

THE NEW "PUBLIC"

The Globalization of Public Participation

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Editor



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The New "Public": The Globalization of Public Participation

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AFRICAN INITIATIVES FOR PUBLIC PARTICIPATION IN ENVIRONMENTAL MANAGEMENT

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Natural resources are the backbone of most African economies. How these natural resources are managed is at the root of governance within the African continent as it affects the livelihood of most citizens. In Africa, the traditional management structures were participatory. However, in colonial and post-colonial times, traditional structures were dismantled, leading to the adoption of top-down, state-controlled governance approaches. Under these approaches, communities are viewed as having interests and practices adverse to the environment and natural resources so policies are developed to keep citizens from the natural resources.¹

These state-controlled governance approaches have largely failed. There has been a realization that for effective environmental management, communities and nonstate actors must be consulted and involved. Simply put, there must be citizen participation in natural resource management.

This chapter explores the development of public participation initiatives in the process of environmental management in Africa. It focuses on declarations, conventions, and other pronouncements within the continent of Africa that have sought to espouse the concept of public participation in environmental management.² This evolving regional framework is significant as its norms reflect national commitments to enhance opportunities for the public to be involved in decisions that affect their lives.

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¹ See Albert Mumma, *Review of Emerging Trends in the Laws on Community Management of Natural Resources in East Africa*, Workshop materials on Access to Environmental Justice, Jinja Nile Resort (June 18-20, 2000) produced by ELI, ACTS, Greenwatch, and LEAT.

² For a review of provisions in African constitutions guaranteeing access to information, freedom of association, public participation, and access to justice, see Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131 (2001).

Historically in Africa, public participation was central to natural resource management. In traditional African societies, governance was consultative and participatory. This traditional governance included mechanisms for citizen involvement and participation in decisions within the community. The advent of colonialism, with its attendant negative impacts, dealt a severe blow to African concepts and practices of public participation in governance.

Current developments globally make public participation very important in Africa. First, African governments increasingly tend to discourage direct government involvement in economic activities and instead support and encourage private investment to boost economic growth. This approach combined with the state's limited ability to monitor the environmental impacts of private activities make it imperative for citizens to play a greater role in environmental management. The importance of citizen involvement is compounded by the fact that most citizens in Africa are not only poor and live in rural areas but are also principally reliant on the continent's natural resources.

The second factor making public participation an imperative in Africa is the colonial legacy. Despite the independence of most states for over four decades, their laws and institutions are still a relic of the colonial past. These laws and institutions still inhibit transparency, participation, and accountability, especially in environment matters where the importance of natural resources make them a source of power.

This chapter discusses the trends in public participation within the African continent, highlighting opportunities to make public participation in environmental governance a reality within the region. The first section discusses general considerations of public participation in environmental management. The second section discusses Africa-wide initiatives, and the third section discusses sub-regional initiatives.

I. GENERAL CONSIDERATIONS OF PUBLIC PARTICIPATION IN ENVIRONMENTAL MANAGEMENT

The 1972 United Nations Conference on Human Environment held in Stockholm, Sweden, brought environmental management into the international spotlight. However, even before this conference regional concerns with environmental management had already manifested in Africa.³ In 1968 for example, the African nations adopted the African Convention on the Conservation of Nature and Natural Resources, the first such regional effort in Africa.

By the time the United Nations Conference on Environment and Development (UNCED) was convened in 1992, it was increasingly evident that in order for environmental governance to be successful, the active involvement and participation of not only governments but also citizens and non-state actors was required. The recognition of the importance of citizen participation led to the articulation of Principle 10 in the Rio Declaration that stipulated procedures for enjoyment of citizen's environmental rights:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial administrative proceedings, including redress and remedy, shall be provided.⁴

Since the Rio Conference, several international and regional instruments have elaborated on the procedural rights guaranteeing public participation in decisionmaking found in Principle 10. The most notable regional instrument to have done so is the Aarhus Convention of 1998.⁵ It is one of the first, most de-

³ John Mugabe & Godber W. Tumushabe, *Environmental Governance: Conceptual and Emerging Issues*, in *GOVERNING THE ENVIRONMENT: POLITICAL CHANGE AND NATURAL RESOURCES MANAGEMENT IN EASTERN AND SOUTHERN AFRICA*, 21 (H.W.O. Okoth-Ogendo & Godber W. Tumushabe, eds., 1999).

⁴ Rio Declaration on Environment and Development, art. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

⁵ UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43; See also Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

tailed, and binding international instruments on environmental governance and public involvement.

While the African region has no regional convention that elaborates on environmental governance principles generally and public participation in particular, several covenants, treaties, and declarations have been adopted within the region that have provisions dealing with these issues. This chapter will briefly discuss some of these.

II. AFRICA-WIDE INITIATIVES

Several of the African charters, declarations, and organizations include provisions encouraging or mandating public access to information, participation, and justice. These instruments could provide a basis for the development of a set of African environmental government principles, including provisions for public access to information, public participation, and access to justice. These principles could be either binding or persuasive.

These charters, declarations, and organizations are discussed, along with their provisions addressing these issues. This section considers the African Charter on Human and Peoples' Rights, the Organisation of African Unity, the African Union, the African Ministerial Conference on the Environment, the New Partnership for African Development, the African Perspectives on World Summit on Sustainable Development, and the Africa Convention on the Conservation of Nature and Natural Resources in Africa.

A. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

In the pre-colonial period, human rights in Africa were communally based. The rights of members of society were fully integrated into the rights of society as a whole.⁶ Human rights were thus those recognized by the community and collectively enforced for the benefit of members of the society. In contrast, the exploitation of African resources and the subjugation of its people characterized the colonial period in Africa. This colonial period thus saw a regressive period in the development of human rights on the continent. Independence in Africa was greeted with a lot of euphoria as it marked the beginning of rule by Africans. It was hoped that it would also mark the beginning of the protection and promotion of human rights and the restoration of African dignity.

