discussion to the public. This is the case for projects financed by most international financial institutions.[172] One easy step is to open meetings of river management authorities up to the public. This costs relatively little, and the public could participate as either silent observers or as participating, but non-voting, observers.

Access to justice measures can be difficult because they often require national judicial systems to be altered. Initially, however, nations in a region can establish broad interpretations of standing to facilitate access to their courts both by their nationals and by others who may be affected, particularly those living in other riparian nations.

In developing these norms—which give a voice to citizens, NGOs, and local governments—it will be necessary to balance the roles of international, national, and local actors in the management of transboundary watercourses.[173] The national and international actors are essential to ensuring that local control does not lead to parochial dominance and unsustainable abuse of natural resources; and the participation of local actors is necessary for the norms and institutions to be relevant (and thus implemented) on the ground.

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[169] Eriksen 8, *supra* note 8, at 26. For example during the 1970s and 1980s, the MRC was largely dormant.

[170] *Id.* at 32 (citing the Nile River as highly polarized due to political instability).

[171] *Id.* at 41.

[172] *See* Bernasconi-Osterwalder & Hunter, *supra* note 131.

[173] Milich & Varady, *supra* note 6, at 37.

VI. CONCLUSION

While public involvement in the management of transboundary watercourses goes back decades, if not millenia,[174] the last decade has seen a remarkable proliferation of international agreements and institutional practice. At the same time, national laws and institutions charged with the management of fresh water resources, frequently crossing national borders, have incorporated transparency, public participation, and access to justice.

In the context of transboundary watercourses, access to information ensures that citizens and other members of civil society have the ability to request from governmental and intergovernmental authorities information on the status of the watercourse and its tributaries (including water flow and water quality); factors that could affect the watercourse or its tributaries; and norms, policies, and management plans that shape activities relevant to the watercourse. Public participation should include the opportunity for members of the public to submit comments (and have the authority take due account of the information) regarding specific activities that could affect the watercourse; the development of norms, policies, and plans that govern the watercourse; and even in the development of the transboundary watercourse agreements themselves. Access to justice entails resort to national courts and agencies, international courts, and factfinding and legislative bodies.

Regional initiatives on public involvement are developing in Europe, the Americas, Asia, and East Africa. Already the commissions charged with managing watercourses in many of these regions have begun to include more public participation, to the benefit of both the local communities and the projects. The steps towards furthering public involvement can in some cases be simple and inexpensive, and at other times require the restructuring of national environmental governance. Nations should look at the context of an international watercourse while determining the best path towards greater public access to information, participation, and justice.

[174] KAOSA-ARD ET AL., *supra* note 11, at 173 ("Thailand has a thousand years' tradition of people's involvement in the management of water resources."), 181 (public participation in Vietnam dates back "almost 4000 years").

UNEARTHING GOVERNANCE: OBSTACLES AND OPPORTUNITIES FOR PUBLIC PARTICIPATION IN MINERALS POLICY

Marcos A. Orellana [*]

Mining is one of the oldest economic activities on earth. And so are the legacies that mining has left behind once the ores have been exhausted. As much a source of wealth and value, minerals and metals are also given symbolic and even ritual meaning by cultures around the world. In recent times, satellite and engineering technology has enabled mining operations in remote areas, usually inhabited by local communities that depend on a clean environment for water, livelihoods, and survival. The opportunities and spaces for these communities to learn about the impacts of mining before these operations begin, to participate in the decisionmaking processes, and to access effective remedies where damages occur have been lacking at the national and international levels. That is, governance in mining has yet to devise mechanisms where the rights of affected communities, including the right to prior informed consent and self-determination, are safeguarded.

The signs of globalization are visible in the contemporary mining industry, where transnational mining corporations operate in the different regions of the world. What makes mining unique is that it can only take place where the ores are found. Having exhausted the most accessible ores, the efforts by prospectors and miners have taken them to more distant places, where communities have usually lived undisturbed by the presence of the state and where the possibilities of enforcing regulations are slim at best. In any event, the elites in metropolitan capitals have been all too sympathetic to the influx of foreign direct investment, as the costs and burdens of mining operations are felt by voiceless communities, far away from the centers of politics and debate.

Affected communities have begun to organize their opposition to the negative impacts of mining. Pollution of waters by acid mine drainage, sulfuric acid, cyanide, and mercury is dangerous to humans, even in trace amounts. The construction of roads through pristine forests, with its influx of settlers and alien values, customs, and diseases disrupts the social fabric and the conservation of biodiversity. The contamination of the air by dust and by fumes from smelters affects agriculture and human health. The forced resettlement of communities, usually without adequate compensation, represents a denial of livelihoods and culture. These negative impacts have encouraged affected communities to mobilize their opposition to mining, many times impeding access to the areas and to the minerals.

These demands for a healthy environment and for self-determination pose important challenges to governance in mining. This chapter will expand on different fora where mining has been discussed with members of the public and NGOs at the local, regional, and global levels, with a view to mapping not only the various initiatives regarding governance in mining, but also identifying the different stakeholders involved in these processes. The chapter will begin with an account of initiatives at the national and local levels, where civil society has utilized procedural environmental rights to advance their demands. Next, the chapter will explore some of the regional initiatives, focusing on Africa, the Americas, and the countries of the Asia-Pacific. From there, this chapter will explore some of the recent debates at the international level, looking into the spaces opened for the consideration of voices from civil society and affected communities. In this section, attention will be devoted to the United Nations Environment Programme's (UNEP's) Cyanide Code, to the Mining, Minerals, and Sustainable Development Project (MMSD), and to the certification of conflict diamonds, among others. The chapter will close with an overall account of some of the alternatives under discussion for ensuring respect of substantive and procedural rights in the context of mining.

I. INITIATIVES AT THE NATIONAL AND LOCAL LEVELS

At the national and local levels, a comparative approach reveals common threads in strategies and initiatives across different continents and legal traditions regarding the emerging role of civil society in the making of mining policy. Some of these strategies deal with social mobilization to influence changes in the laws, while

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other initiatives include resort to legal tools for accessing information. Public participation has also been sought through formal channels where they exist and through informal ways where those channels are yet to be effective. This section will explore some specific cases from Perú, Turkey, Costa Rica, the United States, and the Philippines that illustrate the challenges involved in implementing procedural environmental rights in the context of mining at the national and local levels.

A. Habeas Data and Prior Informed Consent in Perú

In the mid-1990s, the Peruvian Environmental Law Society (Sociedad Peruana de Derecho Ambiental, or SPDA) established through litigation the right of communities to use "habeas data," a legal tool for obtaining relevant information from the government.[1] Habeas data is a tool that allows citizens to appeal to a court to compel public authorities to release information, when this information has been denied administratively. It is subject to narrow exceptions, such as national security. This mechanism resembles habeas corpus (literally, "bring forth the body," a legal tool to obtain the release of a wrongfully-imprisoned person), one of the oldest human rights safeguards against unconstitutional imprisonment, in that it is oriented to "bring forth" or "show" the data. The SPDA case is the first application of this tool to the environment in general, and to mining in particular, in Perú and Latin America.

In March 1993, the tailings of the Mina "Gigante" (Giant Mine) in the La Libertad Department of Perú, located 3500 meters above sea level, contaminated the watershed. The flood from the tailings dam destroyed crops and local ecosystems, and killed eight people in communities downstream. The community of Pías requested assistance from SPDA with their case, and SPDA submitted a request for information to administrative authorities seeking records regarding the location of the tailings pond in the Mushmush gorge.

The Mining Director General of Perú dismissed the petition on unclear grounds. SPDA then requested reconsideration of this decision. There was no reply. Consequently, in March 1994, SPDA initiated a judicial action against the Ministry of Energy and Mines for violating the right of access to information, which is recognized in Perú's Constitution and in international human rights treaties. The 25th Specialized Civil Tribunal of Lima dismissed the legal action on the grounds that it should have been brought before a special court with subject matter jurisdiction over contentious administrative matters. SPDA appealed, arguing *inter alia* that such an interpretation would render the constitutional habeas data action meaningless. The Second Civil Chamber of the Superior Court of Lima reversed and found in favor of SPDA on all issues. The Chamber reaffirmed the right of NGOs with diffuse interests, such as the protection of the environment, to present judicial actions to prevent or seek remedies for environmental harm. The Constitutional and Social Law Chamber of the Supreme Court, on 16 June 1996, sharing this reasoning, affirmed the Chamber's decision and ordered the Ministry to provide the information requested by SPDA.

Also in Perú, the ongoing case of *Tambogrande* has become emblematic for communities around the world, as it highlights the stakes and conflicts that occur when mining is proposed against the will of the local community. The links between prior informed consent and procedural rights are clear: without information and participation there can be no informed consent. A necessary implication of the right to prior informed consent is the need to secure access to justice when this right is denied.

Tambogrande and the San Lorenzo Valley is an area known for its agricultural produce, particularly mangos and lemons; the World Bank had financed important agricultural development projects in the area. The people of Tambogrande are concerned that mining would destroy their town, their valley, and their livelihoods, and have thus organized resistance against the proposed mining plans of Manhattan Minerals Co., a Vancouver, BC-based corporation. Since this company became active in the area, the leader of the Frente de Defensa (the local grassroots organization set up to counter the pressure of industry) was assassinated and the families of other members of the Front have been intimidated and harassed.[2] The company used the national media, resorting to the anti-development discourse to bolster its cause. When the company, without prior notice, started preliminary digging, the people mobilized and burned the machinery and the facilities. The police intervened but were overwhelmed by popular resistance and had to capitulate. It became clear that mining could only take place with the support of the military, raising fears of yet another massacre in Latin American history.

The right to prior informed consent as an expression of the right to self-determination is at issue in this case. In June 2, 2002, the Municipality of Tambogrande organized an official referendum asking either yes or no to mining; 98 percent of the votes cast were against mining. As an expression of democracy and participation in public affairs, the people of Tambogrande have now placed questions with potential impacts all across the

[1] Carlos Chirinos, *Análisis del Primer Caso Judicial Exitoso sobre Habeas Data en el Perú: Sociedad Peruana de Derecho Ambiental vs. Ministerio de Energía y Minas*, paper presented in the Regional Seminar: Experiences of Success and Failure of Juridical Instruments in the Defense of the Environment, Lima, Perú Dec. 7, 2000 (on file with author).

[2] Scott Wilson, *A Life Worth More Than Gold*, Wash. Post, June 9, 2002, at A01.

world: Is the prior consent of an affected community an indispensable element for mining? Will national mining easement laws, which would benefit the economic interests of a transnational corporation, override the democratically expressed will of the local people?

Perú has had particular trouble dealing with these questions, as it is involved in a transition away from dictatorship towards democracy. During the Fujimori dictatorship, the State promoted a mining boom, granting concessions for the development of large mining projects covering the territory encompassing more than 3,200 communities. By and large, surveillance of industry's compliance with environmental laws has been undertaken by auditing companies contracted by the mining industry. In organizing opposition against the unconstitutional taking of property rights and against the negative impacts of mining in their communal territories, affected communities throughout Perú recently created the National Coordinating Body of Communities Affected by Mining (*Coodinadora Nacional de Comunidades Afectadas por la Minería*, or CONACAMI). In Perú, this organization is at the forefront in demanding spaces for public participation, access to information, and access to justice for communities harmed by mining.

B. Access to Courts in Turkey: The Bergama Villages Against Cyanide

The struggle of peasants from 17 villages in the Bergama region of West Anatolia reveals some of the difficulties associated with legal strategies to secure adequate and effective remedies. This case also reveals how the lack of legal avenues for public participation may lead to social unrest. When this is the case, as in Bergama, community leaders and advocates often become targets of human rights violations. Also, this case shows that legal strategies may be more effective when supported by social mobilization strategies oriented to sensitize the public.

The Bergama region is known for its prime agricultural produce, such as olive oil, grapes, and high-quality cotton, and for the ancient ruins of Pergamon that attract thousands of tourists each season. The proposed mine is expected to occupy 100 hectares of land and use cyanide for the processing of the ore. A result of the exploratory night drillings, the water turned white in the morning and was undrinkable for four months. In an unofficial referendum, "89 percent of those eligible voted, and they all voted no to the mine," noted Bergama's mayor Sefa Taskin.[3] The villagers mobilized their opposition by blocking roads, and the security forces responded by arresting the farmers. The villagers then traveled 565 kilometers to Istanbul, blocking the Bosphorus bridge linking Asia with Europe with banners stating, "NO to Cyanide, until we die."

Legal actions were brought by affected citizens through civil society organizations against the administrative decrees that authorized the mine. In July 1996, the 1st Chamber of the Administrative Court dismissed the lawsuit after finding that the Ministry of the Environment had not contravened the licensing procedures. Almost a year later, in May 1997, the Supreme Court reversed the lower court's judgment, holding that the gold processing method involving the use of cyanogen compounds would not be consistent with the public interest and violated the constitutionally protected right to life.[4] In 1997, the Turkish State Council also ruled that the mine was violating the country's constitution and that it should close.

The Turkish Prime Minister ignored these rulings and authorized the company to proceed with an experimental safety plan. The Bar of Izmir sued the Turkish government for failing to enforce the Supreme Court decision and also initiated an action before the European Court of Human Rights. On June 23, 2001, the Izmir Administrative Court canceled the temporary authorization for mining operations on grounds of the previous Supreme Court order of 1997. On March 6, 2002, the Third Administrative Court ordered the mine to close, and on March 8, 2002, the First Administrative Court issued a similar order. However, on April 4, 2002 the Turkish Council of Ministers again ignored these decisions and communicated its authorization to the company.[5] This recent decision by the Council of Ministers was taken in the context of a deep economic crisis in which Turkey has embraced the IMF and the World Bank's recipes of privatization and deregulation aimed at attracting foreign investment.

