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Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters

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In recent years, the critical role of civil society and the public in protecting the environment has become clear. International declarations and agreements increasingly recognize that individuals, nongovernmental organizations (NGOs), and local governments are central to the sustainable management of natural resources and protection of critically important areas. Countries have given life to environmental governance principles by establishing institutions that guarantee public access to the decisionmaking processes, as well as by creating and clarifying substantive rights to information, participation, and justice.

Regional organizations have also advanced environmental governance in their Member countries. The United Nations (U.N.) Economic Commission for Europe (UNECE) convened a process that led to the creation of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).¹ Similarly, in April 2000, the Organization of American States (OAS) adopted the Inter-American Strategy for the Promotion of Public Participation in Decisionmaking for Sustainable Development (ISP).² Still ongoing, the Asia-Europe Meeting (ASEM) is developing Elements of Good Practice in the draft document *Towards Good Practices for Public Involvement in Environmental Policies*, which is expected to be

adopted in 2002.³ Other regions of the world have implemented similar initiatives: the North American Agreement on Environmental Cooperation (NAAEC),⁴ a Memorandum of Understanding (MOU) for Cooperation on Environmental Management⁵ in East Africa, and the Charter of Civil Society for the Caribbean Community.⁶

These collective actions are evidence of the emergence of international norms that seek to ensure that people have a voice in decisions that may affect them by guaranteeing public access to information, participation, and justice. While none of these regional initiatives specifically mention the term "environmental governance," they all seek to advance environmental governance processes by creating or modifying laws and institutions to improve public access to decisionmaking processes that can affect the environment, public health, and economic development.

Although some of the international instruments mentioned below broadly advance democracy and governance (such as the Universal Declaration on Human Rights), most apply specifically to environmental matters. As such environment is proving to be a wedge issue, allowing advocates to open up government processes and make them more participatory and accountable. Due to the essential role that natural resources and the environment have in securing a safe,

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1. UNECE 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]. The 55 Member States of the UNECE include the nations of the West, central, and eastern Europe, the Newly Independent States of the former Soviet Union, Israel, Turkey, Canada, and the United States. <http://www.unece.org/oes/eceintro.htm> (last visited Feb. 13, 2002).
2. 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].

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 <http://www.vyh.fi/eng/intcoop/regional/asian/asem/junedraft1.RTF> and <http://www.aetec.org> (last visited Feb. 20, 2002). See generally ASEM Official Home Page <http://asem.inter.net.th/>; Asian Cooperation: The ASEM Process <http://www.vyh.fi/eng/intcoop/regional/asian/asem/asia.htm> (visited Jan. 25, 2002); personal communication from Eeva Furman, Finland Environment Institute, to Carl Bruch, Environmental Law Institute (Aug. 7, 2001) (on file with authors).

4. North American Agreement on Environmental Cooperation (NAAEC), Sept. 8-14, 1993 (entered into force Jan. 1, 1994), U.S.-Can.-Mex., art. 1(g), (h), reprinted in 32 I.L.M. 1480 [hereinafter NAAEC].

The Mediterranean Commission on Sustainable Development has also considered the importance of public involvement, but has yet to develop a more formal initiative. See Recommendations and Proposals for Action on the Theme of: Information, Public Awareness, Environmental Education and Participation, U.N. Doc. UNEP(OCA)/MED IG.12/9, Annex IV, Appendix I (adopted in Malta, Oct. 27-30, 1999).

5. Memorandum of Understanding Between the Republic of Kenya and the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environmental Management, done at Nairobi, Oct. 22, 1998 [hereinafter East African MOU].
6. Charter of Civil Society for the Caribbean Community, done at St. Johns, Antigua, and Barbuda, Feb. 19, 1997, Caribbean Community and Common Market (CARICOM) Governments, available at www.caricom.org/chartercivilsoc.html (last visited Feb. 20, 2002).

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healthy, and productive life, people have been more likely to demand—and governments to grant—opportunities to be involved in decisions that affect them.

The regional initiatives are significant both for their substantive provisions promoting public participation and for the process by which they were developed, which saw civil society involved in the conceptualization and negotiation of these international agreements. Traditionally, international agreements have been the realm of nations to negotiate. Experiences with the Aarhus Convention, the ISP, the Draft ASEM Elements of Good Practice, and other initiatives, have proven that civil society can contribute meaningfully to the development of international norms.⁷ Furthermore, the newly won respect for civil society has fostered a more collaborative relationship between governments and NGOs.

Practice is catching up with the declarations as governments and civil society have steadily implemented mechanisms that protect the environment by promoting democracy and good governance. Thus, while most environmental campaigns continue to emphasize traditional substantive concerns such as wildlife and hazardous waste, environmental organizations and agencies increasingly turn to the decisionmaking processes that affect the environment. The result has been a paradigm shift in which the dispersal of environmental information, once considered a valuable private commodity and hoarded accordingly, has come to be seen as an integral part of an open, vibrant, and sustainable political and economic structure.

This Article examines how the experiences of ongoing regional initiatives has laid a foundation for the development of a global framework that ensures sound environmental governance. It briefly discusses the benefits of public access to environmental decisionmaking and highlights the global context of environmental governance. It then analyzes several regional initiatives that have changed the landscape of public involvement in environmental affairs. The Article concludes with several options for furthering public access to environmental decisionmaking.

Global Background

Over the past few decades, there has been a growing recognition, domestically and internationally, that environmental protection and management must involve all sectors of civil society.⁸ Most environmental impacts are local, and citizens

frequently know their particular local area more intimately than the government. These citizens and NGOs bring their experience, resources, and energy to bear on environmental problems, supplementing scarce government resources, promoting transparent and sustainable business activity, and improving governmental actions. Furthermore, including civil society in the development, implementation, and enforcement of environmental laws and policies educates the public and the regulated community and builds support for governmental actions.

As experience has developed at the national level, international declarations, agreements, and conventions increasingly have promoted access to information, participation, and justice.⁹ Access to information—usually defined broadly and with a presumption in favor of disclosure—ensures that people can know the actual and threatened environmental impacts of particular actions, and respond appropriately. Public access to governmental decisionmaking processes allows the public to participate in the development of projects and policies, as well as the implementation of environmental provisions. Access to justice guarantees that these procedural rights are not just paper pronouncements, but concrete requirements that people can enforce in courts and administrative bodies.¹⁰ It provides mechanisms to enforce substantive environmental rights, and access to justice also includes advocacy and associational rights, e.g., freedom of assembly, which protect the right of people to come together to advocate their interests through public interest and community-based organizations.¹¹ Associational rights are particularly important where organizations are in danger of being decertified or disbanded for challenging governmental actions.

As early as 1948, the Universal Declaration on Human Rights proclaimed the generalized rights of access to information (Article 19) and justice (Articles 8 and 10), as well as the right to associate (Article 20).¹² Similarly, the 1966 International Covenant on Civil and Political Rights guaran-

Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence, 26 B.C. ENVTL. AFF. L. REV. 263 (1999); Hilary French, *Reshaping Global Governance*, in CHRISTOPHER FLAVIN ET AL., STATE OF THE WORLD 2002, at 174 (2002).

7. Jeremy Wates, *Introducing the Aarhus Convention: A New International Law on Citizens' Environmental Rights*, Background Paper distributed at the Pan-European ECO Forum Conference on Public Participation, Chisinau, Moldova, Apr. 16-18, 1999 (on file with authors). At the global level, see, e.g., WORLD COMMISSION ON DAMS, DAMS, AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING (2000), available at <http://www.dams.org/report/> (last visited Feb. 4, 2002); NAVROZ K. DUBASH, A WATERSHED IN GLOBAL GOVERNANCE?: AN INDEPENDENT ASSESSMENT OF THE WORLD COMMISSION ON DAMS (2001).

8. On the benefits of public involvement, see, e.g., BRADLEY BOBERTZ, PUBLIC PARTICIPATION IN ENVIRONMENTAL REGULATION (1991); KENNETH L. ROSENBAUM ET AL., INFORMATION ACCESS MECHANISMS: COLLECTING AND DISSEMINATING THE INFORMATION NECESSARY FOR ENVIRONMENTAL PROTECTION (1993); Ann M. Florini, *Does the Invisible Hand Need a Transparent Glove? The Politics of Transparency*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1999 163 (2000); Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 ENVTL. L. REP. 10141 (1995); Susan Casey-Lefkowitz, *A Comparative Look at the Role of Citizens in Environmental Enforcement*, NAT'L ENVTL. ENFORCEMENT J., June 1997, at 29; Nancy P. Spyke, *Public Participation in*

9. For a good history of international instruments incorporating public participation principles, see STEPHEN STEC & SUSAN CASEY-LEFKOWITZ, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 10-14 (Regional Env'tl. Center, Budapest 2000), available at <http://www.unece.org/env/pp/acig.htm> (last visited Feb. 20, 2002).

10. E.g., Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 ELR 10141 (Mar. 1995); Casey-Lefkowitz, *supra* note 8.

11. See generally CARL BRUCH ET AL., CONSTITUTIONAL ENVIRONMENTAL LAW: GIVING FORCE TO FUNDAMENTAL PRINCIPLES IN AFRICA 41-42 (2000), reprinted in 26 COLUM. J. ENVTL. L. 131 (2001); Tundu A. Lissu, *Repackaging Authoritarianism: NGO Policy Reform and the Freedom of Association and Expression in Tanzania* (LEAT Research Report Series No. 1, May 2000).

12. Universal Declaration of Human Rights, adopted by the U.N. General Assembly on Dec. 10, 1948, G.A. RES. 217A(III), U.N. Doc. A/810, at 71 (1948). Regional human rights declarations expand upon and reinforce the global declarations. See, e.g., San Salvador Protocol, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1988 (entered into force Nov. 16, 1999), art. 11, available at <http://www.oas.org/juridico/english/Treaties/a-52.html> and <http://www.cidh.oas.org/B%20C3%A1sicos/basic5.htm> (proclaiming a right to a healthy environment), available at <http://www.cidh.oas.org/B%20C3%A1sicos/basic6.htm> (last visited Feb 5, 2002); Charter of Civil Society for the Caribbean Community, *supra* note 6.

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tees the “freedom to seek, receive and impart information and ideas of all kinds.”¹³ 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.”¹⁴ Following the elaboration of various regional instruments,¹⁵ the 1992 Rio Declaration on Environment and Development crystalized the emerging public involvement norms 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 decisionmaking 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.¹⁶

Since the Rio Declaration, various international conventions addressing specific environmental issues have incorporated public involvement. 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.¹⁷ The primary mechanism adopted is the national action program which provides a framework for identifying the causes of desertification, as well as the 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 [NGOs] and local populations . . . in policy planning, decision-making, and implementation and review of national action programmes.”¹⁸ The Biodiversity Convention incorporated similar public participation principles.¹⁹

The global effort to include civil society in environmental decisionmaking extends to many international institutions that affect the environment. While examining public participation in international institutions is beyond the scope of this Article, it is worth noting that a number of these institutions now provide mechanisms for public access to information, for civil society participation in decisionmaking processes, and for concerned parties to appeal decisions. World Bank organizations such as the International Bank for Reconstruction and Development (IBRD) and the International Finance Corporation (IFC) make many of their documents (including environmental impact assessments (EIAs) of projects) publicly available, and the IBRD has developed inspection panels to investigate claims by citizens and NGOs that a World Bank-funded project harmed the environment or human rights.²⁰ Likewise, the World Trade Organization’s (WTO’s) Appellate Body recently allowed environmental NGOs to submit amicus curiae briefs in a case with environmental implications.²¹ Other international or-

DPI/130/7, art. 14(a)(1)(a), *reprinted in* 31 I.L.M. 818 (1992); *id.* art. 14(1)(a) (encouraging public participation in “environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity”), *id.* art. 17 (promoting the exchange of publicly available information). The 2000 Biosafety Protocol to Biodiversity Convention 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 Int’l Envtl. Rep. (BNA) 623 (Apr. 26, 2001).

With regard to public involvement in the Kyoto Protocol, see KEVIN A. BAUMERT & ELENA PETKOVA, *HOW WILL THE CLEAN DEVELOPMENT MECHANISM ENSURE TRANSPARENCY, PUBLIC ENGAGEMENT, AND ACCOUNTABILITY?* (World Resources Inst. 2000).

Since the Rio Declaration, various international undertakings have linked human rights and environmental rights, highlighting the central role of procedural rights to both. *E.g.,* Review of Further Developments in Fields With Which the Sub-Commission Has Been Concerned on Human Rights and the Environment, U.N. Doc. E/CN.4/Sub.2/1994/9, app. 1 (Draft Principles on Human Rights and the Environment, available at <http://fletcher.tufts.edu/multi/www/1994-decl.html> (last visited Feb. 17, 2002)). The U.N. 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 <http://www.cedha.org.ar/conclusions.htm> (last visited Feb. 17, 2002) (report of a meeting of experts convened by the U.N. Commission on Human Rights (UNCHR) and the U.N. Environment Program (UNEP) from January 14–15, 2002, in Geneva).

13. International Covenant on Civil and Political Rights, *done at* New York, Dec. 16, 1966 (entered into force Mar. 23, 1976), art. 19(2), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316, *reprinted in* 6 I.L.M. 368 (1967).

14. World Charter for Nature, adopted by the U.N. General Assembly, Oct. 28, 1982, arts. 18 & 23, G.A. Res. 37/7, U.N. GAOR Supp. (No. 51) 21, U.N. Doc. A/37/L.4 and Add. 1 (1982); *see also id.* arts. 15, 18.

15. *E.g.,* 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, Dec. 3, 1980.

16. Rio Declaration on Environment and Development, *done at* Rio de Janeiro, June 14, 1992, art. 10, *reprinted in* 31 I.L.M. 874 (1992).

17. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *done on* June 17, 1994 (entered into force Dec. 26, 1996), art. 3, *reprinted in* 33 I.L.M. 1328 (1994).

18. *Id.* art. 10(2)(e), (f).

19. United Nations Framework Convention on Biological Diversity, *done on* June 2, 1992 (entered into force Dec. 29, 1993), U.N. Doc.

20. *See* Documents Available from the Public Information Center, available at <http://www.worldbank.org/html/pic/DetailsOfDocuments.html> (last visited Feb. 5, 2002) (listing of publicly available documents); INTERNATIONAL FINANCE CORPORATION (IFC), ENVIRONMENTAL AND SOCIAL REVIEW PROCEDURE (1998), available at <http://www.ifc.org/enviro/EnvSoc/ESRP/esrp.htm> (last visited Feb. 5, 2002); THE WORLD BANK GROUP: THE INSPECTION PANEL, available at <http://www.worldbank.org/inspectionpanel/> or <http://www.worldbank.org/html/ins-panel/> (last visited Feb. 5, 2002); *see generally* DANA CLARK, *CITIZEN’S GUIDE TO THE WORLD BANK INSPECTION PANEL* (Center for International Environmental Law (CIEL), 2d ed. 1999), available at <http://www.ciel.org/Publications/citizensguide.pdf> (last visited Feb. 5, 2002). *But see* Erin K. MacDonald, *Playing by the Rules: The World Bank’s Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects*, 31 ENVTL. L. 1011, 1040–48 (2002).

21. WTO Appellate Body, Oct. 12, 1998, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (AB-1998-4), at 31; *but see id.* at 35–36 (noting that amicus curiae, i.e., friend of the court briefs not submitted as attachments to a party’s filings should not be considered; *see also* Suzanne Pyatt, *The WTO Sea Turtle Decision*, 26 ENVTL. L.Q. 815, 835–37 (1999).

