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## THE EVOLVING ROLE OF CITIZENS IN ENVIRONMENTAL ENFORCEMENT

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### SUMMARY

In many countries of the world, citizens interested in environmental issues are experimenting with participation in development planning and governmental decisionmaking. However, only in a few countries have governments and citizens developed workable mechanisms for public participation in environmental enforcement. This paper reviews why it is important to encourage citizen participation in environmental enforcement efforts and outlines the main elements which citizens have found necessary to ensure their participation, such as legal rights and remedies, clear environmental standards, and access to information. The paper then outlines common strategies for public participation in enforcement which are being initiated in many countries at the national level, such as citizen monitoring and inspection, public complaint mechanisms, and citizen enforcement suits. It concludes with a discussion of new options for transboundary public participation in enforcement and examples of how international networking and cooperation is building capacity and infrastructure in the non-governmental community to take on the challenges of meaningful participation in enforcement efforts.

### 1 WHY ENCOURAGE CITIZEN PARTICIPATION IN ENFORCEMENT?

The two past International Conferences on Environmental Enforcement in Budapest, Hungary (1992) and in Oaxaca, Mexico (1994) established the principle that citizen participation is an important supplement to governmental enforcement efforts.<sup>1</sup> Still, examination of the situation shows that in many countries citizens are often overlooked as one of a nation's greatest resources for enforcing environmental laws and regulations.<sup>2</sup> It has been acknowledged in international fora, such as the 1995 Conference of European Environment Ministers in Sofia, Bulgaria, that citizens know the country's land and natural attributes more intimately than a government ever will; that their number makes them more pervasive than the largest government agency; and that seeing citizens as part of the enforcement team helps shield an agency from isolation and builds broad-based popular support for what can be controversial enforcement actions. Yet, in many countries citizens and non-governmental organizations (NGOs) are still struggling to assure the fundamental legal basis for citizen enforcement.

A fisherman out on the river sees chemical waste flowing through a stream, traces the source to a neighboring factory, and alerts government agencies to the factory's violation of its emissions discharge permit. A local citizen group in a small town near a coal mine suggests to a

state mining agency practical ways, based on experiences working in the mines, of making environmental standards for mines easier to administer and enforce. A trade association convenes small businesses to craft consensus on new regulatory measures, thus avoiding protracted litigation. A city resident notices that municipal buses are emitting noxious fumes, sues the bus company, and wins a court order requiring the company to place pollution control devices in the bus exhaust systems. These are just a few examples of the many and varied influences citizens can have on the process of environmental enforcement.

Drawing on the resources of citizens can enrich and strengthen the environmental enforcement process in several ways. Public participation strengthens governmental authority; improves environmental decision-making; encourages sound business practices for sustainable development; and strengthens civil society. Participation and authority are two sides of the same coin. The government that encourages broad public participation is capable of mobilizing effective popular support of its policies. Its authority is legitimate. Citizens want the state to govern effectively and realize that at some point implementation demands authority.

Yet tension sometimes arises between the government and the governed. The government may fear that citizen involvement in environmental enforcement will disrupt its own enforcement efforts and will reduce its flexibility to tailor enforcement decisions to particular circumstances.<sup>3</sup> Government enforcers may also believe that if enforcement actions in the courts are mounted on a piecemeal basis, rather than as part of a coordinated strategy, poor judicial precedents may be set that could hinder further enforcement efforts.<sup>4</sup> Consequently, government agencies sometimes decline to support, or may even resist, private enforcement initiatives.

Citizens, on the other hand, often suspect government agencies of not properly fulfilling their enforcement responsibilities. Citizens may view government employees as overly susceptible to the influence of the business interests they regulate.<sup>5</sup> Or they may attribute government inaction to bureaucratic inertia. Either way, agency enforcers often are seen as overlooking or impeding environmental protection goals.<sup>6</sup>

If properly channelled, this tension between government and citizens can result in improved environmental enforcement. The government's desire to prevent citizen action it views as disruptive can encourage agencies to take their own regulatory or enforcement steps. The public's suspicion that government may not vigorously implement certain laws may prompt the legislature to grant citizens a statutory right to bring a lawsuit requiring the government to perform its assigned regulatory duties. And in instances when the government insists on inaction, citizen action can replace government enforcement. Not only may compliance be achieved, but the government can be required to account publicly for its own inaction.<sup>7</sup>

When the interests of the government and the citizens are similar — as is often the case — individuals can fill gaps in government enforcement caused by resource constraints.<sup>8</sup> The sheer size of the citizenry, for example, enables individual citizens to monitor compliance throughout the nation and identify violations that an understaffed investigative agency might miss. An enlightened government agency can also use citizen volunteers to implement a comprehensive enforcement strategy. This could both help the government meet its enforcement objectives and avoid the potential conflicts that may result from piecemeal enforcement efforts.