These intricate legal proceedings reveal the obstacles that affected communities face in obtaining justice and protecting their rights. Izmir Lawyers for the Environment and other Turkish civil society organizations have devoted significant efforts to the legal strategy, including the financial resources necessary to support prolonged litigation. Moreover, the legal strategy has been complemented by social mobilization, intended to sensitize public opinion and raise concerns at the highest levels. The Courts have sided with the villagers, but their decisions and orders have been offset by the political and economic interests of the Turkish Administration. Consequently, despite landmark cases granting the public access to justice and even ruling in their favor, Turkish courts have

[3] Bob Burton, *Normandy's Turkish Foray*, 1(2) Mining Monitor (1996).

[4] Judgment of the court, Case No. 1996/5348, Ruling No. 1997/2311 (6th Chamber of the Higher Administrative Court), *available at* www.korte-goldmining.de (Turkish Legal Proceedings) (last visited July 22, 2002).

[5] *See* www.geocities.com/siyanurlealtin/archive.html (last visited July 22, 2002).

proven unable to ensure the rule of law when it comes to high-profile gold mines.

C. Public Participation in Lawmaking: Mining Moratoria in the Philippines and Wisconsin

Recently, civil society organizations have focused not only on social mobilization and court actions, but also on lobbying local and national governments for effective bans on mining. That is, participation in decisionmaking may be channeled administratively, but it also can strengthen the lawmaking process. The cases discussed below also show that the effective implementation of procedural rights is best accomplished with strong and coordinated civil society organizations.

In the Philippines, for example, the Oriental Mindoro Provincial Board passed a 25-year mining moratorium on January 28, 2002, following controversies over nickel-cobalt mining programs by Crew Minerals. The role of civil society in influencing the Provincial Board to adopt this moratorium reveals that the participation of the public in lawmaking processes may be even more effective than in decisionmaking processes. Moreover, as the Bergama case highlighted, access to justice may come too late to effectively remedy irreversible environmental and social damage.

In the US state of Wisconsin, one of the strongest grassroots campaigns ever mounted in the Great Lakes Basin opposed the copper and zinc mine proposed for Crandon area of northern Wisconsin. The campaign focused on a "mining moratorium" bill introduced to the Wisconsin legislature, following its road in the Senate and the House and involving dozens of community, environmental, and hunting and fishing groups, as well as several Native American tribes. On April 22, 1998 (Earth Day), then-Governor Tommy Thompson signed the Sulfide Mining Moratorium Bill,[6] which prohibited the state from issuing permits for new metallic sulfide mines unless one such mine in North America is certified by the Department of Natural Resources to have operated for 10 years and been closed for 10 years without causing pollution. This requirement effectively bans mining in the state, as no company has been able to show compliance with these requirements.[7]

III. REGIONAL INITIATIVES

In the regional sphere, three distinct forums have actively discussed mining: the Southern Africa Development Community, the Asia-Pacific Economic Cooperation, and the Mining Ministries of the Americas. These regional initiatives described below have yet to materialize tangible contributions to the participation of the public in the discussion of mining policy at the regional level. There are various explanations for the lack of information available and the lack of public participation. These include the fact that these forums are more concerned with the contributions of the mining sector to economic growth, narrowly construed. In this scenario, industry and foreign direct investment are seen as driving economic improvement, while civil society and affected communities are viewed as obstacles to economic progress. That is, these regional forums have yet to internalize and confront the challenges involved in the overarching concept of sustainable development, particularly those regarding the effective implementation of procedural environmental rights and public involvement.

A. The Southern African Development Community (SADC) Mining Protocol

The Southern African Development Community has developed a number of binding protocols on natural resources, including one on mining, which incorporate environmental governance principles to varying degrees.[8] In fact, the SADC Mining Protocol[9] sets forth general principles that provide *inter alia* that member states shall encourage private sector participation in the exploitation of mineral resources, and shall improve the availability of public information to the private sector.[10] The key issue is thus determining who constitutes the private sector in the context of these provisions. A narrow reading would include only private mining companies, while a broader reading would also include civil society.

A review of other provisions of the Mining Protocol offer assistance in determining the term "private sector", including for example Article 6 on the promotion of private sector participation. This article asks governments

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[6] 1997 *Wisconsin Act* 171, enacted Apr. 22, 1998.

[7] Another high-profile mining moratorium was imposed by Costa Rican President Abel Pacheco in his inaugural address, when he declared Costa Rica to be a country free of oil exploration and exploitation and free of open pit mining. President Abel Pacheco de la Espriella, Inaugural Message, May 2002-May 2006 (May 8, 2002). President Pacheco stressed that Costa Rica's future was better secured in harmony with nature, which represented the country's true and lasting treasure. His program includes constitutional and legal reforms oriented towards securing reforestation, the protection of watersheds, waters, wetlands, and wildlife. His declaration read, "Before we declared peace within us and declared peace with all peoples; now we must make peace with nature." The role of civil society organizations in supporting the newly elected President's platform, and now in implementing his reform program provides interesting opportunities for public participation.

[8] *See generally* Collins Odote & Maurice O. Makoloo, *African Initiatives for Public Involvement in Environmental Governance* sec. III.B, in this volume.

[9] The SADC Mining Protocol was signed by Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe on Sept. 8, 1997.

[10] Southern Africa Development Community, Protocol on Mining, arts. 2.7, 2.9, *available at* wysiwyg://154/http://www.sadc.int/english/protocols/p_mining.html (last visited July 22, 2002).

to establish: (a) policies that encourage "exploitation of mineral resources by the private sector", (b) mechanisms to enable "the private sector's continued participation," and (c) a conducive environment for attracting investment to the mining sector. Although the first and third points lend some support to the narrow reading of private sector, the inclusion of an open formula in the second point lends support to a broader reading.

A broad reading of public access to information is reinforced by Article 8 of the SADC Mining Protocol, on environmental protection. Article 8 requires states to share information on environmental protection and environmental rehabilitation. Furthermore, it favors a regional approach in conducting environmental impact assessments (EIAs) especially in relation to shared systems and cross-border environmental effects. In light of the fact that EIAs emphasize and institutionalize transparency and public participation in the planning and evaluation process, and also considering other environmental priorities included in the protocol, private sector participation should be read broadly to include citizens and non-governmental organizations.[11]

B. The Asia-Pacific Economic Cooperation Forum (APEC)

The GEMEED (APEC's Expert Group on Minerals and Energy Exploration and Development) was created at the initiative of Chile and Korea as a sub-group of APEC's Energy Working Group.[12] It focuses on promoting mining in a "socially acceptable, environmentally sound and economically efficient manner." To reach this goal, the GEMEED is tasked with "gather[ing] and distribut[ing] information about mineral and energy exploration, development potential and opportunities."[13] This narrow focus on promoting industry has limited the potential of the working group, and thus of APEC, to open spaces for the participation of civil society or for the dissemination of information other than investment opportunities.

The first GEMEED meeting took place in Santiago, Chile in May 1996. While the first two meetings were oriented towards investment-related issues, the third annual meeting focused on the sustainable development of minerals and metals, offering a forum for industry to provide examples of best practices that could be adopted in other APEC economies. However, none of the best practices that were highlighted involved consultations with civil society on mining policy or with affected communities on environmental and social impacts, nor did they envisage effective channels for access to information. The seventh meeting was hosted by the US Department of Commerce in Anchorage, Alaska, in May 2002, and it focused on how "mining and communities can constructively engage for mutual benefit." However, the overwhelming majority of speakers and participants came from the industrial sector, largely undermining its stated purpose engaging communities in the dialogue. Civil society and affected community voices have yet to be heard by the APEC in any meaningful manner.

C. The Mining Ministries of the Americas (CAMMA)

Back in the mid-1990s, the mining ministers of Venezuela and Chile developed the idea of CAMMA to bring together the respective mining ministries in the hemisphere.[14] The first meeting was hosted by Chile in 1996, and it adopted the Santiago Declaration that recognized the importance of hemispheric cooperation on issues relevant to mining. Since then, CAMMA has been instrumental in fostering cooperation in two principal ways: by organizing annual meetings of mining ministries, where much of the discussion revolves around elaborating a final declaration, and by organizing specialized workshops. Progress on access to information and public participation within CAMMA has been slow, although in the recent past NGOs have been more active in pre-CAMMA meetings and in CAMMA-related meetings.

At first, access to information and public participation were not on the CAMMA agenda. For example, the first experts workshop organized by Chile and Canada in 1997 to discuss sustainable development did not include either access to information or public participation within its six high-priority areas. Two years later, in 1999 in Buenos Aires, in preparation for the 4th CAMMA, an experts workshop recognized the importance of disseminating information and the need for improved stakeholder communications. This recognition provided further impetus for the creation of a website.[15] Further progress was made in the 5th CAMMA, as expressed in the Vancouver Declaration, where the mining ministries agreed to "promote the dissemination of information to the public about the nature of mining, and the actions industry is developing which benefit communities and the environment."[16] The problem with CAMMA's focus is that this information is oriented not necessarily at empowering civil society to face the impacts of mining, but rather "to counteract the negative

[11] *See* Carl Bruch, *African Environmental Governance: Opportunities at the Regional, Subregional, and National Levels*, *in* African Environmental Law and Policy (Beatrice Chaytor & Kevin Gray eds., 2002) (forthcoming).

[12] *See generally* www.gemeed.cl (last visited July 22, 2002).

[13] *Id.* (First Plenary Meeting/Report by GEMEED Secretariat/GEMEED terms of reference (Mar. 25-28, 1996)).

[14] CAMMA is the Spanish acronym.

[15] *See* www.camma.org (in dramatic need of more regular updates).

[16] *See* Vancouver Declaration, para. 5, *available at* www.camma.org/vancouveren.txt.htm (last visited July 22, 2002).

image that prompts public opposition to mining development."[17] In this vein, it was proposed that CAMMA organize an experts workshop on mining and community relations in preparation for the 6th CAMMA, but ultimately the experts workshop discussed mine closure.

CAMMA has, for the most part, reflected the influence of mining companies on the governments of the countries in the Americas— influence that has undermined the prospects for increased public participation in this regional forum. Still, recent involvement of NGOs within the CAMMA process seems to indicate a receptivity (and perhaps a trend) toward greater participation of civil society in this forum.

D. The Proposed EU Directive on Mining

The European Union has recently started discussing mining and mining related issues. For example, on February 22, 2002, the European Commission met in Brussels to discuss cyanide leach mining. NGOs sought to influence this meeting by releasing a report on cyanide the day before,[18] showing the need for mining waste regulation (as wastes from cyanide leach mining have the potential to negatively impact municipal sewage and water treatment), and the need for independent studies and monitoring (as UNEP's Cyanide Code by and large expresses the industry perspective).

As the discussions leading to the elaboration of a directive on mining by the EU are at a preliminary stage, their timing and scope remain unclear. In any event, it is interesting to note that the European Community is a signatory to the Aarhus Convention, and the Commission is in the process of preparing EU directives to bring EU law into line with the Aarhus Convention.[19] The new mining directive will certainly have many environmental implications, and thus will fall within the ambit of the Aarhus Convention, meaning that it will need to incorporate the Convention's requirements on public access to information, decisionmaking processes, and justice. That is, the proposed mining directive could serve as a testing ground on the actual effectiveness of the Aarhus Convention applying the requirements for public involvement in this high-impact industry.

IV. GLOBAL INITIATIVES

It has been at the global level where the public has enjoyed greater access to forums where mining policy has been debated. For example, the World Bank's Extractive Industries Review was designed precisely to consult the global public on the role of the World Bank in extractive industries, while the Mining, Minerals, and Sustainable Development project was in itself a process for producing and disseminating information on mining and sustainable development. The following section explores various initiatives where the public has been involved, such as certification for conflict diamonds and UNEP's Cyanide Code. This section will also briefly present the Washington Agreement on Gold as an example where there has been a critical lack of public access to information and participation.

A. Certification for Conflict Diamonds

In 1998, the United Nations Security Council imposed sanctions against the purchase of Angola diamonds.[20] The trade in diamonds was fueling increasing instability and conflict in the region, which resulted in huge losses in life and limbs. The links between conflicts and diamonds were researched by two studies: "A Rough Trade" by Global Witness and "The Heart of the Matter" by Partnership Africa Canada.[21] Those studies provided the analytical basis for actions by community-based and international NGOs, actions that were unified more by their goal than by a common strategy.

A coalition of human rights groups led by Global Witness, Amnesty International, OXFAM, Physicians for Human Rights, and Partnership Africa Canada, first focused on an explicit consumer education campaign based on hard-hitting action research. Then in May 2000, South Africa, Namibia, and Botswana, worried that the campaigns would negatively impact their industries and economies, initiated the Kimberley process by organizing a meeting for governments, industry, and NGOs. Through a series of ten meetings around the world, this process evolved into an attempt to develop a certificate-of-origin scheme for raw diamonds. Civil society organizations were instrumental in pushing the process forward. In fact, concerned about the slow pace of the process, approximately 200 NGOs signed a petition to speed up the process and threatened to walk out.

Soon, the important players in the global diamonds trade, including the World Diamond Council, came to realize that the diamond industry depends on its reputation and stepped up the pace. In March 2002, 37 countries and the European Union concluded a certification scheme for rough diamonds. This certification model requires each shipment to be accompanied by a certifi-

[17] *See id.*, annex III, panel 2 ("Mining and Communities").

