THE NEW "PUBLIC"

The Globalization of Public Participation

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ENVIRONMENTAL PUBLIC PARTICIPATION IN THE AMERICAS

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Public participation can strengthen democratic governance and enhance decisionmaking processes through the direct effective involvement of civil society in the different phases of the decisionmaking process. In a region where democratic rule has not traditionally been the rule but where democracies are developing and consolidating, public participation can play an important role in assisting in the development of these democracies.

This chapter briefly reviews policy and legal developments regarding environmental public participation in the Americas, focusing on Latin America. This chapter will describe recent policy and regulatory developments, particularly in the areas of access to information, participation in decisionmaking processes, and access to justice. In particular, this chapter focuses on an overall review of the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (ISP) of the Organization of American States (OAS).[1] Although still a recent international instrument, the ISP can be useful in promoting public involvement in the hemisphere.

The chapter is broadly divided into two sections. The first section addresses public participation and its policy and regulatory developments in different countries in the region. The second section analyzes the main provisions of the ISP and how they relate to the region's realities and institutional frameworks. This chapter concludes with some thoughts on measures that can improve public access to information, participation, and justice at the various levels in the Americas.

I. LEGAL AND CONSTITUTIONAL PROVISIONS IN THE COUNTRIES OF THE REGION

In contrast to the dictatorial and authoritarian regimes that ruled Latin America during the 1970s and part of the 1980s, from 1990 onwards, there have been significant political changes throughout the region. Democratic rule has emerged in many countries, and weak democracies have been strengthened. The frequent change of regimes in the region has led to constitutional reforms, and the new constitutions have incorporated modern concepts of governance and human rights. From 1972 to 1999, new constitutions have been elaborated in 16 countries in the region. All of them have sought to provide answers to new social demands, including environmental protection. This phenomenon has been termed the "Greening of Constitutions in Latin America."[2] Almost every new constitution in the region, with probably the only exception the 1994 Dominican Republic Constitution, has incorporated environmental principles and norms.

The inclusion of environmental issues in Latin American constitutions has progressed gradually.[3] First, the constitutions tended to establish state obligations to protect the environment. Second, this duty was extended to society as a whole—sometimes indirectly through other human rights—in conjunction with the recognition of the right to a healthy environment. Third, connections were made between environment and development, and constitutions prescribed that the economy should be oriented towards sustainable development. Finally, constitutions included references to certain environment components or areas that should be protected through specific legislation, such as in the case of the protection of wild fauna and flora or Amazonian conservation.

The right to a healthy environment has been included in the extensive catalogue of human rights in

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[1] Organization of American States Inter-American Council for Integral Development (OAS CIDI), Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, CIDI/RES. 98 (V-O/00), OEA/Ser.W/II.5,CIDI/doc.25/00 (Apr. 20, 2000), adopting Organization of American States, Unit for Sustainable Development and Environment, Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (1999) [hereinafter ISP], *available at* www.oas.org/usde/isp/1pgmissi.htm (last visited July 29 2002).

[2] Raul Brañes, *La Legislación Ambiental Latinoamericana en el Contexto de la Globalización Económica*, *in* SOCIEDAD PERUANA DE DERECHO AMBIENTAL, 10 AÑOS DEL CÓDIGO DEL MEDIO AMBIENTE: OPORTUNIDADES EN EL CONTEXTO DE LA GLOBALIZACIÓN ECONÓMICA 34 (2001).

[3] *Id.* at 35. To see the evolution of environmental legislation in Latin America and a comparative study of the constitutions in environmental matters, see Raul Brañes, *Derecho del Desarrollo Ambiental Latinoamericano y su Aplicación. Informe sobre los Cambios Jurídicos después de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo (Rio 1992)*, Programa de las Naciones Unidas para el Medio Ambiente, Oficina Regional para América Latina y el Caribe, México Distrito Federal, México (2001).

almost every constitution in Latin America.[4] Constitutional provisions usually go further than simply recognizing the quality of the environment as the basis for a new guaranteed human right. They also recognize the mutual responsibility of the state and society to protect the environment as a key principle to orient and inform economic development. In this regard, constitutions adopted after the 1992 Earth Summit have looked to the Rio Declaration and adopted intergenerational equity and sustainable development terminology, and some constitutions have modified their texts to incorporate principles of sustainable development.[5] In addition, environmental preservation as a responsibility of society as a whole has also been included in some constitutions, and in some, the possibility to establish environmental limits to individual rights is contemplated.[6]

A growing number of constitutions include provisions on environmental public participation. Colombia's 1991 Constitution—considered to be an environmentally oriented constitution with more than sixty environmental provisions—expressly includes a chapter on "Collective Rights and the Environment." For example, Article 79 recognizes that "every person has the right to enjoy a healthy environment. Law will guarantee community participation in the decisions that could affect it." Society's participation is, on the other hand, considered a state duty in Article 127 of the 1999 Venezuelan Constitution. The 1998 Ecuador Constitution establishes in Article 88 that every governmental decision that could affect the environment should first take into account the communities' views and, in this regard, society should be previously informed about proposed decisions. Furthermore, Ecuador's Constitution requires laws to guarantee the communities' right to participate.