Post-independent Africa's concern with human rights can be traced to 1961, when 194 jurists from 32 countries met in Lagos, Nigeria under the auspices of the International Commission of Jurists. This meeting was

⁶ U.O. UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* 17 (1997).

held when Governor General Azikiwe called on African states to adopt a convention on human rights. It was not, however, until 1981 that such a convention — the African Charter on Human and Peoples' Rights — was adopted in Nairobi.⁷ The Charter came into force in 1986.

The Charter contains several provisions that are especially relevant for environmental governance. Article 7 contains provisions ensuring access to justice. This Article guarantees every individual the right to have his cause heard,⁸ which includes the right to an appeal to competent national organs against violations of fundamental rights, the right to be presumed innocent until proved guilty by a competent court or tribunal, the right to the defense and counsel of one's choice, and the right to be tried within a reasonable time by an impartial court or tribunal. Article 9 guarantees every individual the "right to receive information" and to express and disseminate opinions. The Charter also recognizes an individual's right to free association. Moreover, the Charter at Article 24 provides that "all peoples' shall have the right to a general satisfactory environment favourable to their development." The charter therefore contains provisions that can be used and expanded upon to guarantee good environmental governance and public participation within the continent.

The institutional mechanism established by the Charter to protect human rights is the African Commission on Human and Peoples' Rights.⁹ Compared to other regional human rights treaties, notably those for the European and American regions, the African Charter's protective regime is remiss in several respects. First, until 1998, the African human rights system did not have a human rights court. It was only in 1998 that the Assembly of Heads of States signed a protocol to the Charter that established an African Court on Human and Peoples' Rights.¹⁰ Second, the Commission has dealt with very few cases and its interventions are usually after the event.

The success of the African Charter on Human and Peoples' Rights in promoting environmental governance and public participation has been limited. It needs to be strengthened, and one critical measure would be through a specific regional instrument on procedural rights. The limited utility of the Charter may be traced to the great emphasis placed by African states on sovereignty and the concept of non-interference in the internal affairs of states.

This emphasis has worked against an effective human rights protection system. The end result is that despite having provisions that encourage public involvement, the Charter's mechanisms are weak.

B. FROM THE OAU TO THE AU: PROMISE OR PERIL?

In 1963, the Organisation of African Unity (OAU) was established as a pan-African Organization to deal with issues affecting the African continent. Just like the African Charter on Human and Peoples' Rights, the OAU Charter had both positive and negative aspects in its treatment of public participation.¹¹

On the positive side, the charter recognized the importance of the Universal Declaration of Human Rights of 1948, which has provisions that address aspects of public participation. Also, under the aegis of the OAU, the African Charter on Human and Peoples' Rights was negotiated and adopted, and the OAU adopted several declarations and decisions on good governance.

In July 1996, the OAU summit passed a Declaration, "Africa: Preparing for the 21st Century," which addressed good governance within the continent.¹² The Declaration noted that at the close of the 20th century, Africa was "the most backward continent in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned."¹³ The heads of states of OAU member countries agreed at the meeting to take appropriate steps to enable Africa to take up the challenges facing it. The declaration also noted that the 1990 Declaration on "Africa's Political and Economic Situation" had stated Africa's plight and poor development is due primarily to lack of an enabling environment and adequate development strategies and failure by states within the continent to provide good governance.¹⁴ Resolving Africa's problems was the responsibility of African governments and its peoples.

The Declaration recognized the need for regional cooperation in addressing the problems facing the African continent. It also recognized that sustainable development can only be achieved through reliance on the principles of *inter alia* democracy, human rights, and good governance. This declaration clearly identified the importance of good governance and thus provides a fertile ground for advancing public participation.

⁷ African Charter on Human and Peoples' Rights, approved at Banjul on June 26, 1981, entered into force Oct. 21, 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 59 (1982).

⁸ *Id.* art. 7(1).

⁹ *Id.* art. 30.

¹⁰ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted at Ouagadougou, Burkina Faso on June 9, 1998.

¹¹ The use of the past tense is due to the fact that the Charter has been superseded by the African Union following the launch of the latter in South Africa on July 9, 2002.

¹² Yaounde Declaration (Africa: Preparing for the 21st Century), AHG/Decl.3(xxxII), available at www.nhri.net/pdf/THE%20YAOUNDE%20DECLARATION.pdf (last visited July 22, 2002).

¹³ *Id.* para. 2.

¹⁴ *Id.* para. 7.

On the negative side, while the Charter establishing the OAU acknowledged the importance and application of the Universal Declaration of Human Rights and thus provided a useful framework for human rights protection, it, however, only mentioned the term "human rights" in its preamble and then only in very general terms. Another weakness with the Charter was the emphasis placed on non-interference with the internal affairs of member states.

The greatest hindrance to public participation and good governance within the context of the OAU was the emphasis placed on the principle of non-interference in internal affairs of states. At Article 3(2) of the Charter, the member states clearly stipulated that one of the principles that would guide them in achieving the objects and goals of OAU was that of non-interference in the internal affairs of states. Unfortunately, the over-reliance on this principle led to the failure and eventual collapse of the OAU, as it was never able to promote good governance within the continent. Its weakness led to efforts to replace it with a more effective successor, the African Union (AU).

