

# THE NEW "PUBLIC"

## The Globalization of Public Participation

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*The New "Public": The Globalization of Public Participation*

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# EMERGING GLOBAL NORMS OF PUBLIC INVOLVEMENT

*Carl Bruch and Meg Filbey\**

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

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

These advances in opening up governance structures are not necessarily tied to electoral processes. A multiparty representative democracy is not a predicate to involving the public in decisionmaking, and good governance practices of transparency, inclusion, and accountability may be seen in monarchies and traditional tribal structures.<sup>1</sup> Moreover, international institutions

are rarely “democratic,” in that the officers are not elected by the populace, and in many cases they are effectively appointed by the largest financial contributors. However, as this volume shows, international institutions have responded to international pressure to engage the public, as well as practical considerations for doing so. While these institutions often only focus on the “affected” public—those individuals who may be directly affected by an institution’s decision—measures to promote transparency also can reach a broader audience.

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

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

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

<sup>2</sup> For a thorough examination of public involvement at the national level in many countries, see “The Access Initiative” website and related publications at [www.accessinitiative.org](http://www.accessinitiative.org).

<sup>3</sup> See UNIVERSITY OF VICTORIA’S CENTRE FOR GLOBAL STUDIES, “RETHINKING GOVERNANCE” HANDBOOK: AN INVENTORY OF IDEAS TO ENHANCE ACCOUNTABILITY, PARTICIPATION, AND TRANSPARENCY; United Nations Environment Programme, *Enhancing Civil Society Engagement in the Work of the United Nations Environment Programme—Implementation of GCSS.VII/5: Revised Strategy Paper (Draft 3b)* (Aug. 4, 2002).

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

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

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

The third and final part of the volume analyzes experiences of various international institutions in promoting public access to information and public consultation, as well as mechanisms for ensuring that NGOs and affected individuals have access to quasi-judicial international dispute resolution mechanisms to protect their rights. These include multilateral and bilateral financial institutions, human rights bodies, international water management authorities, trade organizations, and international bodies involved in mining. The experiences highlighted in this part, relating to international institutions, are perhaps the most diverse. Some institutions have proven to be quite open, while a few others (including most export credit agencies and bodies

relating to mining) are only beginning to effectively involve the public. In many instances, international bodies have made strides in making information available and in consulting with the public, but effective public participation in decisions and meaningful access to justice remain elusive.

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

## I. THE FOUNDATIONS OF PUBLIC INVOLVEMENT

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

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

<sup>4</sup> Carl Bruch & Dorigen Fried, *Public Involvement in the Management of International Watercourses*, in this volume.

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

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

#### A. HISTORICAL OVERVIEW OF PUBLIC INVOLVEMENT<sup>6</sup>

International recognition of public involvement—including provisions for transparency, participation, and justice—dates back more than 50 years.<sup>7</sup> As early as 1948, the Universal Declaration on Human Rights provided the kernels for generalized rights of access to information (Article 19) and justice (Articles 8 and 10), as well as the right to associate (Article 20).<sup>8</sup> Similarly,

<sup>5</sup> See, e.g., RUGEMELEZA NSHALA, THE FREEDOM OF ASSOCIATION IN TANZANIA: IMPLICATIONS FOR CIVIL SOCIETY AND SUSTAINABLE DEVELOPMENT, Lawyers' Environmental Action Team Policy Brief No. 1 (1997); Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 176-78 (2001).

<sup>6</sup> This historical summary is adapted with permission from Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428, 10429-30 (2002). Another good history of international instruments that incorporate public participation principles is STEPHEN STEC & SUSAN CASEY-LEFKOWITZ, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 10-14 (2000), available at [www.unece.org/env/pp/acig.htm](http://www.unece.org/env/pp/acig.htm) (last visited Aug. 4, 2002).