Pursuant to these constitutional provisions, extensive laws and regulations have been elaborated by national environmental laws or codes, particularly those that create a national environmental framework. The holistic and systemic view of the environment that followed new environmental legislation must coexist, however, with previous but still prevailing sectoral regulation of water, forests, minerals, and other specific environmental aspects. This sectoral legislation has progressively started to adapt to environmental requirements. However, this sectoral tradition has meant that public

[4] For example, Article 19 of Chile's 1980 Constitution establishes that "every person has the right to live in an environment free of pollution." Ecuador's 1983 Constitution has an identical provision. The 1997 Constitution of Nicaragua guarantees that all Nicaraguan citizens have the right to inhabit a healthy environment. Brazil's 1988 Constitution establishes that all citizens "have the right to live in an ecologically balanced environment." Similarly, Colombia's 1991 Constitution also establishes that "all persons have the right to live in a healthy and ecologically balanced environment." And the 1999 Venezuelan Constitution recognizes that every person "has the individual and collective right to enjoy life and a safe, healthy and ecologically balanced atmosphere."

Some Latin American constitutions have enshrined the right as an individual fundamental right (such as Argentina, Chile, Ecuador, and Paraguay), while others contain the right under the title of collective rights or social rights and guarantees (including Colombia, Costa Rica, and Nicaragua). The Brazilian Constitution has incorporated it under the title of Economic and Financial Order. *See* Borrero Navia, *Derecho Ambiental y Cultura Legal en América Latina, in* JUSTICIA AMBIENTAL: CONSTRUCCIÓN Y DEFENSA DE LOS NUEVOS DERECHOS AMBIENTALES, CULTURALES Y COLECTIVOS EN AMÉRICA LATINA 57 (Enrique Leff ed., 2001).

[5] For example, Article 97 of Guatemala's 1985 Constitution refers to the concepts of sustainable development and shared responsibility, where the state, municipalities, and citizens have the obligation to promote social, economic, and technological development preventing pollution and ensuring an ecological balanced environment. Article 225 of the Brazilian Constitution explicitly establishes that citizens "have the right to an ecologically balanced environment, where this is a common and public use patrimony, essential for a healthy quality of life, imposing on public powers and collectivity in general, the duty of defending and preserving it for present and future generations." The 1994 Argentine Constitution establishes in Article 41 that citizens "enjoy the right to a healthy environment, appropriate for human development and for productive activities to satisfy present needs without compromising those of future generations…." In 1999, Mexico reformed its Constitution to include the principle of sustainable development, and the Constitution now establishes in Article 25 that the state has the duty to orient national development towards sustainability and integrity. The 1999 Venezuelan Constitution in Article 127 establishes that every generation "has the right and duty to protect and maintain the environment for their benefit and that of the world." Derecho del Ciudadano: Análisis Comparativo de Constituciones de los Regímenes Presidenciales, Base de Datos Políticos de las Américas (1998), *available at* www.georgetown.edu/pdba/Comp/Ambiente/derecho.html (last visited May 27, 2002).

Furthermore, Venezuela's Constitution establishes in Article 128 that the state "will carry out territorial planning in accordance with sustainable development principles." Finally, Ecuador's Constitution establishes in Article 3 that the state "will protect citizens rights to live in an environment that guarantees sustainable development" and that "the economy should have as an objective environmentally sound sustainable development."

[6] For example, the Constitution of Colombian states, with respect to property rights, that "property is a social function that implies obligations … as such, its ecological function is an inherent feature of property" (Article 8) and that "Law will establish limits to economic liberties when the social interest, environment and national cultural patrimony are at stake" (Article 333). Ecuador's Constitution also establishes, in Article 23, that "Law will determine restrictions to the exercise of certain rights and liberties to protect the environment." The Venezuelan Constitution similarly establishes, in Article 112, that "citizens can undertake freely to any economic activity without limits but for those established in the same Constitution, or by Law, related to causes of human development, security, health, environmental protection and others of social interest." Finally, the Chilean Constitution recognizes in Article 19 that "every person is guaranteed the right: to live in an environment free of pollution. It is the State's duty to prevent this right being affected and also to guarantee nature preservation. A Law can establish specific restrictions on the exercise of private rights and liberties in order to protect the environment …."

participation is regulated independently in the various sectors, and thus the elaboration of sound environmental procedures with respect to access to information, public participation, and justice has not been uniform. The immediate consequence has been legislative and institutional dispersion, inconsistency, practical gaps in the environmental and public participation guarantees, and limited coordination among authorities to respond to such fragmentation.

Prior to the adoption of the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (ISP) in 2000 by the OAS, most laws and regulations included some formulation of a right to participate in decisionmaking processes, but less than half really included participation provisions *per se*. Bolivia and Chile appear to be the countries with the most laws including participation provisions, while Argentina, Ecuador, and Mexico remain the countries with the fewest participation provisions.[7]

Among the legislatively mandated public participation provisions, priority is given to the right of the public to have access to decisionmaking, followed by access to justice and access to information. Although it seems to be a good sign that more emphasis is placed on processes of participation in decisionmaking—where a diverse range of mechanisms can be included to engage citizens directly in choices about environmental protection—the notable lack of laws ensuring access to information, however, significantly limits participation in matters of collective interest and, in particular, environmental matters. When translated into practice, these limited provisions for environmental information represent a failure or limitation in the participation framework, as information is a critical component of a citizen's effective right to participate in decisionmaking and to exercise his right to access to justice

II. THE INTER-AMERICAN STRATEGY FOR THE PROMOTION OF PUBLIC PARTICIPATION IN DECISION-MAKING FOR SUSTAINABLE DEVELOPMENT

A. Background

The foundation of government commitments to public participation in the Americas is in Principle 10 of the 1992 Rio Declaration, which states that "environmental issues are best handled with the participation of all concerned citizens at the relevant level." To ensure such participation, emphasis should be placed on access to information, access to process, and access to justice. This principle became a critical element of a number of the regional summits that took place after Rio. For example, the Plan of Action adopted at the 1994 Miami Summit of the Americas includes a chapter on "invigorating society and communities participation," and it declares that "a strong and diverse society, organized in various ways and sectors, including individuals, the private sector, labor, political parties, academics, and other non-governmental actors and organizations, gives depth and durability to democracy [and] a vigorous democracy requires broad participation in public issues."[8]