[18] Decoding Cyanide: An Assessment of Gaps in Cyanide Regulation at Mines, *available at* www.mineralpolicy.org (last visited July 22, 2002).

[19] *See generally* Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

[20] UN Doc. S/RES/1173.

[21] *See* Global Witness, A Rough Trade, *available at* www.globalwitness.org/text/campaigns/diamonds/reports.html (last visited July 22, 2002); Ian Smillie et al., The Heart of the Matter: Sierra Leone, Diamonds & Human Security, *available at* action.web.ca/home/pac/attach/heart%20of%20the%20matter%20summary.pdf (last visited July 22, 2002).

cate expedited by the competent authority of a participating party. Certificates and containers must be tamper proof and reveal such information as dates, authorizing official, and statements accrediting the validity of the load. In turn, participating states must comply with certain obligations, including the implementation of the certification scheme through domestic laws, and the maintenance of information systems on production, imports, and exports of rough diamonds. More significantly, mining states should set up control systems over mines and mining companies, designed to exclude traffic of conflict diamonds.

The outcome of the Kimberley Process was certainly influenced by other campaigns, including the US campaign led by Amnesty International (AI). The goal of the AI campaign was to draft legislation that would use the market to leverage reform and support the Kimberley process. An important angle of Amnesty's campaign was the use of the media, including stories in *Vogue*, *Seventeen*, the *National Enquirer*, and other national magazines. Amnesty also organized demonstrations outside Cartiers and utilized the Internet to spoof the "Diamonds are Forever" DeBeers advertisement. For greatest effect on the market, the bill was introduced by Congressman Hall on Valentines Day; a few months later, industry introduced its own bill into Congress. In November 2001, the House of Representatives passed HR 2722, the Clean Diamond Trade Act, by a vote of 408-6, prohibiting the import of conflict diamonds, establishing reporting requirements, and providing funding for capacity building relating to international arrangements, such as the Kimberley Process and UN Security Council resolutions.[22]

B. OXFAM Mining Ombudsman

The Australian NGO Oxfam Community Aid Abroad formally established a Mining Ombudsman in February 2000, with the aims of assisting communities in developing countries whose basic human rights are being threatened by the operations of Australian mining companies.[23] The ombudsman checks all claims through on-site investigations and does not take up cases until they have been validated by credible evidence. The ombudsman is not a forum to adjudicate cases, but rather seeks to ensure that the process by which companies deal with local communities is fair and equitable. To this effect, the mining ombudsman raises complaints directly with the companies concerned in Australia in order to get a fair, negotiated solution.

The mining ombudsman's fundamental position is that the mining industry must ensure that the basic economic, social, cultural, and political rights of individuals, groups, and communities affected by their operations are upheld and not compromised. These fundamental rights are based upon international human rights instruments and include the right to control the use of land, the right to clean water, the rights to a safe environment and a livelihood, the right to be free of intimidation and violence, and the right to fair compensation for losses.

The number of complaints brought to the mining ombudsman in its first year of operation far exceeded the capacity of resources with which to respond. These cases came from Indonesia,[24] Papua New Guinea,[25] and Perú.[26] The grievances documented in these cases fall within four categories: loss of land without proper compensation, loss of sustainable livelihoods, degradation of waterways and other natural resources upon which people depend, and human rights abuses by the police or security forces acting in the interests of the company. After its first year of operation, the ombudsman has concluded that the Australian exploration and mining operations are having significant detrimental impacts on local communities in developing countries.[27]

The rights-based approach adopted by Oxfam provides a benchmark for evaluating performance, as well as recognized international standards below which mining operations should not take place. In seeking to resolve existing problems, the ombudsman regards the principle of prior informed consent as critical. Expression of this principle requires recognizing rights, involving rightholders in decisionmaking processes, and ensuring that they are fully informed of the proposed use of their lands and all the likely environmental and social impacts. The ombudsman believes that agreements reached after fair negotiation process would decrease the likelihood of conflict, loss, and degradation articulated by the communities in their grievances.

Oxfam has stated that it is neither appropriate nor sustainable in the longer term for a small aid agency such as itself to manage this sort of complaint mechanism for an entire industry. The standards by which Australian mining companies are supposed to operate overseas are set by the Minerals Council of Australia in its Code for Environmental Management. Although this Code contains requirements on reporting to the public, its shortcomings stem from the fact that it addresses primarily

[22] The act is expected to be finalized by Congress in the coming months. *See* www.amnestyusa.org/diamonds (last visited July 22, 2002).

[23] The discussion below follows the Oxfam Community Aid Abroad, Mining Ombudsman Annual Report 2000-2001, *available at* www.caa.org.au (last visited July 22, 2002).

[24] Complaints included those filed against the Kelian gold mine in Kalimantan, the Indo Muro gold mine in Kalimantan, and the Barisan gold and silver mine in South Sumatra.

[25] Complaints included those filed against the Porgera gold mine and the Tolukuma mine.

[26] A complaint was filed against the Tintaya copper and gold mine

[27] *See* Mining Ombudsman Annual Report 2000-2001, *supra* note 23.

environmental issues, is adhered to voluntarily, and carries no sanctions for non-compliance. These features of the Code, coupled with the absence of extraterritorial legislation regulating industry standards, have persuaded Oxfam to call on the Minerals Council to incorporate basic rights into its code of practice and to establish an independent complaint mechanism.

C. The World Bank Extractive Industries Review (EIR)

The World Bank has been under the close scrutiny of civil society organizations since the 1980s, when the first campaigns were initiated to introduce an environmental policy framework, dramatically lacking in the face of detrimental projects in the Amazon, Indonesia, and India.[28] Although the World Bank has taken important steps in creating accountability mechanisms that are open to affected citizens around the developing world, such as the IBRD/IDA Inspection Panel and the IFC/MIGA Ombudsman, the mainstream of the Bank's portfolio has yet to make the transition towards sustainable development.

Particularly controversial lending sectors of the Bank, such as dams and mining, have received considerable attention by global civil society.[29] The problematic issues arising from the construction of dams motivated IUCN and the World Bank to launch a World Commission on Dams in 1998, which was open to the participation of civil society around the world. By the late 1990s, the advent of information technology had enabled civil society individuals and organizations around the world to start to establish effective links between local and national as well as southern and northern NGOs. Accordingly, NGOs were well prepared to participate in the process followed by the World Commission on Dams, which involved concrete mechanisms for the participation of the public such as regional consultations, commissioned research, and case studies. This process produced a successful report[30] that exerted deep influence in the design of the Extractive Industries Review (EIR).

The EIR was a response by the Bank to mounting pressure from international NGOs, including prominently Friends of the Earth. The EIR was designed to be an international consultation on the role of the World Bank Group in extractive industries, in the light of the Bank's objectives of poverty reduction and sustainable development. Among the questions implicated in these consultations were whether there are some extractive industries that the Bank should support in some way, and the extent to which the World Bank should continue to support these industries.

To explore these issues, in July 2001, the EIR appointed Dr. Emil Salim[31] as the Eminent Person to lead the EIR process. In the second half of 2001, the EIR team held planning workshops and refined the consultation process to include six workshops, community visits, a research program, a number of informal meetings, direct consultations with stakeholders, and web-based participation.[32] However, all too soon it was evident that there were material problems regarding the timeframe of the review, the independence of the secretariat, the inclusiveness of the review process, and the control over the budget.

More than 100 organizations signed a letter to Dr. Salim asking him to consider these issues and to suspend the EIR process until they were resolved.[33] Less than two weeks later, Dr. Salim electronically distributed his reply, addressing these issues as follows.[34] The timeframe was extended in order to benefit from the Bank's internal evaluation units. The secretariat was moved to Jakarta from its offices in the IFC, next to the mining department. The US$3.1 million budget was placed under the control of the Eminent Person, who also retained independence to raise more funds as necessary to meet EIR goals. While this exchange reveals that the EIR process has been open to NGO input, a number of unresolved issues remain.[35] The process is expected to conclude in June 2003, after incorporating the web-based comments and a final consultation workshop provide the concluding inputs to the final report.

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[28] *See* Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*, in this volume.

[29] *See* Michael Ross, Extractive Sectors and the Poor (Oct. 2001); *see also* Friends of the Earth, "Treasure or Trash?": The World Bank's Flawed Defense of Mining as a Tool for Economic Development (2002).

[30] World Commission on Dams, Dams and Development: A New Framework for Decision-Making (2000), *available at* www.dams.org (last visited July 22, 2002). The recommendations of the WCD are being followed-up by a two-year project led by UNEP.

[31] Dr. Salim is the former Indonesia environment minister and was chair of the Preparatory Committee meetings for the World Summit on Sustainable Development.

[32] *See* Extractive Industries Review, What We Do, *available at* www.eireview.org/eir/eirhome.nsf/EnglishOtherlinks/What+we+do?opendocument (last visited July 22, 2002).

[33] NGO letter to Dr. Emil Salim (Jan. 21, 2002) (on file with author).

[34] Letter from Dr. Emil Salim to All Extractive Industries Review Stakeholders (Jan. 30, 2002).

[35] Center for International Environmental Law et al., Action Alert: World Bank Extractive Industries Review (Mar. 1, 2002) (on file with author).

One unresolved issue is the fact that the World Bank participates in the EIR as a stakeholder, influencing discussions that it will later use as a basis for making recommendations to its Board of Executive Directors. Also, the expected outcome of the process is in question, as it remains unclear what impact the consultations will have on the recommendations made by Bank management or on actions taken by the Bank's Board. As of writing, the first two regional consultations have taken place in Rio de Janeiro and Budapest.

D. The Mining, Minerals, and Sustainable Development Project (MMSD)

Mining chief executive officers (CEOs) gathering in Davos, Switzerland in 1999 confronted their poor reputation by developing an initiative to document and publicize industry's "efforts in addressing issues [of] concern to the community, like safety and the environment."[36] The nine companies that launched this Global Mining Initiative (GMI) were Anglo-American, Barrick, Freeport-McMoran, Noranda, Placer Dome, WMC, BHP, Phelps Dodge, and Rio Tinto. These CEOs and the "sherpas" (consisting of one key executive from each company) were initiating a multifaceted strategy which included a prominent public relations campaign to project its discourse of change. That is, the GMI was conceived as an instrument for molding representation and visibility of reality,[37] for defining the terms of the debate, and for demarcating the issues that required further attention.

The Mining, Minerals, and Sustainable Development (MMSD) project was a central part of the information strategy of the GMI, which was designed to look at mining within the framework of sustainable development. It asked not whether mining non-renewable natural resources was sustainable, but whether mining could contribute to sustainable development. In order for the MMSD's findings to be objective, unbiased, and credible in spite of GMI funding, the project needed to be hosted by an established, impartial research organization and directed by recognized practitioners in the field. To that effect, the GMI, through the World Business Council for Sustainable Development (WBCSD), hired the International Institute for Environment and Development (IIED), a non-profit organization based in London. The MMSD was thus initiated in April 2000 under a novel governance scheme aimed at introducing transparency and independence to the research process.

The project was governed by three centers of influence: the sponsors, the assurance group, and the host (IIED). As originally envisaged, the sponsors would not determine the outcomes of the research project. Its commercial sponsors (each donating US$150,000) included over 30 of the largest mining corporations that had responded to the call of the GMI, as well as non-commercial entities (each donating US$50,000),[38] including the Chilean Copper Commission, Colorado School of Mines, Government of Australia, MacKay School of Mines, Price Waterhouse Coopers, the Rockefeller Foundation, UNEP, and the World Bank. The sponsors selected IIED as the host, influenced the selection of the project leadership, set the schedule and timeline, accepted IIED's research plan, and provided the resources for the project. The GMI also retained the critical role of reviewing the research, making no commitments to adopt or follow the results of the research project. That is, the MMSD was not about elaborating recommendations, as the definition of the agenda was the province of industry, but about exploring and documenting the links between mining and sustainable development.

The assurance group was comprised of people acquainted with mining and sustainability issues from diverse backgrounds, selected by the MMSD project directors.[39] The members of this group had no direct interest in a mining company nor did they stand to benefit from IIED/MMSD research contracts. Without actual authority, the group's influence stems from its members' experience and stature. The assurance group was not intended to be responsible for the research outcomes, but as a key organ in assuring that the voices and concerns of the different stakeholders would be faithfully incorporated into the findings of the MMSD. Still, the assurance group played a much more substantive role, and before the draft MMSD report was made available for public comment, the group met eight times to review progress and provide guidance on future direction. The assurance group thus enabled the participation of several prominent and well-regarded individuals from civil society organizations, such as World Resources Institute, Sierra Club, Mineral Policy Center, PDA, Earthjustice, Friends of the Earth-UK, and Conservation International, among others.

IIED hosted a small secretariat that supported the project's two key undertakings: the research and the public engagement process. The research included approximately 175 individual pieces of commissioned research, much of which was presented for discussion and debate during workshops and consultation meetings. The engagement process included regional partnerships in Southern Africa, South America, Australia, and North America, each of which conducted its own outreach and consultations. Also, 23 global workshops attended by experts and stakeholders dealt with substantive issues, such as biodiversity, access to information, finance, and corruption. Finally, the secretariat also prepared 21 project bulletins, distributed electronically to more than 5,000 people, with updates and requests for feedback.

The MMSD process sought the participation of all those concerned with mining impacts, particularly affected communities and civil society organizations. Many organizations engaged in the dialogue, but many others denounced the project as an industry public relations campaign that would be legitimized by their participation. Other organizations did not have the time and re-

[36] This early description of the Global Mining Initiative by Hugh Morgan of Western Mining Corporation was cited in *A Survey of the Mining Landscape: Situation Analysis* (Draft) (Sept. 4, 2001).