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

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

the 1966 International Covenant on Civil and Political Rights guarantees the “freedom to seek, receive and impart information and ideas of all kinds.”<sup>9</sup> 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.”<sup>10</sup>

Following the elaboration of various regional environmental instruments,<sup>11</sup> the 1992 Rio Declaration crystallized the emerging norms of public involvement in Principle 10:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>12</sup>

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

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

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

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

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

rights, highlighting the central role of procedural rights to both.<sup>13</sup>

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

The global effort to include civil society in environmental decisionmaking extends to many interna-

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

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

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

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

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

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

<sup>16</sup> See Nathalie Eddy & Glenn Visser, *Public Participation in the Clean Development Mechanism of the Kyoto Protocol*, in this volume.

<sup>17</sup> See Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*, in this volume.

<sup>18</sup> See *id.*; Aoubacar Fall, *Implementing Public Participation in African Development Bank Operations*, in this volume.

<sup>19</sup> See Nicholas Gertler & Elliott Milhollin, *Public Participation and Access to Justice in the World Trade Organization*, in this volume.

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

elaborated similar constructions of the general principles, including:

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

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

<sup>21</sup> See Dowdeswell, *supra* note 20.

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

<sup>23</sup> See Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

<sup>24</sup> See Godber Tumushabe, *Public Involvement in the East African Community*, in this volume.

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

<sup>26</sup> See Caillaux et al., *supra* note 20.

<sup>27</sup> See Hildén & Furman, *supra* note 1.

<sup>28</sup> See Odote & Makoloo, *supra* note 1.

<sup>29</sup> See *infra* notes 69 to 71 and accompanying text.

## B. BASES FOR PUBLIC INVOLVEMENT

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

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

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

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

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

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

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

in their "Bills of Rights" and other enumerations of fundamental rights.<sup>36</sup>

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

### C. OTHER CONSIDERATIONS

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

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

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

<sup>30</sup> Bruce Rich & Tomás Carbonell, *Public Participation and Transparency at Official Export Credit Agencies*, in this volume.

<sup>31</sup> See Fall, *supra* note 18 (discussing the Bani River Project in Mali); cf. Bruch & Fried, *supra* note 4 (discussing the Pak Mun Dam).

<sup>32</sup> See Bruch & Czebiniak, *supra* note 6, at 10431, n.21 (discussing the popular protests at WTO and other meetings).

<sup>33</sup> Ira Feldman, *The Stakeholder Convergence: Public Participation and Sustainable Business Practices*, in this volume; see also Rich & Carbonell, *supra* note 30 (discussing reputational risk that can arise from a lack of public involvement in ECA-supported activities).

<sup>34</sup> See Feldman, *supra* note 33; ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 624-26 (1992).

<sup>35</sup> Cf. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>36</sup> See Carl Bruch & Sarah King, *Constitutional Procedural Rights: Enhancing Civil Society's Role in Good Governance*, in this volume.

<sup>37</sup> See Ahmad, *supra* note 1.

<sup>38</sup> *Id.*

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

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

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

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

<sup>39</sup> See, e.g., Feldman, *supra* note 33.

## II. ACCESS TO INFORMATION

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

### A. PASSIVE ACCESS TO INFORMATION

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

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

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

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

### B. ACTIVE ACCESS TO INFORMATION

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

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

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

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

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

has also undertaken to develop a common PRTR report for North America—*Taking Stock*—that draws upon the national systems.<sup>46</sup>

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

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

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

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

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

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

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

<sup>45</sup> See Kravchenko, *supra* note 23.

<sup>46</sup> See Dowdeswell, *supra* note 20.

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

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

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

### III. PUBLIC PARTICIPATION

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

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

Second, the decisionmaker needs to provide timely notice to the public of impending decisions that may affect them. This notice should include the nature of the decision to be made, the time and place that it will be made, and the means for submitting comments. The public usually has a chance to submit written or oral comments on the proposed decision. This comment period should be sufficient for the public to have time

to prepare and submit meaningful comments. The decisionmaker must take these public comments into account when reaching the final decision. The decision does not have to exactly follow the public comments, but it should explain which comments were incorporated and offer legitimate reasons for not incorporating the others.