This commitment was addressed again at the 1996 Santa Cruz Summit Conference on Sustainable Development, where the countries of the Americas adopted a declaration supporting the full integration of civil society into the design and implementation of sustainable development policies and programs at the hemispheric and national levels. The Summit's Plan of Action makes the OAS responsible for the "formulation of an Inter-American strategy for the promotion of public participation in decision making for sustainable development." This strategy was mandated with promoting at the national level the exchange of experiences and information among government representatives and civil society groups with regard to the formulation, implementation, and improvement of sustainable development policies and programs, legal and institutional mechanisms, including access to and flow of information among the relevant actors, training programs, and consultation processes used at the national level to ensure civil society involvement.[9]

This mandate for a consultative process in developing the strategy is significant, but at the same time it represents a history of fora that the OAS has regularly convoked for government and civil society dialogue, often running in parallel with high-level meetings.

Over two years, the OAS collaborated with a broad array of government and civil society representatives throughout the hemisphere, national focal points, and a project advisory committee to develop an Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (ISP).[10] In April 2000, the OAS Inter-American Council for Integral Development approved the ISP.

The process leading up to the ISP was the first time that public participation experiences in so many different American countries were analyzed and the best prac-

[7] *See* www.oas.org/usde/isp/1pgmissi.htm (Legal Provisions, Findings) (last visited July 28, 2002).

[8] The Miami Plan of Action, *available at* www.summit-americas.org/miamiplan.htm#3 (last visited May 29, 2002). This 1994 Central American Summit for Sustainable Development held in Managua, Nicaragua also emphasized public participation.

[9] The Santa Cruz Summit Plan of Action, para. 16, *available at* www.summit-americas.org/boliviaplan.htm (last visited May 29, 2002).

[10] *See supra* note 1.

tices in the region summarized. From these summaries, a comprehensive approach to public participation was developed from a regional perspective. It was also the first time that the importance of the interaction between governments and civil society was so prominently highlighted as a critical component for sustainable development and was translated into an international strategy through policy recommendations and concrete guidelines for action. These guidelines establish a reference for future institutional design and legal frameworks in the countries of the region.[11]

The ISP is based on the understanding that public participation supports, rather than impedes, sustainable development. This premise rejects the idea that sustainable development requires a proactive, centralist environmental policy. Rather, promoting broad participation and the implicit extensive notions of democracy are considered beneficial to the sustainable management of natural resources.[12]

The ISP blurs the boundaries between the national and international contexts. The ISP responds to the increased concern of international law with issues that once were considered to be essential attributes of states sovereignty—public participation in governmental decisionmaking, transparency and secrecy, domestic legal procedures, and public administration, among others.

The same flexibility becomes apparent when treating the dichotomy between private and public interests. The ISP defines not only the role that the state should play but also the position of private persons and their responsibilities in participating in sustainable development in their own countries. However, the ISP only addresses states when establishing policy recommendations. It does not oversee the mutual responsibility of governments and civil society when implementing the other lines of action set forth in the ISP.

Public participation is defined as "all interaction between government and civil society, and includes the process by which government and civil society open dialogue, establish partnerships, share information, and otherwise interact to design, implement, and evaluate development policies, projects and programs."[13] Therefore, public participation policies are understood not only from the side of public institutions, for example by providing information or institutional mechanisms to allow participation. From the civil society perspective, public participation also means creating public responsibilities and awareness, so that real public participation in decisionmaking becomes feasible through necessary interaction.

This civil involvement is also evidenced in the ISP by a broad definition of legal standing to sue, whether in defense of collective interests or public interest before administrative or judicial bodies. The defense of public interests is not only an obligation of governments and administration but also of the public itself. Following that principle, the ISP advocates the involvement of citizens and organizations not only to protect their own interests, but also to promote public interests and concerns. In this sense, the ISP Policy Recommendations propose the need to create legal frameworks that "clarify and expand the legal standing of those persons and communities affected by development decisions, seeking a reasonable balance in the roles and joint responsibilities of the various levels of government and civil society."[14]

By including these ideas and concepts, the ISP seeks to ensure that they are reflected in procedural and administrative changes. These changes have already been introduced in some legislation, for example, by allowing nongovernmental organizations (NGOs) to act on behalf of public interests and by recognizing the existence of collective or diffuse interests and the need to defend them. They have been reflected not only by a broad definition of legal standing, but also in the promotion of access to administrative decisionmaking and access to information. In regard to these latter two issues, the need to prove a legitimate, direct private interest to justify access has been reduced in a number of countries.

In terms of governance, there is no doubt that these principles connote a comprehensive concept of democracy. Nevertheless, it is mainly the concept of legitimization[15] that serves as a theoretical foundation for public participation in the ISP document. Public participation promotes legitimacy and, as a consequence, acceptance of decisions related to the environment. Moreover, the ISP states that public participation introduces a broad range of ideas that motivate the development of alternative solutions, enhances the knowledge of decisionmakers, reduces the potential for serious conflict, increases the likelihood of improved and lasting solutions, strengthens the fulfillment of public standards and policies, provides opportunities for cooperation, builds trust among the participants, and leads to the creation of long-term collaborative relationships.[16] Environmental laws provide one example of how participation measures can be introduced into legal structures

[11] Since the ISP was adopted only two years ago, it is too soon to determine the full range of impacts that that such an initiative may have had in countries' institutions and regulations.