Finally, public involvement in enforcement is a logical next step for democratic political systems that have encouraged public participation in the creation of environmental statutes and regulations.<sup>9</sup> Allowing citizens to have a concrete role in implementing the regime they helped to design strengthens public support for and awareness of environmental goals. If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a role, even the most sophisticated system of environmental protection laws may exist only on paper. Developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make these countries' environmental protection goals a reality.

## 2 LAYING THE GROUNDWORK FOR EFFECTIVE PUBLIC PARTICIPATION

Effective citizen participation requires more than a willing citizenry. Both in countries like the United States where citizen involvement in enforcement is fairly common, and in countries like Hungary where it is just beginning, there are several fundamental regulatory and institutional elements that are necessary for effective citizen participation. These prerequisites are legal rights and remedies, access to information, and clear environmental standards. Where even one of these elements is missing, citizens find it very difficult to participate in the environmental enforcement process.

### 2.1 Legal rights and remedies

Citizen participation in the environmental enforcement process is usually built around 1) the recognition of certain rights beyond personal property rights and the recognition of citizens or environmental organizations' ability to represent the public interest; and 2) the existence of an independent and well-informed judiciary which can adjudicate and enforce these rights.

Many newer constitutions, such as the one in Colombia, are guaranteeing citizens the right to a healthy environment. In other countries, such as Argentina, courts have made use of a constitutional guarantee called *amparo*, which can be loosely translated as "protection," to defend individual or collective environmental rights derived from statutes, international treaties, or the constitution itself. In still other countries, such as Mexico, the constitution guarantees a right to petition, which constitutes a vehicle for the public to direct inquiries to the government to which the government must respond in some manner.<sup>10</sup>

Alternatively, in some countries environmental statutes themselves give a cause of action to individuals to enforce the law when the government is not taking action. This system has been largely developed in the United States over the past twenty years with citizen enforcement suits being expressly included in the major federal environmental laws. For example, in the United States, despite enactment of the Resource Conservation and Recovery Act in 1976, the Environmental Protection Agency did not even begin to regulate hazardous waste until four years later, when required to do so by court order in a citizen suit.<sup>11</sup> However in the last few years, citizen groups in other countries have had growing success in bringing such cases.

Granting citizens the ability to bring enforcement suits, however, does not necessarily mean that citizens will be able to do this in practice. Citizens also need to consider costs. For example, Ireland's laws appear comparable to U.S. provisions: Irish citizens may bring a suit for injunctive relief against any person for violations of water, air, or land use regulations. However, because of the risk that the plaintiff will have to pay defendant's costs and fees, these suits have not been commonly used.<sup>12</sup>

Another hurdle for citizens can arise if government agencies and courts are reluctant to grant standing to citizen groups in administrative or court proceedings. Even where laws say that any interested group may become a party to a proceeding, this access is often denied to citizen groups. For example, in Slovakia, a forest protection NGO tried to become a party to an administrative decision under a local forestry plan. The Ministry of Agriculture and subsequent court decisions denied the NGO standing, even though the Slovak Administrative Procedure Act states that any interested person may become a party to the proceeding. As of March 1996, the case was before the Slovak Supreme Court which agreed to hear the standing issue. In only a few countries, have courts determined that environmental organizations in a civil proceeding can represent the interests of the environment as a public interest. For example, in the 1986 *De Nieuwe Meer* case, the Dutch Supreme Court recognized the standing of an NGO to defend the environment as a public interest.<sup>13</sup> It was the first time that it was not necessary to prove that a specific individual interest had been harmed.

In systems that rely on judicial, rather than administrative mechanisms for enforcement, an independent judiciary becomes an essential element of citizen enforcement. In many legal systems, such as in Europe, it is normal for the judiciary to be at least partially under the control of the executive branch. When this is combined with a legacy of a totalitarian regime, it may mean that the judiciary is too closely tied to the executive bodies to allow citizen enforcement actions against the government. For example, in the Russian Federation, environmental organizations have had difficulty convincing lower level courts to take their cases against the government seriously. However, some Constitutional Courts have been active in protecting constitutionally guaranteed rights, such as the right to a healthy environment. The Hungarian Constitutional court can be counted among the success stories in its region in helping to promote the rule of law and consequently a sound basis for public participation. The court held in a 1994 decision that amendments to the Law on Agricultural Cooperatives violated the constitutional right to a healthy environment by lifting protected status from certain lands. The court found that the constitutional right to a healthy environment required the state to give legal and institutional guarantees to environmental protection.<sup>14</sup>

As a result, many countries in Central and Eastern Europe have reorganized their lower court systems.<sup>15</sup> The major focus of such changes has been to ensure the independence of the judiciary from other branches of government. At a minimum, the power of appointment and removal and the control of resources available to carry out the judiciary's tasks need to be guaranteed. In some countries, the judiciary slowly is achieving the necessary independence. In Slovenia, for example, judges have been given life tenure, freeing them from dependency on the executive branch for their livelihood.