[37] *Cf.* Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972-1977 93 (1980).

[38] This figure may include in-kind contributions.

sources to engage in the process, having to face more pressing priorities, such as mobilizing against the impacts of mining in their particular areas. Furthermore, the short timeline and a certain rush in the process meant that many other organizations were excluded. These dynamics were reflected in a May 2001 meeting in London, where 27 representatives of communities and groups affected by mining in Asia, Africa, India, and the Americas issued a joint declaration refuting industry's claims to sustainability, opposing current models of engagement (such as the GMI), and demanding full recognition of community rights.

The final report of the MMSD project—entitled *Breaking New Ground*[40]—represents a landmark in involving a broad public constituency in the discussion of mining impacts on the environment and local communities and in identifying unsustainable mining practices. In fact, the report captures and elaborates on most of the issues of concern to civil society, such as prior informed consent, no-go protected areas,[41] legacies of abandoned mines, planning for closure, labor standards, and submarine tailings disposal. The report also devotes an entire chapter to access to information in the mining context.

Chapter XII of *Breaking New Ground* builds upon two MMSD workshops addressing access to information. Held in March 2001 in Toronto, the first workshop identified as key areas for commissioned research the role of governments in disseminating information, systems for making information available to stakeholders, and a gap analysis of current information practices. The second workshop (held in Vancouver, British Columbia in December 2001) provided the opportunity to discuss these papers and to explore outstanding challenges. Recurrent themes were that information often fails to flow to communities in a timely and transparent fashion, the need for the mining industry to have a rational and cost-effective system of public reporting, and a concern by industry that civil society organizations often did not perform to the same standards of accountability as industry and governments.[42]

Chapter XII explores information's key role in mining and society by expanding on the different information needs of the different stakeholders—including, for example, communities, government, corporations, international institutions and labor—as well as opportunities for progress to be made to meet the various stakeholders' needs. For example, the report recommends disclosure of payments and royalties given to governments for access to resources.[43] Similarly, it recommends a "culture of disclosure" as the core means to make progress towards increased trust in the field.[44]

Regarding civil society, the report notes that communication goes both ways: it is as much about listening as it is about providing information.[45] The report is not blind to the power imbalances and the costs associated with producing information, noting that in terms of social justice, transparent and inclusive processes of information-gathering and dissemination enhance the rights of those involved or affected. The report also underlines that "access to information is not sufficient – people must also be given the ability, through the political system, to use information."[46] In this context, the report recalls the 1991 UN Berlin Guidelines and the 1994 Environmental Guidelines for Mining Operations, which specified that states, regulators, and companies should "ensure that the decision maker(s) and the community are fully informed of the nature of the development, its impacts on the environment, and the nature of the mitigating measures proposed."[47]

The MMSD also focused on particular challenges faced by industry regarding access to information and public participation. The Global Reporting Initiative (GRI) and the MMSD jointly convened an advisory panel to explore issues relating to public reporting criteria and indicators. The MMSD also identified corporate best practice in this ambit, singling out independent verification and continuous community consultations as key to building trust.[48] The MMSD report makes the business case for free and open access to information, noting the advantages of reduced transaction costs, more effective resource use, better feedback, increased reputation value, and reduction of risk.[49]

In general, the MMSD report proposes a framework for action at all levels to recognize and promote public participation, access to information, and effective access to systems of justice. In effect, it proposes the creation of a dispute resolution mechanism, where parties could come together in a neutral forum to work out a mutu-

[39] The MMSD project directors are Luke Danielson (a US attorney specializing in mining law) and Richard Sandbrook (co-founder of Friends of the Earth-UK).

[40] BREAKING NEW GROUND: MINING, MINERALS, AND SUSTAINABLE DEVELOPMENT (2002), *available at* www.iied.org/mmsd/finalreport (last visited July 22, 2002).

[41] *See also* Protection and Conservation of Biological Diversity of Protected Areas from the Negative Impacts of Mining and Exploration, Res. 2.82, The Second World Conservation Congress, held in Amman, Jordan on Oct. 4-11, 2000, *available at* www.iucn.org/amman/content/resolutions/rec82.pdf (last visited July 22, 2002).

[42] BREAKING NEW GROUND, *supra* note 40, at 297.

[43] *Id.* at 304.

[44] *Id.* at 308-11.

[45] Ginger Gibson et al., Access to Information: A Key to Building Trust in the Minerals Sector, MMSD-commissioned paper (2001).

[46] BREAKING NEW GROUND, *supra* note 40, at 294. The MMSD also partnered with the Academic Advisory Group of the Section on Energy and Resources Law of the International Bar Association to conduct an analysis of public participation in mining and resources development. *See id.* at 302.

[47] *Id.* at 298.

[48] *Id.* at 300.

[49] *Id.* at 293.

ally acceptable facilitated settlement.[50] Further, the report recommends a harmonized system of reporting guidelines to ensure that key aspects of companies' practice are publicly reported.[51] Finally, the report also proposes the creation of a Sustainable Development Support Facility, "to serve as a clearinghouse for information on who is doing what in the sector" and to coordinate efforts.[52]

The MMSD report has been criticized, however, for falling back on voluntary initiatives, where trust is placed before accountability and where exhortatory best efforts replace binding and enforceable standards.[53] The report has also been criticized for failing to adequately contextualize the liberal transformation of the global economy, including structural adjustment and the reform of investment and mining laws around the world. Further, many NGOs have rejected the report for replacing a rights-based approach, as was proposed by the World Commission on Dams, with a forum open the participation of stakeholders.

The MMSD report was officially presented at an event entitled "Resourcing the Future," which was organized by the GMI in May 2002 in Toronto. The meeting also allowed the industry association to take stock of the report and elaborate an agenda for addressing the controversial issues highlighted in the report.[54] Approximately 500 people attended the conference, of which 40 percent were from the industry and 15 percent from the NGO community (as defined by the organizers). Individuals from civil society were offered spaces in plenaries and sub-plenaries to discuss issues such as mining legacies, access to information, small-scale mining, and economic and social rights.[55] The participation of civil society in the meeting contributed both to widening the scope and refining the analysis of the difficult environmental and social issues facing the mining industry.

To conclude this sub-section, the GMI was also established to review the mining trade association, which resulted in the dissolution of the International Council of Metals and the Environment (ICME) and the creation of the International Council for Mining and Metals (ICMM). This change in name corresponds to a concerted effort by the mining industry to have a more active presence in the various forums in which mining is discussed, particularly at the regional and global levels.[56] The ICMM has taken an active role in influencing language on mining that has been negotiated at the Preparatory Committee meetings to the World Summit on Sustainable Development. The ICMM was also intimately involved in organizing the "Resourcing the Future" event in Toronto, described above.

E. The Washington Agreement on Gold (WAG)

While the global initiatives described above provide evidence of the increasing spaces for civil society in the global mining debate, the WAG offers exactly the opposite example. The WAG is not an international treaty, but a gentleman's agreement of dubious legality concluded in secrecy by certain European central banks with the aim to freeze their gold sales. It was announced on September 26, 1999.[57] Japan expressed its intent to follow the WAG the day after, and the United States later followed suit.[58]

The WAG was concluded at a time of increasing uncertainty regarding the future of gold reserves, which had introduced instability to the market and exerted considerable downward pressure on the price of gold. In this scenario, the WAG's stated purpose was to maintain gold's role as an important element of global monetary reserves. However, the real objective of the agreement calls for speculation, given that the central banks had until recently been selling gold and they projected further increases their gold sales. Another motivation of the central banks was probably to avoid a race-to-the-bottom in their gold sales, as that would have negatively affected the value of their reserves. Also, central banks wanted to avoid the press coverage associated with gold sales, which were becoming increasingly controversial.

The WAG creates an artificial scarcity of gold, which raises its price and thus stimulates an industry with high social and environmental impacts. Ironically, in an era where politics and economics emphasize the free market, the WAG inherently seeks to defeat the efficient allocation of resources in a market-based economy, a guiding principle of the ESCB Protocol.[59]

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[50] *Id.* at 405-06.

[51] *Id.* at 406-07.

[52] *Id.* at 406.

[53] Alan Young, MMSD Critique, presented at York University Conference on "Canadian Mining Companies in Latin America: Community Rights and Corporate Responsibility," in Toronto (May 2002).

[54] *See* ICMM Toronto Declaration, done May 15, 2002; ICMM Toronto Declaration: Implementation Process done May 24, 2002 (on file with author).

[55] *See, e.g.*, Marcos Orellana, Access to Information, presentation at "Resourcing the Future," in Toronto (May 2002).

[56] The ICMM is currently based in London, with an estimated budget of US$5-7 million, and is headed by Jay Hair, former President of IUCN-The World Conservation Union and Executive Director of the National Wildlife Federation.

[57] *See* Marcos Orellana, The Washington Agreement on Gold, *available at* www.iied.org/mmsd_pdfs/030_orellana.pdf (last visited July 22, 2002).

[58] The other key gold holder, the International Monetary Fund, may sell gold only with the approval of 85% of the total voting power of its Executive Board, which effectively gives the United States a veto.

[59] Protocol on the Statute of the European System of Central Banks and the European Central Bank to the Amsterdam Treaty on the European Union, *available at* europa.eu.int/eur-lex/en/treaties/selected/livre324.html (last visited July 22, 2002).

Although the WAG does not contain formal mechanisms for renegotiation, a review process is scheduled for 2004. It has been proposed that the WAG include provisions on controlled sales of gold, implemented with appropriate safeguards to avoid detrimental effects on small-scale miners in developing countries dependent on gold. Also, it has been proposed that the WAG create a compensation fund to alleviate the transition from gold-dependent economies to lesser volumes of extraction, in addition to remedying past wrongs.[60] The renegotiation should be transparent and open to the participation of stakeholders around the world. Different views and interests on the role of the WAG must be exchanged and confronted in a proper venue for debate, particularly given the sensitive issues involved in the WAG: environment, equity, financial structure, and mining, to name a few.

F. UNEP's Cyanide Code

Cyanide is an ultra-hazardous chemical produced in the order of 1.4 million tons annually, of which 13% is used by the mining industry for the production of gold. In January 2000, an overflow of mine tailings from the Aurul Gold smelter's dam in Baia Mare, Romania, released 100,000 cubic meters of cyanide-tainted wastewater within 11 hours into the Lapus and Somes Rivers, before crossing the border into Hungary. The cyanide was carried downstream to the Danube River in Yugoslavia, devastating local ecosystems. Then, in October 2001, villages in western Ghana were also hit by a spill of thousands of cubic meters of mine wastewater contaminated with cyanide when a mining dam ruptured. Earlier similar accidents have been recorded in Guyana, Colorado, and Kyrgyzstan.[61]

The Baia Mare accident produced widespread transboundary contamination and sparked public outrage in Europe, setting the stage for discussions on how to elaborate standards for cyanide management and emergency response. To address these concerns, in May 2000, the mining industry took the lead in calling for a two-day multi-stakeholder workshop held in Paris to consider the development of a voluntary industry code of practice for the use of cyanide in mining.

The United Nations Environment Program (UNEP) and the International Council on Metals and the Environment (ICME, the predecessor of the ICMM) selected a steering committee to elaborate such a code. The committee consisted of participants mainly from the mining industry, and a few from government, academia, NGOs, labor, and financial institutions. Some civil society organizations engaged in the process at first, hoping that it would lead to the enactment of meaningful standards and to their enforcement. However, these organizations soon felt that industry had hijacked the process and that most of the NGO comments were ignored. Accordingly, the Cyanide Code that was ultimately developed[62] has been criticized since as "greenwash," "giving the appearance that the regulatory inadequacies have been addressed, without actually requiring the changes necessary to protect communities and the environment."[63]

The Cyanide Code is not intended to derogate from laws and regulations, but to complement them. Also, compliance with the Code is entirely voluntary and does not create enforceable rights or obligations. To administer the Code, a nonprofit corporation controlled by the gold mining industry was established, the International Cyanide Management Institute. Gold companies that become signatories to the Code are not required to have all of their operations certified, only those that they have specifically requested. In turn, cyanide suppliers and transporters can become Code supporters and may conduct audits, but cannot become signatories.

The Code is comprised of principles that broadly state voluntary commitments and standards of practice that identify performance goals and objectives. Independent third-party audits, including site inspections and review of records, will verify every three years whether operations meet the standards of practice and will certify compliance if warranted. Only a summary of the audit report will be made available to the public on the Code's website.[64] Operations that are only in partial compliance will be conditionally certified, subject to the successful implementation of an action plan to be posted on the Code's website. The Institute will develop a procedure for resolving disputes regarding auditor credentials or otherwise arising from the certification scheme. It is yet unclear what types of spaces will be established in this conflict resolution mechanism for the participation of interested parties or affected communities.

The Code focuses exclusively on the safe management of cyanide, addressing production, transport, storage, and use of cyanide, and the decommissioning of

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[60] Orellana, *supra* note 57.

[61] *See* Mineral Policy Center Factsheet: Cyanide, *available at* www.globalminingcampaign.org/theminingnews/assets/pdf/cyanide_leach_packet.pdf (last visited July 22, 2002). In Kyrgyzstan, the European Bank for Reconstruction and Development and the International Finance Corporation participated in the financial arrangements of the gold mine.

[62] The International Cyanide Management Code for the Manufacture, Transport and Use of Cyanide in the Production of Gold, *available at* www.cyanidecode.org (last visited July 22, 2002) [hereinafter Cyanide Code].