[12] Jonas Ebbesson, *The Notion of Public Participation in International Environmental Law*, *in* 8 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW – 1997 (1998).

[13] ISP, *supra* note 1, at 6.

[14] *Id.* at 11.

[15] Ebbesson, *supra* note 12, at 75.

[16] *See* ISP, *supra* note 1, at 8 (benefits chapter).

to ameliorate the legitimization crisis that may exist in national legal regimes.[17]

In contrast with the 1998 Aarhus Convention,[18] which was recently ratified by European and Central Asian countries and has become a landmark for public participation, the ISP was born as a voluntary instrument. The text of the ISP focuses on the description of general provisions and objectives that could offer guidance to the countries in the region, rather than establishing specific and binding norms with compulsory timeframes. Therefore, it creates a framework of principles and recommendations for action that can guide state policies and civil society towards increased and more effective interaction. The document identifies common principles, presents a set of objectives, makes recommendations for achieving public participation, and urges the different states to adopt the participation measures contained in its recommendations. It leaves the parties to determine, according to each country's background and culture, the means by which the objectives can be attained.

Although the ISP developed from a regional initiative, it does not address how to promote public involvement at a regional level. It does not create regional procedures for participation or regional compliance mechanisms that could resolve regional environmental problems, such as transboundary conflicts.[19] It also does not propose regional platforms in which participation initiatives and barriers could be addressed or environmental information shared at an international context. The ISP applies to the OAS member states, and it is from this point of view that policy recommendations are made.

B. Content

The ISP is structured in two parts: the initial part of the document creates a policy framework to guide countries' efforts to formulate policies that ensure public participation in planning, environmental management, and decisionmaking for sustainable development; and the second part of the document provides practical recommendations for implementation at the national level.

Recommendations in the Policy Framework refer to six different areas: Information and Communication, Legal Frameworks, Institutional Procedures and Structures, Education and Training, Funding for Participation, and Opportunities and Mechanisms for Public Participation. Through these policy recommendations, the ISP encourages governments to create and strengthen formal and informal communication mechanisms to encourage information sharing. They also promote the development and implementation of legal and regulatory frameworks that ensure the participation of civil society in sustainable development decisions, guaranteeing public access to relevant information, access to the decisionmaking process, and access to justice. Countries also should develop institutional structures and procedures that facilitate civil society and government interaction, develop the capacity of individuals to participate with an increased base of knowledge in sustainable development issues, procure financial resources so that these practices become feasible, and support formal and informal opportunities and mechanisms for public participation.[20] The ISP supports its recommendations through an overarching set of principles that provides the foundation for a broad understanding of public participation.[21]

Following the policy recommendations, the ISP describes a set of actions that should be adopted and the rationale behind them. The specific provisions in the recommendations for action will be further examined from the perspective of the three pillars of public

[17] The lack of meaningful public participation in decisionmaking has been emphasized as one of the main causes of the lack of compliance with environmental laws in Latin America. For an analysis of this problem, see www.farn.org.ar/enforcement (last visited May 30, 2002).

[18] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention]; *See* Svitlana Kravchenko, *Aarhus, Espoo, and London: Promoting Public Involvement In the UN/ECE Region,* in this volume.

[19] Notably, though, the Inter-American Commission and Court of Human Rights provide one regional avenue for members of the public to protect human rights, including those relating to the environment and natural resources. *See* Danièle M. Jean-Pierre, *Access to Information, Participation and Justice: Keys to the Continuous Evolution of the Inter-American System for the Protection and Promotion of Human Rights*, in this volume.

[20] ISP, *supra* note 1, Policy Recommendations.

[21] *Id.* at Principles. These principles are:

- Access: In order to participate effectively, civil society should have timely access at the various levels of government to information, the political process, and justice.
- Proactive role of governments and civil society: Government and civil society should take initiatives and ensure opportunities for public participation, in accordance with their respective roles.
- Inclusiveness: This principle refers to the broad participation of a diversity of interests and sectors and a broad interpretation of standing, which is the right to attend and participate in administrative and judicial processes.
- Shared responsibility: The responsibility of civil society and governments to share the burdens and commitments of development.
- Openness: This principle should be included throughout the process of design, implementation, and evaluation of projects, policies, and programs.
- Transparency: This principle should apply to all concerned parties, ensuring that all objectives are explicit and that information vital to the decision process is reliable.
- Respect for public input: Citizen contributions should be evaluated and given proper consideration in a timely manner.

involvement: access to information, access to decision-making, and access to justice.

C. Access to Information

This subsection reviews how the ISP conceives of access to information, specific ISP recommendations for action to promote public access to information, and advances in the region.

1. Concept

Access to information entails a right by which any person may consult and select any documentation and information from public records administered by the state. According to the ISP, access to and exchange of accurate, relevant, and timely information, including scientific and traditional knowledge, is fundamental to assuring that civil society and government have the means and ability to participate meaningfully and responsibly in sustainable development decisions. Information raises the level of debate and influences opinions that might otherwise be compromised by mistrust and bias.[22]

This available information could comprise technical reports; scientific surveys; information about policies, programs, plans, and projects; information about various decisionmaking petitions; opportunities to make oral or written comments; and public and technical organizations' opinions. Free access to information is based on the public nature of relevant information regarding decisions affecting a person or community.[23]

This concept should not be confused with the state's duty to enable the public to know about its decisions and to collect environmental information and disseminate it to other stakeholders. These requirements compel governments to establish systems and structures for disseminating information—i.e. creation of databases, national reports, and monitoring statistics—and to provide a system for ensuring public access to environmental information. They also imply the obligation on the part of operators and developers to transmit relevant information about their potentially harmful activities to the competent authorities.