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ganizations, such as the United Nations and its organs, the OAS, the European Union (EU), and the North American Commission on Environmental Cooperation (NACEC) have increasingly provided for public access to information and participation in their deliberations.²²

The Technical Barriers to Trade Agreement (TBT), adopted by the member countries of the WTO, was designed to eliminate standards and technical regulations that are unnecessary barriers to trade.²³ Access to information, Member participation, and access to justice are some of the instruments implemented by the agreement. In particular, the TBT requires that nations go through certain notice-and-comment procedures whenever a proposed technical regulation that could have a significant impact on trade is developed and is not in accordance with the relevant international standard or where such a standard does not exist.²⁴ In these circumstances, nations must promptly publish notice and inform WTO Members of the proposal, provide copies of the proposal upon request, and accept and consider comments regarding the proposed regulation. Settlement of related disputes takes place under the WTO Dispute Settlement Body.²⁵

The global development of public involvement norms has interacted synergistically with 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 different countries and regional bodies provide lessons learned that then may be incorporated—or avoided—in subsequent international documents. Through this iterative approach, governments have been able to learn from the experiences in various countries, regions, and contexts; become comfortable with the principles; and gradually implement the principles in their own countries.

At the same time, one of the primary objections voiced by activists at the aborted 1999 WTO negotiations in Seattle—as well as subsequent meetings of international institutions in Genoa, Montreal, Prague, and Washington, D.C.—was that the organization operates largely in secrecy and without the opportunity for public involvement.

22. E.g., NACEC, May 18, 1999, on the Draft Framework for Public Participation in Commission for Environmental Cooperation Activities, C/DIR/01/Rev.6; 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); see also Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 ELR 11389 (Dec. 2001); Fe Sanchis Moreno, Case Study: Fisheries, Transparency, and Participation (unpublished manuscript, Nov. 20, 2000) (paper prepared for WWF/Adena) (on file with authors); CLAUDIA SALADIN & BRENNAN VAN DYKE, IMPLEMENTING THE PRINCIPLES OF THE PUBLIC PARTICIPATION CONVENTION IN INTERNATIONAL ORGANIZATIONS (1998). An excellent reference in this area is the RETHINKING GOVERNANCE HANDBOOK: AN INVENTORY OF IDEAS TO ENHANCE ACCOUNTABILITY, PARTICIPATION, AND TRANSPARENCY (University of Victoria's Centre for Global Studies 1999).

23. WTO, TBT Agreement (entered into force Jan. 2, 1980).

24. *Id.* art. 2, §9.

25. *Id.* art. 14.1.

Regional Initiatives—Articulating Norms and Mechanisms

Regional initiatives promoting environmental governance have complemented the evolution of global principles, and continue to be important in clarifying and implementing those principles. Initially, the regional initiatives were primarily declarations and other “soft law” documents, with little substantive import for the signatories.²⁶ Nevertheless, these general pronouncements promoting environmental governance principles paved the way for more global and more specific pronouncements, such as the 1992 Rio Declaration.

While global instruments have promoted environmental governance through general principles, they have provided little guidance on how to implement those principles. Yet, clear and concrete domestic implementation is necessary to ensure public involvement as a practical matter. In the Americas, Asia, East Africa, Europe, and in the Newly Independent States of the former Soviet Union, regional initiatives are fleshing out the basic principles and providing guidance to nations in operationalizing access to information, participation, and justice in environmental matters.²⁷

The Aarhus Convention

The 1998 Aarhus Convention provides the most vivid example of how governments and civil society can collaborate

26. For example, in Europe, consider the 1980 Salzburg Declaration, *supra* note 15.

27. In addition to the five regional initiatives considered here, it is worth noting that on February 19, 1997, the Member nations of the CARICOM agreed to a Charter of Civil Society for the Caribbean Community, *supra* note 6, and accompanying text, that has several provisions relating to environmental governance, including: art. 1(a) (including NGOs within the definition of “Social Partners”); arts. 2.2(d), 6, 7 (reaffirming the freedoms of assembly and association); arts. 5, 17.2 (ensuring equality and nondiscrimination before the law; requiring an independent and impartial judiciary); art. 22 (requiring Members to implement a framework for consulting NGOs when considering and implementing “national economic and social programmes”); art. 25 (mandating periodic reports by Members to the CARICOM Secretariat on progress made under the Charter; NGOs must be consulted when making such reports, and their Members must have “due regard” for their input); art. 25 (requiring a national committee or body to receive complaints from NGOs and others regarding charter breaches or noncompliance; and the Conference of Heads of Government shall inform the States of the results of their deliberations and of recommendations regarding the breaches).

The Treaty of Chaguaramas, signed by Barbados, Guyana, Jamaica, and Trinidad and Tobago at Chaguaramas, Trinidad, July 4, 1973 (and taking effect on Aug. 1, 1973), established CARICOM. CARICOM has three main objectives: “economic cooperation through the Caribbean Single Market and Economy; coordination of foreign policy among the independent Member States; and common services and cooperation in functional matters such as health, education and culture, communications and industrial relations.” The CARICOM Member States are Antigua and Barbuda, Belize, Grenada, Montserrat, St. Vincent and the Grenadines, Turks and Caicos Islands, The Bahamas, British Virgin Islands, Guyana, St. Kitts and Nevis, Suriname, Barbados, Dominica, Jamaica, Saint Lucia, Trinidad and Tobago. However, the Bahamas is a Member of the community but not the common market; and Haiti is expected to become the a full Member upon completion of a final formality. The CARICOM Charter of Civil Society for the Caribbean Community is available on the Internet, at www.caricom.org/chartercivilsoc.html (last visited Feb. 4, 2002). General information on the history and structure of CARICOM is available on the Internet at <http://www.caricom.org> (last visited Feb. 4, 2002). Additional information is available on the Internet at The Caribbean Community and Common Market, CARICOM <http://www.itcilo.it/english/actrav/telearn/global/ilo/blokut/caricom.htm> (last visited Feb. 4, 2002).

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on a regional level to jointly develop and implement environmental governance laws, institutions, and practices. In addition to elaborating the details of how to strengthen environmental governance through national laws and institutions, the Aarhus Convention also saw an unprecedented level of NGO involvement in its conceptualization, drafting, signing, ratification, and implementation.

The Process Leading to the Aarhus Convention

The Aarhus Convention grew out of the Environment for Europe process, which started in 1991.²⁸ The Environment for Europe process seeks to pursue a coherent strategy for addressing Europe's environmental problems, with particular emphasis on restoring the environments of countries in transition from communism. An integral part of this international effort has been to define the role of public participation in implementing sustainable development. It is noteworthy that officials in many of the countries in transition had formerly been in NGOs, and consequently supported efforts to improve transparency, participation, and accountability.

The third Ministerial Conference of the process—held in Sofia, Bulgaria, in 1995—included environment ministers from 49 countries from Central Asia, Europe, and North America (comprising most of the UNECE countries), as well as from Australia, Japan, and Mexico. Representatives of the European Community and NGOs also attended. The conference considered the UNECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decisionmaking.²⁹ Members of Global Legislators Organization for a Balanced Environment (GLOBE) and NGOs asserted that the nonbinding guidelines were too weak and that a stronger, binding convention was necessary. Ultimately, the Ministerial Declaration highlighted public participation as a key issue, and it recommended that the UNECE should take the lead in developing a regional public participation convention with appropriate NGO involvement.³⁰

One of the unique features of the Aarhus Convention is the unprecedented role that NGOs have had throughout the convention process.³¹ Public participation in this process has meant added technical and personnel resources in the negotiating process, a stronger convention, increased public support for the outcome, and a broad-spectrum of advocates who can assist in implementing the convention. In addition to participating in drafting the convention, NGO representatives served on official national delegations. The NGOs established a coalition called the European ECO Forum, which fielded a delegation that participated in the

Environment for Europe conferences and drew upon a resource group of more than 200 public interest environmental experts who reviewed drafts, provided input, and suggested strategies.³²

In 1993, 1995, and 1998, NGOs held conferences that paralleled the ministerial conferences. NGOs also hosted country roundtables in 15 central and East European nations, as well as some West European nations, to educate the public about the potential Aarhus Convention. An NGO coalition—including the Regional Environmental Centre for Central and Eastern Europe (REC)—conducted and coordinated extensive research on the state of environmental governance in the UN/ECE countries. In 1994, the REC published a *Manual on Public Participation*, which assessed public participation practices and opportunities in central and eastern Europe, and was essentially a guide of best practices.³³ Later, the NGOs, through the REC, published *Doors to Democracy*, a series of country-by-country assessments of trends and practices in central, eastern, and western Europe, and the Newly Independent States.³⁴

Considering the high-profile role of NGOs in this convention, it may be said that this was the first civil society convention, drafted largely for civil society and with substantial participation by the nongovernmental community.

The Substance of the Aarhus Convention

The Aarhus Convention is one of the first binding international instruments codifying environmental governance principles. As such, it is likely to influence the development of other regional initiatives. In fact, the OAS and the ASEM considered the Aarhus Convention as they developed regional instruments for the Americas and Asia, respectively. These regional initiatives have prompted similar discus-

28. For more information on the history leading up to the Aarhus Convention, see the UNECE web page, at <http://www.unece.org/env/pp>, the web page for the European environmental citizens' organizations (ECOs), at <http://www.participate.org> (last visited Feb. 8, 2002), and Wates, *supra* note 7, at 4.

29. ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making, adopted at UNECE Ministerial Conference on Environment for Europe, Sofia, Bulgaria (Oct. 25, 1995), available at <http://www.unece.org/env/documents/1995/cep/ece.cep.24e.pdf> (last visited Feb. 13, 2002); <http://www.participate.org/archive/guidelines.htm> (last visited Feb. 13, 2002).

30. See STEC & CASEY-LEFKOWITZ, *supra* note 9, at 2.

31. Wates, *supra* note 7, at 8; see also STEC & CASEY-LEFKOWITZ, *supra* note 9, at 5.

32. See generally <http://www.participate.org> (last visited Feb. 20, 2002).

33. REGIONAL ENVTL. CENTER FOR CENTRAL AND EASTERN EUROPE, *MANUAL ON PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING: CURRENT PRACTICES AND FUTURE POSSIBILITIES IN CENTRAL AND EASTERN EUROPE* (Magdolna Toth Nagy et al. eds., 1994), available at <http://www.rec.org/REC/Publications/PPManual/Default.html> (visited Feb. 5, 2002).

34. *DOORS TO DEMOCRACY: CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING IN WESTERN EUROPE* (Regional Env'tl. Center for Central and Eastern Europe eds., 1998), available at <http://www.rec.org/REC/Publications/PPDoors/WEST/cover.html> (last visited Feb. 5, 2002); *DOORS TO DEMOCRACY: CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING IN CENTRAL AND EASTERN EUROPE* (Regional Env'tl. Center for Central and Eastern Europe eds., 1998), available at <http://www.rec.org/REC/Publications/PPDoors/CEE/cover.html> (last visited Feb. 5, 2002); *DOORS TO DEMOCRACY: CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING IN THE NEWLY INDEPENDENT STATES* (Regional Env'tl. Center for Central and Eastern Europe eds., 1998), available at <http://www.rec.org/REC/Publications/PPDoors/NIS/cover.html> (last visited Feb. 5, 2002); *DOORS TO DEMOCRACY: A PAN-EUROPEAN ASSESSMENT OF CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS* (Regional Env'tl. Center for Central and Eastern Europe eds., 1998), available at <http://www.rec.org/REC/Publications/PPDoors/EUROPE/cover.html> (last visited Feb. 5, 2002). A listing of all REC publications, including those above, is available at <http://www.rec.org/REC/Publications/List.html> (last visited Feb. 5, 2002).

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sions about their relevance as possible models for an African initiative.

The Aarhus Convention emphasizes three related areas or “pillars” of environmental governance: access to information, public participation in decisionmaking, and access to administrative and judicial redress. In these three areas, the convention provides minimum standards for the state parties to adopt in their domestic legislation.³⁵ The convention emphasizes enforceable rights of citizens in each of the three areas and also makes reference to a human right to a healthy environment.³⁶ In contrast to many conventions that establish norms that do not necessarily vest rights in anyone, this rights-based approach underpins many of the specific provisions expanding public access, as well as providing a basis for citizens and NGOs to enforce their procedural and substantive environmental rights in court. The Aarhus Convention also focuses on the obligations of governmental bodies and individuals at the national, subnational, and local levels, as well as natural and legal persons “performing public administrative functions”³⁷ and EU institutions; wholly private bodies, such as for-profit corporations, are generally beyond the scope of the Aarhus Convention.³⁸

The Aarhus Convention specifically prohibits nations from discriminating against natural or legal persons on the basis of “citizenship, nationality or domicile.”³⁹ In fact, this provision seems to apply to all members of the “public,” and not just reciprocally to other Member States. Thus, to the extent that a citizen has a right to obtain information from the government, participate in decision-making processes, or appeal to independent bodies for recourse, anyone from any country appears to have the same rights under the convention.

Before examining the specific provisions of the Aarhus Convention, it is worth observing that this convention does not represent the least common denominator. Initially envisioned as a mechanism to assist countries in transition from communism to become more open and democratic, the ultimate formulation of the convention requires practically all European nations to change their laws, institutions, and practices. In fact, as a region, western European nations have been the slowest to ratify the convention: only 2 of the first 18 nations were EU Member States (Denmark and Italy).

Access to Information

Access to information forms the basis for public awareness of and response to threats to public health and the environment, and is essential to effective public participation in governmental decisionmaking.⁴⁰ The Aarhus Convention’s

access to information pillar (Articles 4 and 5) establishes public rights to obtain environmental information and governmental responsibilities to collect, organize, and disseminate environmental information. Thus, the government must both provide information on request (passive dissemination under Article 4) and collect, analyze, and disseminate certain information widely (active dissemination under Article 5).

Environmental information is broadly defined to include information in any material form (written, electronic, visual, etc.) on the “state of the elements of the environment . . .”; institutional and natural factors “affecting or likely to affect the elements of the environment”; and the “state of human health and safety, conditions of human life, cultural sites and built structures . . .”⁴¹ This definition is nonexhaustive, and extends well beyond the typical definition of “environment” that is primarily linked to human health and biodiversity concerns. It also extends to information held by any public authority within the scope of the convention,⁴² not merely to information held by environmental authorities.

Under Article 4, which addresses passive dissemination of information, civil society is guaranteed broad rights to obtain environmental information that the government holds. There is a presumption in favor of access, and any person may request the information without demonstrating an interest in the information or stating the purpose for which it will be used.⁴³ The government must provide the information “as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request.”⁴⁴ The Aarhus Convention allows public authorities to withhold requested information only if its release would harm specific enumerated interests, such as national defense, commercial confidentiality, intellectual property rights, and personal privacy.⁴⁵ The exemptions “shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”⁴⁶ Thus, the convention seeks to maintain the public’s right to information regarding the quantity, nature, and sources of pollutants that could affect them.

If the authority does not have the requested information, it must either forward the request to the authority that does have the information, or it must inform the applicant where it believes the information may be obtained.⁴⁷ If the authority refuses to release the information, the refusal must be in writing if the original request was in writing or the applicant requested a written response. The refusal decision must state the reasons for the refusal and provide information on how to administratively appeal or judicially review the refusal, under Article 9 of the Aarhus Convention.⁴⁸ Finally, when releasing information public authorities may impose a

35. Aarhus Convention, *supra* note 1, art. 3.5.

36. *Id.* arts. 4-5 (access, collection, and dissemination of information); arts. 6-8 (public participation); art. 9 (access to justice); Intro. (“every person has the right to live in an environment adequate to his or her health and well-being”).