In addition to independence, citizens need a judiciary which understands environmental law and is receptive to its special needs in the court. Moreover, in countries in transition for example, many judges still carry assumptions from the previous regime, including supremacy of government production quotas and a relative lack of concern with environment. A case in Estonia where a lower court admonished a local environmental administrator for appealing to the courts to push the central authorities to rectify inconsistencies in law and regulation illustrates this point. That judge was later overturned by the National Court which found the administrator's case to be proper.

## 2.2 Accessible information

Access to information is the cornerstone of effective public participation at all levels of decisionmaking. For environmental enforcement, the public needs access to specific information concerning discharges and emissions, such as the discharge monitoring reports required in the United States or the toxics release information required in countries with a pollutant register system. Yet, in many countries access to this type of information is limited or not allowed.

The degree of development of legal regimes for public access to government-held information varies from country to country. In many countries, recently amended constitutions and national environmental laws grant the citizen the right to have access to information, but fail to provide implementation and enforcement mechanisms. This is the case, for example, in the Czech Republic. The Czech constitution guarantees a right to information, however, the Czech government has been reluctant to draft an implementing law providing for public access to government-held environmental information. In addition, the government has been reluctant to use the constitutional right to allow actual citizen access to environmental information without an implementing law. Instead it limits access to environmental information to the relevant provisions of the environmental impact assessment law.

Only a few countries allow citizens to request and receive from the government environmental monitoring data and discharge reports. Experienced environmental litigators in citizen groups warn that any environmental program that requires citizens to gather evidence, take samples, perform tests on effluents will present almost impossible barriers to a successful citizen suit.

One invaluable source for such information is data on pollution levels supplied by polluters themselves, as part of a regulatory self-monitoring and reporting regime.<sup>16</sup> For example, the U.S. Federal Water Pollution Control Act requires that the holders of permits to discharge effluents from point sources submit regular discharge monitoring reports (DMRs) to the government.<sup>17</sup> These reports are usually accepted by courts as definitive proof of a violation, since they are written and filed by the alleged violator itself. However, especially in emerging democracies, environmental laws usually do not contain monitoring and self-reporting requirements. Even when such requirements are in place, citizens in countries in transition have expressed a distrust of such systems being enforceable and trustworthy.

Access to information concerning permit conditions and regulatory standards are also necessary to verify whether a violation has taken place. It is fairly well accepted that the public has the right to access information concerning regulatory standards. It is less well accepted, however, that the public has the right to access information concerning decisions affecting a regulated entity (e.g., permits, licenses, etc.). For instance, in most of the European Union, the Council Directive on access to environmental information has been interpreted to include access to information concerning draft and final permit decisions.<sup>18</sup> Still, in Slovakia where the Ministry for Environment is currently drafting legislation concerning access to environmental information, the Ministry interpretation, as of March 1996, is to exclude permit information from the definition of "environmental information" accessible under the law.

Systems with publicly accessible information concerning toxic releases are slowly spreading to other countries from the United States. These laws typically provide for databases where the government compiles information provided by industry on toxic chemicals stored, transferred, or released and provides for access by the public to this information. These types of "right-to-know" provisions have helped citizens to identify and prove environmental violations. In the U.S. the Emergency Planning and Community Right-to-Know Act (EPCRA), imposes extensive self-monitoring and reporting requirements on certain industries that use and release extremely hazardous chemicals.<sup>19</sup> A growing number of countries are developing laws concerning toxic release inventories (TRI) or pollutant release and transfer registers (PRTR). For example, in the Czech Republic, the government is working together with a coalition of environmental organizations and other sectors of the public to develop a pollutant release and transfer register.

### 2.3 Clear environmental standards

Clear standards of conduct against which the behavior of potential violators can be compared are the final prerequisite for effective citizen participation in enforcement efforts.<sup>20</sup> When a citizen is provided with specific emission levels, deadlines for compliance, or other definite substantive requirements contained in statutes, regulations, or permits, it is easier to identify and prove the violation. Such substantive requirements are particularly effective when used together with industry self-monitoring obligations, reporting schedules, or other information access mechanisms. Clear standards may be provided for in statutory language, regulations developed by agencies in accordance with statutory duties, or industry-specific permits issued pursuant to the regulations. The only question at issue in most enforcement actions should be:

did the defendant violate the standard set forth in the law, regulation, order, or permit. In the United States, for example, compliance is a matter of strict liability and a defendant's intention to comply or good faith attempt to do so does not excuse a violation.

A law which simply prohibits "harmful" or "dangerous" pollution would be very difficult to enforce consistently; it might serve as a safety net, but experience has proven that enforcers need clear standards to avoid debates over scientific and policy issues. The more scientific and policy issues are resolved by statute, regulation, or permit, the easier and more cost-efficient enforcement becomes. Thus, for example, laws that set a standard for water quality in a stream, but fail to set an end-of-pipe standard would still be difficult to enforce. Unless there is a clear standard of how much may be released from each pipe, enforcers will be burdened with proving that it was the defendant's discharge which violated the water quality standard. Such causation issues can become very complicated, especially given the complex scientific issues surrounding release, combination, and dilution of chemicals in a stream.