2. ISP Recommendations for Action

The state's communication and dissemination of environmental information is at the core of the ISP. The ISP seeks to ensure an appropriate flow of information to public authorities so that it can then be made available to all stakeholders. Thus, the ISP recommends that states strengthen mechanisms to gather the necessary information, exchange it with other stakeholders, and disseminate it to the general public; employ various means of communication that allow government and civil society to exchange relevant information on development; and use information and communication tools that are adapted to the local cultural and social conditions in order to engage all stakeholders.[24]

These recommendations are supported by various proposed actions, including the obligation of project proponents to introduce a complete information strategy that includes monitoring, auditing, and reporting into the various phases of the project. Another is the obligation of different stakeholders to share information opportunities, to participate in decisionmaking processes, and to raise public awareness of specific development projects or programs. Countries also should use the mass and interactive media to communicate and inform the public about sustainable development issues and expand access to the media for grassroots organizations and communities. Importantly, the ISP emphasizes that all the interested persons receive necessary information in the appropriate format at the right time.[25] The proposed actions do not make any reference, however, to the need to create specific instruments such as pollution inventories or to establish minimum mandatory elements of participation to be included in the system.

Special mention is made of the need for all stakeholders to be involved. Information should be disseminated with the guarantee that it is received by all stakeholders who are involved and at all stages in the process of decisionmaking. This duty is also applied to private sector economic activities when the proposed action could have environmental or social impacts, and thus the public, including isolated communities, should be involved in each level of the project cycle.[26]

To guarantee the effective provision of information, the ISP foresees the need to carry out evaluations on the quality of the information that is made available. The ISP provides that "government agencies, with the input of civil society organizations, should develop performance indicators to measure the effectiveness of information and communication programs, and should be responsive to user feedback."[27] The ISP also recommends academic institutions to monitor the quality and scientific grounds of such information.

Ultimately, access to this information depends on each country's approach to governance and its under-

[22] ISP, *supra* note 1, Recommendations for Action, Information and Communication, at 18.

[23] *See* Public Participation and Sustainable Development On-Line Module elaborated by SEI, REC, IISD, and FARN, *available at* www.farn.org.ar/docs/pp/ppmodule.pdf (last visited May 31, 2002).

[24] ISP, *supra* note 1, Recommendations for Action, Information and Communication, at 18.

[25] *Id.* at 19.

[26] *Id.*

[27] *Id.*, ch. 1.1.6, at 19.

standing of what constitutes open government. In addition, institutional elements such as economic resources and the expertise available at the governmental level are also critical factors that determine the quantity and quality of the environmental information that is provided and disseminated. In many countries of the region, the state's lack of capacity contributes significantly to the lack of adequate databases and environmental information.

With respect to free access to information, the ISP is relatively limited. It states that all levels of national and sub-national governments should create legal frameworks and institutional structures that permit such access, ensure timely access to information, establish clear procedures for requesting and receiving information, and provide contact points to facilitate the exchange of information.[28] The ISP considers access to information from a procedural point of view and addresses the states' role in facilitating such access. In this sense, the ISP also establishes that access to information should be assured by incorporating provisions into new and existing laws that grant public access to data, documents, and other information relevant or related to policy formulation and implementation, including information on the present quality of the environment, the environmental performance and conduct of regulated communities, and development budget proposals.[29]

However, the ISP does not recognize access to information as an explicit right of citizens that could be defended in administrative or judicial bodies.

In contrast with the Aarhus Convention[30] and due to ISP's soft language and purpose, the ISP does not take the further step of defining which entities should be the suppliers of information—for example, whether it should include private companies providing public services or only public institutions. It also does not mention the subjects that may seek the information—for example, whether it should be extended to organizations representing collective interests or only to individuals with a direct interest. Moreover, the ISP does not make any reference to the timeframe in which information should be made available, the type of information that can be excluded from public access, and whether the causes of denial of information by authorities should be explicitly mentioned. Finally, it does not define what constitutes environmental or sustainable development information.

Finally, the ISP considers citizen education a prerequisite for effective participatory processes, since education improves the ability of members of the public to act, whether it is on their own behalf or in defense of public interests more broadly. The ISP develops the theme of education as a separate line of action, and considers the lack of education to be one of the main barriers to public participation. The provisions on environmental education seek to increase "the capacity of individuals to participate in sustainable decision making with an increased base of knowledge (local, traditional and technical) of sustainable development issues and public participation practices."[31] In this regard, the ISP states that governments and civil society should promote activities to develop awareness and a culture of participation, link public participation and public interest to environmental and sustainable development issues, and create alternative instances of conflict resolution and active involvement.