The African Union has sought to depart from its predecessor in several aspects. Principally, the AU was modeled along the lines of the European Union and places good governance at the root of its obligations. The Constitutive Act of the AU,¹⁵ however, still contains the principle of non-interference in the internal affairs of its members as one of its objectives. The AU does specifically have a mandate of intervening in the affairs of a member state pursuant to a decision by the Heads of State Assembly with respect to grave circumstances, such as war crimes, genocide, and crimes against humanity.¹⁶

The Constitutive Act of the AU places good governance at its center and gives the organization some teeth. It thus gives hope that the continent can go a step further and clearly enact a regional instrument that identifies, articulates, and guarantees procedural rights and public participation in environmental governance.

C. THE AFRICAN MINISTERIAL CONFERENCE ON THE ENVIRONMENT (AMCEN)

The African Ministerial Conference on the Environment (AMCEN) is the only Africa-wide intergovernmental organization focused primarily on environmental issues. It was established in 1985 to strengthen the cooperation between African governments on economic, technical, and scientific activities to halt the degradation of Africa's environment and satisfy the food and energy

needs of the African people. The Conference meets once every two years in a regular session.

Some of the roles of AMCEN include: providing continent-wide leadership by promoting awareness and consensus on global and regional environmental issues, especially those relating to international conventions on biodiversity, desertification, and climate change; developing common positions to guide African representatives in negotiations for legally binding international environmental agreements; promoting African participation in international dialogues on global issues of particular importance to Africa; reviewing and monitoring environmental programs at the regional, sub-regional, and national levels; promoting ratification by African countries of multilateral environmental agreements relevant to the region; and building African capacity in the field of environmental management.¹⁷

AMCEN aims to assist in adopting Agenda 21, and its objectives closely mirror those of the 1992 United Nations Conference on Environment and Development (UNCED). Accordingly, AMCEN focuses on building capacity in the region; enhancing information flow between countries, agencies, and sectors; and promoting political cooperation.¹⁸

AMCEN has sought to achieve its objectives by creating committees and networks in various environmental fields. These committees and networks also represent communication links in terms of both technical information and decisionmaking between local environmental institutions and of AMCEN, governments, and supranational organizations and agencies. "Co-ordination in terms of studies, data collection, processing and planning and projects execution is expected for every specialization to evolve from individual countries, to regional groupings and continental level."¹⁹ Thus, AMCEN envisages information flow from the bottom through its structures to reach regional cooperation at the top level.

Nevertheless, AMCEN itself has not reached independence from institutional and technical support from external agencies. It is worth noting that the first meeting of AMCEN was initiated by the Governing Council of the United Nations Environment Programme (UNEP) in May 1983 at the request of UNEP's African members. This initial support of UNEP's secretarial services has continued, and AMCEN depends on UNEP for both expertise and funding.²⁰ Dependence on external support

¹⁵ Constitutive Act of the African Union, approved at Lome, Togo on June 12, 2000, available at www.africa-union.org/en/commpub.asp?ID=41 (last visited July 22, 2002).

¹⁶ *Id.* art. 3(d).

¹⁷ AMCEN Constitution, art. 5, available at www.unep.org/ROA/1/Amcen/pdf/AMCENbur92.pdf (last visited July 19, 2002).

¹⁸ Siri H. Eriksen, *Shared River and Lake Basins in Africa: Challenges for Co-operation*, African Centre for Technology Studies Ecopolity Series No. 10, 23 (1998).

¹⁹ AMCEN, 1990b, *Proceedings of the Third Meeting of the Management & Planning Group of AMCEN's Water Resources Network*, in Cairo, Egypt on Dec. 3-5, 1990, at 6.

²⁰ All materials on AMCEN are available only at the UNEP's website, www.unep.org/ROA/1/Amcen/amcen_documentation.htm (last visited July 22, 2002).

and lack of donor funding is a serious restraint on the implementation of AMCEN's program.²¹

Pursuant to its mandate, the biannual AMCEN meeting was held in Kampala, Uganda in July 2002. At this meeting, member states discussed a common African position for the forthcoming World Summit on Sustainable Development (WSSD).²² As discussed below, the WSSD is an opportunity for the world to herald the gains achieved ten years after the Rio Conference and to address the gaps in implementation.

In the run-up to the Earth Summit in Rio de Janeiro in 1992, African heads of state developed a common position on the environment and development, which was presented at the Rio Summit.²³ The 1992 Common Position articulated the African needs, constraints, and opportunities for sustainable development, and called for a convention to combat desertification—ultimately one of the key instruments developed following the 1992 Earth Summit. The African Common Position on the Environment and Development continues to shape the environmental agenda in Africa, as nations and the international organizations invoke the Position to support and provide historical context for particular endeavors.²⁴ The evolving African Common Position on WSSD should look at issues of public participation in decisionmaking on environmental matters, access to information, and access to justice.

AMCEN has made several notable strides on environmental governance that need to be expanded upon. First, at the eighth session of AMCEN held in April 2000 in Abuja, Nigeria, the ministers adopted the Abuja Declaration.²⁵ In recognition of the need for African governments to bear primary responsibility for the means of implementation of the AMCEN policy and programs, a decision was made to establish conditions that would allow AMCEN to succeed and develop a stronger identity. The Abuja session thus adopted decisions on policy and institutional changes, medium-term programs, and measures to bring about stability and predictability in the financial base of the conference to enhance and revitalize AMCEN.

The medium term program, for the years 2002-4, had two main clusters. The first cluster dealt mainly with issues of environmental governance. It addressed environmental information, access to justice, early warn-

ing, and environmental security. It also dealt with AMCEN's role in securing Africa's stance in WSSD.

At the recently concluded AMCEN 9th meeting in Kampala, Uganda, a declaration on "The Environment for Development" (Kampala Declaration) was approved, which noted the importance of environmental governance within the continent.²⁶ In its preamble at paragraph 10, the Kampala Declaration recognized that "success in achieving global sustainable development will ultimately depend upon development and implementation of sound and cost-effective national response policies and measures; good environmental governance, effective participation by civil society and collection and exchange of quality data and information on the environment for use by national decision-makers." This clause in the preamble of the Declaration identifies environmental governance generally and public participation and access to information specifically as essential for sustainable development.