[63] Press Release, CEE Bankwatch et al., Cyanide Mining Hazards Endanger Communities, Environment (Feb. 21 2002), available at www.foeeurope.org/press/21.02.02_Cyanide.htm (last visited July 22, 2002); *see also* Danielle Knight, *ENVIRONMENT: Groups Urge "No" to Cyanide Use in Mining*, Inter Press Service, Feb. 21, 2002, *available at* www.oneworld.org/ips2/feb02/00_15_001.html (last visited July 22, 2002).

[64] *See* Cyanide Code, *supra* note 62, at 8.

cyanide facilities, as well as on financial assurance, accident prevention, worker health and safety, and emergency response. The Code also deals with community dialogue, recommending public consultation and disclosure. In this regard, the Code's standards of practice call for making "appropriate operational and environmental information regarding cyanide available to stakeholders."[65] The question of what is appropriate in this ambit will have to be answered by the audit teams.

The Code has been presented as an important step forward in managing the risks associated with cyanide use, but a careful reading of the Code reveals critical gaps and omissions.[66] First and ironically, the Code neglects design and construction issues of tailings impoundments, which was an important element causing the Baia Mare accident. Then, there is no provision for limiting or excluding cyanide use from locations and environments where it cannot be effectively controlled. Further, the verification and compliance provisions are extremely weak. Even more, the Code is deficient with respect to operations, neglecting to require verifiable measures, as required by many legal regimes, including leak detection systems, mandatory reporting of leaks and discharges, double liners for process ponds, and other containment-related requirements. Finally, the Code does not contemplate clear instances for the participation of the public in the certification process. That is, the Code standards actually lower the standards of best practice to something far more subjective and ambiguous.

V. THE ROAD AHEAD

The road ahead for advancing governance structures applicable to mining has many tracks, some of which run in parallel, some of which run in different directions. Three of the main players in the global mining debate are elaborating on these tracks: NGOs, governments and intergovernmental organizations, and industry. Community-based initiatives toward standard-setting and mechanisms of control for mining have received increased attention. Also, the Global Mining Campaign Network[67] has elaborated a set of demands that provide a basis for actual progress. Second, a proposal for the creation of a multi-stakeholder forum, advanced separately by Canada and UNEP, would open new spaces for global debate on mining policy. Industry, in turn, has taken stock of the MMSD research and elaborated concrete steps on a number of issues, including constituency engagement and community development.[68] All these proposals face major obstacles, but their contribution to improving governance in mining may be significant.

A. A Multi-Stakeholder Forum

The forum being proposed by Canada would be "a global dialogue of governments" to examine the manner in which governments can promote the "life cycle contribution of mining to sustainable development, including a focus on communities."[69] Canada acknowledges that the issues would be best addressed by "encouraging participation of stakeholders such as industry, labour, Indigenous groups and NGOs," although the actual mechanisms for this are yet unclear.

Following a similar approach, the global forum on mining, minerals, and metals proposed by UNEP also seeks to facilitate a global multi-stakeholder dialogue on mining and its relationship to sustainable development.[70] Rather than creating a new institution, UNEP proposes that the forum would build on existing consultative regional groups such as APEC, CAMMA, and SADC, discussed above. This forum would be guided by a steering committee, in which environmental and community NGOs could participate along with industry, academia, professional associations, development banks, and governments.

The proposal for the creation of a multi-stakeholder forum has to face a history of denial of community rights, which severely curtails the prospects of trust by civil society in global structures. Moreover, the global initiatives explored in this chapter have to a large extent exhausted the financial and other resources available for participation, especially of affected communities and NGOs. It has also been questioned whether these global processes have resulted in anything beyond rhetoric and discourse of change, with business as usual on the ground. The question of how to structure a multi-stakeholder process poses its own set of issues, including the convening institution, the scope of discussions and working groups, the organizations invited to participate, financial resources necessary to convene the forum, and most importantly, the concrete outcomes expected from the effort. In this regard, the lack of clarity as to expected outcomes of these time and resource consuming processes could undermine the effectiveness of these forums to advance public participation and governance.

B. The ICMM Work Program

The ICMM Declaration identified the issues of highest priority to industry and set the basis for its imple-

[65] *Id.* prin. 9, Standard of Practice 9.3.

[66] *See* Letter from Susan Bass & James McElfish, Environmental Law Institute to UNEP re the Cyanide Code (Dec. 10, 2001) (on file with author).

[67] *See* www.globalminingcampaign.org/theminingnews.html (last visited July 22, 2002).

[68] *See* ICMM Toronto Declaration, *supra* note 54.

[69] Canada, Sustainable Development in the Mining/Metals Sector: The Need for a Global Dialogue of Governments (draft for discussion) (Mar. 2002) (on file with author).

[70] UNEP, Global Forum on Mining, Minerals, and Metals (draft for

mentation process.[71] The Declaration acknowledged that successful mining requires the support of the communities in which they operate, and thus serious engagement with them is required. The implementation process builds on this realization by outlining a series of concrete steps. These include the development of voluntary protocols to encourage third-party verification and public reporting of performance, prepared in consultation with ICMM Members and other key constituencies.[72] Another area targeted for action is ICMM's intent to engage "in a constructive dialogue process with key constituencies" by improving the opportunities created by the MMSD.[73] This multi-party engagement process requires prior discussion with key constituencies on relevant guidelines, expectations, and timetables.[74] Finally, the ICMM together with the World Bank is also contemplating action on developing tools and systems regarding how industry "can interact with communities in an effective, timely, and responsible manner."[75] Although it is too soon to assess these initiatives by ICMM, they do represent a transition from the MMSD research towards concrete plans of action.

C. Community-Based Proposals

A community-based proposal that has received increased attention is the creation of mechanisms of control for extractive industries by local communities. This initiative contemplates discussions on several issues, including standard-setting processes that may express the rights and demands of affected communities and the role of communities in monitoring and oversight of mining activities. The asserted need for mining companies to obtain a social license in order to operate provides the context for debate over the appropriate tools in advancing standards and roles. Recently, the limitations on legal strategies arising from a lack of resources (including information, technical studies, and so forth), unwieldy bureaucratic structures, and often endemic corruption have placed the focus of attention in alternative mechanisms, such as good neighbor agreements and certification.

Good neighbor agreements represent an attempt to set up a parallel governance structure that builds on and goes beyond guarantees provided by laws. Some examples include "participation agreements" in Canada, "local agreements" in the United States, "future acts agreements" in Australia, and the "corporate social investment program" in South Africa.[76] These private-private sector models of public participation complement regulatory models.

Certification is being discussed in a variety of forums. Industry retains a clear interest in distinguishing leaders from laggards, and certification is viewed as a tool for accomplishing this. In contrast, communities are weary of a tool that may serve to "greenwash" unfulfilled promises by an industry with a meager record of compliance and respect for human and environmental rights. As to date, certification initiatives include the ISO 14000 series, which deal more with environmental management systems than with substantive standards; certification under the Cyanide Code, discussed earlier; government certification of diamonds, also discussed earlier; and two NGO-driven initiatives. For example, WWF Australia is working with Placer Dome on a pilot certification system; and ELI, OXFAM America, and SPDA are conducting a project to explore adequate mechanisms of control, including certification, in the Andean Region. Many questions remain open, such as who would set the standards and through what process, how standards would incorporate public participation and access to information, what roles communities may have in monitoring and oversight, who would verify compliance, what kind of markets could provide a preference for certified products, and what is the role of financiers and insurers in a certification scheme, among others.

Finally, the Global Mining Campaign Network (GMC) has been launched by NGOs, community-based organizations, and activists from around the world to hold mining companies accountable for their performance on environmental, human rights, cultural rights, economic, and social issues. GMC has recently discussed and finalized a document that contains its demands, including procedural environmental rights.[77] *Digging for Change* demands that mining companies must not conduct operations without free, prior informed consent of all affected communities. The GMC also insists that communities must have access to all relevant information, that it is provided in local languages and through culturally appropriate means, and that it is provided in a timely, affordable and convenient manner to ensure informed input and meaningful participation in decisionmaking. Also, the GMC maintains that mining operations must not be permitted without full environmental and social impact assessments with adequate opportunity for public input and review.

discussion) (March 25, 2002) (on file with author).

[71] *See* ICMM Toronto Declaration, *supra* note 54.

[72] *Id.* at 1-2.

[73] ICMM Toronto Declaration: Implementation Process, *supra* note 54, at 6-7.

[74] This discussion process is underway and will be reported on during the upcoming ICMM Principal Liaison's meeting in Helsinki.

[75] ICMM Toronto Declaration: Implementation Process, *supra* note 54, at 8.

[76] *See* Breaking New Ground, supra note 40, at 303.

[77] GMC, Digging for Change: Towards A Responsible Minerals Future, and NGO and Community Perspective, *available at* www.globalminingcampaign.org/theminingnews/solutions.html (last visited July 22, 2002).

VI. CONCLUSION

The initiatives discussed in this chapter provide evidence on the values associated to the participation of civil society in the debate on mining policy. These values flow from several sources. First, NGOs possess specialized knowledge and views that enhance the opportunities for critical, informed discussion. Also, the participation of civil society through formal channels may prevent social instability. More significantly, however, the participation of communities in decisions that affect them is an imperative of equity and closely tied with fundamental human rights.[78]

This chapter has examined experiences with access to information, public participation, and access to justice at the local, national, regional, and global levels. At the local and national level, experiences in Perú and Turkey highlight the difficulties in utilizing courts to enforce environmental rights. In turn, the regional initiatives show that progress in involving civil society has been particularly slow, perhaps because the focus of regional bodies on "economic growth" has yet to confront the broader social and political challenges involved in sustainable development. At the global level, the coordination and links between international and local NGOs have placed greater pressure on the various forums to ensure transparency and participation. Still, in the global sphere results have been mixed: the Cyanide Code, for example, ignored most of NGOs comments, in contrast with the MMSD process which actively sought public engagement.

Each of the different experiences and forums described in this chapter poses a particular set of issues, which makes general conclusions difficult, save for one: in the challenge of unearthing governance, the opportunities presented by increased public involvement should not and cannot be ignored further.

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[78] *See* Carl Bruch & Sarah King, *Constitutional Constitutional Procedural Rights: Enhancing Civil Society's Role In Good Governance*, in this volume.

ACCESS TO INFORMATION, PARTICIPATION AND JUSTICE: KEYS TO THE CONTINUOUS EVOLUTION OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

Danièle M. Jean-Pierre *

This chapter explores access to information, public participation, and access to justice within the Inter-American System for the Promotion and Protection of Human Rights (the Inter-American System for Human Rights or the System). The first section examines the regional documents that establish the System and provide the legal foundation for human rights complaints within the System. The second section analyzes the institutional framework and functions of the System. The third and forth sections discuss the procedural dimensions of Inter-American Commission on Human Rights (the Inter-American Commission or the Commission) and the Inter-American Court of Human Rights (the Inter-American Court or the Court) as examples of international bodies that provide an avenue for access to justice and information for human rights violations in the Americas. The final section concludes with a case study of the *Awas Tingni Community v. Nicaragua* case, which was adjudicated before the Court, as an example of access to justice, information, and public participation within the System. In sum, this discussion will demonstrate that access to justice, information, and public participation are fundamental to the development and operation of the Inter-American System for Human Rights.

I. BASIC INSTRUMENTS PROMOTING AND PROTECTING HUMAN RIGHTS IN THE AMERICAS

The American Declaration of the Rights and Duties of Man[1] (the American Declaration or the Declaration) and the American Convention on Human Rights[2] (the American Convention or the Convention) establish the Inter-American System for Human Rights. According to the Charter of the Organization of American States (OAS), respect for the "fundamental rights of the individual without distinction as to race, nationality, creed or sex" is one of the primary principles espoused by the states that are members of the OAS.[3] While the OAS Charter expounds on the rights and duties of member states, the Declaration delineates the rights and duties accorded to all human beings. The rights mentioned include, among others, the right to life, liberty, and personal security; the right to the preservation of health and to well-being; the right to the benefits of culture; the right to petition; and the right to property.[4] Although the Declaration provides for the promotion of many basic rights, it fails to establish any type of enforcement mechanism to protect these enumerated rights. Notwithstanding the foregoing, the Declaration is a vital instrument in the System because all OAS members are signatories and, thus, are subject to respect the rights and undertake the duties described therein.

The American Convention, in contrast, does provide for an enforcement mechanism in the form of the Inter-American Commission and the Inter-American Court. The Convention was signed at the Inter-American Specialized Conference on Human Rights, in San José, Costa Rica on November 22, 1969. A more substantive human rights instrument, the Convention reaffirms the principles expressed in the OAS Charter and the Declaration, then elaborates on the civil and political rights that states who have ratified the Convention must endeavor to promote and protect, and finally creates an affirmative obligation for the states parties to respect human rights. For instance, Article 2 of the Convention states, "[w]here the exercise of any rights or freedoms referred to in Article 1 is not already en-

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[1] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted at Bogotá, Colombia on Mar. 30 - May 2, 1948, *available at* www.cidh.oas.org/Basicos/basic2.htm (last visited July 16, 2002) [hereinafter American Declaration].

[2] American Convention on Human Rights, done at San José, Costa Rica on Nov. 22, 1969, entered into force July 18, 1978, OAS Treaty Ser. No. 36, *available at* www.cidh.oas.org/Basicos/basic3.htm (last visited July 16, 2002) [hereinafter American Convention].