3. Advances in the Region toward Access to Information

Citizen access to the information produced by public authorities has been generally included in constitutions and laws in the different countries of the region. The Argentine Constitution declares in Article 41 the obligation of authorities to provide environmental information. At the provincial level, the legislature of Buenos Aires Province recently approved the Access to Environmental Information Law,[32] which is the first such law in Argentina.[33] This law establishes an obligation for authorities to systematize environmental information by creating databases, organizing available information, creating an environmental information registry, and disseminating an annual report. The law also guarantees a citizen's right to demand information about the "state and management of the environment and natural resources" without the need to show a special or specific interest.[34] Other advances in the law include: sanctions against civil servants who impede the right to obtain information; the burden of proof is placed on any authority that denies access; and broadening the obligation to provide information to every institution that provides public services, including private sector entities.[35]

Concrete access to information provisions, influenced by the 1992 Rio Declaration, have also been included in general environmental laws and sectoral laws in the Americas.[36] For example, Colombia established,

[28] *Id*., ch. 1.1, at 18.
[29] *Id*., ch. 2.1.1, at 22.
[30] *Supra* note 18.
[31] ISP, *supra* note 1, ch. 4, at 30.
[32] Law 303/1999, BOCBA No. 858, 13/01/2000, *available at* www.farn.org.ar/bd/ecologis/tc/3347.html (last visited June 3, 2002).
[33] García Conto & Caeiro, *Ley de Acceso a la Información Ambiental en la Búsqueda de la Transparencia y la Eficacia*, *in* La Ley. Suplemento de Derecho Ambiental (2000).
[34] *Supra* note 32.
[35] *Id.*
[36] In addition to the Colombian examples, Mexico's 1996 General Law on Ecological Equilibrium and Environmental Protection (LGEEPA) incorporates norms related to the right to access to public sector environmental information.

in Law 99/1993, a person's right to directly file an information petition for information relating to pollution and to human health dangers corresponding to pollution. Such a petition must be answered within ten days. In addition, Article 74 of Colombia's Constitution allows any person to invoke the right to be informed about the quantity and destiny of the financial resources relating to environmental preservation. The Constitution also creates in Article 268 a special body called the Contraloría General de la República, which has, *inter alia*, the function of providing an annual report on the state of natural resources and the environment. Additionally, environmental education is contemplated in some Latin American constitutions.[37]

Finally, the scope of the right of access to information has been further defined by the successive exercise of legal actions and appeals before tribunals and courts. This clarification of the right and development of specific legal mechanisms for compelling the release of information highlights the critical importance of specified causes of action to seek judicial redress when information is denied. For example, Article 100 of Peru's 1993 Constitution created a special appeal called *habeas data* against any act or omission of a public authority, civil servant, or any other person who interferes with the constitutional right to obtain information.[38] The action of *habeas data* has already been successfully invoked and applied by the Peruvian Society for Environmental Law (SPDA) to challenge a denial by the Ministry of Energy and Mines to provide information related to the building and closure of a mining tailings pond by the Compañía Aurífera Retama. On Sept. 19, 1996, the Supreme Court issued its landmark ruling declaring that the information solicited was of a public character and that the judiciary could not exempt itself from cases whose main object is the protection of collective interests. This jurisprudence has broad implications, and it has provided legal support to other information requirements placed on public authorities.

In practice, the use of *habeas data* actions has even reached the OAS Inter-American Commission on Human Rights. For example, *habeas data* was invoked to appeal the denial by the Chilean Foreign Investment Committee of information related to its evaluation of the forestry exploitation by the timber company Forestal Trillium Ltda.[39] The action was brought by the Chilean NGO TERRAM under Articles 1, 2, and 13 of the American Convention on Human Rights, which recognizes the access to public information.[40] On September 5th, 2000, the action was also brought against the State of Chile under Article 23 of the Convention, which declares that citizens have the right to participate directly in the management of public affairs. This case is still underway.

With respect to environmental information dissemination, the majority of environmental laws in the region have authorized the creation of a *Sistema Nacional de Información Ambiental*, or national environmental information system, to compile, register, organize, and disseminate environmental information. For example, national environmental information systems have been developed in Argentina, Chile, Colombia, and Mexico with the aim of supporting environmental management and decisionmaking.[41] These on-line systems normally consist of a searchable webpage that connects several databases through websites and documentation centers located in several regions in each country, and they normally allow for direct use of databases on environmental legislation and documentation.

The Mexican government's initiative to use the media to disseminate environmental matters includes a periodical magazine, *La Gaceta Ecologica*, which has been published since 1988. Its content focuses on national and international environmental information, national environmental legislation, natural protected areas, environmental impacts, and the use of natural resources. The *Gaceta* is published every three months and is sent to members of the general public who are subscribers. After a while the same information can also be obtained electronically for free at the *Gaceta* website.[42]

Apart from the initiatives mentioned above, some framework environmental codes or legislation in the region require national environmental authorities to develop and annually publish national environmental reports. For example, Mexico recently published *Sustainable Development Indicators 2000*.[43]

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[37] *See* COLOMBIA CONST. art. 67 (environmental education is a state duty); ARGENTINA CONST. art. 41 (same); VENEZUELA CONST. art. 127 (environmental education must be included in the education curricula).

[38] *See* Carlos Chirinos, *Acciones de Interés Público: Protección del Medio Ambiente*, Tema No. 12, Seminario de Integración de Teoría General del Derecho, semestre 97-II, Pontificia Universidad Católica del Perú, Facultad de Derecho, Lima (Jan. 1996).

[39] *See* www.terram.cl (last visited May 30, 2002); *see also* the San Jose Convention, *available at* www.oas.org/juridico/english/Treaties/b-32.htm (last visited June 3, 2002).

[40] For more information on the American Convention on Human Rights (i.e., the San Jose de Costa Rica Agreement), see Jean-Pierre, *supra* note 19.

[41] *See* [Argentina] Sistema de Información Ambiental Nacional (SIAN), *available at* www.medioambiente.gov.ar/sian/default.htm (last visited July 23, 2002); www.medioambiente.gov.ar/mlegal/marco/res459_98.htm (last visited July 23, 2002) (containing the mandate for the SIAN); [Chile] Sistema Nacional de Información Ambiental, *available at* www.sinia.cl (last visited May 25, 2002); [Colombia] Sistema Nacional de Información Ambiental, *available at* www.ideam.gov.co/index4.asp (last visited May 25, 2002).