In paragraph 7 of the Kampala Declaration, Africa's environmental ministers committed themselves "to make every effort to integrate environmental concerns into national pursuits of economic development in Africa, while at the same time not neglecting the priorities of the continent for sustainable social, economic, and human development particularly for the benefit of the poor and marginalized communities." This should be expanded upon to ensure that the said communities have access to justice, which is essential for environmental governance.

A notable outcome of the Kampala meeting, which is reflected in paragraph 13 of the Declaration, is the endorsement of the proposal to establish a comprehensive information network to promote access and harmonization of data in the continent and to act as a basis for tracking environmental changes using quantitative indicators focusing on national needs. Such a network will facilitate the access to information on environmental issues and improve good governance and public participation in decisionmaking.

D. NEW PARTNERSHIP FOR AFRICAN DEVELOPMENT (NEPAD)

The New Partnership for African Development (NEPAD)²⁷ is a holistic, comprehensive, integrated, strategic, and homegrown framework for the socio-economic development of Africa. NEPAD is an outgrowth of a variety of emerging ideas and earlier initiatives. Although the idea for the development of NEPAD can trace its roots to the concept of an African renaissance first ad-

²¹ AMCEN, 1992.

²² See Ugandan National Environmental Management Authority (NEMA), *THE EAST AFRICAN*, Apr. 22-28 2002, at 5.

²³ United Nations Economic Commission for Africa, *African Common Position on Environment and Development* (1992).

²⁴ See Carl Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 *ENVTL. L. REP.* 10428, 10441 (2002).

²⁵ Report of the Eighth Session of AMCEN, held in Abuja, Nigeria on April 2000.

²⁶ UNEP, *Kampala Declaration on the Environment for Development*, approved in Kampala, Uganda on July 4, 2002.

²⁷ See NEPAD's Constitutive Document, available at www.nepad.org (last visited July 18, 2002).

vanced by Nelson Mandela and clearly articulated by President Thabo Mbeki of South Africa, its immediate genesis is linked to the transformation of the OAU into the AU and the Millennium Development Goals agreed on by the United Nations at the turn of the 21st century.²⁸

Efforts to replace the OAU with a more effective body were spearheaded by Colonel Muammar Gaddafi, the President of Libya. His proposals for the establishment of an African Union were approved at the extraordinary summit of the OAU in Sirte, Libya in March 2001. At the time, Algeria's President Abdelaziz Bouteflika was head of the OAU, President Mbeki was the Chairman of the Non-Aligned Movement, and Nigeria's President Olusegun Obasanjo was the Chairman of the Group of 77. The three leaders were charged with the task of drafting a common plan to address the problems of marginalization, underdevelopment, conflict, diseases, poor capacity, and bad governance. In the end, President Mbeki was the principal architect behind drafting the plan, which was called the Millennium Partnership for the African Recovery Programme (MAP).

At around the same time that MAP was developed, Senegal's President Abdoulaye Wade drafted what he called the Omega Plan, which he first presented to the Francophone African summit in Cameroon in January 2001. The two plans were merged into The New African Initiative (NAI), on July 2001 in the run-up to OAU heads of state meeting in Lusaka, Zambia. The heads of state meeting on July 11, 2001 approved the NAI. In October 2001, NAI was refined and adopted with its present name, New Partnership for African Development (NEPAD).

NEPAD's overriding goal is to end Africa's underdevelopment and poverty.²⁹ It strives to promote accelerated growth and sustainable development within the continent, eradicate widespread and severe poverty, and halt the marginalization of Africa in the globalization process. NEPAD seeks to achieve these goals by bringing about peace and political stability, instilling respect for human rights and political freedom, enshrining good economic and political governance, and launching programs to address Africa's shortcomings in infrastructure, education, health, science, and technology, amongst other areas.

NEPAD was developed by African heads of states and is conceived as the principal means of partnership for development between Africa and the rest of the world. NEPAD will be implemented through the African Union.

To achieve its goals, NEPAD is divided into seven main initiatives—peace, security, democracy, and political gover-

nance; economic and corporate governance; bridging the infrastructure gap; human resource development; capital flows; market access; and the environment.

The environment initiative under NEPAD targets eight areas: combating desertification, wetland conservation, invasive alien species, coastal management, global warming, cross-border conservation areas, environmental governance, and financing.³⁰ The environmental governance sub-theme offers an opportunity for NEPAD to fully develop principles and rules for public participation. Such rules could take the form of a regional strategy (such as the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development), a document on good practices (ASEM), or a binding convention (such as the Aarhus Convention). Whatever form it takes, the rules or principles should clearly expand on the three pillars of access to environmental information, public participation, and access to justice. Already NEPAD has proposed a process of enforcing standards within African countries through an African Peer Review Mechanism.³¹ It has been proposed that nine codes of conduct will form the cornerstone of this process.³² Only the code on democracy and political governance remains to be finalized. A timely opportunity exists to either include environmental governance in this code or to adopt a code on public participation in environmental governance.

Good governance is at the core of NEPAD's implementation strategy. There is acceptance that political and economic governance is the root of the concept of NEPAD and will lead to its eventual success. The importance of environmental governance within NEPAD is very clear. First, governance has been clearly identified as one of the issues under the environmental initiative of NEPAD. Second, effective governance founded on transparent decisionmaking and public access to official information is the basis of achieving sustainable development. Open decisionmaking processes not only spur economic growth but also lead to the entrenchment of democracy as citizens have an opportunity to participate in and influence public decisions.