37. *Id.* art. 2.2.

38. The Pollutant Release and Transfer Register (PRTR) Protocol, which is currently being negotiated and is expected to be adopted in 2003, will extend pollution emission reporting requirements to private entities. See Aarhus PRTR Task Force, available on the Internet, at <http://www.ecn.cz/prtr-tf/> (last visited Jan. 25, 2002).

39. Aarhus Convention, *supra* note 1, art. 3.9.

40. See generally STEC & CASEY-LEFKOWITZ, *supra* note 9, at 17-20.

41. Aarhus Convention, *supra* note 1, art. 2.3.

42. See *id.* art. 2(2) (defining “public authority”).

43. *Id.* art. 4.1.

44. *Id.* art. 4.2.

45. *Id.* art. 4.4; see also *id.* art. 4.3.

46. *Id.* art. 4.4.

47. *Id.* art. 4.5.

48. *Id.* art. 4.7; see also *infra* note 80 and accompanying text.

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“reasonable” fee for supplying the requested information,⁴⁹ as well as the circumstances under which the charges may be waived (for instance, for nonprofit institutions).

Article 5 of the convention, dealing with active dissemination of information, requires public authorities to collect, update, and actively disseminate environmental information that is “relevant to their functions.”⁵⁰ For example, when there is an imminent threat to public health or the environment, the authority must immediately disseminate all information that could help the affected public prevent or mitigate the effects.⁵¹ To promote public access to the information, states must inform the public about the nature and extent of information held by the government and how the public may access it.⁵² The convention requires each state to “progressively” provide information via electronic databases that the public may access through the Internet.⁵³

Each country must prepare, publish, and disseminate national state-of-the-environment reports.⁵⁴ These reports provide the public with information on environmental quality and on the various pressures on the environment. Under the convention, reports must be produced at least once every “three or four” years.

The Aarhus Convention also requires nations to establish national pollution inventories or registers.⁵⁵ These databases must be computerized and publicly accessible, and they may track the inputs, releases, and transfers of specified chemicals. Frequently, these systems take the form of a pollutant release and transfer register (PRTR).⁵⁶ A PRTR system tracks the releases and transfers of specific chemicals to the different environmental media: air, water, and soil. Generally, any private or public facility that uses or emits more than threshold levels of these chemicals in a given year must report its releases of that chemical.

PRTR systems illustrate the power of public access to environmental information. In determining the amount of chemicals released to the environment, industrial facilities are often surprised to discover the quantities of raw materials that they waste.⁵⁷ Through the PRTR and materials accounting, companies can reduce the amount of pollution they are emitting, saving money by conserving raw materials and reducing disposal costs. Since PRTR systems typically have facility-specific information, citizens are able to determine the sources, types, and amounts of pollution to which they are exposed. In many cases, this knowledge has empowered citizens to apply direct pressure on a facility to reduce its emissions, particularly when it releases significantly more than comparable facilities located elsewhere.⁵⁸

As a result, a number of facilities reduced the amount of chemicals used and released, or even replaced them with nontoxic substances.⁵⁹

Finally, the information generated through the PRTR process can be valuable in shaping environmental policy and legislation. The chemicals tracked by the PRTR often are not regulated, and the information gathered on their releases and transfers can help prioritize government actions by determining which chemicals are being released in sufficiently large quantities that suggests that further investigation and action may be required.⁶⁰ As for the state-of-the-environment reports, harmonization of PRTR standards could provide an effective tool for monitoring pollutants released throughout a region, as well as providing insight into their sources.⁶¹ The convention’s PRTR provisions remain primarily hortatory, with few concrete obligations. The UN/ECE established a task force to investigate opportunities for developing PRTR in the region, and a PRTR Protocol is expected to be adopted at the 2003 Kyiv Ministerial Meeting.⁶²

Finally, the Aarhus Convention requires dissemination of legal and policy documents, as well as publication of the facts and analyses relied upon in developing major environmental policies.⁶³ The convention also promotes mechanisms such as eco-labeling and environmental auditing that provide the public, governments, and industry with specific environmental information.⁶⁴

Public Participation in Decisionmaking

Public participation in decisionmaking improves the quality of the decision by widening the knowledge base. Individual citizens frequently know particular areas—including their unique environmental values and the impacts of environmental threats—more intimately than public authorities do, and civil society can bring added energy, expertise, and innovation to bear on environmental issues. Additionally, by providing citizens with an opportunity to be heard, public participation builds the public support for the ultimate decision.

For purposes of the Aarhus Convention, the “public concerned” has a right to participate in a wide range of governmental decisionmaking processes under Articles 6, 7, and 8. The public concerned is defined as the “public affected or likely to be affected by, or having an interest in, the environmental decision-making.”⁶⁵ Furthermore, NGOs “promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest,”⁶⁶ and thus have a right to participate.

49. *Id.* art. 4.8.

50. *Id.* art. 5.1(a).

51. *Id.* art. 5.1(c).

52. *Id.* art. 5.2.

53. *Id.* art. 5.3.

54. *Id.* art. 5.4.

55. *Id.* art. 5(9).

56. For more information on PRTR, see Global Chemical Right-to-Know Resources, at <http://www.mapcruzin.com/globalchem.htm> (with links to right-to-know initiatives around the world); OECD PRTR Documents, at <http://www.oecd.org/ehs/ehsmono/#PRTRS> (with documents in English, French, and Russian); and the UNEP web page on PRTR, at <http://irptc.unep.ch/prtr/> (last visited Feb. 20, 2002).

57. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 624-26 (1992).

58. See generally *id.*

59. *E.g., id.* at 626 (noting how Unocal substituted a solvent derived from citrus peel for methyl chloroform, an ozone-depleting chemical).

60. See *id.* at 626-27 (providing examples of how the U.S. Congress and the U.S. Environmental Protection Agency used TRI information in shaping domestic environmental law and policy).

61. See, e.g., NACEC, TAKING STOCK 1998: NORTH AMERICAN POLLUTANT RELEASES AND TRANSFERS (Commission for Env'tl. Cooperation 2001) [hereinafter TAKING STOCK].

62. See generally Aarhus PRTR Task Force, *supra* note 38.

63. Aarhus Convention, *supra* note 1, arts. 5.5, 5.7.

64. *Id.* arts. 5.6, 5.8.

65. *Id.* art. 2.5; see also art. 2.4 (defining “the public” to mean “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”).

66. *Id.* art. 2.5.

Article 6 establishes requirements for public participation in decisionmaking on licensing and permitting certain kinds of proposed activities, which are listed in Annex I to the convention.⁶⁷ The activities are similar to those for which an EIA is typically required.⁶⁸ Additionally, public participation is required “in accordance with . . . national law” for decisions regarding proposed activities that are not listed in Annex I if they may have a “significant effect on the environment.”⁶⁹ For both sets of proposed activities, there is an exemption for proposed activities if public participation would adversely affect national defense.⁷⁰

For activities for which the Aarhus Convention mandates public participation, public authorities must provide adequate, timely, and effective notice to the public of the proposed activity, the nature of the possible decision, the responsible public authority, the process for making the decision (including opportunities for public comment), and other relevant information.⁷¹ The convention requires public participation to occur early in the decisionmaking process, when options remain open and public input can still be incorporated into the final decision.⁷² To ensure informed and effective public participation, authorities must provide all relevant information to the public free of charge and as soon as it is available.⁷³ The public is guaranteed an opportunity to submit written or oral comments.⁷⁴ The convention seeks to ensure that participation is meaningful by requiring parties to “ensure that in the decision due account is taken of the outcome of the public participation,” mandating that public authorities issue their decisions in writing (including the bases for the decisions made), and providing that the final decisions be made publicly available.⁷⁵

While Article 6 mandates significant opportunities for public participation in the permitting and development of projects, both Articles 7 and 8 are more circumscribed when it comes to involving the public in the development of the overarching norms or the general plans and programs that implement the norms. Article 7 requires nations to “make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment.”⁷⁶ The Aarhus Convention requires plans and programs to follow the Article 6 provisions relating to reasonable time frames for public participation, opportunity for early participation, and taking “due account” of the participation. In hortatory language, Article 7 encourages parties “to provide opportunities for public participation in the preparation of policies relating to the environment.” Similarly, Article 8 generally encourages nations to promote public participation in the preparation of rules and regulations “that may have a significant effect on the environment.”

67. *Id.* art. 6.1(a).

68. *Cf. Wates, supra* note 7, at 4.

69. Aarhus Convention, *supra* note 1, art. 6.1(b).

70. *Id.* art. 6.1(c).

71. *Id.* art. 6.2; *see also* art. 6.3.

72. *Id.* art. 6.4.

73. *Id.* art. 6.6.

74. *Id.* art. 6.7.

75. *Id.* arts. 6.8, 6.9.

76. *See Wates, supra* note 7, at 5 (noting that the scope of this provision is potentially vast, as “relating to the environment” could include broad sectoral activities such as energy, transportation, and farming).

Access to Justice

The third pillar of the Aarhus Convention—access to justice—provides the enforcement mechanism necessary to ensure that citizens and NGOs can realize their procedural rights under the convention, as well as empowering citizens and NGOs to enforce environmental law. Article 9 requires that the judicial and administrative review procedures be “fair, equitable, timely and not prohibitively expensive.”⁷⁷ Court decisions must be in writing and publicly accessible, and the convention encourages other authorities to make their decisions public whenever possible.⁷⁸ Additionally, the Aarhus Convention encourages parties to consider mechanisms for removing or reducing financial and other barriers to access to justice.⁷⁹

Article 9.1 provides that any person who believes that his or her request for information under Article 4 was not dealt with according to the prescribed requirements must have access to a court or other independent legally empowered body to review the decision.⁸⁰ Alternatively, an aggrieved person can seek independent reconsideration of the request. Final decisions under either option bind the public authority holding the information; and if the refusal to release information is upheld, the reasons must be in writing.

Article 9.2 provides a right for the public to seek review of the decisions made on projects or activities addressed by Article 6. Members of the public can appeal either the substantive or the procedural legality of any decision, act, or omission. In order to invoke this provision, the appellant must have a “sufficient interest” or claim “impairment of a right,” although the article also provides that these requirements must be interpreted “consistently with the objective of giving the public concerned wide access to justice.”

Finally, Article 9.3 requires nations to provide public “access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.” This provision allows the public to enforce a broad range of environmental laws against both the government and against private individuals and corporations.

Future Directions for the Aarhus Convention

As of February 2002, 18 countries have ratified or acceded to the Aarhus Convention.⁸¹ The convention entered into force on October 30, 2001.⁸² Some countries, such as Moldova and Ukraine, ratified the convention and now must implement its provisions by modifying existing laws and institutions, as well as adopting new ones. Other countries, as well as the EU, have opted to reform their laws before formally ratifying or acceding to the convention.

77. Aarhus Convention, *supra* note 1, art. 9.4.

78. *Id.* arts. 9.4, 9.5.

79. *Id.* art. 9.5.

80. *See Wates, supra* note 7, at 5 (noting that “the latter option [was] included to accommodate those countries which have a well-functioning office of Ombudsperson”).

81. *See* <http://www.unece.org/env/pp/ctreaty.htm> (last visited Feb. 14, 2002).

82. *Id.*; Press Release, UNECE, Aarhus Convention Starts Count-Down to Entry Into Force (Aug. 9, 2001) (on file with author); Aarhus Convention, *supra* note 1, art. 20 (providing for entry into force).

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While focusing on ratification and implementation by its Member countries, the UNECE has expressed some interest in expanding the convention beyond the UNECE region. Under Article 19.3, any country that is a Member of the United Nations can accede to the convention.

A few unresolved issues remain in implementing the Aarhus Convention. Due to a lack of agreement on certain topics during the negotiations, the Parties drafted framework provisions that need more elaboration. Consequently, the UNECE has established task forces on PRTR, compliance mechanisms, genetically modified organisms, access to justice, and electronic tools.⁸³

The UNECE is seeking to coordinate its efforts with other convention secretariats in the region, such as the 1991 Espoo Convention on Transboundary Environmental Impact Assessments.⁸⁴ For example, the Strategic Environmental Assessment (SEA) Protocol to the Espoo Convention, that is currently being negotiated, seeks to strengthen the requirements for nations to include the public in the assessments made of plans or programs that will affect the environment.⁸⁵ Moreover, the European Parliament and the Council of the EU have adopted an SEA Directive in anticipation of the SEA Protocol.⁸⁶ The 1999 Protocol on Water and Health⁸⁷ became the first international instrument to expressly incorporate the Aarhus Convention provisions, doing so in the context of environmental health.⁸⁸

The UNECE is also reaching out to other organizations to support development of similar regional environmental governance initiatives. For example, the UNECE and the OAS communicated during the development of the ISP in the Americas. As a step toward developing the principles

globally (and particularly in Africa and Asia), U.N. Environment Program/International Referral System for Sources of Environmental Information (UNEP/INFOTERRA) and the UNECE hosted a consultation on "Promoting the Application of Principle 10 of the Rio Declaration." Held in May 2000, this meeting brought together environmental lawyers and experts from Africa, the Americas, Asia, and Europe to discuss ways to link and support ongoing and planned activities to implement Rio Principle 10 in different regions and to chart future actions at the national, regional, and global levels.⁸⁹

The ISP

The ISP is an independent regional initiative of the OAS promoting environmental governance. Growing out of the Summits of the Americas, the ISP rests on the commitments that OAS Members made regarding Principle 10 of the 1992 Rio Declaration and Agenda 21.⁹⁰ At the 1994 Miami Summit of the Americas meeting, the countries reiterated the importance of participation of all sectors of civil society to a vigorous democracy. At the 1996 Santa Cruz (Bolivia) Summit Conference on Sustainable Development, the heads of state charged the OAS with formulating the ISP, emphasizing legal and institutional mechanisms, access to information, training programs, and consultations to ensure civil society involvement in environmental governance.⁹¹ The 1998 Santiago (Chile) Summit of the Americas reaffirmed the governments' commitment to developing legal and institutional frameworks to encourage public participation.

The OAS coordinated the ISP process, with funding from the Global Environmental Facility, through UNEP, the U.S. Agency for International Development, and the U.N. Educational, Scientific, and Cultural Organization (UNESCO). The OAS initially drafted the ISP, which was then frequently revised to incorporate comments from: consultations by national "focal points"; from hemispheric conferences that debated the draft language in detail; and from public comments received (including ones from the Internet). The Inter-American Council for Integral Development⁹² ultimately approved the ISP (consisting of both the *Policy Framework* and the *Recommendations for Action*) in April 2000.

The ISP consists of two documents: the short, general *Policy Framework* and the longer, more detailed *Recommendations for Action*. The *Policy Framework* was intended to be the essential document for the OAS Member States to adopt. It contains the principles, objectives, and policy recommendations of the ISP. The *Policy Framework* is intentionally general, establishing the basic elements that the nations are encouraged to implement.

In contrast, the *Recommendations for Action*, which were appended to the adopted *Policy Framework* (and originally not intended to be signed by the Parties), are hortatory and provide the nations with an array of particular policies, practices, and institutional mechanisms that nations may consider adopting. Generally, the recommendations urge Mem-

83. See <http://www.unece.org/env/pp/tfwg.htm> (last visited Feb. 20, 2002).

84. UNECE, Convention on Environmental Impact Assessment in a Transboundary Context, *done at* Espoo, Finland, Feb. 5, 1991.