[42] *Gaceta Ecologica*, *available at* www.ine.gob.mx/ueajei/publicaciones/consultaListaPub.html?id_tema=13&dir=Temas (last visited June 3, 2002).

[43] *Available at* www.ine.gob.mx (last visited June 3, 2002).

Public access to information can be critical for rooting out corruption, but existing systems in many countries have not been very effective in addressing corruption. Hence, it becomes even more important to develop mechanisms to ensure transparent provision of information, that the information should be granted as a right, and that citizens can enforce these and other collective rights through courts.

In this sense, the globalization of communication networks has given a new dimension to the content of the right, creating new information demands and thereby pushing public authorities toward more open and transparent information policies. Despite the cultural and economic barriers in the region, such as the high levels of illiteracy and poverty, the impact of the Internet and related technologies on public involvement in environmental decisionmaking is already evident. For example, the use of Internet in the region has increased from approximately 14.3 million people that used Internet in December 2000 in South America to almost 25.4 million nowadays, or about 7.2 percent of the current population of 355 million.[44] Although far from the 44 percent of users in North America, the explosion of Internet use in the region is predicted to continue to increase regionally by 40 percent each year until 2005.[45] The Mexican government has quickly become aware of the importance of such media and has already used it to launch a public consultation regarding a law on transparency and access to governmental information.[46]

There have been considerable advances in creating legislative frameworks on access to environmental information. However, there have only been limited parallel advances in the creation of information platforms and legal systems generally to make the environmental information developments effective. Additionally, most countries have seen few changes in the traditional culture of Latin American bureaucracies toward more open and transparent attitudes. Finally, the environmental information developments have not been accompanied by adequate binding mandates on authorities to establish specific mechanisms—registers, pollution databases, and other instruments—designed to compile, organize, and disseminate environmental information.[47]

[44] Statistics obtained from Éxito Expotador, *available at* www.exitoexportador.com/stats2.htm (last visited June 3, 2002).

[45] *See* www.nua.ie/surveys/index.cgi?f=VS&art_id=905356630&rel=true (last visited June 3, 2002).

[46] The Initiative is *available at* www.ltg.org.mx (last visited June 10, 2002).

[47] As an example, see the assessment realized in Chile by Access Initiative in relation to weaknesses and strengths in access to environmental information in Chile *available at* www.casapaz.cl/biblioteca/acuerdos/a14/acuerdo14-6.htm (last visited June 14, 2002).

D. Access to Decisionmaking

This subsection examines how the ISP conceives of public participation in decisionmaking, specific ISP recommendations to promote public participation, and regional advances at the national level.

1. Concept

The notion of a representative democracy and citizenship rests on adequate and effective participation. Complementary mechanisms to participate in representative institutions are critical in an organized society so that an extensive net of intermediate groups and voluntary associations can be formed outside state bodies. Implicit in this rationale is the concept of an empowered and active citizen, the need for governments to open different public platforms, and community involvement in implementing government policies. Structural changes in countries in the region are slowly developing in that direction, as new and more evident demands from citizens have emerged. In fact, it could be argued that a strengthening of civil society in the region is starting to become apparent—particularly in comparison to the government rule of the 1980s—and that civil society is realizing certain successes in promoting accountability and participation in higher levels of decisionmaking.

At the same time, public participation looks to good governance principles at least as much as to representative democracy for its underpinnings. Public participation may be ensured and advanced in a variety of different democratic systems, as well as other political systems in which leaders are not elected in what may be deemed a "democratic" manner.

2. ISP Recommendations

The ISP proposes different lines of action that focus primarily on involving the public in decisionmaking through legislative, regulatory, and institutional reforms. For example, the ISP explicitly recommends that "legislative and administrative bodies should ensure public access throughout the process of formulating and implementing policies, laws and regulations, including the approval of development proposals, projects and budgets, the granting of permits, the process of assessing environmental impacts, and the establishment of specific environmental performance standards."[48] Thus, public participation in decisions relating to projects as well as broader programs, policies, regulations, and laws is advanced.

[48] ISP, *supra* note 1, ch. 2.1.2, at 23.

For effective participation to occur, the legal standing "to participate in development decision-making and implementation should be granted to all who are interested or affected by the decisions, regardless of their race, ethnicity, culture or gender."[49] While the ISP does impose some limit on who may have a right to participate (they should have some personal interest in the outcome of the decision), the ISP notably does not require any special interest. Moreover, the ISP mandates nondiscrimination in public participation, so that those persons and communities that traditionally have been marginalized—including women and vulnerable groups such as indigenous populations, youth, and disadvantaged racial and ethnic minorities, including disadvantaged populations of African descent—have an equal claim and opportunity to participate in decisions that could affect them.[50] The ISP also highlights the need to facilitate local and grassroots participation through the development of community organizations.

During legislative reform processes, the ISP articulates the need to include civil society in the governance process, recognizing the need to achieve a reasonable balance in the respective roles and responsibilities of government and civil society. In the overall decisionmaking processes, decentralization policies and technical assistance are particularly necessary to ensure broad participation of civil society at the local level.[51]

Following the ISP rationale, public participation should also be embedded in institutional procedures and structures so that participatory practices are incorporated into institutional decisionmaking procedures at all levels, and channels are created that allow for a continuous dialogue with civil society.[52] In this regard, the ISP proposes the creation of formal joint management structures, such as co-management schemes to facilitate working relationships with local communities and citizen groups, ad hoc joint management schemes to allow for partnerships, and the inclusion of civil society representatives on boards of directors and advisory committees.[53]

The ISP also highlights the government's duty to undertake assessments participatory mechanisms using performance indicators. These indicators of participatory practices are to be developed in implementing their policies, programs, and projects.