The identification of governance as one of the critical aspects of the environment initiative provides an opportunity for African countries to secure the three pillars of environmental governance—access to information, public participation, and access to justice—and thus achieve the NEPAD agenda, which is based on partnership. This

²⁸ *Id.* para. 138.

²⁹ *Id.* para. 85.

³² Eight codes have already been approved: the code of conduct of good practice on monetary and fiscal policy; code of good practice on fiscal transparency; budget transparency; public debt management; principles of good corporate management; international accounting standards; international auditing standards; and core principles of effective banking supervision.

²⁸ The Millennium Development Goals, approved at Millennium Summit on Sept. 2000, available at www.developmentgoals.org (last visited July 19, 2002).

²⁹ See NEPAD's Constitutive Document, *supra* note 27, paras. 1, 2, 67.

achievement will further the NEPAD objectives and the United Nations Millennium Development Declaration adopted by the heads of states in New York in September 2000. In the United Nations Millennium Development Declaration, the heads of states representing the international community committed themselves to support the consolidation of democracy in Africa and assist Africans in the struggle for lasting peace, poverty eradication, and sustainable development.³³

Under the democracy and political governance initiative section of NEPAD, "it is generally acknowledged that development is impossible in the absence of democracy, respect for human rights, peace and good governance."³⁴ This initiative strives to strengthen the political and administrative framework of participating countries in accordance with the "principles of democracy, transparency, accountability, integrity and respect for human rights and promotion of the rule of law."³⁵ This initiative combined with the environmental initiative illustrates the recognition that African states have recently accorded to environmental governance, as they authorize states to be guided by the principles of transparency and accountability. For example, NEPAD expects that there will be access to information for the public since it is only through government allowing the public access to official information that the public can assess the extent to which the government is democratically conducting its affairs. It is also only then that the government can claim to be transparent and accountable.

NEPAD also intends to undertake capacity-building initiatives aimed at promoting participatory decisionmaking.³⁶ Public participation in decisionmaking will increase the knowledge base as individuals will be able to contribute their skills and expertise in the process of arriving at decisions. Moreover, allowing civil society to contribute to public discourses on environmental policies promotes democratic governance generally.

Participating NEPAD countries also commit to support efforts to strengthen national, sub-regional, and continental structures that support good governance.³⁷ This commitment can be actualized to the benefit of environmental governance by adoption of a continental instrument on environmental governance that clearly allows citizens access to environmental information, defines the procedures for accessing the information, defines the types of information that can be assessed, and authorizes penalties for officers who fail to make information accessible. The instrument should also address access to justice and public participation in decisionmaking.

³³ United Nations Millennium Development Declaration, adopted in New York on Sept. 2000, available at www.un.org/documents/ga/res/55/a55r002.pdf (last visited July 22, 2002).

³⁴ NEPAD's Constitutive Document, *supra* note 28, para. 79.

³⁵ *Id.* para. 80.

³⁶ *Id.* para. 83.

The third meeting of the steering committee of the environmental component of NEPAD held in Dakar, Senegal from June 12-14, 2002 adopted the framework of an action plan for the environment initiative of NEPAD.³⁸ Although the action plan is only a framework, uses terms such as "may" and "should," and lacks time-specific targets, it does identify the importance of environmental governance and procedural rights. Section 3 of the plan states that the action plan will build on ongoing activities to be carried out by the African Ministerial Conference on the Environment (AMCEN), including the generation and dissemination of environmental information in Africa, environmental assessment, and strengthening of collaboration with major bodies in Africa.

One of the objectives of the action plan is to enhance effective participation of African major groups and their important contribution to inform intergovernmental decisionmaking and improve the institutional framework for regional environmental governance.³⁹ This regional framework could include the establishment of institutions through an agreement to ensure access to information, participation, and justice.

Despite its noble intentions, NEPAD has so far failed to fully involve non-state actors and citizens in its conceptualization and implementation, with the consequence that it risks being seen as a sole initiative of heads of states.⁴⁰ This runs counter to the spirit of partnership championed in the document and that is so essential for the success of the effort. Despite this weakness, NEPAD offers an opportunity for Africa and Africa's people to advance environmental governance within the continent.

E. AFRICAN PERSPECTIVES ON WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT (WSSD)

Ten years after the Rio Conference on Sustainable Development, the world community will meet to review the progress made on the Rio commitments and specifically on implementation of Agenda 21. While Rio heralded the beginning of environmental governance as a crucial concern for the world, the 2002 World Summit on Sustainable Development (WSSD) held in Johannesburg, provides an opportunity to not only reaffirm commitments to environmental governance but also to accelerate efforts at implementation. The Summit also offers the opportunity to clearly recognize the role of individuals and nonstate actors in global affairs.

³⁷ *Id.* para. 84.

³⁸ UNEP, Framework of an Action Plan for the Environment Initiative of the New Partnership for Africa's Development (NEPAD), approved at Dakar, Senegal on June 12-14, 2002.

³⁹ *Id.* at 7.

⁴⁰ Personal observations of the authors based on numerous press reports and interactions with other people on the issue.

The Summit being held on African soil gives African countries the opportunity to push an African Agenda. It is also being held at a time when African countries have had some experience with sustainable development and hopefully have realized that it is a process that can only succeed with a partnership between governments and their citizens through their institutions.⁴¹ The Summit also provides an avenue for Africa to foster commitment on public participation on environmental governance.