[3] Charter of the Organization of American States, art. 3(l), done at Bogotá, Colombia on April 30, 1948, entered into force Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361; as amended by the Protocol of Buenos Aires (1967), the Protocol of Cartegeña de Indias (1985), the Protocol of Washington (1992), and the Protocol of Managua (1993), *available at* www.cidh.oas.org/Basicos/charter.htm (last visited July 16, 2002) [hereinafter OAS Charter].

[4] American Declaration, *supra* note 1, arts. I-XXVI.

sured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."[5] Unlike the Declaration, the Convention not only lists the rights[6] but also explains the scope of the rights. For example, according to Article 23, "Right to Participate in Government," every citizen must have the right and opportunity to participate in public affairs, through democratically elected representatives or directly and have the right to vote in free and fair elections, subject to state regulations for "age, nationality, residence, language, education civil and mental capacity, or sentencing by a competent court in criminal proceedings."[7]

The most significant aspect of the Convention is the formation of a system to ensure that human rights are protected. Article 33 creates the Commission and the Court as organs having "competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention."[8] The Commission is essentially an organ of the OAS. Its functions consist of increasing awareness of human rights issues in the Americas, preparing various human rights reports in accordance with its duties and submitting them to the OAS General Assembly or individual states, recommending courses of action to member states to safeguard human rights and considering petitions alleging human rights violations. The Court, on the other hand, is an autonomous judicial body vested with authority to adjudicate alleged human rights abuses by states parties that have submitted themselves to the jurisdiction of the Court. Because of this significant power, some states have ratified the Convention, without accepting the contentious jurisdiction of the Court. States parties that have accepted the competence of the Court include the following: Argentina,* Barbados, Bolivia, Brazil, Chile,* Colombia,* Costa Rica,* Dominica, Dominican Republic, Ecuador,* El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica,* Mexico, Nicaragua, Panama, Paraguay, Peru,* Suriname, Trinidad & Tobago, Uruguay,* and Venezuela.*[9] The Court derives its strength from acceptance of its jurisdiction; however, any country in its discretion can rescind its acceptance. However, once a state party has ratified the Convention, it may only withdraw from it after the expiration of a five-year period. After this initial five-year period, withdrawal will be granted if the state party provides one-year notice to the Secretary General of the OAS.[10]

In addition to the Convention and Declaration, other documents relevant to the System and adopted by the OAS General Assembly include the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,[11] the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities (the basic instruments). The basic instruments are a manifestation of the continuous development and evolution of human rights norms in the System. Each state party is subject to these instruments based on its status of ratification.

II. AN OVERVIEW OF THE INTER-AMERICAN COMMISSION AND COURT

As previously mentioned, the Inter-American System for Human Rights is essentially composed of one OAS organ that administers the System, the Inter-American Commission on Human Rights, and an autonomous judicial institution, the Inter-American Court of Human Rights, as well as conventions, protocols, and declarations ratified by various member states. The Commission and the Court investigate and adjudicate alleged human rights abuses by individuals and state actors.

[5] American Convention, *supra* note 2, art. 2.

[6] In addition to Article 16 (freedom of association), Article 23 (right to participate in government), and Article 25 (right to judicial protection), the enumerated civil and political rights are the following: right to life, right to humane treatment, freedom from slavery, right to personal liberty, right to a fair trial, freedom from ex post facto laws, right to compensation, right to privacy, freedom of conscience and religion, freedom of thought and expression, right of reply, right of assembly, rights of the family, right to a name, rights of the child, right to nationality, right to property, freedom of movement and residence, and right to equal protection.

[7] American Convention, *supra* note 2, art. 23.

[8] *Id.* art. 33.

[9] The asterisk (*) denotes states that have accepted the competence of the Inter-American Court to receive and examine communications in the limited circumstance when one state party alleges that another state party has violated the human rights set forth in the Convention, but not when an individual person or nongovernmental entity has lodged the complaint.

[10] American Convention, *supra* note 2, art. 78.

[11] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, signed in San Salvador, El Salvador on Nov. 17, 1988, OAS Treaty Series No. 69, *available at* www.cidh.oas.org/Basicos/basic5.htm (last visited July 16, 2002) [hereinafter Protocol of San Salvador]. This protocol recognizes more economic, social and cultural rights than the Declaration or Convention, including the right to a healthy environment in Article 11:

(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services.

(2) The States Parties shall promote the protection, preservation and improvement of the environment.

The Commission, composed of seven members who are elected for a four-year term by the OAS General Assembly, has several functions within the System. The objectives of the Commission with respect to member states consist of increasing awareness of human rights issues in the region, advising member states on measures to protect human rights, obtaining reports from member states detailing efforts to promote human rights in general, surveying the overall human rights condition in a state, drafting reports in furtherance of its objectives, and submitting an annual report to the General Assembly of its work throughout the year.[12] As an OAS organ, it serves in an advisory capacity to any member state and to the OAS. Thus, any member state may seek counsel from the Commission on a question of human rights, such as how to make its domestic legislation conform to the basic instruments of the System. Additionally, the Commission has the authority to review and investigate petitions alleging violations of the American Declaration, such as the right to life, equality before the law, and due process of law. In order to exercise this power, the Commission must ensure that all domestic remedies have been exhausted before pursuing any action against a member state. Given the limited powers of the Commission with respect to states not party to the American Convention, the only recourse the Commission has at the conclusion of an examination of a petition regarding a nonparty is to make recommendations to the member states and perhaps prepare a special report on the status of human rights observance in that state or other reports in furtherance of human rights protection.[13]

With respect to states parties, the powers accorded to the Commission pursuant to the American Convention are more substantial. Thus, in addition to the functions mentioned above, the Commission can consider petitions, appear before the Court in a human rights case, and petition the Court for preliminary injunctive relief in urgent cases. The Commission also has the authority to seek consultation from the Court regarding interpretation of the basic instruments of the System. Another function of the Commission is to ensure that the basic documents effectively promote and protect human rights in the Americas. Thus, the Commission has the ability to submit proposed amendments or additional draft protocols to the American Convention to the General Assembly for ratification. This power is meant to allow human rights principles to evolve continuously and adapt for more effective protection and implementation.[14]

The Inter-American Court of Human Rights is a seven-member judicial institution of last instance within the System, meaning that there is no court with higher authority that can review its decision. The General Assembly selects the judges from among human rights jurists from OAS states. The Court has two primary roles, one advisory and one adjudicative. Like the Commission, the Court may provide consultation to OAS member states that inquire about domestic statutory compliance and the interpretation of the Convention or other treaties. The Court can also issue an advisory opinion at the request of the Commission or other OAS organ pursuant to Article 64 of the American Convention. Once a state party to the Convention has recognized the competence of the Court, the Court can adjudicate a human rights case brought before it by the Commission, the only institution with the authority to initiate a case before the Court. Thus, the Commission will always be a party in all cases before the Court. Since Court judgments are binding, the Court has the responsibility of following up on compliance with its decision.[15] The Court monitors compliance by ordering the state to submit follow-up reports and by ordering the Commission to monitor compliance. In addition to a ruling in the case, the Court can order a state party to pay reparations and any costs incurred as a result of the litigation. The Court can issue injunctive and declaratory relief at its discretion.

III. ACCESS TO JUSTICE IN THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS

The litigation process of the Inter-American System for Human Rights begins with the submission of a petition to the American Commission alleging a violation of human rights recognized in the basic instruments. The procedure for claiming a human rights violation against member states that have not ratified the Convention is essentially the same as for states parties to the Convention except for the following: (1) the grounds for a claim must be based on the American Declaration, as opposed to the American Convention; and (2) the Commission cannot refer the case to the Inter-American Court.[16] The Commission will recognize the submission of a petition by any person, group of persons, or nongovernmental organization (NGO) legally recognized in at least one OAS member state. A person can file a complaint on his own behalf or on that of a third party.[17] An attorney or other person may represent the petitioner before the Commission. Additionally, the Commission may ini-

[12] Statute of the Inter-American Commission on Human Rights, art. 18(a)-(h), approved in La Paz, Bolivia on Oct. 1979, OAS/GA Res. No. 447, *available at* www.cidh.oas.org/Basicos/basic15.htm (last visited July 16, 2002) [hereinafter Statute of the Inter-American Commission].

[13] *Id.* art. 20(a)-(c).

[14] *Id.* art. 19(a)-(f).

[15] *See infra* section V.

[16] Rules of Procedure of the Inter-American Commission on Human Rights, arts. 49-50, approved Dec. 4-8, 2000, *available at* www.cidh.oas.org/Basicos/basic16.htm (last visited July 16, 2002) [hereinafter Rules of Procedure of the Inter-American Commission].

[17] The person, group of persons, or entity that submits the petition to the Commission shall hereinafter be called the "petitioner."

tiate the petition process on its own.[18] Petition forms and the Commission's contact information are available via the Internet at the Commission's website (www.cidh.oas.org/basic.htm). The completed form can be submitted to the Commission by mail, fax, or e-mail.

The petition process before the Commission concerning states parties to the Convention is rigorous and protracted. Before a petition can be considered by the Commission, it must be initially reviewed and processed by the Commission's administrative organ, the Executive Secretariat, for compliance with the petition requirements of Article 28 of the Commission Rules of Procedure. As a result, the Commission has adopted an expedited process whereby temporary measures can be taken to protect persons in immediate danger. This type of preliminary injunctive relief can be granted at the request of the petitioner or at the initiative of the Commission. If the Commission grants precautionary measures, it will request that the state undertake to protect an individual or individuals from irreparable harm until the Commission makes a final determination.[19] Precautionary measures are not final decisions in a matter. In addition to the precautionary measures, the Executive Secretariat can immediately send a petition to the Commission for review in urgent cases. During the admissibility phase, the Commission can exert pressure on the state to respond as soon as possible to its request for information. Finally, the Commission can investigate the case in the state after the admissibility requirements have been fulfilled.[20]

A. The Commission Process

According to Article 28 of the Commission Rules of Procedure, each petition presented to the Commission must contain the following information in order to be processed:

a. the name, nationality and signature of the person filing the petition. If a non-governmental organization files the petition, then the name and signature of the legal representative;
b. whether the Commission can release the petitioner's identity to the State;
c. comprehensive contact information, an address, phone and fax number, e-mail address;
d. a detailed description of the alleged violations, specifying the place and date;
e. the name of the victim and of any public authority aware of the alleged violations;
f. the State allegedly responsible, by act or omission, for the violation of any human rights recognized in the American Convention and other applicable instruments;
g. evidence that the petition was presented within 6-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies;
h. all measures undertaken to exhaust domestic remedies, or the impossibility of doing so; and
i. confirmation that the complaint is not pending in another international settlement proceeding.[21]

If any complaint does not conform to the requirements, the Commission will grant the petitioner leave to amend the form pursuant to Article 28. During this initial review phase, complaints are sometimes joined or divided depending on the specific facts at issue.

Once a petition has met the formal requirements, the Commission must decide whether the alleged victim has a valid claim for relief.[22] At this juncture the Commission through the Executive Secretariat will conduct an investigation by asking the state to respond to the petition. If necessary, the Commission may ask the petitioner to submit additional information or order a hearing. In any case, the state has two months to respond to the allegations and may receive a one-month extension. If the petitioner has a valid claim, the Commission will further investigate whether all domestic legal avenues for relief have been exhausted. During this phase of the process, the burden is on the state to prove that domestic remedies have not been exhausted. There are three exceptions to the exhaustion of legal domestic remedies requirement: (1) lack of rights to due process in the domestic legislation to protect the human rights in question; (2) denial of access to domestic remedies or to exhaustion of domestic remedies; and (3) undue delay in delivering a final judgment.[23] Once admitted, the petition shall then be registered as a case, and proceedings on merits can begin.

As the foregoing has demonstrated, litigation before the Commission is a slow process. The correspondence, investigation, and verification that must occur in the admissibility phase can take months or even years. Then after a case is opened, the petitioner has two months to produce further evidence and the state has another two months to respond. The Commission has the responsibility of determining what information from one party should be disseminated to the other party in order to

[18] Rules of Procedure of the Inter-American Commission, *supra* note 16, arts. 23-24.
[19] *Id.* art. 25.
[20] *Id.* art. 40(2).
[21] *Id.* art. 28(a)-(i).
[22] The alleged victim or victims, the next of kin, or duly appointed representative shall hereinafter be called the "claimant." While the claimant is the alleged victim, the petitioner is the person, group of persons, or organization that files and presents the petition before the Commission. The claimant and petitioner can be the same person but are usually different people.
[23] Rules of Procedure of the Inter-American Commission, *supra* note 16, at art. 31(2).

advance the case. At its discretion, the Commission may convene hearings on the matter. While this long process may or may not be advantageous to an individual petitioner, it helps to validate the System as a whole because the Commission undertakes to conduct a thorough investigation in every matter.

The facts conveyed to the state from the petition are presumed valid unless otherwise invalidated. Thus, as in the admissibility phase, the burden is on the state to disprove alleged facts during the two-month response period. This allocation of presumptions and burdens heavily favors the petitioner. Once the Commission has gathered enough information and evidence from both sides and conducted its investigation, it shall deliberate the merits in private and draft a detailed report on its decision. There are no time requirements for the Commission to make its determination.