85. UNECE, Draft Elements for a Protocol on Strategic Environmental Assessment, Mar. 8, 2001, MP.EIA/AC.1/2001/3, available at <http://www.unece.org/env/documents/2001/eia/ac1/mp.eia.ac.1.2001.3.e.pdf> (last visited Feb. 5, 2002); UNECE, Revised Texts for the Substantial Provisions of a Protocol on Strategic Environmental Assessment, Jan. 11, 2002, MP.EIA/AC.1/2001/3, available at <http://www.unece.org/env/documents/2002/eia/ac1/mp.eia.ac.1.2002.3.e.pdf> (last visited Feb. 5, 2002).

86. On June 27, 2001, the European Parliament and the Council of the European Union adopted Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment, otherwise known as the Strategic Environmental Assessment (SEA) Directive. The purpose of the SEA Directive, in part, is to ensure public participation in the preparation and adoption of plans and programs that may significantly affect the environment. Before approving any plans or programs which would have a significant effect on the environment, Member States must make the draft plan (and any corresponding environmental report) available to the public and other Member States, and allow a reasonable time for the public to comment on the draft. The relevant authority must then make a statement summarizing how the comments were taken into account before making its final decision. Directive 2001/42/EC of the European Parliament and of the Council on the Assessment of the Effects of Certain Plans and Programmes on the Environment, arts. 1, 6, 9, PE-CONS 3619/3/01 REV 3, *done at* Luxembourg, June 27, 2001, available at http://europa.eu.int/comm/environment/eia/full-legal-text/0142_en.pdf (last visited June 27, 2001).

87. Water and Health Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *done at* London, June 18, 1999, U.N. Doc. E/ECE/MP.WAT/AC.1/1998/10, available at <http://www.un.org/Depts/Treaty/collection/notpubl/27-5a-eng.htm> (last visited Feb. 5, 2002).

88. *Id.* arts. 10 (access to public information), 5 (access to information and public participation), 15 (public participation in compliance).

89. See UNECE/UNEP Consultation on Promoting the Application of Principle 10 of the Rio Declaration, *done at* Rome, May 20, 2000 (draft meeting report, on file with author).

90. ISP, *supra* note 2, at 2.

91. *Id.* at 2-3.

92. See <http://www.cidi.oas.org/> (last visited Feb. 20, 2002).

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ber States to take action to: (1) improve communication mechanisms to share information; (2) establish legal and regulatory frameworks to ensure public access to information, decisionmaking, and justice; (3) promote institutional structures, policies, and procedures for expanding public participation; (4) advance education and training programs; (5) dedicate funding for public participation in decision-making; and (6) promote fora for consultation.

The six primary recommendations were, in part, built around several studies, reports, and programs. Case studies, including several ISP Demonstration Sites, were used to supplement the broader and more comprehensive empirical studies; and served to demonstrate how each recommendation could be implemented. They also provided the ISP participants with real-world examples of how different mechanisms for environmental governance actually played out in practice. The successes and failures of each project were discussed and analyzed, and incorporated into the final ISP reports.

For instance, the information and communication recommendation included a report that analyzed 12 case studies of efforts to include the public in environmental decision-making.⁹³ The case study of the Organization of East Caribbean States' (OECS') Solid Waste Development Project in Grenada demonstrated how only involving the public in the later stages of a proposed project can lead to significant transaction costs for all parties involved.⁹⁴ In contrast, the ISP Demonstration Site in the Portland Bight Protected Area in Jamaica incorporated civic involvement in the early planning stages, which helped ensure that a reasonable project plan was developed, thus avoiding the need for costly programmatic modifications later on.⁹⁵ Hence, incorporating public involvement early and often made the government decisionmaking process more, rather than less, efficient.

Several other programs are worth mentioning. The legal and institutional framework component of the ISP, which seeks to integrate civil society into environmental matters, included a legal inventory and nine case studies.⁹⁶ The inventory assessed public involvement provisions in regional environmental laws, while the case studies examined on-the-ground experiences.⁹⁷ Under its education and training component, the ISP held three regional technical assistance and training seminars, each for 30-40 government representatives, in an effort to stimulate civil society involvement in governmental affairs.⁹⁸ The ISP created a website,

which has disseminated technical information on the ISP and other public participation efforts.⁹⁹

The ISP method of interspersing detailed case studies among its broader and more generalized empirical studies is an innovative example of how regional (or international) action can assist nations in promoting environmental governance by providing a wealth of knowledge and experience from other nations. Such case studies and reports provide also strong foundation for the regional initiative participants since they often involve common environmental contexts, legal systems, cultural values, and economic and institutional realities. These integrated studies and pilot projects thus enhance the effectiveness and likelihood of success for nations seeking to develop laws and institutions to ensure good environmental governance.

The ISP experience has also yielded a few insights into the role of civil society in developing and advocating for a regional environmental governance initiative. In the ISP process, the OAS assumed the lead in developing the strategy for public participation in the negotiating process. It utilized a Public Advisory Committee (PAC) consisting of civil society representatives from different sectors, such as environmental NGOs and businesses. The Members of the PAC were selected in their personal capacity, but expected to act as representatives of their respective sectors, keeping their peers apprised of developments and collecting their comments. NGO representatives also served on a Technical Group, which was to provide expert advice on the design and substance of the ISP. In retrospect, however, the rights and responsibilities of the PAC could have been more clearly defined. PAC Members were uncertain of their rights to attend meetings, review documents, comment on those documents, or to have their comments incorporated. Additionally, the responsibility of the PAC Members to represent particular sectors or interests was unclear, and some PAC Members felt comfortable taking institutional or sectoral positions on the developing ISP, and thus did not always seek to build peer consensus on the draft ISP provisions.

The dichotomy between the *Policy Framework* and *Recommendations for Action* facilitated the discussion among ISP participants. Government representatives did not need to spend as much time negotiating the fine points of a document provision that did not impose binding legal obligations on its signatories.

It should not be forgotten that while the Aarhus Convention is a binding treaty with concrete obligations, the ISP is deemed a "strategy." This strategy encourages, but does not require, signatories to undertake specific legal and institutional reforms. Thus, while the ISP is technically soft law, with no binding obligations or institutional framework, it establishes regional principles and standards that the OAS and Member States are now seeking to implement.

Nevertheless, any limitations of the ISP are more than outweighed by its significance to environmental governance in the Americas. The ISP represents a landmark initiative in the Americas.¹⁰⁰ The OAS included NGOs, business, and citizens in the development of the ISP to an extent that was unprecedented in Inter-American efforts. In fact,

93. ISP, *supra* note 2, at 16-21. The case study also examined the Aarhus Convention, the U.S. Emergency Planning and Community Right-To-Know Act, and INFOTERRA. It is also worth mentioning that the information and communication component created a website and implemented a pilot informational network that provides interested parties with updated information on the ISP's progress. *Id.* at 18-19.

94. *Id.* at 19.

95. *Id.* at 20. The ISP also mentions the Patuca II Hydroelectric project in La Mosquitia, Honduras, as another example of how the lack of transparency and public participation can hinder project success. *Id.* at 21.

96. *Id.* at 24; <http://www.ispnet.org> (last visited Feb. 14, 2002). See generally WORLD RESOURCES INSTITUTE, INTER-AMERICAN STRATEGY FOR THE PROMOTION OF PUBLIC PARTICIPATION IN SUSTAINABLE DEVELOPMENT DECISION-MAKING, available at <http://www.wri.org/governance/isp.htm> (last visited Jan. 22, 2002).

97. ISP, *supra* note 2, at 24-27.

98. *Id.* at 34.

99. *Id.* at 18-19, 39.

100. The NAAEC is another important regional instrument. The 1997 CARICOM Charter of Civil Society for the Caribbean Community is also relevant. See *supra* note 6.

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the OAS has been expanding the participation of civil society organizations by developing guidelines for their participation in the OAS.¹⁰¹ The ISP has also made improvements in domestic policy more acceptable and realizable. National governments now have a mandate on environmental governance and an initial set of tools to assist them in further developing practices and principles. Thus, the ISP has advanced international law by starting to clarify the scope of environmental governance principles and mechanisms as they apply in the Americas.

ASEM

ASEM was first convened in Bangkok in March 1996, and its participants included 10 Asian nations, the European Commission, and all 15 EU nations.¹⁰² The collective effort was to create a cooperative process to better promote economic, political, and cultural development, as well as environmental protection.¹⁰³ In 1999, ASEM established the Asia-Europe Environmental Technology Centre (AEETC)¹⁰⁴ to provide policy guidance, exchange technologies, and promote cooperation in the areas of environment, agriculture, and technology.¹⁰⁵

As a part of this effort, a three-year project entitled "Public Participation in Environmental Aspects in ASEM Counties" was initiated in June 2000.¹⁰⁶ The project is coordinated by AEETC, funded by the Finnish government, and jointly carried out by the Finnish Environment Institute and the Thailand Environment Institute.¹⁰⁷ AEETC is currently in the process of developing Elements of Good Practice for environmental governance.¹⁰⁸ The nonbinding elements are intended to establish a foundation for advancing public involvement in ASEM nations.¹⁰⁹ The Elements of Good Practice are still in draft form, and will undergo further discussion (and possibly adoption) at the First ASEM International Conference on Public Participation, June 10-12, 2002, in Bangkok, Thailand.¹¹⁰

The Elements of Good Practice are rooted in Principle 10 of the Rio Declaration and divided into four sections: access to environmental information, public participation, access to justice, and implementation of the elements. The information provisions (Articles 1-17)¹¹¹ provide detailed guidance on collecting, disseminating, and making available environmental information. Environmental information is broadly defined to include information on the state of the environment and human health, and any plans or actions taken that may affect or protect them (Appendix 1). Upon request, any "natural or legal person will have free access" to such information (Article 1). Information, in general, must be made available for review free of charge, but a reasonable, cost-based fee may be assessed for copies of information (Article 8). Public authorities at all levels are responsible for making information available to the public, and requests for information must be responded to "within a specified time limit" (Article 7). Finally, information may be denied only on specific grounds (Articles 4-6).

Governments are required to collect, update, and "periodically disseminate" environmental information, including "social, health, and cultural data" (Article 4). Information must be "regularly published," and may be disseminated through a State-of-the-Environment report, or through a PRTR (Articles 4, 9, 14). Additionally, environmental auditing and eco-labeling programs are "encouraged" (Article 14).

Public participation in decisionmaking processes is envisioned for all activities—including permitting of projects, as well as preparing policies, plans, and programs—that could have significant environmental implications (Articles 18, 24). Public opinion must be solicited before taking any actions that may affect the environment (Articles 21, 24); and input should be sought at an early stage, "when options are still open" (Article 23). Actors must allow "sufficient time for public discussions"; and comments from the public must be "taken into account" before making any decisions (Articles 21, 23). Moreover, States must ensure that people who participate "are not penalized in any way for activities that are lawful" (Article 26).

The Elements of Good Practice require Member States to "promote an approach" that ensures that people have "fair, open, transparent and equitable" access to administrative and judicial proceedings to enforce their rights to information and participation (Articles 27-29). These proceedings are also available when a person (or NGO) believes that his or her input was "ignored," and where the government's response or decision was "inadequate" (Article 28, Appendix 3). To implement these principles, nations should develop clear regulations, promote environmental education for the general public, and regularly evaluate the application of the principles (Articles 30-36).

The Elements of Good Practice are notable for guaranteeing that the cultural diversity and literacy of persons seeking to utilize the environmental governance mechanisms will be "taken into account," even suggesting specific methods such as radio programs, posters, and "helpers" to assist the illiterate (Article 9). Participation of the public is to be advanced "regardless of gender, cultural or ethnic identity, language, citizenship, nationality or domicile" (Article 19).

101. *E.g.*, OAS, G.A. Res. 1707 (2000) (endorsing the Guidelines for the Participation of Civil Society Organizations in OAS Activities, approved by the Permanent Council, Dec. 15, 1999, CP/RES. 759 (1217/99)); *see generally* Permanent Council of the OAS, Committee on Civil Society Participation in OAS Activities, Background Information on Civil Society Participation in OAS Activities, OEA/Ser.G, CP/CSC-3/99, Aug. 26, 1999, available at <http://www.civil-society.oas.org/CSC-3-99.htm>; AG/RES.1661. The OAS and Civil Society, XXIX General Assembly of the OAS, Guatemala City, Guatemala, June 7, 1999; G.A. Res. 1668, Strengthening Cooperation Between Governments and Civil Society, XXIX General Assembly of the OAS, Guatemala City, Guatemala, June 7, 1999.

102. *See* What Is ASEM?, at <http://asem2.fco.gov.uk/whatisasem/> (last visited Jan. 25, 2002); Asian Cooperation: The ASEM Process, at <http://www.vyh.fi/eng/intcoop/regional/asian/asem/asia.htm> (last visited Jan. 25, 2002). The 10 Asian nations are Brunei, China, Indonesia, Japan, Malaysia, the Philippines, Singapore, South Korea, Thailand, and Vietnam. *Id.*

103. *Id.*

104. *See* <http://www.aeetc.org/> (last visited Jan. 25, 2002).

105. AEETC PILOT PHASE GUIDANCE GROUP, AEETC STRATEGY ON INVOLVEMENT OF THE PUBLIC IN ENVIRONMENTAL ASPECTS (2000).

106. *See generally* http://www.aeetc.org/pro_publ.html and <http://www.vyh.fi/eng/intcoop/regional/asian/asem/asem.htm> (last visited Jan. 24, 2002).

107. *See id.*

108. *See supra* note 3.

109. *Id.* introductory paragraphs.

110. *See supra* note 3.

111. All citations to the Draft ASEM Elements of Good Practice are to the June 28, 2001, draft.

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Such assurances are necessary if the protections afforded by these mechanisms are to be applied uniformly.

As with the other regional initiatives, the Elements of Good Practice constitute an important regional initiative that starts to promote good environmental governance. At the same time, there remain areas for future development. For example, while the Elements of Good Practice provide to judicial or administrative avenues for those claiming failure in the information or participation procedures, they do not explicitly offer access to justice for violations of environmental laws. Also, like the ISP, the Elements of Good Practice are nonbinding. In fact, the level of Member nation commitment to environmental governance norms may be waning; the November 2000 draft was on “Guidelines on Public Participation in Environmental Aspects in the ASEM Countries”; the January 5, 2001 draft referred to “Guiding Principles on Public Involvement in Environmental Aspects in the ASEM Countries”; and the June 28, 2001 draft is titled “Towards Good Practices for Public Involvement in Environmental Policies.” Overall, though, the Elements of Good Practice are comprehensive and offer member nations a strong foundation upon which domestic policy may be built. The document clearly and concisely lays out mechanisms for access to information, participation, and justice.

North America

The NAAEC¹¹² among Canada, Mexico, and the United States is a “side agreement” that grew out of concerns that the North American Free Trade Agreement (NAFTA) did not adequately take into account environmental or labor interests.¹¹³ The NAAEC commits governments to publicly release environmental noncompliance information (Article 5.1(d)); ensures that interested persons may petition the competent authorities to investigate alleged violations of environmental legislation (Article 6.1); provides persons who have legally cognizable interests with access to judicial, quasi-judicial, or administrative bodies in order to enforce the environmental legislation (Article 6.2); and ensures that such proceedings are “fair, open and equitable” (Article 7.1).