The African Civil Society Forum, held in Nairobi on October 15-16, 2001 in advance of the African Ministerial Prepcom preparing for the WSSD, clearly set the stage for the need for environmental governance to form part of the WSSD agenda and outcome. The Civil Society Position stipulated that security and environment are clearly linked with good governance and noted that part of the crisis in Africa has been due to autocratic governments, corruption, greed, patronage, and violation of human rights by the governments. The Position further identified obstacles to sustainable development in Africa, including lack of access to information and lack of public participation.⁴² To rectify the obstacles, it was proposed that African governments commit themselves to systems of participatory democracy and eradication of poverty: specifically that a culture and practice be adopted that ensures access to information, justice, and the rights of people to participate in all aspects of decisionmaking.⁴³ The Civil Society Position also urged the African governments through their ministers to start a process of negotiating a binding instrument that guarantees these principles as enunciated in Principle 10 of the Rio Declaration.⁴⁴

F. THE AFRICA CONVENTION ON THE CONSERVATION OF NATURE AND NATURAL RESOURCES IN AFRICA

The Africa Convention on the Conservation of Nature and Natural Resources in Africa, popularly known as the Algiers Convention, was adopted on September 15, 1968 in Algiers, Algeria by the heads of state and government of (the then) independent African states. As a fundamental principle, the contracting parties undertook "to

⁴¹ For recommendations on public participation in sustainable development generally and for a case for incorporating it in the agenda of WSSD by African governments, see *Making the Concern for Africa the First Concern of Africans: Emerging African Perspective on Sustainable Development, Governance, and Globalisation*, presented to African Ministers for Environment at the Regional Prepcom for Africa, in Nairobi, Kenya on Oct. 15-18, 2001, reproduced in *SUSTAINABLE DEVELOPMENT, GOVERNANCE, GLOBALISATION: AFRICAN PERSPECTIVE* 10-23 (2002).

⁴² African Civil Society Position of the African NGO Forum, approved at Nairobi, Kenya on Oct. 15-16, 2001, available at www.johannesburgsummit.org/html/prep_process/africadocs/position_of_the_african_civil_society.doc (last visited July 22, 2002).

⁴³ *Id.*

⁴⁴ *Id.*

adopt the measures to ensure conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interest of the people."⁴⁵

The Convention as it presently exists has three articles that tangentially deal with issues of access to information, access to justice, and public participation in decisionmaking. The first is Article 13, dealing with Conservation Education:

The contracting parties shall ensure that their peoples appreciate their close dependence on natural resources and that they understand the needs, and the rules for, the rational utilization of these resources. For this purpose they shall ensure that the principle indicated in paragraph (1) ... form the object of information campaigns capable of acquainting the public, with and winning it over to, the idea of conservation.⁴⁶

The second is Article 14, which calls for the incorporation of ecological, as well as economic and social factors, into the formulation of development plans. Finally, Article 18 deals with dispute resolutions. However, this only applies to the parties to the Convention—essentially states—implying that individuals may not benefit from this arrangement.

Perhaps due to lapse of time as well as recent developments in environmental management and especially the influence of the Rio Conference, the Convention has been marked for several amendments. One such proposed amendment is the introduction of a new article on procedural rights. If adopted, the proposed new Article 16 would provide:

The parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate (a) dissemination of environmental information; (b) access of the public to environmental information; (c) participation of the public in decisionmaking with a potentially significant environmental impact; and (d) access to justice in matters related to the protection of the environment and natural resources.

The adoption of this amendment, together with other suggested amendments would truly herald a significant step forward in the journey of environmental governance.

⁴⁵ Africa Convention on the Conservation of Nature and Natural Resources in Africa, art. 2, adopted at Algiers, Algeria on Sept. 15, 1968, entered into force June 16, 1998, available at www.mtnforum.org/resources/library/accn68a.htm (last visited July 22, 2002) [hereinafter Algiers Convention].

⁴⁶ *Id.* art. 13(1)(a), (b).

Once adopted, however, it will be necessary for member states to develop and strengthen national legal policy and administrative measures necessary to implement and enforce the revisions. At the same time, the successful implementation of the Algiers Convention and its revisions must also be considered in the broader context of the emerging AU and its renewed hope to ensure respect for human rights.

The AMCEN meeting in Kampala, Uganda in July 2002 deferred making a recommendation on the adoption of the revised text and instead requested the AU to initiate a further process of intergovernmental negotiations, thus extending the long road of revising the Charter.

II. SUB-REGIONAL INITIATIVES IN AFRICA

Several organizations, charters, and agreements have developed in sub-regions of Africa that generally address the principles of public access to information, public participation, and public access to justice. These sub-regional initiatives include efforts in East Africa, southern Africa, and West Africa. These organizations, charters, and agreements will be discussed, along with opportunities to strengthen their provisions that address public involvement in the governance process. The discussed sub-regional initiatives are the East African Memorandum of Understanding, the Southern Africa Development Community, and the Economic Community of West African States.

A. EAST AFRICAN MEMORANDUM OF UNDERSTANDING (MOU)⁴⁷

The East African Community, which collapsed in 1977, was a regional initiative between Kenya, Tanzania, and Uganda. It was formally revived on November 30, 1999, when the presidents of the three East African countries signed the Treaty for the Establishment of the East African Community.⁴⁸ With the revival of the East African Community, two developments relevant to environmental governance occurred. First, unlike its predecessor, the revived East African Community grants a principal role to the citizens of the three East African states. It clearly recognizes the role of private citizens and civil society. The importance of partnerships can also be discerned from the treaty's reference to partner states as opposed to member states in its predecessor. Second,

⁴⁷ See generally Godber Tumushabe, *Public Involvement in the East African Community*, in this volume.

⁴⁸ Treaty for the Establishment of the East African Community, UN Treaty Registration No. 37437, available at www.eacq.org/Treaty/eac-TheTreaty.htm (last visited July 22, 2002).

the treaty identifies environmental management as one of the areas that the Community will address.⁴⁹

The most explicit provisions dealing with public involvement within the context of East Africa are in a Memorandum of Understanding (MOU) among the three East African countries for cooperation in environmental management.⁵⁰ The MOU clearly recognizes and gives prominence to the importance of public access to environmental information, public participation, and access to the courts.