### **3 MAKING PUBLIC PARTICIPATION WORK**

Environmental organizations and governments in many countries have been experimenting with innovative methods for increasing citizen involvement in monitoring and inspection, as well as the use of citizen complaint and enforcement mechanisms.

#### **3.1 Citizen monitoring**

The growing number of environmental problems and the increasing demands on limited government resources combine to strain the resources of environmental agencies to perform all the necessary investigatory and monitoring duties. Monitoring alerts the government not only to possible violations of the law, but also to potential damage or threat to the public health and safety. However, in general, public participation in monitoring compliance with laws and permits is very limited. With a few exceptions, the public and NGOs usually do not have proper technical equipment or the practical possibility to undertake monitoring.

In some countries, governmental institutions make use of citizen monitoring which may already be taking place. For example, in the U.S., some citizen organizations have begun harborwatch programs to identify oil spills or other emissions in local harbors. Others teach citizens to walk streams, identifying locations of pollutant emissions and observing the effects of these emissions on water quality or indicator species. The Izaak Walton League of America trains citizens in this way. The citizens then report information to a national clearinghouse, which notifies state or federal agencies. State agencies also help fund the League's training and reporting programs.

Another vehicle for public participation is the establishment of coordination agreements between the government and public organizations. For example, in Mexico, such coordination agreements provide for joint activity on a particular issue or problem. The Mexican Federal Ecology Law envisions coordination agreements between government environmental agencies and the public aimed at facilitating joint administration, conservation and monitoring of protected nature reserves.<sup>21</sup>

The opportunity for post-project monitoring usually falls within the environmental impact assessment (EIA) process. However, in practice, monitoring is the weak point of most EIA regimes. Most EIA regulations do not explicitly require any monitoring. Yet, without monitoring, there can be no guarantee that conditions imposed by the decisionmaking body on the project

proponent are being implemented. Monitoring also provides an opportunity to assess the accuracy of impact predictions and the effectiveness of proposed mitigation measures, thereby contributing to the design of future projects and the improvement of future EIAs.

Where national EIA legislation does require some type of monitoring, it rarely specifies whether that includes citizen participation.<sup>22</sup> However, there are some exceptions. For example, in the Philippines, once the environmental compliance certificate is issued, compliance monitoring is normally conducted by the Department of Environment and Natural Resources (DENR) regional offices as part of their standard regulatory and enforcement procedures.<sup>23</sup> But, with the emergence of the concept of multi-partite monitoring, a monitoring team consisting of representatives from the DENR, the project proponent, NGOs, and local community residents may jointly undertake compliance monitoring. For example, to ensure that industrial developers comply with environmental standards set by the government in the ongoing development of a major industrial corridor in Northern Mindanao in the Philippines, representatives of local communities, together with NGOs and government agencies, organized a task force to monitor compliance. The Philippine DENR is creating in each regional office a Regional Community Advisory and Monitoring Committee whose membership will include NGOs and the private sector. The Committees will be involved in all phases of EIA, including compliance monitoring.

Post-project monitoring can also be required in the permitting process. For example, in the Czech Republic, citizen involvement was encouraged during a public participation experiment in Ostrava in 1992 which included post-project monitoring.<sup>24</sup> A facility for the reprocessing of used mineral oil has been permitted with the condition that an independent citizen's commission be established to control implementation of the permit conditions. In theory this process could also be used in the Czech Republic for EIA post-project monitoring. The Czech Administrative Code allows for the establishment of a special commission on post-project analysis for each particular project to ensure application of a sound administrative permit.

### 3.2 Citizen inspections

In some countries, government agencies are allowed to contract with citizen groups or other associations to enlist their assistance in inspection efforts. For example, in Estonia, under the Nature Protection Act, citizens can be deputized as "public inspectors." They are allowed to write protocols about violations of nature protection rules, but they cannot take payment. These public inspectors monitor compliance with laws, regulations, and permits concerning hunting, fishing, and forestry.<sup>25</sup>

In Poland, a similar institution exists in the form of the Nature Protection Guard, which was established 1957.<sup>26</sup> This is an organization affiliated with conservation associations. Its aim is to monitor compliance with nature conservation laws and its members have powers similar to forest rangers. Authorized members of the Guard have the right to enforce nature conservation laws directly through a procedure of ticketing violators and imposing a small fine. However, Poland has been slower at transferring this model to the pollution control area. The Polish Environmental Protection Act of 1980 provides for the existence of a number of institutions meant to facilitate public participation in monitoring compliance. For instance, trade unions and other associations can function as civic environmental protection bodies with in-house environmental commissions or inspectors to monitor a company's environmental performance. However, this model has not had much chance to prove itself, partially because the Council of Ministers has not issued the necessary regulations.