The NAAEC also established the NACEC to provide a centralized forum for environmental cooperation.¹¹⁴ The NACEC is charged with promoting, and as appropriate, developing recommendations regarding: public access to environmental information held by the government and public participation in decisionmaking processes related to such public access (Article 10(5)(a)); transboundary EIA (Article 10(7)); and access to administrative and judicial bodies in transboundary pollution cases (Article 10(9)). In a number of cases, the NACEC goes beyond mere “promotion,” to actually provide access to information and justice in environmental matters. For example, the NACEC publishes and disseminates annual compilations of the three countries’ pollutant releases and transfers.¹¹⁵ Still evolving, these *Taking Stock* reports enable citizens, policymakers, and

other interested parties to analyze the pollution loading by different sectors in the different countries.

One of the more innovative aspects of the NAAEC is the ability of citizens and organizations to file a complaint with the NACEC alleging that any Party is not enforcing its environmental laws.¹¹⁶ If the Secretariat determines that the submission merits a response, it forwards the submission to the Party.¹¹⁷ Considering the submission and the response, the Secretariat then determines whether to dismiss the action or develop a “factual record.”¹¹⁸ Once completed, the Secretariat submits the factual record to the council, incorporates any comments that the Parties may have, and produces the final factual record. This final record is only made public if two-thirds of the council decides that it should be publicly available.¹¹⁹

Many NGOs had high expectations for this process, but these hopes were tempered by a Secretariat decision holding that it did not have the authority to review a U.S. appropriations bill suspending the application of environmental laws to salvage timber sales and exempting them from administrative review.¹²⁰ Furthermore, the process has little public input and the filings and final decision remain confidential unless two of the three countries agree to make the documents public.¹²¹ In the end, the most the NACEC can do is develop a factual record that shows that the complained-of country indeed did not enforce its environmental laws: there are no stronger sanctions available to the NACEC. Nonetheless, in practice, the NACEC makes most of the final factual records available to the public, and advocacy groups are able to use them to marshal domestic and international pressure on the Party to come into compliance.¹²²

The NACEC also has adopted guidelines for promoting public participation in its own decisionmaking processes.¹²³ These guidelines emphasize transparency, participation, and accountability. The NACEC seeks to provide the public

116. NAAEC, *supra* note 4, arts. 14, 15.

117. *Id.* art. 14(2).

118. *Id.* art. 15(1). Note, however, that the Secretariat can only develop the factual record if two-thirds of the NACEC council (composed of the environment ministers of the three NAFTA countries) affirms the Secretariat’s decision. *Id.* art. 15(2). In developing the factual record, the Secretariat can consider information from a wide range of sources. *Id.* arts. 15(2), (4).

119. *Id.* art. 15(7).

120. *Sierra Club v. United States, Determination of the Commission for Environmental Cooperation-Secretariat, SEM-95-002, Dec. 8, 1995, available at http://www.cec.org/citizen/guides_registry_registrytext.cfm?varlan=english&documentid=8 (last visited Feb. 6, 2002).*

121. The NACEC may consider “information submitted by interested [NGOs] or persons.” NAAEC, *supra* note 4, art. 15(4)(b). In practice, the NACEC has also solicited information from the general public relating to a particular citizen submission. *See, e.g., Secretariat Seeks Information for Aquanova Factual Record, at* <http://www.cec.org/news/details/index.cfm?varlan=english&ID=2453&year=2002> (last visited Feb. 14, 2002); *Secretariat Seeks Information for BC Mining Factual Record, at* <http://www.cec.org/news/details/index.cfm?varlan=english&ID=2449&year=2002> (last visited Feb. 14, 2002).

122. *See Registry and Public Files of Submissions, at* http://www.cec.org/citizen/guides_registry/index.cfm?varlan=english (last visited Feb. 14, 2002); *see generally* David L. Markell, *The Citizen Spotlight Process*, ENVTL. F., Mar./Apr. 2002, at 32.

123. NACEC, *Framework for Public Participation in Commission for Environmental Cooperation Activities*, NACEC Doc. C/DIR/01/Rev. 11 (Oct. 22, 1999), *available at* <http://cec.org/english/files/guide19e.pdf> (last visited Feb. 20, 2002).

112. NAAEC, *supra* note 4.

113. The agreement was established in part to “enhance compliance with, and enforcement of, environmental laws and regulations [and to] promote transparency and public participation in the development of environmental laws, regulations and policies.” *Id.* art. 1(g), (h).

114. *Id.* art. 8; *see generally* pt. 3.

115. *See, e.g., Taking Stock, supra* note 61.

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with all relevant documents in English, French, and Spanish—in hard copy and electronically. The guidelines provide that the public should be involved in a wide range of NACEC meetings, and allows for public notice of upcoming meetings. The NACEC has committed itself to providing financial assistance to facilitate public participation. To facilitate this participation, the NACEC adopted three mechanisms: open meetings, call for public comment, and a contact list to notify interested people of upcoming NACEC events.

Africa

The African Context for a Regional Public Participation Initiative

Africa has long struggled with the legacy of colonialism,¹²⁴ and when African nations won their independence, they frequently maintained the old laws and institutions.¹²⁵ Over the last few decades, however, African NGOs have grown in number, diversity, size, and sophistication that discouraged local, public involvement in decisionmaking. These organizations have sought to improve government institutions—particularly those with authority over natural resources—to be more transparent, participatory, and accountable.¹²⁶ In pursuing their mission, the NGOs have frequently encountered vestiges of the old colonial system that discourage such procedures and institutions. In this context, African environmental advocates have been examining the various regional public participation initiatives and considering options for similar endeavors in Africa.¹²⁷

Additional factors have constrained African nations. Some African governments have been reluctant to allow public access to governmental decisionmaking processes that relate to natural resources, which are often perceived to be a quick source of necessary hard currency or political support.¹²⁸ A similar constraint on promoting environmen-

tal governance in many African countries is a culture of secrecy that views information as a source of power and something to be hoarded.¹²⁹ This reflects one of the most significant challenges faced by African environmental advocates: how to convince governments to open up the governance processes to civil society when there has been a lack of public participation traditions at the national level, often for decades.

There are a number of ways of addressing these impediments to transparency, access, and accountability; indeed, in many cases such principles reflect African traditions. Before colonization, many African cultures involved people in the decisionmaking processes, and there was usually the opportunity for affected individuals to have their grievances heard. Drawing on customary institutions and practices at the local level, countries throughout Africa have increasingly devolved powers to local authorities to manage natural resources. The increased transparency, participation, and accountability—as well as the greater share of revenues flowing to the local communities—have established credible precedents for environmental governance at the local level.¹³⁰

Further research is necessary to explore the possible links between existing practices at the local level and developing environmental governance at the national and regional levels in Africa. Ultimately, only Africans can determine whether there is sufficient demand for a regional environmental governance initiative, and what form such an initiative should take.¹³¹

The Status of Environmental Governance in Africa

Pan-Africa

Africa has taken significant steps toward articulating a regional perspective on involving civil society in decisions. The earliest Pan-African initiatives focused on the need to improve public participation in development. The 1989 African Alternative Framework for Structural Adjustment Programs¹³² and the 1990 African Charter for Popular Par-

124. In the context of environment, see generally Benjamin J. Richardson, *Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2000); Annie Patricia Kameri-Mbote & Philippe Cullet, *Law, Colonialism, and Environmental Management in Africa*, 6 REV. EURO. COM. & INT'L L. 23 (1997).

125. See Richardson, *supra* note 124, at 30, 32.

126. See generally *id.*; Kameri-Mbote & Cullet, *supra* note 124.

127. See, e.g., Abani A. Ibrahim & Brian Rohan, Aarhus Convention: A Model for Advancing Africa's Citizen Rights, 6 INNOVATION 29 (1999) (emphasizing potential application in Niger).

128. In Kenya, for example, the government gave notice in February 2001, of forest excisions that would open up to development 167,000 acres of forests—about 10% of the country's remaining forest cover. See *Carve-Up of Forests Can Go Ahead, Court Rules*, THE NATION (NAIROBI), Oct. 5, 2001, available at <http://www.forests.org> (last visited Feb. 8, 2002); *Out on a Limb, Saving Kenya's Woodlands*, E-LAW ADVOCATE, Autumn 2001, available at <http://www.elaw.org> (last visited Feb. 8, 2002). Some believe that the land will be given to people with political connections in advance of the 2002 elections, rather than being used to settle the landless, as the government has claimed. Jennifer Wanjiru, *Kenya to Clear 10 Percent of Its Forests*, ENV'T NEWS SERV., Oct. 30, 2001, available at <http://ens.lycos.com> (last visited Feb. 8, 2002). The government's actions have triggered widespread protest and the filing of at least three lawsuits to fight the excisions. One case, filed by Eldoret environmental lawyer Nixon Sifuna, was dismissed on technical grounds. *Id.* A central argument in the case was that the government's decisionmaking process failed to provide for legally mandated public involvement. See *Court Halts Govt. Plan on Forests*, THE NATION (NAIROBI), Mar. 16, 2001, available at <http://www.nationaudio.com> (last visited Feb. 8, 2002).

129. In fact, it has been asserted that the Kiswahili word for government—*serikali*—comes from *siri kali* meaning “top secret.” See Michael Ochieng Odhiambo, *Top Secret: Legal and Institutional Framework for Access to Environmental Information in Kenya* (paper presented at the Workshop on Freedom and Access to Environmental Information in East Africa, Arusha, Tanzania, May 6-7, 1999) (on file with authors).

130. E.g., Jesse C. Ribot, *Representation and Accountability in Decentralized Sahelian Forestry: Legal Instruments of Political-Administrative Control*, 12 GEO. INT'L ENVTL. L. REV. 447 (2000).

131. As one UNEP official observed, “[i]f the need to elaborate such a framework is recognized the instrument should be conceived as a specific legal response to the requirements, practices and national conditions of the African region.” Alexandre Timoshenko, Briefing Note on The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and Its Relevance to Other Regions (paper distributed at the 8th Session of the African Ministerial Conference on the Environment (AMCEN), Abuja, Nigeria, Apr. 2000), ¶ 18.

132. U.N. Economic Commission for Africa, *African Alternative Framework for Structural Adjustment Programs*, U.N. Doc. E/ECA/CM.15/16 Rev. 3 (1989), ¶ 35 (“development has to be engineered and sustained by the people themselves through their full and active participation”); see also U.N. Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N. GAOR Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986), pmb. (“development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire popula-

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ticipation in Development and Transformation¹³³ responded to the traditional mechanisms for development that did not adequately involve civil society or local governments in the decisionmaking processes.¹³⁴

The 1981 African Charter on Human and Peoples' Rights is particularly relevant.¹³⁵ Article 9 guarantees to every individual the right to receive and disseminate information. Article 13 generally provides that citizens have the "right to participate freely in the government of [their] country." Article 7(1) ensures the right of every person to "have his cause heard," and Article 10 protects the right of free association. Many African constitutions have incorporated these provisions, either explicitly or by reference.¹³⁶ These general provisions provide a starting point for elaborating more detailed and concrete rights and mechanisms for environmental governance in Africa. In fact, Article 24 of the African Charter guarantees to "all peoples . . . the right to a generally satisfactory environment favorable to their development," a right which is reflected in many African constitutions.¹³⁷

The African Charter for Popular Participation in Development was unanimously adopted by 500 participants attending a U.N. Economic Commission for Africa (UNECA) conference, which was held in Arusha, Tanzania, in February 1990. Participants included representatives from 23 African governments, NGOs throughout Africa, NGOs working in Africa, U.N. organizations, donors, and development specialists. While the charter is not legally binding, many commentators have resorted to its declarations,¹³⁸ and it appears to have influenced regional and national initiatives.¹³⁹

tion and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom").

133. African Charter for Popular Participation in Development, *done at Arusha*, Feb. 16, 1990, U.N. Doc. E/ECA/CM.16/11; *see also* Note Verbale, U.N. GAOR, 45th Sess., Agenda Items 12, 82, U.N. Doc. A/45/427 (1990) (including as App. I, U.N. Economic Commission for Africa Conference of Ministers Responsible for Economic Planning and Development, 25th Sess., Res. 691 (XXV) (May 19, 1990) (adopting the African Charter for Popular Participation in Development and Transformation (Arusha 1990)).
134. Note Verbale, U.N. GAOR, 45th Sess., Agenda Items 12, 82, U.N. Doc. A/45/427 (1990) (noting the "lack of full appreciation of the role popular participation plays in the process of recovery and development").
135. African Charter on Human and Peoples' Rights, *done at Banjul*, June 26, 1981 (entered into force Oct. 21, 1986), O.A.U. Doc. CAB/LEG/67/3 Rev. 5, *reprinted in* 21 I.L.M. 59 (1982) [hereinafter African Charter].
136. *See* BRUCH ET AL., *supra* note 11, at 41-62 (surveying constitutional provisions in African nations governing freedom of association (all nations), access to information (21 nations), public participation (5 nations), and access to justice (more than 35 nations)).
137. *See id.* at 11-28.
138. Russel L. Barsh, *Current Development: A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States*, 85 AM. J. INT'L L. 192, 197 n.44 (1991); Daniel D. Bradlow, *Regional Developments: Africa*, 25 INT'L LAW. 1053, 1054-58 (1991); Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 186-87 (1993); Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Toward a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 23 (1993); Celia R. Taylor, *The Right of Participation in Development Projects*, 13 DICK. J. INT'L L. 69, 98-99 (1994); J. Oloka-Onyango, *Beyond the Rhetoric: Reinventing the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1, 59-60 (1995); James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT'L L.J. 307, 316 (1995).
139. Paul, *supra* note 138, at 316 (noting the influence of the charter in the subsequent development of the *African Common Position on Hu-*

Starting from the "fact that people have a fundamental right to participate fully in the making of policy decisions which affect their lives at all levels,"¹⁴⁰ the Charter included detailed mechanisms to promote and monitor public participation. It set forth the roles and responsibilities of the people (Articles 13-15, 23(B)), African governments (Articles 16-20, 23(A)), the international community (Articles 21-22, 23(C)), and NGOs (Article 23(D)), as well as the media, women's organizations, organized labor, and youth (Articles 23(E)-(H)). The Charter specifically highlighted the need for the "full support and participation of the people" to address environmental challenges.¹⁴¹

To monitor the implementation of the goals and mechanisms of the Charter, it proposed a set of indicators to be used at the national and regional levels. The nonexhaustive list of indicators includes:

[T]he literacy rate . . . freedom of association . . . representation of the people and their organizations in national bodies . . . the rule of law and social and economic justice . . . protection of the ecological, human and legal environment . . . press and media freedom . . . number and scope of grass-roots organizations with effective participation . . . extent of implementation of the Abuja Declaration on Women (1989) . . . political accountability of leadership at all levels [and] decentralization of decision-making processes and institutions.¹⁴²

Following the African Charter, African heads of state met with more than 100 African environmental and development NGOs to prepare a common position on the environment and development that could be advanced at the 1992 U.N. Conference on Environment and Development in Rio de Janeiro (popularly known as the Earth Summit). Ultimately, this meeting led to the African Common Position on Environment and Development,¹⁴³ which was endorsed by the African Union (formerly the Organization for African Unity) and presented at the Earth Summit. One commentator noted that this process "would appear to be the first international meeting for which African governments and African [NGOs] have sought to coordinate their strategies."¹⁴⁴ The 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 Earth Summit. The African Common Position on Environment and Development continues to shape the environmental agenda in Africa, as nations and international organizations invoke the position to support and provide historical context for particular endeavors.¹⁴⁵

man and Social Development in Africa, which was prepared for the 1994 World Summit on Social Development; Bradlow, *supra* note 138, at 1055.