If no violations are found, the report will be adopted and published in the Commission's Annual Report. If the petitioner has successfully established that the state has committed any human rights violation, the Commission will issue a preliminary report to the state, proposing remedial measures to protect human rights. The state then must report back to the Commission by a time designated (usually within three months) by the Commission on any action in compliance with the proposed suggestions. Three months after the issuance of the preliminary report, if the case remains unresolved, such that there is no referral to the Court and the state has not complied with the Commission's proposals, the Commission will prepare a final report with further suggestions. Both parties (i.e., the petitioner and the state) will then have an opportunity to demonstrate compliance or non-compliance, as the case may be, with the recommendations. With this information, the Commission at its discretion can decide whether or not to publish the report separately or include it in its Annual Report.[24]

Since the authority of the Commission revolves around recommending strategies to protect human rights, it can continue to monitor the situation in the state and convene hearings at its discretion on adherence to its proposals or to settlement obligations. It also has the discretionary power to issue reports on its monitoring activities. For example, since 1969 the Commission has been investigating and reporting on human rights in Haiti. It issued special reports on this topic in 1969, 1979, 1988, 1990, 1993, 1994, and 1995.[25]

At any stage of the process after the case has been declared admissible but before a decision on the merits, the option of a friendly settlement is available. The Commission or either party may initiate settlement talks. Both parties, the state and the petitioner, must mutually consent to the settlement procedure and to the Commission serving as a facilitator. The petitioner, in its capacity as representative of the claimant, has the right to fully engage in the settlement negotiations. If one party decides not to participate, the settlement proceedings will be terminated. If a settlement is not reached between the parties, then the parties will resume the litigation process. If the parties agree to settle based on adherence to the human rights principles of the Declaration and Convention, the Commission will adopt and publish a report, available at its website describing the situation and its resolution.[26]

A matter decided before the Commission can only be referred to the Court if that state party has accepted the contentious jurisdiction of the Court, pursuant to Article 62 of the Convention. If a state is in violation of one of the OAS basic instruments and has recognized the Court's jurisdiction, the Commission will adopt a report on the merits, send it to the state, then notify the petitioner of the report and its transmittal to the state. The petitioner has one month from this notification to present an additional brief arguing that the Commission should refer the case to the Court. In the petitioner's additional brief, any claims for costs or reparations should be included as well as the position of the claimant and any relevant evidence. A case in which the state has blatantly disregarded the Commission's recommendations is a prime candidate for referral to the Court. However, the decision to refer to the Court will also be based on the egregiousness of the violation, the arguments of the petitioner, the reliability of the evidence, the need to develop jurisprudence in the System on a particular matter, and the possible improvements to the domestic legal system that could occur with compliance to a Court decision.[27]

B. The Court Process

As a party before the Court, the respondent state must designate an agent to represent its interests. Likewise, the Commission must appoint one or more delegates to proceed with the matter. The Commission may appoint the petitioner as one of its delegates. The claimant, however, has the right to participate in the proceedings independently from the Commission by offering evidence and any additional arguments at its preference.[28]

The process to appear before the Court begins with the submission of an application by the Commission on behalf of the petitioner and claimant. This application

[24] *Id.* art. 45.

[25] *Available at* www.cidh.oas.org/country.htm (last visited July 18, 2002).

[26] Rules of Procedure of the Inter-American Commission, *supra* note 16, art. 41.

[27] *Id.* art. 44.

[28] Rules of Procedure of the Inter-American Court of Human Rights, art. 23, approved on Nov. 24, 2000, *available at* www.cidh.oas.org/Basicos/basic18.htm (last visited July 16, 2002) [hereinafter Rules of Procedure of the Inter-American Court].

must specify the allegations and facts, claims for compensatory damages and costs associated with litigation, the parties (including the state, non-state perpetrators, or both), an explanation of the relevance of witnesses' and expert witnesses' proposed testimonies and other evidence, legal arguments, and conclusions. In addition to that information, the application should provide background information on the Commission review and admissibility procedure as well as the final report on the matter prepared by the Commission pursuant to Article 50 of the American Convention. Only the evidence described in the brief will be admitted during oral arguments. The brief should also provide the contact information for the claimant, the petitioner, the agents, and the delegates.[29] Once received in proper form, the secretary of the Court has the responsibility of providing notice to the following entities: the president and judges of the Court, the respondent state, the original petitioner, the claimant, all the states parties to the Convention, and the Permanent Council and Secretary General of the OAS. At this juncture, if the respondent state and Commission have not already selected delegates and agents, the Secretary will request that they do so within one month of the notice.

The deadline for submission of the state's response is two months after the Secretary's issuance of the notice. The respondent (that is, the state) shall include the same elements in its reply brief as those in the Commission's application brief. Likewise, only the evidence discussed in the response is available for admission during the hearing. The respondent's reply brief must also include any preliminary objections (and their factual and legal justifications) or they are waived for the remainder of the proceedings. Any party, delegate, or claimant may respond to the preliminary objections within thirty days of notification. The Court may consider the preliminary objections before it issues a decision on the merits or simultaneously for judicial efficiency. As in the Commission proceedings, the burdens and presumptions favor the claimant. For instance, the Court may presume as valid any allegation or fact not expressly disputed in the reply.

Like most judiciaries, the Court enjoys significant pre-trial procedural authority. For example, the Court has the power to issue preliminary injunctions in the form of provisional measures. Employed in urgent cases to avoid irreparable harm, these provisional measures may be issued by the Court at the request of either party or at the discretion of the Court. The Court determines admissibility of witness and expert witness testimony, the relevance of evidence, and the reliability of evidence. Finally, the Court allows the delegates and agents to settle the case even if proceedings before the Court have commenced.[30] In fact, after a judgment on the merits, these parties can determine the damages. All settlements are subject to Court approval for fairness to the parties.

In addition to the pleadings already submitted and before oral arguments, the parties can request permission to present supplementary pleadings. The decision to supplement the pleadings is at the discretion of the Court. Once the trial begins, the president of the Court presides over the hearings, but any of the seven judges of the Court can question any admissible witness before the Court. Agents, delegates, and the claimant may also examine any witness, subject to the president's determination of relevance. The Court also has the authority to request and obtain any evidence it deems relevant. If a delegate requests that the state produce evidence, the delegate must pay for the production of that evidence. Likewise, the state must pay for the production of evidence it requests from a delegate. However, there is no cost to access the Court.[31] The Court may call its own witnesses and expert witnesses as well as request "any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point."[32] This feature allows the Court to get a comprehensive view of a case, even when the evidence presented by the parties is insufficient for a determination. Also, this provision allows NGOs that are not parties to the case to participate by sharing their knowledge and expertise as requested on a particular issue. After a session, the Court will distribute copies of the court minutes to the delegates, agents, and claimant.

After private deliberations, the Court will issue a judgment and order. A judgment not only includes the decision and the result of the voting on the case, but also the identity of the judges and parties, a summation of the facts, proceedings, legal arguments and conclusions, and any order for costs and reparations. Reparations can also be considered in a separate hearing after the judgment. The Court secretary will then transmit certified copies of the judgment to the states parties to the Convention, the OAS Permanent Council, the Secretary General of the OAS and any other person or entity who requests it. The judgment will eventually be published on the Court's website. Article 29 of the Court Rules provides that "judgments and orders of the Court may not be contested in any way."

[29] *Id.* art. 33.

[30] Usually the delegates, claimant, and petitioners work together on case. However, the officially recognized parties to the case before the Court are the delegates and agents, i.e. the Commission and the state. Thus, the petitioner and claimant do not necessarily have the right to settle the case with the state or even participate in the settlement negotiations.

[31] Rules of Procedure of the Inter-American Court, *supra* note 28, art. 45.

[32] *Id.* art. 44(3).

Although the Commission has an adjudicative feature that is evident in the petition process, it is important to remember that it is not a court. Its primary function in the petition process is to investigate and verify allegations, then make recommendations. Because the Commission is not a court, its obligations for public participation lower, even though making information available to the public is a priority. Since the Court wields so much power and its decisions are final, the process is particularly transparent, more so than that of the Commission. This transparency ultimately strengthens the System from the perspective of the state and the public. Moreover, since the Court is based on Western norms of justice and fairness, a secret court or one less transparent would not be considered legitimate, deterring state submission to its jurisdiction.

IV. PUBLIC PARTICIPATION AND ACCESS TO INFORMATION IN THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS

Public participation and access to information allow the System, conceived and created by states, to benefit from the expertise and contributions of non-state actors. It also makes the System more accountable because these non-state actors can critique the System and aid in its improvement. This section contemplates the opportunities for public participation and access to information throughout the Commission and Court processes.

A. Public Participation

The rules of procedure and statutes of both the Commission and Court set forth opportunities for public participation. Public participation in the System occurs, for instance, when a non-state actor lodges and pursues a petition before the Commission,[33] voluntarily sends an *amicus curiae* brief to the Court for consideration during its session,[34] or attends a public hearing.

According to the Statute of the Court, "the hearings of the Court shall be public and the decisions, judgments and opinions of the Court shall be delivered in public session" and later published with relevant background information.[35] Thus, Court proceedings, held at the headquarters in San José, Costa Rica, are transparent and seek to ensure public access. Unlike that of the Court, the hearings of the Commission are not public and only interested parties, including the petitioner and claimants, may attend.[36] The Commission Rules of Procedure provide that the regular sessions of the Commission as well as the minutes taken at each session are confidential.[37] On the other hand, Article 64 of the Commission Rules allows any person with a general interest in human rights in at least one OAS state to request a hearing before the Commission. The application to appear during a regular session of the Commission must include, "the purpose of their appearance, a summary of the information they will furnish, the approximate time required for that purpose, and the identity of the participants."[38] Thus, although Commission sessions are closed forums, members of the public with a recognized human rights agenda can access the Commission.

There are also occasions for public participation during Commission and Court proceedings. In addition to the participation of the petitioner (discussed in section III above), other non-state actors who are not official participants in the Commission proceedings can submit a brief in support of the petition to the petitioners who at their discretion can then submit it to the Commission as supplemental materials. This type of public participation occurred during the *Awas Tingni Community v. Nicaragua* proceedings before the Commission when the petitioner transmitted to the Commission a brief in support of the petition by other indigenous communities of the North Atlantic Autonomous Region and the Indigenous Movement of the South Atlantic Autonomous Region.[39]

The Court Rules accord significant opportunity for claimant participation in the adjudication process. As explained above, the Commission through its appointed delegates, which can include the petitioners, represents the case on behalf of the claimant before the Court. Thus, even though the claimant benefits from this representation by the Commission and the petitioner, the Rules allow him within thirty days of the notification to offer any evidence, arguments, and requests to the Court.[40] This feature is particularly useful in situations where the interests of the petitioner and claimant might diverge in any respect. For example, environmental NGOs and indigenous groups could have overlapping but different interests in pursuing a violation against a state if the NGO is more concerned with the preservation of natural resources while the indigenous group is

[33] *See supra* section III.

[34] *See infra* section V.

[35] Statute of the Inter-American Court of Human Rights, art. 24, adopted in La Paz, Bolivia on Oct. 1979, OAS/GA Res. No. 448, *available at* www.cidh.oas.org/Basicos/basic17.htm (last visited July 16, 2002) [hereinafter Statute of the Inter-American Court].

[36] Rules of Procedure of Inter-American Commission, *supra* note 16, art. 66.

[37] *Id.* art. 20.

[38] *Id.* art. 64(2).

[39] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, ser. C, No. 79, paras. 1-28 (Inter-American Court of Human Rights Aug. 31, 2001), *available at* www.corteidh.or.cr/seriecing/Mayagna_79_ing.html (last visited July 16, 2002) [hereinafter Awas Tingni Community v. Nicaragua].

[40] Rules of Procedure of Inter-American Court, *supra* note 28, art. 35(4).

more concerned with the protection of their property rights that would allow them to consume rather than preserve natural resources. Although opportunities for public participation in the Court and Commission are different, they are designed to complement the nature of the two institutions and are nonetheless significant.

B. Access to Information

An examination of the basic documents that govern the Inter-American System for Human Rights reveal that there are no established principles that guide the institutions with respect to public access to information. Nonetheless, in practice, both the Commission and the Court strive to make information available, particularly through public hearings, publication of reports, and Internet websites.