Some countries allow citizens to demand inspections under limited circumstances. For example, in the Czech Republic, under the Building Act, parties to the land planning decision and investment permitting process have the right to demand the inspection of facilities prior to

and subsequent to completion. Another example can be found in Argentina where water quality legislation allows private parties who have filed a complaint about a facility to participate in any inspection of the facility during the investigation.<sup>27</sup> The U.S. Surface Mining Control and Reclamation Act of 1977 contains a similar provision.<sup>28</sup>

### 3.3 Public complaint process

The public complaint process is one of the most common mechanisms for public input in environmental enforcement. The process usually allows any person to file a complaint with the state regarding activities that are causing environmental harm or ecological imbalance. The state or municipal government is then required to look into the matter and provide a response within a relatively short period of time.

Some countries have an independent complaint committee or designated staff member (ombudsman) at the national or local levels. Citizens can lodge their complaints with the committee whenever they disagree with any measure taken by the government. The institution is usually funded by, but independent of, the government and is competent to deal with complaints on the basis of statutory rules. The law providing for the creation of an ombudsman also regulates what kinds of complaints may be reviewed. In many cases, the publicity achieved through the complaints puts pressure on the violator to address the situation at hand.

The ombudsman, as an officer of parliament with the power of oversight over organs of state administration, is established under the constitutions of nine countries in Central and Eastern Europe. Yet, this institution has not been fully implemented in this region. Ombudsmen have only taken office in five countries, as of late 1995, three of these only during 1995.<sup>29</sup> Only Poland has had substantial experience with an ombudsman in place. Nonetheless, the recent appointments may indicate the momentum for ombudsmen is building and the next few years will be critical ones in determining the long-term viability of such an institution in this region.

In many countries, however, there is a more informal complaint mechanism or petitions are used. For example, in Bulgaria, citizens and NGOs can petition or make a request to environmental authorities if they discover violations of environmental law or regulations. In Albania, there is a new energy law which specifies that citizens claiming legal violations on the part of a license-holder have the opportunity to file written complaints with the licensing agency, which is obliged to require a response from those permit-holders. This has not yet been implemented or tried in practice. In Mexico, the federal and state Ecology Laws contain provisions enabling any person to file a complaint with the government regarding activities that are causing environmental harm.<sup>30</sup> The state or municipal government agency is required to look into the matter and provide a response within a relatively short period of time. In practice, the public complaint process appears to be among the most widely used means of bringing government attention to environmental violations and enforcement problems. In Mexico, state enforcement officials in Nuevo Leon found the public complaint process so useful that they established a special telephone hotline to facilitate receiving citizen complaints.<sup>31</sup>

### 3.4 Citizen enforcement actions

In many countries, citizens are allowed to take legal action to enforce environmental laws, either under constitutional rights, under specific provisions in environmental laws, or in accordance with administrative or civil codes. Legal action by citizens has been used to enforce environmental regulations and duties against both governmental institutions and private entities. Most public participation opportunities provide citizens with the opportunity to give their comments. However, to participate effectively, citizens must also have some way to ensure that their comments are considered and that the laws and procedures are properly implemented. Political pressure

can be used on elected officials, but special avenues are needed to challenge decisions of non-elected officials. Without an administrative or judicial review process of agency decisions, public participation in decisionmaking can be an empty gesture.<sup>32</sup>

Avenues for direct public participation in enforcement include allowing citizens to intervene in government enforcement proceedings through filing friend-of-the-court briefs, allowing citizen participation in reviewing the terms of settlement decrees, allowing citizens to bring administrative review proceedings, and allowing legal action to be brought by citizens to enforce environmental law against the government or against violators.<sup>33</sup>

Government agencies are usually granted a great deal of discretion in deciding enforcement priorities. However, in the United States, Congress supplemented governmental enforcement with citizen enforcement rights. This is done through explicit provisions in the major national environmental statutes granting members of the public the ability to enforce the law directly against violators or to bring a suit against a government agency for failing to carry out duties that are not discretionary (for instance, missing a statutory deadline). In the U.S., federal environmental statutes grant “any person” the right to bring a citizen suit, with “person” defined broadly to include individuals, corporations, associations, and governments. In most cases, citizens need only show primarily that the law was violated, not that there was fault or causation linked to actual or threatened harm. The cases usually result in certain action being ordered by the court, or in civil penalties being awarded to the government. Citizens do not usually collect compensation for personal injury or property damage in enforcement suits. However, if citizens succeed on any significant issue in litigation, they may be awarded attorneys fees, determined by the court.

It is also common in the U.S. for environmental cases, including citizen suits, to be settled during the lawsuit. To ensure that settlements are enforceable, they are often crafted as court negotiated consent decrees, with interim deadlines for specific actions and penalties. In addition to citizen suit settlements, citizens who are parties to or have an interest in a government enforcement suit often may participate in negotiating the terms of the consent decrees.