140. African Charter, *supra* note 135, at third recitation.
141. *Id.* art. 9.
142. *Id.* art. 24.
143. U.N. ECONOMIC COMMISSION FOR AFRICA, AFRICAN COMMON POSITION ON ENVIRONMENT AND DEVELOPMENT (1992).
144. Bradlow, *supra* note 138, at 1058.
145. *E.g.*, Resolution on the Conclusions of the Pan-African Conference on Sustainable Integrated Coastal Management (PACSIKOM), *done at Maputo, Mozambique*, July 24, 1998, available at www.sdn.org.mz/entidade/pacsiKOM/conclus3.htm (last visited Feb. 8, 2002) (on the protection of the marine and coastal environment).

East Africa

The Treaty for the Establishment of the East African Community¹⁴⁶ between Kenya, Tanzania, and Uganda provides for “Co-operation in Environment and Natural Resources Management” (Chapter 19), “Co-operation in Tourism and Wildlife Management” (Chapter 20), and harmonization of “Legal and Judicial Affairs” (Chapter 24). These chapters contain the kernels for developing public access to information, participation, and justice in East Africa.¹⁴⁷

An MOU¹⁴⁸ among the three East African countries is even more explicit about the need for a subregional instrument incorporating public participation.¹⁴⁹ Throughout the MOU, the Partner States committed to promoting access to information, public participation, and even access to courts. The Partner States agreed to ensure “the right of the people of the Partner States to a clean, decent and healthy environment through domestic laws (Article 7(1)(a)). In order to guarantee the right of people to a clean, decent, and healthy environment, the States agreed to develop and harmonize their laws on EIA (Article 7(1)(b)) and the “full involvement of their people in the sustainable use and management of [the] environment and natural resources” (Article 7(1)(i)).

As the MOU recognizes, EIA is an essential tool of environmental management. The Partner States agreed to enact EIA legislation and to include “public participation at all stages of the process related to [EIAs]” (Article 14(2)). The States further agreed to “develop common programmes and procedures for the dissemination of information on the operation and use of [EIA] as a necessary regulatory measure for sustainable development” (Article 14(3)). The MOU also sets forth the basis for developing transboundary EIAs.¹⁵⁰

The MOU contemplates much broader transparency, participation, and accountability in environmental matters, above and beyond the project-specific context of an EIA. For example, the Partner States have committed to exchanging information on forest resources (Article 9(a), (d)), wildlife (Article 10(1)(c)), the marine and coastal environment (Article 11(b)), and wastes and hazardous waste (Article 12(d), (e)). While most of the provisions speak generally of information exchange, the MOU specifically mentions “regional and international organizations” in research, monitoring, and information exchange relating to the marine and coastal environment.¹⁵¹ At the same time, the Partner States agreed to “promote public awareness programmes and ac-

cess to information” on environmental issues and environmental management generally,¹⁵² and to establish resource centers on environmental information, the use of EIAs, and other aspects of environmental law and management.¹⁵³ The broad scope of these commitments applies to all environmental issues, and could be a key factor in removing a number of the hurdles to access to information (such as national secrecy laws).

Through the MOU, the Partner States have agreed to adopt approaches to enhance public participation in environmental management generally,¹⁵⁴ as well as in particular contexts. These include EIAs (where public participation is to be at “all stages”) as well as participatory forest management.¹⁵⁵

The MOU takes specific steps to improve access to environmental justice in East Africa. 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.”¹⁵⁶ By granting access to courts and administrative agencies, this provision greatly reduces the burden on plaintiffs to show that they have standing or “locus standi,” the legal right to be in court. For example, in Kenya, a number of environmental cases had been dismissed because the plaintiff could not show that she had been injured in a way that was different from the other people who were also injured (and thus it was the province of the state to act, not a private individual).¹⁵⁷ The MOU seeks to harmonize definitions of environmental offenses in the three countries as well as the judicial and administrative procedures, which will “promote consistency in compliance and enforcement.”¹⁵⁸ Finally, with respect to transboundary environmental damage, the Partner States agreed to grant access to their courts and administrative agencies equally to all nationals and residents of East Africa.¹⁵⁹

The MOU could provide a basis for developing a subregional compact on environmental governance generally, or relating to a particular topic that includes access to information, public participation and EIA, and access to justice. In fact, the African Centre for Technology Studies, with assistance from the U.S. Agency for International Development, is promoting the development and implementation of a common regime of EIA in East Africa, centered around Lake Victoria.¹⁶⁰ Finally, the East African environmental

146. *Done at Arusha*, Tanzania, Nov. 30, 1999.

147. *See id.* arts. 112(2)(b) (EIA), 112(2)(d) (public awareness and education regarding chemicals), 112(2)(i) (exchange information on pollution and conservation technology), 114(2)(c) (establish databases and networks to exchange information on mining), 116(b) (exchange information on wildlife management).

148. East African MOU, *supra* note 5. The MOU was appended to the EAC treaty and thus appears to have gained the force of law.

149. The MOU anticipates the development of a protocol on environmental management under the Treaty for the Establishment of the East African Community (Article 3). Such a protocol could harmonize the domestic environmental and natural resource laws and institutions in East Africa, and promote cooperation in the implementation of these laws.

150. *Id.* art. 16(4)(a) (“The Partner States agree not to carry out any activity that may have significant transboundary environmental impact or harm without prior consultations, timely notification and provision of adequate technical information and data.”).

151. *Id.* art. 11(b).

152. *Id.* art. 16(2)(a).

153. *Id.* art. 16(2)(b).

154. *Id.* arts. 16(2)(a), 7(1)(i).

155. *Id.* arts. 14(2) (EIA), 9(f) (pledging to “institute new techniques or measures which enhance . . . partnerships with local people” in the management of forest resources).

156. *Id.* art. 16(2)(d).

157. *E.g.*, *Wangari Maathai v. Kenya Times Media Trust*, High Court Civil Case No. 5402 (Nairobi 1989); *Wangari Maathai v. City Council of Nairobi*, High Court Civil Case No. 72 (Nairobi 1994); *but see* Environmental Management and Coordination Act, 1999, art. 3(3) (allowing any person who alleges that their right to a clean and healthy environment, guaranteed by Article 3(1) “is being or is likely to be contravened in relation to him, then . . . that person may apply to the High Court for redress . . .”).

158. East African MOU, *supra* note 5, art. 16(2)(e).

159. *Id.* art. 16(3).

160. This initiative also relates to Article 8 of the MOU, which seeks to “initiate, develop, implement and harmonize policies, laws and

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protocol envisioned by the MOU would likely expand upon the environmental governance provisions outlined in the MOU.

Southern Africa

The Southern African Development Community (SADC) Region has developed a number of binding protocols on natural resources for its 12 Member States to adopt, including one on shared watercourses and one on mining.¹⁶¹ These protocols incorporate environmental governance principles to varying degrees. For example, Article 5 of the Protocol on Shared Watercourse Systems in the Southern African Development Community charges River Basin Management Institutions with collecting, analyzing, and disseminating information relating to the development of the resources within shared watercourse systems.¹⁶² They also charge the institutions with “stimulating public awareness and participation in the sound management and development of the environment including human resources development.”¹⁶³ EIAs of projects within the shared watercourse systems are to be promoted, as is monitoring (especially hydrometeorological monitoring) the effects of navigational activities on water quality.¹⁶⁴ When considered together, these provisions anticipate the collection of a wide range of information on natural and man-made conditions, making the information publicly available, and promoting public participation in the management of international watercourses in southern Africa.¹⁶⁵

The SADC Region’s ministers of environment agreed in October 1999, to establish a binding environmental protocol.¹⁶⁶ This protocol could incorporate procedural aspects of environmental management (such as public participation) that are essential to implementing substantive environmental norms and standards. In fact, a December 1998, UNEP/INFOTERRA meeting on “Building Bridges for the Aarhus Convention” in Gaborone, Botswana, examined the potential relevance of the Aarhus Convention to the SADC Region.¹⁶⁷ Building on this workshop and Tanzania’s expe-

riences with the East African MOU, the SADC Region could incorporate environmental governance into the ongoing development of an environmental protocol or develop a separate protocol on environmental governance for southern Africa.

Options for Advancing Environmental Governance in Africa

There is a wide range of options available to further advance environmental governance principles in Africa. The primary options include: domestic incorporation of participatory principles, accession to an existing convention, and development of an African convention or other regional initiative. The various approaches may be undertaken piecemeal, as a series of independent actions, or as part of a coherent strategy.

In fact, the greatest potential for improvements in environmental governance may be through a comprehensive approach which utilizes several, if not all, of the approaches. Parallel activities at the national, subregional, regional, and/or global levels would complement one another. At the national level, there is the most flexibility to experiment with different mechanisms. Experiences from countries with similar cultural values, legal systems, and states of economic development can provide invaluable political capital for adopting similar mechanisms, as well as provide credibility for developing an international instrument. At the same time, supranational declarations and instruments can—even as soft law—provide legitimacy for domestic initiatives and articulate effective options.

The first option would be to incorporate participatory principles into domestic legal and institutional frameworks. When doing so, a nation could look to the other regional initiatives (including the MOU, the Aarhus Convention, ASEM, and the ISP) as reflective of emerging norms and practices in international law. Indeed, many African countries have already incorporated different participatory provisions in their constitutions, environmental laws, decentralization policies, and institutions.¹⁶⁸ Even so, some nations still lack the necessary laws, institutions, or political will to advance the participatory principles in practice.

A domestic approach has the benefit of not conditioning action on the participation of any other nation. Indeed, development and implementation at the local and national levels is likely to do the most to improve environmental governance. In order to facilitate domestic implementation, financial and technical assistance will be essential, particularly in building the capacity of civil society and governance authorities.

Second, African nations could opt to accede to the Aarhus Convention, pursuant to Article 19.3. This approach would

programmes to strengthen regional coordination in the management of the resources of the lake Victoria ecosystem”

161. Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region, *done at Johannesburg* (Aug. 1995) (entered into force Sept. 1998); Protocol on Mining in the Southern African Development Community (SADC), *done at Blantyre, Malawi*, Sept. 5, 1997; *see also* Draft Protocol on Wildlife Conservation and Law Enforcement in the Southern African Development Community, *done at Blantyre, Malawi*, Dec. 1998.

162. Protocol on Shared Watercourse Systems, *supra* note 161, art. 5(b)(i), (iv). While Article 2(5) requires Member States of a shared watercourse to “exchange available information and data regarding the hydrological, hydrogeological, water quality, meteorological and ecological condition of such watercourse system,” this requirement appears to apply only between states and not necessarily to public access to information.

163. *Id.*

164. *Id.* art. 5(d)(iii), 5(d)(iv), 5(e).

165. *See generally* Bruch, *supra* note 22, *reprinted in part as Role of Public Participation and Information Disclosure*, in INTERNATIONAL WATERS IN SOUTHERN AFRICA (Mikiyasu Nakayama ed., forthcoming 2002).

166. *SADC Ministers Agree to Form Binding Protocol*, TIMES OF ZAMBIA, Oct. 11, 1999.

167. *See* Beth Ingraham, *Southern African Countries Discuss Aarhus Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters*, INFOTERRA Listserv, Dec. 16, 1998 (on file with authors).

168. *See* BRUCH ET AL., *supra* note 11, at 41-62 (reviewing the incorporation and nascent implementation of participatory principles in African constitutions); COMPENDIUM OF ENVIRONMENTAL LAWS OF AFRICAN COUNTRIES, VOLUME I: FRAMEWORK LAWS AND EIA REGULATIONS (UNEP/UNDP Joint Project on Environmental Law and Institutions in Africa 1996) and 1998 Supplement (containing framework environmental laws with public participation provisions for most African nations, as well as EIA laws of some African nations—including Algeria, Congo, Niger, Nigeria, Tunisia, and Uganda—which typically require transparency, an opportunity for the public to participate in the decisionmaking process, and an opportunity for citizens and NGOs to appeal decisions to administrative and judicial bodies).

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take advantage of an instrument with concrete obligations that reflect a growing international consensus on the topic. In addition, funding and technical assistance (from the UNECE, and other institutions) may be available to assist nations in accession. However, African environmental advocates have expressed reservations about acceding to a public participation convention in which their governments have not participated.¹⁶⁹ In addition, local advocates argue that the Aarhus Convention would fail to incorporate the particular African context and relevant African traditions, and that it would potentially bypass the development of a collaborative relationship between governments and NGOs that a regional or global negotiating process could engender.

A third option would be for a group of African nations or an intergovernmental organization to undertake a new initiative on environmental governance. Such an initiative—whether it is couched as a convention, or guidelines—could be undertaken by UNEP in Nairobi, which currently has a program to develop environmental laws in countries throughout Africa. Additionally, INFOTERRA, the Global Environmental Information Exchange of the United Nations, has extensive experience in promoting access to information in Africa (and globally) through technology transfer, development of policy and legal frameworks, and general capacity building. Other bodies that could undertake a regional process include the new African Union, the UNECA, and the African Ministerial Conference on the Environment (AMCEN). If this option is pursued, then one supporting component (which was useful in developing the Aarhus Convention and the ISP) could be a country-by-country survey of the status of the relevant laws and institutions in the countries likely to adopt the initiative, as well as a manual of best practices.¹⁷⁰ Similarly, on-the-ground pilot projects, utilized effectively in the ISP process, could be useful in providing African experiences upon which to build.

In light of the experiences with the African Common Position on Environment and Development as well as other African common positions,¹⁷¹ African nations could develop a common position on environmental governance.¹⁷²

169. On this point, the author is particularly indebted to the participants of a May 6-7, 1999, workshop on Access to Environmental Information in East Africa, held in Arusha, Tanzania.

170. See *supra* note 34 (discussing the DOORS TO DEMOCRACY series). The Access Initiative is an ongoing effort to establish criteria for assessing the access to information, participation, and justice in nations around the world. See <http://www.accessinitiative.org> (visited Jan. 25, 2002).

171. E.g., African Ministerial Conference on the Environment (AMCEN), African Common Perspectives and Position on the Convention on Biological Diversity, U.N. Doc. AMCEN/Conventions/CBD/1 (Oct. 26, 1994); African Common Position on the Clean Development Mechanism, Paper No. 1: Uganda (On Behalf of the African Group), U.N. Doc. FCCC/CP/MISC.7/Add.2, ECE.98-135.

The 2001 NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT (NEPAD) offers another basis for developing a common position on public involvement. See *id.* ¶¶ 79-85 (on the Democracy and Political Governance Initiative).

172. See generally African Centre for Technology Studies et al., Environmental Procedural Rights in Africa: An Agenda for Reform: An Information Document Prepared for Africa's Ministers of the Environment at the Fifth Conference of the Parties to the Convention on Biological Diversity (May 2000); Jennifer F. Klot, New Directions for Africa: Trends in Economic Development, Governance, and Knowledge Use, Report of a Meeting Convened by Carnegie Corporation of New York (Nov. 9-11, 1997). In fact, at the Eighth Session of the AMCEN, held in Abuja, Nigeria, in April 2000, African environ-

Such an initiative could build on earlier declarations (such as the African Charter) and national experiences and constraints to advance an African voice on environmental governance. There is a risk that a common position might represent the least common denominator and thus have little practical effect.¹⁷³ Still, it has been a decade since the clear articulation of the need and mechanisms for public participation in Africa in the African Charter, and African nations have significantly more experience with public participation now, there are more democratic governments, and civil society (including citizens and NGOs, as well as other actors) is becoming an integral partner in protecting the environment and promoting development. A contemporary African initiative to articulate the current needs and opportunities for strengthening transparency, participation, and accountability in environmental matters would seem to be timely, particularly in light of other regional initiatives around the world. The preparatory processes leading up to the 2002 World Summit on Sustainable Development (Rio + 10), focusing on the implementation of sustainable development, offers but one context in which to develop and advance a common position on environmental governance.