Article 7 of the MOU sets forth the commitment of the partner states to guarantee public participation generally. This Article guarantees the "full involvement of (the) People in the sustainable use and management of environment and natural resources." Public participation is further secured by Article 16(2)(a), which states that partner states agree "to promote public awareness programmes and access to information as well as measures aimed at enhancing public participation on environmental management and issues." Public participation is also included in the context of environmental impact assessment (EIA) where the states agree to ensure public participation at all stages of the process,⁵¹ and again in the context of forest management, where it encourages partnerships with local people.⁵²

The MOU also contains provisions guaranteeing access to environmental justice. The partner states have agreed to "develop measures, policies and laws which will grant access, due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by environmentally harmful activities in the territory of any of the partner states."⁵³ To ensure access to information, the MOU provides that the partner states agree to "promote public awareness programmes and access to information" on environmental matters and establish resource centers on environmental information and the use of EIA.⁵⁴

The legal authority of the MOU is weaker than a formally binding legal convention or protocol. Indeed, in its provisions it contemplates the development of a protocol in the area of environment and natural resource management.⁵⁵ It does, however, offer a strong basis for developing a sub-regional instrument on environmental

⁴⁹ Chapter 19 of the treaty deals with cooperation in environment and natural resources management, while chapter 20 concerns itself with cooperation in tourism and wildlife management.

⁵⁰ Memorandum of Understanding between the Republic of Kenya and the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environment Management, approved at Nairobi, Kenya on Oct. 22, 1998 [hereinafter MOU].

⁵¹ *Id.* art. 14(2).

⁵² *Id.* art. 9(f).

⁵³ *Id.* art. 16(2).

⁵⁴ *Id.*

⁵⁵ See *id.* arts. 2(1)(C), 3(1).

governance encompassing the three pillars of access to information, public participation, and access to justice.

B. THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC)

The Southern Africa Development Co-ordination Conference (SADCC) was formed in Lusaka, Zambia on April 1, 1980, following the adoption of the Lusaka Declaration by nine founding member states. Twelve years later on August 17, 1992 in Windhoek, Namibia, the Declaration and Treaty establishing the Southern Africa Development Community (SADC), replaced the Co-ordination Conference.⁵⁶

The SADC Treaty is a legally binding and all-encompassing framework by which countries of the region must coordinate, harmonize, and rationalize their policies and strategies for sustainable development in all areas of human endeavor. The Treaty commits the members to the fundamental principles of sovereign equality of member states; solidarity, peace, and security; human rights, democracy, and the rule of law; and equity, balance, and mutual benefit.

SADC's objectives include achieving sustainable utilization of natural resources and effective protection of the environment.⁵⁷ It aims to harmonize the political and socio-economic policies and plans of the members states; mobilize the people of the region and their initiatives to develop economic, social, and cultural ties across the region and to participate fully in the implementation of the programs and operations of SADC and its institutions; and to create appropriate institutions and mechanisms for the mobilization of requisite resources for the implementation of the programs and operations of SADC and its institutions.⁵⁸

Every member has the responsibility to coordinate one or more sectors on behalf of SADC. For instance, Lesotho is currently in charge of environment and land management matters for SADC, while Zimbabwe takes care of food, agriculture, and natural resources.

SADC has developed a number of binding protocols on natural resources for its 12 members to adopt, including one on shared watercourses and one on mining.⁵⁹ These protocols contain, to varying degrees, environmental governance principles. The protocol on shared water systems, for example, contributes to the concept of sustainable development of water through very spe-

cific recommendations on what co-basin states can and cannot do. It then suggests collective management through integrated master plans, and it requires member states to exchange information and data on the watercourse.⁶⁰ Together, these provisions are concerned with the collection of a wide range of information, making that information publicly available, and promoting public participation in the management of international watercourses in southern Africa.⁶¹

In October 1999, the environmental ministers of the SADC region agreed to establish a binding environmental protocol, and the efforts to develop the protocol remain ongoing. This protocol could build upon national experiences in the sub-region as well as international initiatives to promote public involvement. Specifically, it could recognize that this protocol could incorporate procedural aspects of environmental management—such as public participation and access to justice—that are essential to implementing substantive environmental norms and standards.⁶²

C. THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

The Economic Community of West African States (ECOWAS), which was established in 1975, seeks to promote integration and cooperation in order to create an economic and monetary union for encouraging economic growth and development in West Africa.⁶³ The highest decisionmaking organ of ECOWAS is the ECOWAS Authority, which is comprised of heads of state or government. The Authority is charged with administering and directing the integrative movement of ECOWAS. In this regard, "the ECOWAS Treaty is merely adopting the practice of both the past and existing economic, and even political schemes in Africa. It is often considered necessary in the continent to involve the highest level of political representation, usually the heads of state and/or government."⁶⁴ Another political body, the Council of Ministers, assists the ECOWAS Authority. The Executive Secretariat of ECOWAS is the institution charged with implementing the ECOWAS priorities.

ECOWAS has been slow in its progress. In view of the slow progress in ECOWAS, the 1975 Treaty has been revised. The principle of supranationality in the application of decisions and the autonomous funding of the budgets of the institutions have been introduced.⁶⁵

⁵⁶ Declaration and Treaty of SADC, available at www.dfa.gov.za/for-relations/multilateral/treaties/sadctrea.htm (last visited July 19, 2002).

⁵⁷ *Id.* art. 5.

⁵⁸ *Id.*

⁵⁹ Protocol on Shared Watercourses Systems in the Southern African Development Community (SADC) Region, approved at Johannesburg on Aug. 1995, entered into force Sept. 1998; Protocol on Mining in the Southern African Development Community (SADC), approved at Blantyre, Malawi on Sept. 1997.