Citizen groups in many other countries have been experimenting over the past ten years with varying forms of citizen suits, such as defense of the public interest under the civil code. Under Colombia’s Civil Code, citizen groups have the right to bring cases or “popular actions” (*acciones populares*) to enforce the law. The code gives the right to stop the threat of harm to the public interest to an indeterminate group of people. Suit can be brought against any public or private person causing threat of harm. However, the plaintiff must show fault and causation, not simply a violation of the law. The Dutch Civil Code defines an unlawful act as any act which neglects to fulfill a general legal duty.<sup>34</sup> However, again, the definition of “unlawful act” also includes fault, damage, causation, and “relativity” (the legal norm that has been violated must have the purpose of protecting the injured person). Such requirements of proving negligence, damage, causation, and relativity place an extra burden on citizen groups trying to enforce the law.

#### **4 TRANSBOUNDARY PUBLIC PARTICIPATION IN ENFORCEMENT EFFORTS**

In many countries, industrial and other activities in the border region affect both their own populations and those of neighboring countries. It is a generally recognized principle of international law that a country should not harm the environment of another country.<sup>35</sup> If this occurs, the affected country can hold the country of origin accountable, and if necessary take the matter to court, even to the International Court of Justice.

In general, granting legal rights for the public to participate in enforcement efforts under international treaties has not yet been broadly implemented or exercised. Until recently, inter-governmental agreements only rarely included rights of the individual citizens of the States in

their provisions. Recent international treaties, such as those concerning transboundary watercourses and transboundary results of industrial accidents provide for limited public participation.<sup>36</sup> Public participation in a transboundary context means that citizens on both sides of a border have the same rights to access to information and legal remedies.

Until the United Nations Conference on Environment and Development in 1992, and the preparatory process which started several years prior to that, there was very little mention of the “public” or of “individuals” in international environmental treaties. In general, there are several points in a typical treaty that have at times allowed participation, or at least access to information, by individual citizens (or by NGOs). These are: 1) the meeting of the Conference of the Parties; 2) EIA procedures; 3) exchange of information procedures; and 4) access to courts. For example, the 1992 Convention on the Transboundary Effects of Industrial Accidents grants a citizen from the affected country access to judicial and administrative proceedings in country of origin. In the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, non-governmental organizations which have the goal of protecting the environment, in accordance with national law, may make certain requests to administrative or judicial bodies in the country of origin concerning prohibition of a dangerous activity or requirement of preventative measures.

The environmental side agreement to the North American Free Trade Agreement (“NAFTA”) created several mechanisms for public participation in promoting the enforcement of national environmental laws in the U.S., Mexico and Canada. Citizens may submit a complaint to the North American Commission for Environmental Cooperation (the “Commission”) whenever they believe a party is failing to effectively enforce its environmental law. The Commission can also be requested to prepare report on environmental matters related to its cooperative functions.

The public was responsible for bringing a major transboundary environmental case to the attention of the Commission. During the winter of 1994-95 between 20,000 - 40,000 migratory water birds died in the Silva Reservoir in the central Mexican State of Guanajuato. As a result of a petition filed by U.S. and Mexican NGO’s, the Commission assembled a team of scientists from the three NAFTA countries to determine what killed the birds. Although it was originally believed that industrial pollutants were entirely to blame for the deaths, the scientific panel concluded that the cause of mortality of water birds at the reservoir was botulism, often caused by raw sewage. The panel then recommended several efforts and management options for improving environmental conditions at the reservoir.

Another example of transboundary public participation in enforcement can be found in Western Europe in a case concerning the dumping of pollutants in the river Meuse. In 1993, a Dutch court heard a case brought by a coalition of NGOs against the steel manufacturer Cockerill Sambre alleging the illegal discharge of pollutants into the river Meuse in Belgium.<sup>37</sup> In its verdict, the court obliged Cockerill to take bi-monthly measurements of the amount of chemicals released in one day and to send these measurements to the environmental groups for monitoring. The plaintiffs had the authority to bring the case in the Netherlands due to a 1976 European Court decision that in a case concerning an international misdemeanor, the injured party could chose the court. The European Court decision is an interpretation of the European Execution Treaty which regulates the mutual recognition and execution of legal verdicts.<sup>38</sup> Belgium and the Netherlands are both party to this treaty.

## **5 INTERNATIONAL COOPERATION AND CAPACITY-BUILDING**

In most countries, there are only a handful of environmental NGOs and lawyers working to ensure public participation in implementation and enforcement of environmental law. However, there are expanding international and regional networks of environmental professionals assisting

each other in building the capacity of local NGOs to participate in this area. International cooperation and support is an important element to many environmental enforcement campaigns. In cases where the developer or industry is from another country, outside information about the firm's background and practices can be essential in public enforcement efforts. International attention can also put pressure on a firm to come into compliance or lose goodwill, as well as putting pressure on a government that may have been reluctant or unable to place resources towards a specific environmental enforcement effort. Finally, exchanges of information concerning public participation strategies and tools provide an opportunity for NGOs to learn from each others experiences.