One variation on such a regional initiative could be to incorporate environmental governance elements into an existing international regime. The Desertification Convention, which already incorporates the principles to some degree,¹⁷⁴ could be a promising candidate for Africa. In fact, the convention relies on a bottom-up approach to resource management, emphasizing transparency and community participation. Incorporation into existing conventions might be one way to move forward if the political will and necessary funds are lacking to negotiate, draft, sign, ratify, and implement an entirely new convention. However, it could be difficult to mobilize the broader environmental community if the principles would only apply to desertification and not other sectors. Moreover, there is the challenge of convincing the signatories to the convention—including African and non-African nations—to accept the modifications.

Convention Secretariats may revisit the text of their original documents to ascertain whether they adequately incorporate environmental governance principles.¹⁷⁵ Currently, there are discussions about amending the 1968 African Convention on the Conservation of Nature and Natural Resources¹⁷⁶ to reflect developments in environmental law over the decades subsequent to its adoption. This convention predates the international development of EIA, and aside from general provisions on conservation education (Article 13), it does not address access to information, participation, or justice. Thus, a protocol to the 1968 conven-

ment ministers called for a common African position on the environment that could be advanced at the 2002 World Summit on Sustainable Development.

173. See, e.g., Albert Mumma, *The Poverty of Africa's Position at the Climate Change Convention Negotiations*, available at www.meteo.go.ke/can/africap.html (last visited Aug. 30, 2000) (criticizing the African Common Position on the Clean Development Mechanism for failing to articulate any significant African position); but see discussion *supra* on the Aarhus Convention being much stronger than the least common denominator.

174. See *supra* note 17 and accompanying text.

175. See *supra* notes 81-88 and accompanying text. This happened, for example, with the 1992 UNECE Convention on the Protection and Use of the Transboundary Watercourses and International Lakes, which led to the 1999 (London) Water and Health Protocol.

176. Done at Algiers, Sept. 15, 1968 (entered into force June 16, 1969).

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tion or other revisions could emphasize transparency, participation, and rule of law in environmental matters, as well as other governance issues such as decentralization, as integral approaches to improve the implementation of the substantive goals of the convention.¹⁷⁷

Finally, if a Pan-African or regional convention is not yet feasible, another possibility would be to pursue a smaller subregional convention through any of the subregional bodies. In East Africa, the EAC treaty and the MOU provide a basis for the elaboration of such a convention or protocol; while in West Africa, environmental governance principles seem to fall within the broad scope of the Economic Community of West African States (ECOWAS). Additionally, the SADC Region, the Economic Community of Central African States (ECCAS), the Inter-Governmental Authority on Development (IGAD), and the Council of Arab Ministers Responsible for the Environment (CAMRE) also present opportunities for promoting environmental governance at the subregional levels.

Linkages Among the Regional Initiatives: Commonalities and Diversity

Although they vary in form and legal force, the different regional initiatives have advanced environmental governance by relying on the three governance pillars: access to information, participation, and justice. This section briefly compares the provisions and approaches of the five regional initiatives analyzed in the previous section. The three tables—one each for access to information, public participation, and access to justice—consider how these initiatives address specific elements and mechanisms of the pillars. As the tables illustrate, there is a great deal of agreement on the elements, although the specific approaches vary.

Environmental information is often broadly defined, recognizing the wide range of activities that can impact the natural and built environment, as well public health impacts of environmental harm. Information that is not accessible is explicitly exempted, and there is a presumption in favor of access. Many initiatives seek to guarantee access without discrimination on the basis of a person's race, gender, ethnicity, language, or citizenship.

Both passive and active access to information is envisioned. With passive access, governmental authorities must provide information that it holds when it is requested. The information must be provided within a reasonable (sometimes specified) time and at little or no cost to the requester: the cost usually must be no more than the actual costs of

copying the information, with no cost for simply reviewing the information. Information must be provided in an efficient and useable form.

Active access, on the other hand, requires government authorities to affirmatively collect and disseminate information; no request is necessary to trigger the dissemination activities. Thus, information on proposed laws, regulations, and specified activities that can affect the environment (including the release of pollutants) is published or otherwise made publicly available through specialized reports or inventories. Specific mechanisms include PRTRs, "State-of-the-Environment" reports, environmental auditing, and eco-labeling. The Internet and electronic databases are contemplated as tools for facilitating active access to information.

Public participation in the approval of proposed projects is the most advanced and commonplace, with some provision for participation in the development rules and regulations, and participation in policies, programs, and plans still emerging. Generally, the public, including NGOs, should be engaged in the early stages of the decisionmaking process. For proposed activities that may significantly affect the environment, EIA processes are adopted: notice of the proposed decision is required, public comments must be solicited, and the public input must be taken into account. The public or private entity proposing the activity typically must provide the public with information on the proposed activity (free of charge), including the EIA.

To ensure the observance of procedural mechanisms and to facilitate the adherence to environmental laws, individuals must have recourse to a judicial or administrative body. The judicial or administrative system is thus open to persons claiming that they were wrongfully denied access to information or participation. Furthermore, civil society is frequently allowed to bring claims against parties violating or failing to enforce the law. A fair, efficient, affordable, and transparent judicial and administrative system is essential to operationalizing access to justice.

The next section examines a number of options for articulating and implementing a global framework on environmental governance. Such an initiative could draw upon and expand upon the common mechanisms and norms that nations around the world have committed to in various regional initiatives. Additional influences likely could draw upon sectoral multilateral environmental agreements (such as the Convention on Biological Diversity), global and regional human rights conventions, and experiences at the national level.

177. A recent draft revision of the African Convention on the Conservation of Nature and Natural Resources in Africa has a new article on procedural rights. African Convention on the Conservation of Nature and Natural Resources, Jan. 18, 2002, Draft, art. 16 (on file with authors). This article would require Parties to

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 protection of environment and natural resources.

Id. art. 16.1. Moreover, Parties would commit to ensuring nondiscriminatory access to justice for persons in other nations who are affected by a transboundary environmental harm. *Id.* art. 16.2. Article 20 also provides for capacity building, education, and training, which will be necessary for people to effectively utilize their procedural and substantive rights and to contribute meaningfully to decisionmaking processes. These provisions could provide a basis for elaborating a more detailed set of guidelines and tools for ensuring public involvement.

Table 1.1 - Access to Information

	Aarhus (Europe/NIS)	ISP (the Americas)	Draft ASEM (Asia/Europe)	MOU (East Africa)	NAAEC (North America)
Broad definition of "environmental information."	Very broad; includes information on environment and human health, and factors that affect them. Art. 2.3.	"Data, documents, and other information . . . 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." Proposed Action 2.1.1.	Broad; includes information on environment and human health, and activities that affect them. App. 1.		No explicit decision, but provisions address status of the environment, projects (through EIA), administrative rulings, and statutes and regulations. Arts. 2.1(e), 4.1, 10.7(a), 45.2.
Limited exceptions to access.	Exempted by "law or customary practice"; would adversely affect legal confidentialities, fair trials, international relations, national defense, public security, personal or commercial confidentiality; or cause environmental harm. Arts. 4.3, 4.4. Presumption in favor of access: "ground[s] for refusal shall be interpreted in a restrictive way." Art. 4.4.		Confidential government proceedings; public security; <i>sub judice</i> matters; commercial or personal confidentiality; harm to environment; etc. Art. 6.	General agreement among partner states to "promote . . . access to information." Art. 15.2(a).	If "contrary to . . . essential security interests"; impedes environmental enforcement; if "protected by its law governing business or proprietary information, personal privacy or the confidentiality of government decision making." Arts. 42, 39.1.
Requested information provided for free or for a reasonable fee.	Free access to info; charges for supplying info "shall not exceed a reasonable amount." Art. 4.8.		Information must be available "for inspection free of charge"; while copies of such information may carry the "cost of reproduction and dissemination." Arts. 1, 8.		
Requested information provided within a reasonable time frame.	Information must be provided "as soon as possible"; at the latest within 1 month [unless 2-month extension justified]. Art. 4.2.	"Timely access" to information must be provided. Proposed Action 1.1.2; Policy Recommendation 2.	Government must respond to information requests "within specified time limits." Art. 7.		
Active Dissemination.	Required "Adequate flow" of information, "immediately" disseminated if imminent threat to environment or human health. Art. 5.	Governments "should ensure that information [is] disseminated on the environment." Proposed Action 1.2.4. Governments to "strengthen and develop mechanisms for" disseminating [info] to the general public." Proposed Action 1.1.	Government must "actively publicize" (Arts. 10, 11) and "periodically disseminate" environmental information to ensure an "adequate flow" of information. Art. 4. Must inform other nations' public of transboundary pollution. Art. 17.	Dissemination of information for EIAs is a "necessary regulatory measure for sustainable development." Art. 14.3.	Each party must "ensure that its laws, regulations, procedures, and administrative rulings . . . are promptly published or otherwise made available [for] interested persons." Art. 4.1. Noncompliance information. Art. 5.1(d).

Table 1.1 - Access to Information (cont.)

	Aarhus (Europe/NIS)	ISP (the Americas)	Draft ASEM (Asia/Europe)	MOU (East Africa)	NAAEC (North America)
State-of-the-Environment Reports.	Required at least once every 4 years. Art. 5.4.	Nothing specific, but reference to “information on the present quality of the environment.” Proposed Action 2.1.1.	“Regular” SOE report or PRTR system required. Arts. 4, 9.		Reports required “periodically” Art. 2.1(a). Secretariat must also prepare a report annually that includes “relevant” views of individuals and NGOs. Arts. 12.2(d), 12.3.
Pollution Inventories (including Pollutant Release and Transfer Registers (PRTRs)).	Required. Art. 5.9. PRTR Protocol being negotiated.		“Regular” PRTR or SOE report required. Arts. 4, 9.		Not mandated, but considered a “valid government action.” Art. 5.1(g).
Other.	“Easily accessible” electronic database required. Art. 5.3. Environmental auditing and eco-labeling encouraged. Arts. 5.6, 5.8.	Strong focus on communicating info through “appropriate medium” so it is accessible to all audiences. Proposed Actions 1.3, 2.2, etc. Governments should develop “performance indicators” to measure information and participatory mechanisms. Proposed Action 1.1.3, 3.1.3.	Environmental auditing and eco-labeling encouraged. Art. 14.		Environmental auditing promoted. Art.5.1(f).

Table 1.2 - Public Participation

	Aarhus (Europe/NIS)	ISP (the Americas)	Draft ASEM (Asia/Europe)	MOU (East Africa)	NAAEC (North America)
Application (activities, policies, regulations, plans, programs, etc.).	Specific activities (Art. 6); plans and programs (Art. 7); regulations (Art. 8).	Projects, policies, and programs at the regional, national, and subnational levels. Principle 4, Specific Objective b. Proposals, projects, budgets, permits, EIAs, setting of standards. Proposed Action 2.2.2.	Activities, projects, policies, plans, processes, and programs. Art. 24, App. 2.	Projects and development activities (EIA). Arts. 14.1, 14.2.	Laws, regulations, and policies. Art. 1(h). Generally. Art. 2.1(e).
Public involved early in the process.	“[E]arly public participation, when all options are open.” Art. 6.4.	“Full participation [in] planning, decision-making, follow-up, and evaluation on sustainable development.” Specific Objective b.	“[E]arly . . . when options are open.” Art. 23.	In “all stages” of the EIA process. Arts. 14.1, 14.2, 7.1(b). “[F]ull involvement of the people” in sustainable use and environmental matters. Art. 7.1(i).	
Public interest NGOs deemed to have an interest and participate.	NGOs included in the definition of “public.” Arts. 2.4, 2.5.	NGOs within definition of “civil society.” Intro. One aim is to “facilitate full participation by [NGOs] in sustainable development decisionmaking processes. Specific Objective b.	The views of NGOs will be “solicited and taken into account.” Art. 21.	Implicit in Arts. 21, 35.	

Table 1.2 - Public Participation (cont.)

	Aarhus (Europe/NIS)	ISP (the Americas)	Draft ASEM (Asia/Europe)	MOU (East Africa)	NAAEC (North America)
Required Notice (and providing relevant information).	“[E]arly in an environmental decision-making procedure, and in an adequate and timely fashion.” Arts. 6.2, 6.3. (for specific activities).	Governments must “ensure the participation of civil society in sustainable development decisions.” Policy Recommendation 2.	Public opinion must be solicited before decisions affecting the environment are made Art. 21. Public participation ensured in the approval and permitting of such activities. Art. 24.		Notice and comment required “[t]o the extent possible” for proposed “laws, regulations, procedures, and administrative rulings of general application.” Art. 4.2.
Information [for specific activities] provided free of charge.	Free of charge. Art. 6.6.		Info must be available “for inspection free of charge”; but copies of info may carry the “cost of reproduction and dissemination.” Arts. 1, 8 (general provision for all information).	Implicit in Art. 23.	
Comments (period for input; taking into account).	Public may submit comments and each party must take “due account” of them. Arts. 6.7, 6.8.	Comments must be “evaluated, analyzed, and given proper consideration in a timely manner.” Principle 7.	Must allow “sufficient time for public discussions”; and opinions must be “taken into account.” Arts. 21, 23.	Recommends “sufficient” time frame and the “right to a decision with justifications.” Art. 23.	To the extent possible, each party shall . . . provide interested persons . . . a reasonable opportunity to comment on [proposed laws, regulations, procedures, and administrative rulings].” Art. 4.2.
Environmental Impact Assessments (EIA).	Information on specific activities must include its effects on the environment. Art. 6.6(b).	Public participation in the process of “assessing environmental impacts” should be required. Proposed Actions 6.3.2, 2.1.2.	EIAs noted, but not required. Art. 23.	EIAs required. Art. 7.1(b).	Parties must “assess, as appropriate, environmental impacts”; and the Council must develop “recommendations” for assessing the environmental impacts of proposed projects. Arts. 2.1(e), 10.7(a).

Table 1.3 - Access to Justice

	Aarhus (Europe/NIS)	ISP (the Americas)	Draft ASEM (Asia/Europe)	MOU (East Africa)	NAAEC (North America)
For access to information.	Requests for information. Art. 9.1.		Requests for information. Art. 28.		Ambiguous. Arts. 6, 7.
For public participation.	Proper public participation. Art. 9.2.		Proper public participation. Art. 28.		Ambiguous. Arts. 6, 7.
For environmental violations (by public and private entities).	Yes: Violations of law. Art. 9.3.	Implicit in “access to the justice system.” Policy Recommendation 2. Right of review and appeal for all. Proposed Action 2.1.3.		For persons affected by “environmentally harmful activities” or for “transboundary” environmental damage. Arts. 16.2(d), 16.3.	“Alleged violations.” Arts. 6.1, 6.2. Enforcement of laws. Art. 6.2. Secretariat will consider submissions from any NGO or person claiming a party is failing to enforce its environmental laws. Art. 14.1.

Table 1.3 - Access to Justice (cont.)