The Court and the Commission both prepare and publish reports on their activities. The Court Rules of Procedure mandate that judgments, dissenting or separate opinions, records of hearings, and any other relevant documents be published and are generally made available via the Internet.[41] Article 37 of the Rules of the Commission provides that the public shall have access to the reports on admissibility or inadmissibility rendered by the Commission.[42] The Commission includes these reports in its annual report to the General Assembly, which can be accessed on the official Commission website (www.cidh.oas.org). As discussed above, once the Commission has reached a decision on the merits of the case, it shall prepare a report on the matter. If the Commission has found that the state has not committed a human rights violation, this report will be included in the annual report to the General Assembly, which is available to the public. If the Commission concludes that the state is in violation of a protected right, a non-public preliminary report with recommendations will be sent to the state but not to the petitioner or claimant.[43]

Both the Court and Commission are obligated to submit annual reports to the OAS General Assembly. These reports are published and made available on the Internet as well. The annual reports provide an opportunity for these institutions to highlight their accomplishments of the past year and inform the General Assembly on compliance with recommendations and decisions by states parties and member states. This reporting encourages compliance by member states with the proposals and orders of the Court and Commission. While the contents of the Court's annual report are discretionary, the requirements for the Commission annual report are very specific. According to Article 57(1) of the Commission Rules of Procedure, the Annual Report presented by the Commission to the General Assembly of the OAS shall include the following:

a. an analysis of the status of human rights in the hemisphere, along with recommendations to the states and organs of the OAS as to measures necessary to strengthen respect for human rights;
b. a brief account of origin, legal bases, structure and purposes of the Commission as well as the status of ratifications of the American Convention and all other applicable instruments;
c. a summary of mandates and recommendations conferred upon the Commission by the General Assembly and the other competent organs, and of the status of implementation of such mandates and recommendations;
d. a list of the periods of sessions held during the time period covered by the report and of other activities carried out by the Commission to achieve its purpose, objectives and mandates;
e. summary of activities of the Commission carried out in cooperation with other organs of the OAS and with regional or universal organs of the same type, and the results achieved;
f. the reports on individual petitions and cases whose publication has been approved by the Commission, as well as a list of precautionary measures granted and extended and its activities before the Inter-American Court;
g. a statement on the progress made in attaining the objectives set forth in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and all other applicable instruments;
h. any general or special report the Commission considers necessary with regard to the situation of human rights in member states, and, as the case maybe, follow-up reports noting the progress achieved and the difficulties that have existed with respect to the effective observance of human rights; and,
i. any other information, observation or recommendation that the Commission considers advisable to submit to the General Assembly, as well as any new activity or project that implies additional expenditures.[44]

The official working languages of the Commission and Court are Spanish, French, English, and Portuguese.[45] As the rules indicate, information is not available in any indigenous language on a regular basis. A person appearing before the Court may speak in his own language

[41] *Id.* art. 30.
[42] Recall that the admissibility process takes place once a valid petition has been submitted.
[43] Rules of Procedure of the Inter-American Commission, *supra* note 16, art. 43
[44] *Id.* art. 57.
[45] *Id.* art. 22; Rules of Procedure of the Inter-American Court, *supra* note 29, art. 20.

if he cannot speak in any of the working languages. In this situation, the Court will provide interpretation services. All of the documents on the Court's and Commission's websites are available in Spanish, while a significant amount is available in English. Official documents in French and Portuguese are rare. For instance, the complaint form to file a petition with the Commission is currently available in Spanish and English only.[46]

Although basic instruments, documents, and information about the System are not generally available in indigenous languages, local NGOs may facilitate participation of indigenous peoples. International NGOs do most of the representation before the Court and Commission, and local NGOs serve as a link between indigenous peoples and international NGOs that are familiar with the System. Although the primary means for obtaining information about the System is through the Internet, many people lack access to this technology. As a result, NGOs again play a significant role in the dissemination of information to alleged victims. For example, the Center for Justice and International Law (CEJIL) has conducted over five hundred training programs in Central and South American countries. In 2000, with the assistance of local organizations, CEJIL conducted thirty-one seminars and twenty-one training workshops in thirteen OAS countries attended by approximately one thousand people.[47] Thus, the ability of citizens to get access to information depends on whether they have access to the Internet or whether they have access to a community organization that is familiar with the System. In most cases, local NGOs identify and work with alleged victims and put them in contact with international NGOs that have greater access to the Commission and Court.

V. CASE STUDY: AWAS TINGNI COMMUNITY v. NICARAGUA

The Commission and Court are overwhelmed with cases because they are the only supra-national human rights institutions of their kind in the Americas. According to the 2001 Commission annual report, the Commission processed 936 human rights complaints in that calendar year.[48] For example, it extended or granted 54 precautionary measures and declared 36 cases admissible and 22 inadmissible. It helped facilitate 12 friendly settlements and issued 4 reports on the merits.[49] In calendar year 2001, the Court issued final decisions on 15 cases,[50] while in the fiscal year ending June 2001, the Court ordered 29 provisional measures.[51] These figures do not take into consideration matters addressed but not yet resolved before the Court.

Over the years, the Commission has considered a number of cases that concern indigenous peoples and their rights to life and natural resources. For instance, the Yanomami Indians of Brazil submitted a petition to the Commission alleging human rights violations of rights to life and health arising from a highway that the Brazilian government constructed through their native lands in the state of Amazonas. This construction and later the mining of rich mineral deposits led to the displacement of the Yanomami as well as the introduction of diseases and physical violence between the Indians and those supporting the exploitation. The Commission concluded that the Brazilian government had, indeed, violated rights recognized in the American Declaration such as the rights to life, liberty, and personal security, the right to residence and movement and the right to preservation of health and well-being. It further recommended that Brazil undertake measures to alleviate and prevent the spreading of diseases as well as demarcate indigenous territory.[52] Another petition before the Commission concerned the rights to land and natural resources of the Toledo Maya indigenous communities of Belize. This petition was filed in response to logging and oil development initiated by the government of Belize over an area covering more than half a million acres that these communities had traditionally occupied. The petition alleged violations of the right to preservation of health and well-being and the right to property, among other rights, in the American Declaration. The Commission determined the petition to be admissible and is still considering the case.[53]

The *Awas Tingni Community v. Nicaragua* case is considered a landmark case because it is the first case before the Court to consider specifically the property

[46] *See* www.cidh.oas.org/Basicos/basic20.htm (last visited July 18, 2002). The petitioner can complete the form on-line and directly submit it to the Inter-American Commission on Human Rights.

[47] *See* http://www.cejil.org/english/programs.htm (last visited July 18, 2002).

[48] Of that figure, 718 new complaints were received and processed by the Commission while 96 petitions were initiated by the Commission. *See* www.cidh.oas.org/annualrep/2001eng/chap.3.htm (last visited July 18, 2002).

[49] *See* www.cidh.oas.org/annualrep/2001eng/chap.3.htm (last visited July 18, 2002).

[50] *See* www.corteidh.or.cr/seriecing/index.html (last visited July 18, 2002).

[51] *See* www.corteidh.or.cr/medidas%20ingles/index_pm_iii.html (last visited July 18, 2002).

[52] Res. No. 12/85, Case No. 7615 (Brazil) (Mar. 5, 1985), *available at* www.wcl.american.edu/pub/humright/digest/inter-american/English/annual/1984_1985/res1285.html (last visited July 18, 2002).

[53] Rpt. No. 78/00, Case No. 12,053 (Belize) (Oct. 5, 2000, *available at* www.cidh.oas.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm (last visited July 18, 2002). *See also* Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10, rev.1 (Apr. 24, 1997), *available at* www.cidh.oas.org/countryrep/Ecuador-eng/chaper-9.htm (last visited July 18, 2002) (discussing another case concerning indigenous peoples in Ecuador and their rights to property, resources, health, and life).

rights of an indigenous community. Moreover, the government of Nicaragua complied with its participatory obligations throughout the process, further legitimizing the Inter-American System for Human Rights.[54] An examination of this case provides a synopsis of the type of information that is included in a Court judgment, which is ultimately made public. Because this judgment is available, others who would like to pursue similar matters within the System can review it and use it for guidance. It also reveals how access to information, public participation, and justice are fundamental aspects of the Inter-American System.

This case was initiated because the Republic of Nicaragua granted a Korean corporation, Sol del Caribe, S.A., a thirty-year license to conduct logging operations on approximately 160,000 acres occupied by the Awas Tingni community without its permission.[55] Furthermore, the state had refused to demarcate the community's ancestral territory, which would solidify their property rights. Before pursuing an international human rights solution, the community tried to negotiate with the state, and then exhausted domestic adjudicative remedies. Because Nicaragua is a state party to the Convention and has accepted the competence of the Court since 1991, the Court had jurisdiction to decide this case once it was referred by the Commission. The petition alleged violations of Articles 1, 2, 21, and 35 of the American Convention—the Obligation to Respect Rights, Domestic Legal Effects, Right to Property, and Right to Judicial Protection, respectively.

The petition for this matter was initiated before the Commission on October 2, 1995, and a final decision rendered by the Court was rendered on August 31, 2001, almost six years later. The proceedings before the Commission lasted from October 1995 to May 1998 and before the Court from June 1998 to August 2001.[56] This case illustrates how slow the adjudication process can be in the Inter-American System.

The comprehensive judgment documents both the Commission and Court proceedings from the initial petition to the final Court decision.[57] Jaime Castillo Felipe, a member of the Awas Tingni Community, filed the petition in his own name and on behalf of the Community and requested precautionary measures to stop the State from allowing Sol del Caribe to log on their communal territory. Other participants before the Commission were S. James Anaya and John S. Allen of the University of Iowa College of Law, Clinical Law Programs,[58] attorneys for the claimant; Maria Luisa Acosta Castellon, Nicaraguan Co-Counsel; Jeffrey G. Bullwinkel and S. Todd Crider, of counsel at Simpson Thacher & Bartlett, a New York law firm; and Steven M. Tullberg, an attorney at the Indian Law Resource Center.[59] Pursuant to the Rules of Procedure of the Commission, both parties submitted their briefs to the Commission. In May 1996, the parties agreed to pursue a friendly settlement of the matter and the numerous meetings occurred in pursuit of a settlement. The Commission, in October 1997, granted precautionary measures to the petitioners by calling for the state to suspend any license to log on the territory and to report on its progress in thirty days.[60] The state continued to argue that the Awas Tingni had not exhausted domestic remedies and asked for the closure of the case. Finally in March 1998, the Commission approved Report No. 27/98 and transmitted it to the state. In this report, the Commission proposed that the state secure the property rights of the community by demarcating their territory and suspend the logging activity. It found that the state was in violation of the rights claimed by the petitioners.[61] The state was granted two months to take action and report on the progress to the Commission. The state replied that it had prepared a draft of a law that, once ratified, would institute a system of demarcation. The state also claimed to have cancelled the logging concession in February 1998 and asked the Commission to conclude the proceedings.[62] Instead, on May 28, 1998, the Commission resolved to submit the case to the Court.

During the proceedings before the Court, organizations which were not parties to the case had an opportunity to participate by submitting *amicus curiae* briefs *sua sponte*. These include briefs by the Organization of Indigenous Syndics of the Nicaraguan Caribbean on January 27, 1999; the Assembly of First Nations of Canada on May 31, 1999; the International Human Rights Law Group on May 31, 1999; Robert A. Williams Jr. on behalf of the National Congress of American Indians in November 2000; and the law firm of Hutchins, Soroka & Dionne on behalf of the Mohawks Indigenous Community of Akwesasne on May 31, 2000.[63] The significance of these interventions should not be underestimated since the Court can consider any relevant information

[54] Claudio Grossman, *Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System*, 8(3) HUM. RTS. BRIEF 2, 2 (Spring 2001).

[55] *Id.*

[56] The judgment and order for the entire proceeding are available in English and Spanish on the Inter-American Court website. *See* www.corteidh.or.cr/seriecing/Mayagna_79_ing.html (last visited July 16, 2002).

[57] The following discussion provides an example of the type of information included in a judgment.

[58] This particular clinical program was sponsored by the World Wildlife Fund, an environmental NGO.

[59] S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157, 201 (1996).

[60] Awas Tingni Community v. Nicaragua, *supra* note 40, para. 20.

[61] *Id.* para. 25.

[62] *Id.* para. 26.

[63] *Id.* paras. 41, 42, 52, 61.

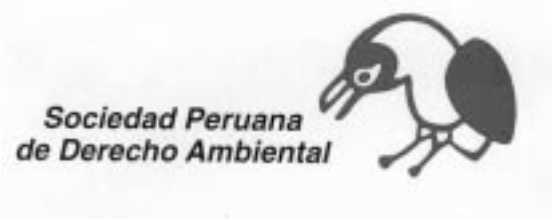
in its discretion. This type of public participation can significantly affect the outcome of the case by offering legal, policy, and factual arguments that might not be reflected in the parties' briefs.

The public hearing on the merits took place on November 16 through 18, 2000 at the Court headquarters in San José, Costa Rica.[64] At this time the parties presented all of the evidence, witnesses, and testimony. The Court ultimately held that Nicaragua violated Articles 1, 2, 21, and 25 of the American Convention. Consequently, the Court mandated that within the next fifteen months the state, with the involvement of the community, "adopt the legislative, administrative, and any other measure required to create an effective mechanism for the delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores."[65] The Court also ordered the payment of reparations in the sum of US$50,000 to the community in the form of "works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Inter-American Commission."[66] Moreover, the Court ordered Nicaragua to pay costs and expense of litigation (not including legal fees) sustained by the community and their representatives within six months of notification of the judgment. This figure, determined to be a total of US$30,000, covers the costs incurred throughout the domestic exhaustion of legal remedies and adjudication before the Commission and Court. Finally, the Court undertook to oversee compliance with its decision and orders by requiring the state to "submit a report on measures taken to comply with this Judgment to the Inter-American Court of Human Rights every six months, counted from the date of notification of this Judgment."[67] The case will officially conclude once the Court is satisfied that the State has fulfill its obligations set forth in the judgment.

VI. CONCLUSION

This examination of the Inter-American System for the Promotion and Protection of Human Rights has described the process of the Inter-American Commission and Inter-American Court while underscoring opportunities for public access to justice, participation, and information. Although public participation was negligible in the initial development of the statutes and rules of procedure of the System, it is now fundamental to the operation of the System. Because any person can file a petition, opportunities for public participation occur at the initiation of a petition before the Commission and continue throughout the proceedings. Likewise before the Court, non-state actors can participate as a delegate or claimant, by submitting *amicus curiae* briefs, or by responding to the Court's request for information or evidence. All of these opportunities ultimately influence how the Court interprets and applies human rights principles in its decisions. Finally, because the Commission and Court do not have the resources to initiate, investigate, and pursue all human rights violations that occur in the Americas, the public, through individuals or NGOs, plays an important role in bringing violations to the attention of the Commission and Court. As such, public participation is integral to the functioning of the System. Even though the System is still developing and improving, it provides an important supranational venue for people to seek access to justice to ensure that their rights are respected, particularly when those rights are abused by a nation and domestic remedies are inadequate.

[64] *Id.* para. 62.
[65] *Id.* para. 164.
[66] *Id.* para. 167.
[67] *Id.* para. 173(8).



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