An example of a structured network for assistance in the most direct type of public enforcement effort — citizen enforcement suits — is the Environmental Law Alliance Worldwide (E-LAW).<sup>39</sup> E-LAW is an international network of public interest environmental attorneys dedicated to collaborating across borders and sharing information in defense of the environment. E-LAW has nineteen offices around the world and has worked with environmental advocates in more than 50 countries. E-LAW uses electronic mail to give these attorneys access to vital scientific and legal information for use in their cases.

A more loosely structured network of public participation activists can be found in Central and Eastern Europe. Coordinated through the Public Participation Program of the Regional Environmental Center (REC), environmental advocates wishing to promote public participation in their countries have been coming together since 1992 to exchange information on strategies used in their countries and to work together to develop country guidelines based on practical experience.<sup>40</sup> This network has served to build local capacity for public participation throughout most of the region, focusing on both legal and informal tools.

A third type of cooperation in environmental enforcement is the IUCN Commission on Environmental Law.<sup>41</sup> The Commission brings together environmental law experts from all regions of the world to think through issues of environmental law implementation and enforcement. The Commission focuses both on tools for implementation of national law, such as environmental impact assessment, and on tools for implementation of the international treaties. Commission members are involved in the current process of drafting a new Convention on Public Participation, which was mandated after the European Environment Ministerial Conference in Sofia in 1995.

An example of cooperative efforts within the IUCN Commission can be found in the Western Hemisphere. In cooperation with the Commission, eight law centers from the Americas have joined forces to address one of the fundamental conditions threatening the biodiversity of the Americas and impeding the sustainable development of local communities: the lack of adequate national laws regulating access to and compensation for local genetic resources. The Biodiversity Convention, which came into force in December 1993, establishes a broad framework for national systems to conserve and manage biological resources. To assist in the development and implementation of these systems, the eight law centers are working cooperatively to produce a comparative analysis of laws regulating access in each of their countries. The study will also identify options and recommendations for reforming existing national laws on access and compensation.

Environmental law professionals in the Americas also have collaborated on efforts to disseminate information and provide training on the development and use of citizen enforcement tools. In July 1994 U.S. and Mexican environmental lawyers teamed to present a workshop for community leaders in Southern Mexico on basic legal tools for the conservation of natural resources and environmental protection. In September 1993 the Environmental Law Institute, the Defensoría del Pueblo, and the Fundación para la Defensa des Interés Público presented an international seminar in Bogotá, Colombia on new tools for exercising collecting rights, bringing together experts from throughout the region.

In addition to networks of individuals working on environmental law implementation and enforcement, the U.S.-based Environmental Law Institute (ELI) tried to build the environmental law profession.<sup>42</sup> ELI's focuses on building capacity of the institutions that are essential for a workable system of environmental protection. It increases the effectiveness of legal practitioners and other professionals through training and education. It transfers the best "legal technology" — the tools that have been proven to work in conserving natural resources and public health to other environmental professionals around the world. One example of this type of capacity building is judicial training which ELI has sponsored in the Americas and in Central and Eastern Europe. As mentioned earlier in this paper, a judiciary which understands the basic concepts of environmental law and is open to citizen environmental enforcement efforts is crucial to effective citizen participation in enforcement. For example, after a 1995 judicial training workshop co-sponsored by ELI and the Ukrainian environmental law group Ecopravo, the participating judges concluded that Ukrainian trial judges not only must take new environmental legislation seriously, but must play an active role in its development and implementation.

These types of formal and informal cooperation through networks of environmental professionals have been essential to spreading experiences with new techniques for public participation in enforcement efforts and for building capacity in local NGOs and in local legal structures to support such efforts.

## 6 CONCLUSION

With the progress of democracy, more and more citizens understand their role, rights and responsibilities related to social and political environmental conflicts and are more willing and able to supplement governmental enforcement of environmental law. The basic groundwork for public participation has been laid in many countries in the form of basic constitutional rights, environmental protection laws, and specific public participation procedures. In a few countries, it can be said that the legislation is more than mere declaration. However, most countries are still at the initial stages of creating a system which is conducive to making good use of the public as a partner in enforcement efforts.

## ENDNOTES

1. Starting in 1990 as a collaborative effort between the U.S. Environmental Protection Agency and the Netherlands Ministry of Housing, Spatial Planning and the Environment (VROM), the International Conference on Environmental Enforcement has become a highly successful international collaboration to build effective environmental compliance and enforcement programs. Already in the 1992 Budapest Conference, the citizens' role in enforcement was a central theme, focusing on why citizen involvement was important and on the techniques developed in the United States and Western Europe to facilitate this involvement.
2. The examples in this paper are based mostly on the authors experiences working with colleagues in Central and Eastern Europe and in Latin America.
3. See Cross, "Rethinking Environmental Citizen Suits," 8 *Temp. Env. L. & Tech. J.* 55, 64-70 (1989).
4. See "Private Watchdogs: Internal Auditing and External Enforcement — Three Perspectives," 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,255, 10,263 (1987) and Snook, Robert D., "Environmental Citizen Suits and Administrative Discretion: When Should Government Enforcement Bar a Citizen Suit?" *Nat'l. Envtl. Enfor. J.*, Apr. 1995, at 3.