	Aarhus (Europe/NIS)	ISP (the Americas)	Draft ASEM (Asia/Europe)	MOU (East Africa)	NAAEC (North America)
Guarantees of fair, efficient, affordable, and transparent system.	"[E]xpeditious" Art. 9.1. "[F]air, equitable, timely and not prohibitively expensive." Art. 9.4.	"Legal standing . . . for all affected and interested persons"; "maintenance of independence" of judiciary. Proposed Action 2.1.3. Remedial measures including compensation and injunctive relief Proposed Action 2.1.4.	"[F]air, open, transparent and equitable and fall within specified time limits." Art. 29.	"[D]ue process and equal treatment." Art. 16.2(d).	"[F]air, open, and equitable"; "open to the public"; "comply with due process"; "not unnecessarily complicated"; no "unreasonable charges or time limits or unwarranted delays." Art. 7.1. "[W]ithout undue delay." Art. 7.2. "[I]mpartial and independent." Art. 7.4. Decisions to be in writing, state the basis for the decision, and promptly made public. Art. 7.2.
Non-discrimination.	Free access to "lists, registers, or files." Art. 5.2. Access to information, public participation, and access to justice, "without discrimination as to citizenship, nationality, or domicile." Art. 3.9.	The participatory process "requires the involvement . . . of all interested parties, including . . . the poor and traditionally marginalized groups, especially disadvantaged racial and ethnic minorities." Intro. "Special efforts must be made to use information and means of communication that will reflect and respect cultural, ethnic, religious, social, linguistic, and economic diversity in order to engage all stakeholders." Policy Recommendation 1. Legal standing extended to "all interested or affected . . . regardless of their race, ethnicity, culture or gender." Proposed Action 2.2.1.	Access to info and participation for "illegal or natural persons." Arts. 1, 18. Participation "regardless of gender, cultural or ethnic identity, language, citizenship, nationality or domicile." Art. 19. The "cultural diversity" of information users "will be taken into account when choosing the language and how the information is provided, such as on radio programmes, posters or by helpers serving illiterate persons." Art. 9.	Access to justice for "all persons who are or may be affected." Art. 16.2(d).	

Toward a Global Framework

Although many regions have undertaken important initiatives to promote environmental governance, there remains a need for a global framework. As discussed below, this framework could take the form of a tool kit, guidelines, or even a convention. 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 ensuring public access to information, participation, and justice.¹⁷⁸ 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. Nations that seek to

operationalize access principles 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 could foster increased cooperation and respect between civil society and governments.

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 U.N. Conference on Environment and Development, the WSSD is focusing on the lessons learned in trying to implement sustainable development over the past decade.

178. For example, most nations in subSaharan Africa, North Africa and the Middle East, the Pacific, and many in Asia.

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Accordingly, the WSSD process provides a platform for highlighting the essential role that public involvement and good environmental governance have in achieving sustainable development.¹⁷⁹

The WSSD 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 for civil society in implementing sustainable development. As Agenda 21 and the other outcomes from the 1992 U.N. Conference on Environment and Development set the agenda for UNEP, the funding priorities for the Global Environment Facility, and the path for the Commission for Sustainable Development, the WSSD will 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 WSSD can strengthen the international mandate for environmental governance by advancing specific institutional practices and mechanisms. These opportunities include: language in the Johannesburg Declaration, a consensus document that may represent soft law, which strengthens and expands 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 the principles; and strengthening national commitments.

Strengthening Soft Law on Environmental Governance—The WSSD Declaration

The WSSD provides a forum in which the international community can strengthen international law on environ-

mental governance. While Rio Principle 10 established a general mandate for national environmental governance, it could benefit from further specificity and expansion: providing protection to all affected persons, application to regional and international institutions, and explicitly protecting 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—apply to individuals at the national level. However, the first sentence of the principle specifically refers to “concerned citizens.”¹⁸⁰ This ambiguity should be resolved. In addition to citizens, all affected people should be ensured access. In instances of transboundary pollution and other environmental impacts, all affected people should have access to information, be allowed to have their voice heard, and have access to justice to protect their human right to a clean and healthy environment.¹⁸¹ Similarly, resident noncitizens (including foreign nationals) should have equal access.¹⁸²

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. Such international institutions would include those responsible for helping to develop and implement environmental treaties, laws, and programs,¹⁸³ as well as those institutions that provide the financing necessary to implement sustainable development.¹⁸⁴ The policies, practices, and decisions of these institutions can affect many peoples lives, health, and environment, just as those of governments. Despite recent changes by some of these institutions in particular instances,¹⁸⁵ most institutions have yet to incorporate adequate mechanisms for including the public in their decisionmaking processes.

Freedom of advocacy, speech, and association should be recognized as essential for people to meaningfully 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 proce-

179. Indeed, the preparatory processes have already emphasized the central role of public involvement. Report of the Secretary General, *Implementing Agenda 21*, U.N. Doc. E/CN.17/2002/PC.2/7 (Dec. 19, 2001) at 37, 38, available at <http://www.johannesburgsummit.org/html/documents/no170793sreport.pdf> (last visited Feb. 5, 2002); Arab Declaration to the World Summit on Sustainable Development (WSSD) (Meeting of the Arab Ministers, Cairo, Oct. 24, 2001), U.N. Doc. E/CN.17/2002/PC.2/(Oct. 24, 2001), available at www.johannesburgsummit.org/html/prep_process/cairo_declaration_wssd2_english.doc and <http://www.johannesburgsummit.org/html/documents/westasiaministerial.pdf>, art. 3(c) (participation and governance) (last visited Feb. 8, 2002); *African Ministerial Statement From Rio de Janeiro to Johannesburg* (African Preparatory Conference, Nairobi, Oct. 18, 2001), U.N. Doc. E/CN.17/2002/PC.2/5/Add.4, available at www.johannesburgsummit.org/html/documents/no172059af_min_statmt.pdf, ¶ 8 (“full participation”) (last visited Feb. 8, 2002); Phnom Penh Regional Platform on Sustainable Development for Asia and the Pacific (High-Level Regional Meeting, Phnom Penh, Nov. 27-29, 2001), U.N. Doc. E/ESCAP/HRM/WSSD/1/Add.1, ¶¶ 6, 24, 30, 44, available at www.johannesburgsummit.org/html/prep_process/asian_platform_for_action_final29nov_1030.doc (last visited Feb. 8, 2002) (good governance, public participation, and multistakeholder participation); Report of the UNECE Regional Ministerial Meeting for the World Summit on Sustainable Development (Regional Ministerial Meeting, Geneva, Sept. 14-15, 2001), available at www.johannesburgsummit.org/web_pages/final_report_ece_prepcom.pdf, ¶¶ 21, 22 (last visited Feb. 8, 2002) (transparency, participation, access to justice); Rio de Janeiro Platform for Action on the Road to Johannesburg 2002 (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, ¶ 11 (last visited Feb. 8, 2002) (transparency and participation); Singapore Declaration of the Alliance of Small Island States (Inter-regional Preparatory Meeting, Singapore, Jan. 7-11, 2002), U.N. Doc. E/CN.17/2002/PC.2/5/Add.6, at 3 (“significant partnership between civil society and the public sector in the implementation of Agenda 21”).

180. Rio Declaration on Environment and Development, *done at Rio de Janeiro*, June 14, 1992, art. 10, reprinted in 31 I.L.M. 874 (1992).

181. See, e.g., East African MOU, *supra* note 5, art. 16.2(d).

182. See *supra* note 37 and accompanying text (nondiscrimination).

183. For example, UNEP, the United Nations Development Program (UNDP), and the Food and Agricultural Organization (FAO), as well as multilateral environmental agreements; regional bodies such as the African Union, the OAS, and Association of South East Asian Nations (ASEAN); and the various international water management authorities. It is also worth considering specific ways to improve environmental governance in export credit agencies, national institutions that help to guarantee financing of projects abroad.

184. For example, the World Bank institutions, regional development banks, and the WTO.

185. See *supra* notes 20-25 and accompanying text.

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dural guarantees represent human rights and should be explicitly recognized as such.¹⁸⁶

Finally, the consensus document or program of action adopted at the WSSD may specifically endorse specific steps to be taken to strengthen the development and implementation of environmental governance at the local, national, and international levels.¹⁸⁷

Development of Global Guidelines

The WSSD provides an opportunity to secure international commitment to developing global guidelines on environmental governance. Regional initiatives have laid the groundwork for the elaboration of nonbinding guidelines.¹⁸⁸

186. See *supra* notes 10-13 and accompanying text (discussion on Universal Declaration of Human Rights and other instruments).

187. Since past consensus documents, such as the 1972 Stockholm Declaration and the 1992 Rio Declaration, have focused on principles (arguably principles reflecting international law), it would appear unusual and probably unlikely that the 2002 Johannesburg Declaration (or whatever it is ultimately entitled) would endorse specific mechanisms. As of early February 2002, it does not appear likely that there will be a detailed implementing document such as Agenda 21.

As nations convene at the WSSD, it is likely that they will adopt a de facto Program of Action that sets forth specific mechanisms and targets to promote sustainable development. In all likelihood, many of the targets will draw upon the Millennium Assessment. See *We the Peoples: the Role of the United Nations in the 21st Century*, U.N. Doc. A/54/2000 (2000), available at <http://www.un.org/millennium/sg/report/full.htm> (last visited Feb. 15, 2002); U.N. Millennium Declaration, U.N. Doc. A/RES/55/2 (Sep. 8, 2000), available at <http://www.un.org/millennium/declaration/ares552e.htm> (last visited Feb. 15, 2002).

In fact, the Second Preparatory Committee Meeting of the World Summit on Sustainable Development saw the development of "Type II" proposals—partnerships focused on concrete and specific initiatives to strengthen the implementation of Agenda 21—which would be announced at the Summit. See *Proposals for Partnerships/Initiatives to Strengthen the Implementation of Agenda 21*, at <http://www.johannesburgsummit.org/html/documents/prepcom2.html> (last visited Feb. 15, 2002).

The Preparatory Committee meetings have placed significant emphasis on good environmental governance, and this may be translated into specific measures that could be adopted as "Type II" proposals and initiatives. Such measures could include (1) the collaborative development of global guidelines on transparency, participation, and accountability that are applicable to nations, international institutions, and even transnational corporations; (2) an independent monitoring mechanism; and (3) national commitments.

188. See generally *Partnership for Public Participation*, at <http://www.environmentalgovernance.org> (last visited Feb. 14, 2002). There is some impetus for a global framework, and perhaps even a global governance convention. For example, U.N. Secretary-General Kofi Annan 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." Kofi Annan, *Foreword*, in STEC & CASEY-LEFKOWITZ, *supra* note 9, at v. See also 1996 IUCN World Conservation Congress, 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") (last visited Feb. 8, 2002); Brussels Declaration of the European ECO Forum (Jan. 21, 2002), at http://www.participate.org/publications/international_conference_on_aarh.htm, ¶¶ 9.1, 9.2 (last visited Feb. 8, 2002).

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.

In the near future, however, barring a clear and compelling need for a binding framework, there appears to be little political will to

Such guidelines could help to 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 include the active participation of civil society.¹⁸⁹ 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 the environment pillar. With the WSSD 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 the particular mechanisms that are believed to be the most appropriate. It may provide a general framework with some general guidelines applicable to all institutions at all levels and then encourage the development of other sets of guidelines specifically applicable to a particular region or group of institutions. Alternatively, 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 could take the lead in developing global guidelines (such as the Commission for Sustainable Development), the UNEP would seem to be the logical institution to facilitate the review of the regional initiatives and coordinate the development of the guidelines.¹⁹⁰ Financial resources will be necessary and could come from donors on an 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. Guidelines will require funding, particularly to include a broad cross-section of nations and civil society organizations. Some institutions and nations may be concerned about what an evaluative process might disclose. Linguistic diversity in particular, 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,

consider, let alone commit to negotiating, a binding global agreement on sustainable development or environmental governance.

189. See, e.g., Lidija Zivcic, *The Role of Environmental Non-Governmental Organizations in Forming International Environmental Instruments* (2000) (unpublished M.S. thesis, Department of Environmental Sciences and Policy, Central European University, Budapest) (on file with authors).

190. UNEP, including INFOTERRA, could draw upon its experience in assisting nations in developing laws and legal provisions concerning 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 UNCHR could collaborate with UNEP in developing global guidelines. See www.cedha.org/ar/conclusions.htm (last visited Feb. 8, 2002).

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and many African nations have more, e.g., Nigeria has more than 250.¹⁹¹ 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 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 rights to access justice. For example, low literacy rates and the absence of electronic media, newspapers and other written media) could in part be made up for by use of other avenues (including radio) when necessary to disseminate environmental information.¹⁹²

It is precisely because of these challenges that global guidelines may be 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 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.

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 WSSD 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 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 made in making its processes more transparent can provide an approach for other regional development banks to consider adopting.

This independent monitoring mechanism could draw upon the Access Initiative and its indicators.¹⁹³ The Access Initiative is a global network of NGOs that promote and ana-

lyze environmental governance processes in an effort to establish “common global practices for public access to information, participation, and justice in environmental decision-making.”¹⁹⁴ The network is currently developing indicators and methodologies in order to assess various approaches aimed at promoting environmental governance. The Access Initiative will present a nine-country report on the first application of its indicators at the 2002 World Summit as a showing of how nations have implemented Principle 10.

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, and the most effective approach would probably be a collaboration between civil society and governments.

Strengthening Existing Legal and Institutional Structures

At the WSSD 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 that will make use of existing spaces to participate in decisionmaking as well as advocating for further legal and institutional developments.

Developed nations and international institutions (including U.N. institutions, international financial institutions, and regional development banks) should place a priority on providing financial and technical resources to assist national and local authorities in developing nations to build civil society and governmental capacity to operationalize these principles. For example, the U.N. Institute for Training and Research (UNITAR) could offer training for government officials implementing the laws and to the grass-roots organizations that would likely take advantage of such information.¹⁹⁵

Local, national, and international authorities should publicly establish clear time lines and plans for developing and implementing the principles. 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 regional initiatives on environmental governance. For example, the relevant nations could commit to operationalizing 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. In practically all instances (including with the NACEC), nations could take steps to fortify the frequently inadequate funding for implementation.

191. See, e.g., Carl E. Bruch, Comparative Policy and Practice of Access to Environmental Information (unpublished manuscript, Sept. 11, 2000) (paper presented at INFOTERRA 2000, Dublin, Ireland, UNEP/INF2000/WP/4), at <http://www.unep.org/infoterra/infoterra2000/Bruch-rev.pdf> (last visited Feb. 6, 2002).

192. See, e.g., Draft ASEM Elements, *supra* note 3, 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).

193. See <http://www.accessinitiative.org> (last visited Jan. 22, 2002). While one of the authors is a member of the Access Initiative, the views expressed in this Article 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.

194. See http://www.accessinitiative.org/access_summary.html (last visited Jan. 22, 2002).

195. See <http://www.unitar.org/diplomacy/prog3.htm#menu> (last visited Jan. 22, 2002).

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Changes in domestic policies, laws, and institutions will have the greatest on-the-ground effects by increasing the role that local residents have 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 is 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 promote environmental governance.

Conclusion

Still emerging, the development of international norms of environmental governance has occurred largely in a piecemeal fashion, through national and regional initiatives and supplemented by provisions in international conventions and declarations. The 1992 Earth Summit seized an opportunity to recognize and affirm the importance of access to in-

formation, public participation, and access 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 nonbinding 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.

The WSSD constitutes a unique and timely opportunity to rally the international community to solidify environmental governance principles and to ensure that they are extended to all the people. This is necessary to effectively implement 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 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.