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

### IV. ACCESS TO JUSTICE

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

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

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

<sup>49</sup> “RETHINKING GOVERNANCE” HANDBOOK, *supra* note 3, at 141.

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

<sup>51</sup> *E.g.*, Aarhus Convention, *supra* note 43, art. 6.4.

<sup>52</sup> *E.g.*, “RETHINKING GOVERNANCE” HANDBOOK, *supra* note 3, at 135.

<sup>53</sup> Aarhus Convention, *supra* note 43, art. 7.

<sup>54</sup> *Id.* art. 6.

in the case of transboundary environmental impacts, the East Africa MOU grants access to the justice system to any affected persons.<sup>55</sup>

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

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

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

As norms of access to justice continue to evolve, advocates and decisionmakers should bear in mind that

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

<sup>56</sup> Draft ASEM, *supra* note 47, para. 26.

<sup>57</sup> "RETHINKING GOVERNANCE" HANDBOOK, *supra* note 3, at 45.

<sup>58</sup> *Id.* at 65; Bernasconi-Osterwalder & Hunter, *supra* note 17.

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

## V. ADVANCING A GLOBAL FRAMEWORK FOR PUBLIC INVOLVEMENT<sup>60</sup>

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

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

<sup>60</sup> This section expands upon ideas advanced first in Bruch & Czebiniak, *supra* note 6.

<sup>61</sup> For example, most nations in Sub-Saharan Africa, North Africa and the Middle East, and the Pacific, and many in Asia.

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

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

The Summit is significant in part because it represents a once-in-a-decade opportunity for the international community to clearly articulate and reinforce the central role of civil society in implementing sustainable development. Agenda 21, the Rio Declaration, and the other outcomes from the 1992 UNCED set the agenda for the United Nations Environment Program, the funding priorities for the Global Environment Facility, and the path for the Commission for Sustainable Development. They also influenced regional and national de-

<sup>63</sup> Indeed, the preparatory processes have already emphasized the central role of public involvement. Report of the Secretary General, *Implementing Agenda 21*, UN Doc. E/CN.17/2002/PC.2/7 (Dec. 19, 2001) at 37, 38, available at [www.johannesburgsummit.org/html/documents/no170793sgreport.pdf](http://www.johannesburgsummit.org/html/documents/no170793sgreport.pdf); Arab Declaration to the World Summit on Sustainable Development (WSSD), art. 3(c) (Meeting of the Arab Ministers, Cairo, Oct. 24, 2001), UN Doc. E/CN.17/2002/PC.2/7 (Oct. 24, 2001), available at [www.johannesburgsummit.org/html/documents/westasiaministerial.pdf](http://www.johannesburgsummit.org/html/documents/westasiaministerial.pdf) (participation and governance); African Ministerial Statement, from Rio de Janeiro to Johannesburg, para. 8 (African Preparatory Conference, Nairobi, Oct. 18, 2001), UN Doc. E/CN.17/2002/PC.2/5/Add.4, available at [www.johannesburgsummit.org/html/documents/no172059af\\_min\\_statmt.pdf](http://www.johannesburgsummit.org/html/documents/no172059af_min_statmt.pdf) ("full participation"); Phnom Penh Regional Platform on Sustainable Development for Asia and the Pacific, paras. 6, 24, 30, 44 (High-level Regional Meeting, Phnom Penh, Nov. 27-29, 2001), UN Doc. E/ESCAP/HRM/WSSD/1/Add.1, available at [www.johannesburgsummit.org/html/prep\\_process/asian\\_platform\\_for\\_action\\_final29nov\\_1030.doc](http://www.johannesburgsummit.org/html/prep_process/asian_platform_for_action_final29nov_1030.doc) (good governance, public participation, and multistakeholder participation); Report of the UNECE Regional Ministerial Meeting for the World Summit on Sustainable Development, paras. 21, 22 (Regional Ministerial Meeting, Geneva, Sept. 14-15, 2001), available at [www.johannesburgsummit.org/web\\_pages/final\\_report\\_ece\\_prepcom.pdf](http://www.johannesburgsummit.org/web_pages/final_report_ece_prepcom.pdf) (transparency, participation, access to justice); Rio de Janeiro Platform for Action on the Road to Johannesburg 2002, para. 11 (Regional Preparatory Conference of Latin America and the Caribbean, Rio de Janeiro, Oct. 23-24, 2001), available at [www.johannesburgsummit.org/html/prep\\_process/regional\\_docs/plataforma\\_final\\_ingles\\_7dec2001.pdf](http://www.johannesburgsummit.org/html/prep_process/regional_docs/plataforma_final_ingles_7dec2001.pdf) (transparency and participation); Singapore Declaration of the Alliance of Small Island States, at 3 (Inter-regional Preparatory Meeting, Singapore, Jan. 7-11, 2002), UN Doc. E/CN.17/2002/PC.2/5/Add.6 ("significant partnership between civil society and the public sector in the implementation of Agenda 21").