5. This may be especially true in state agencies and enforcement programs, whose employees tend to be closer financially, politically, and personally to the potential violators than are federal officials. See Smith, "The Viability of Citizen Suits under the Clean Water Act after Gwaltney," 40 Case W. Res. L. Rev. 1, 55-56 (1989-90).
6. See Environmental L. Inst., *An Analysis of Citizen Enforcement Actions under EPA-Administered Statutes V-11 to V-12* (Sept. 1984) [hereinafter ELI Study].
7. See Webb, "Taking Matters into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement," 36 McGill L.J. 770, 819 (1991).
8. In the United States, government agencies have expressed appreciation for citizen enforcement efforts. See *Chesapeake Bay Foundation v. Bethlehem Steel Co.*, 652 F. Supp. 620, 625 (D. Md. 1987) (citing Brief of the U.S. as amicus curiae in support of the Clean Water Act at 1-2, *Student Public Interest Research Group v. Monsanto*, 600 F. Supp. 1474 (D.N.J. 1985) (indicating that the EPA Administrator enthusiastically supported the role of citizens in enforcement proceedings)); ELI Study, *supra* note 6, at V-7; L. Jorgenson & J. Kimmel, *Environmental Citizen Suits: Confronting the Corporation — A BNA Special Report 17* (1988) [hereinafter BNA Report]; Price, "Private Enforcement of the Clean Water Act," 1 *Nat. Resources & Env't* 31, 60 (1986).
9. See *Participation and Litigation Rights of Environmental Associations in Europe* (M. Führ & G. Roller eds. 1991).
10. Environmental Law Institute, *Draft Report Decentralization of Environmental Authority in Mexico: A Review of the Legal and Institutional Framework for Environmental Protection at the State Level* (forthcoming 1996)
11. See *Illinois v. Costle*, 9 ELR 20243 (D.D.C. Jan. 3, 1979).
12. *Supra* note 9.
13. See MilieuKontakt, *Dutch Environmental Organizations Go to Court* (Amsterdam 1994) [hereinafter MilieuKontakt Report].
14. Magyar Közlöny, 1994/No.55 p1919.
15. Regional Environmental Center for Central and Eastern Europe, *Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe*, September 1995.
16. A 1984 report on citizen suits in the United States identified the lack of readily accessible information as "the single most important factor inhibiting citizen enforcement." "The crucial variable" in a successful citizen suit regime was information provided to citizens in a form that identified key compliance indicators. ELI Study, *supra* note 6, at V-12 to V-13.
17. Federal Water Pollution Control Act, 42 U.S.C. §1251 *et seq.*
18. See MilieuKontakt Report, *supra* note 13.
19. 42 U.S.C.A. § 11001-11050.
20. See Babich, Adam, "Citizen Suits: The Teeth in Public Participation," 25 *Env'tl.L.Rep.* 10141, Environmental Law Institute, March 1995.
21. *Supra* note 10.
22. Report of the International Roundtable on Practical Implementation of EIA in Central and Eastern Europe, Slovakia, November 1995.
23. Smith, David B., and van der Wansem, Mieke, *Strengthening EIA Capacity in Asia: Environmental Impact Assessment in the Philippines, Indonesia, and Sri Lanka*, World Resources Institute, June 1995.
24. Regional Environmental Center for Central and Eastern Europe, *Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe*, September 1995 [hereinafter REC Case Studies].

25. *Id.*
26. *Id.*
27. Ley 13.577 Creación de Obras Sanitarias de la Nación, art. 31 and 32; Decreto 674/89 Regimen contra la Contaminación de Rios Bs. As. 24/V/89.
28. 30 U.S.C. § 1271(a)(1).
29. REC Case Studies, *supra* note 24.
30. *Supra* note 10.
31. *Id.*
32. Babich, Adam, "Citizen Suits: The Teeth in Public Participation," 25 *Envtl.L.Rep.* 10141, Environmental Law Institute, March 1995.
33. The mechanics of citizen suits are discussed in detail in the Environmental Law Institute's paper, "The Role of Citizens in Environmental Enforcement," which was delivered at the Third International Conference on Environmental Enforcement in 1995. Environmental Law Institute, *The Role of the Citizen in Environmental Enforcement* (ELI Working Paper, 1992).
34. Burgerlijk Wetboek, article 6:162, section 2.
35. This has widely been accepted as a general principle of international law based on Article 38(1)(c) of the Statute of the International Court of Justice. See *also* Principle 21 of the Stockholm Declaration (1972) and Principle 2 of the Rio Declaration (1992).
36. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992 and the Convention on the Transboundary Effects of Industrial Accidents, 1992.
37. The "Cockerill Sambre" case, District Court of Maastricht, 3 February 1993. For further information concerning this case, see *supra* note 13.
38. See Article 5, section 3.
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