⁶⁰ See Declaration and Treaty of SADC, *supra* note 56, art. 5.

⁶¹ See generally Bruch, *supra* note 24, especially 10443-45.

⁶² *Id.*

⁶³ ECOWAS Treaty, art. 2.

⁶⁴ S.K.B. Asante, *Regional Economic Co-operation and Integration in West Africa: the Experience of ECOWAS*, in *JOINING THE FUTURE: ECONOMIC INTEGRATION AND CO-OPERATION IN AFRICA* 113 (O.S. Saasa ed., 1991).

⁶⁵ 25th Anniversary Report of the Executive Secretary, Introduction, at 1.

Numerous problems have been encountered by ECOWAS in the enhancement of the process of regional integration of West Africa. Some of these important problems include: political instability and bad governance that has plagued many of the countries; weak national economies with insufficient diversification; bad economic policies in certain cases; multiplicity of organizations for regional integration with the same objectives; failure to involve the civil society, private sector, and mass movements in the process of integration; and the defective nature of the integration machinery in certain cases.⁶⁶ The structure of the ECOWAS institutions has also hindered the progress. For example, ECOWAS does not provide a forum for the exchange of views with interest groups in the West African sub-region. Hence to a large extent, the broad masses of the people of West Africa are excluded from effective participation in the ECOWAS integration process either directly or indirectly through interest groups.⁶⁷ This situation does not bode well for environmental governance in ECOWAS, especially the principle of public participation in decisionmaking processes.

Signs are emerging, however, that the future prospects are good. For instance, the recent developments in the political and economic scenery of West Africa have gradually helped to remove the principle obstacles to integration. Among these developments are the advent of democracy in most ECOWAS countries, particularly in Nigeria, which is the dominant economy in West Africa; the gradual withdrawal of the state from the sectors of productive activity; and the realization that the private sector must be the mainspring of growth and economic integration.⁶⁸

A broad consensus has also emerged around a number of key principles that should guide the integration process in West Africa over the coming years. The need for the implementation of these principles has been sharply realized by the constraints encountered and by the conditions that are required for the effective implementation of ECOWAS programs. Among these conditions are the need for internal political and economic stability, the need for coordination of macroeconomic policies at the regional level, and also the need to improve the operational procedures in the ECOWAS institutions. Most importantly, the member states must show a political commitment to implementing ECOWAS' priority programs.⁶⁹

However, a careful analysis of the ECOWAS Treaty reveals that it does not address the concerns of public involvement in decisionmaking. Perhaps this omission can

be attributed to the fact that ECOWAS's very existence is underpinned by economic concerns based on economic models that by their very nature excluded the participation of the public in the decisionmaking process. Furthermore, these economic models were created when economic issues were completely divorced from environmental concerns with no perceived connections. Indeed, the two concepts were even taken to be mutually exclusive.

Recent political and economic developments occurring in these countries are being influenced by emerging world trends that provide for and demand specific arrangements for access to information, public participation in decisionmaking, and access to justice. There is now an urgent need to amend the ECOWAS Treaty further so as to provide for environmental clauses with specific reference to access to information, access to justice, and public involvement in decisionmaking. As the member countries further democratize, it is to be expected that this democracy will spill over to the regional and sub-regional bodies. As the Executive Secretary of ECOWAS recently observed:

West Africa has to grapple with the issues of development, and with the attendant problems which are many and varied. However, this new century affords a golden opportunity to end the region's marginalization. The last decade was one of rapid political change and the result has been the advent of more responsive governments following multi-party elections. Also there is now a broader consensus on the need to move away from the defective economic models of yesteryears. There is now talk of development underpinned by economic reforms, improved management of public affairs, human resource development and infrastructure growth. In addition, there is a much clearer awareness of the crucial role that regional integration can play in promoting the economic growth and development of the countries of the region.⁷⁰

IV. CONCLUSION

The Rio Conference was a turning point in environmental governance. The overall objective of the conference was to promote the integration of the environment and development policies through effective international agreements and instruments, especially considering the needs and concerns of developing countries. To that end, various efforts must be made in the legal field. Priorities must be set for future lawmaking at the appropriate level, incorporating environmental and development concerns in a balanced manner.

⁶⁶ *Id.* at 2.

⁶⁷ Asante, *supra* note 64, at 114.

⁶⁸ See generally, 2000 Annual Report of the Executive Secretary, available at www.ecowas.int (last visited July 18, 2002).

⁶⁹ *Id.*

⁷⁰ 2000 Annual Report of the Executive Secretary, *supra* note 68, at 1.

As the world has become more seamless, international cooperation is paramount in ensuring that events occurring in one part of the world do not cause harm in other parts of the world. Concomitantly, within the nation state, concerted efforts must be made to incorporate the input of the citizens in environmental governance. In the context of Africa, although it is gratifying to note that several regional initiatives have provisions on environmental issues, a number of them need to develop and adopt protocols that ensure public involvement in decisionmaking on matters with significant environmental effects as well as guaranteeing the public's access to environmental information and justice.

The initiatives underway within the African continent point to the importance of environmental gover-

nance for the continent's success in sustainable development. Owing, however, to the scattered nature of provisions on environmental governance in several instruments and declarations and also the legal status of some of the instruments, time should be ripe for these efforts and initiatives to coalesce into one legally binding instrument on environmental governance. This could be done through a collective effort among AMCEN, AU, and the environment initiative of NEPAD. Such an instrument would elevate environmental governance to its rightful place and clearly expound on the three pillars of environmental information access, access to justice, and public participation in a manner that is sensitive to African conditions and peculiarities.