velopments. The WSSD similarly could have a profound influence on the development and implementation of domestic and international environmental law and policy for the coming decade.

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

#### A. STRENGTHENING "SOFT LAW" ON ENVIRONMENTAL GOVERNANCE

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

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

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

<sup>64</sup> See *supra* note 12.

<sup>65</sup> See *supra* part IV (non-discrimination).

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

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

## B. DEVELOPMENT OF GLOBAL GUIDELINES

The Summit provides an opportunity to secure an international commitment to developing global guidelines on public involvement in sustainable development decisions. Regional initiatives have laid the groundwork for the elaboration of non-binding guidelines.<sup>69</sup> Accordingly, Kofi Annan, Secretary-General of the United

Nations, has observed that “[t]he 2002 Special Session of the United Nations General Assembly marking the 10<sup>th</sup> 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.”<sup>70</sup> While the WSSD preparatory process has emphasized public involvement, the discussions have been broader than the Aarhus Convention. Through three Preparatory Committee meetings in 2002, the issue of global guidelines for public involvement still remains unresolved on the eve of the WSSD.<sup>71</sup>

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

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

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

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

<sup>67</sup> For example, the World Bank Group institutions, regional development banks, and the World Trade Organization (WTO).

<sup>68</sup> See Rich & Carbonell, *supra* note 30.

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

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

<sup>70</sup> Kofi Annan, *Foreword*, in STEC & CASEY-LEFKOWITZ, *supra* note 6, at v.

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

<sup>72</sup> See, e.g., LIDIJA ZIVCIC, THE ROLE OF ENVIRONMENTAL NON-GOVERNMENTAL ORGANIZATIONS IN FORMING INTERNATIONAL ENVIRONMENTAL INSTRUMENTS, Master of Science thesis, Department of Environmental Sciences and Policy, Central European University (Budapest, 2001) (on file with authors).

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

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

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

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

enues (including radio) when necessary to disseminate environmental information.<sup>75</sup>

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

### C. AN INDEPENDENT SYSTEM FOR MONITORING PUBLIC INVOLVEMENT

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

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

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

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

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

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

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

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

#### D. STRENGTHENING EXISTING LEGAL AND INSTITUTIONAL STRUCTURES

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

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

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

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

Local, national, and international authorities should publicly establish clear timelines and plans for develop-

ing and implementing these principles. For example, at the international level, institutions could develop and implement policies that will only allow projects to proceed once they have incorporated stakeholder perspectives.<sup>77</sup> These plans should include an active role for civil society, which can bring its expertise, energy, and resources to bear.

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

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

## VI. CONCLUSION

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

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

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

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

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