With the same aim, the ISP requests that all stakeholders search for new opportunities and mechanisms for consultation, participation, and conflict resolution that allow for the inclusion of different sectors of society in decisionmaking. It recommends strengthening multisectoral institutions, such as National Councils for Sustainable Development and councils at the local level that could involve a broad range of stakeholders.[54]

In regards to incorporating participatory practices into the approval process for developing projects, the ISP recommends that governments and private institutions create management tools that can be used throughout the project cycle, in order to provide a flexible, dynamic, and two-way consultative process.[55] Specifically, the ISP recommends roundtables, public hearings, workshops, and technical meetings be convened during the evaluation of social and environmental impact assessments.[56] In addition, decisionmakers have an final obligation to incorporate or respond to public comments they received during the process.[57]

In contrast to the Aarhus Convention, the ISP does not give any guidance for activities that may have a significant effect on the environment. The ISP also does not specifically refer to the importance of early public participation in different processes when there still exists an opportunity to choose among different development alternatives and, therefore, public participation can be most effective.[58]

3. Advances in the Region toward Access to Decisionmaking

Some Latin American constitutions recognize a citizen's right to participate in decisionmaking which affects the citizen's quality of life. For example, Ecuador's Constitution introduces a criteria in Article 83 for community participation in environmental control. It guarantees that indigenous communities have a collective right to be consulted on nonrenewable resources exploitation, conservation of renewable natural resources located on their lands, and the preservation of their biodiversity management practices. Furthermore, Article 88 also requires the government to take into account communities, their right to be informed, and their

[49] *Id.*, ch. 2.2.2, at 23.
[50] *Id.*
[51] *Id.*
[52] *Id.*, ch. 3, at 27. The ISP states that "as societies develop, their institutional structures become more complex, which makes necessary the strengthening of institutional policies and structures for promoting the systematic interaction with the public. Institutions should be encouraged to innovate, and public-private partnerships should be promoted and consolidated, whenever possible, in order to address this need."
[53] *Id.*, ch. 3.2.1, at 28.
[54] *Id.*, ch. 6, at 39.
[55] *Id.*, ch.3, at 27.
[56] *Id.*, ch.6, at 40.
[57] *Id.*, prin. 7 (comments must be "evaluated, analyzed, and given proper consideration in a timely manner").
[58] While not clear on the matter, ISP Specific Objective b does recognize "Full participation [in] planning, decision-making, follow-up, and evaluation on sustainable development" which could be read to suggest participation at various stages of decisionmaking, including early in the process.

participation in any governmental decision that may affect the environment.[59]

Many national laws, particularly general, framework environmental laws, establish procedures for involving the public in governmental decisionmaking processes. For example, Colombia's General Environmental National System Law guarantees every person's right to intervene in administrative processes related to the concession of permits and licenses that could affect the environment;[60] the obligation to hold public hearings in such processes;[61] and the publication of final decisions, which includes notification to all citizens who would have previously demanded the information.[62] Similar requirements have also been introduced when administrative and legal reforms may affect the environment. For example, Article 63 of the 1996 Constitution of the Province of Buenos Aires Constitution mandates public hearings on legislative proposals related to urban planning, siting commercial or industrial facilities, or modifications in the use or status of public domain resources.[63]

In addition, according to the inventory conducted by the OAS during the process of elaborating the ISP, the majority of environmental laws in the region include some form of participation in decisions regarding specific projects through environmental impact assessments (EIA) processes. Citizens are more likely to have a right to participate under EIA laws than they do under other areas of environmental laws, such as water quality laws.[64] For example, this has been the case in the energy and mining sector policies in Peru, where the Ministry of Energy and Mines issued a 1996 Decree requiring public hearings as part of the approval process for EIAs.[65]

As a practical matter, it is often difficult for legal proposals of public participation to develop into anything beyond a merely *pro forma* requirement. For example, it is a common feature for consultation processes to be developed ex-post, once the development decision has been made and just before its final approval, instead of being articulated ex-ante, at the beginning of the assessment of the project when all options are open and public participation can be most effective. Even where the public participates early in the process, practice often shows that government authorities are do not know how, or are unwilling, to take into account the input from the public participation.

The lack of adequate capacity and organization at the grassroots level frequently impedes effective public participation in the development of policies and projects. To ensure grassroots representation, Bolivia's Public Participation Law promotes and gives legal personality to indigenous and farming committees constituted as Organizaciones Territoriales de Base.[66] These organizations should be established following their traditional rules, and, once registered, are considered to have certain rights and obligations with respect to public participation. They can, for example, express their concerns over local development issues, participate in public hearings, supervise municipal services, and bring legal claims under relevant environmental laws.[67]

Interesting initiatives have also emerged in the effort to develop new forms of participation and new platforms to embrace public and private interests in sustainable development issues. One example can be found in the Regional Environmental Commissions (CARs) in Peru,[68] which are formed by representatives of local government agencies, members of different sectors of the national government, the private business sector, NGOs, and academic institutions to coordinate local institutional actions and elaborate an Environmental Action Plan for the Regions. Similar initiatives have also been adopted in formal governmental decisionmaking processes by involving representatives from social and environmental NGOs, so that complex environmental problems can be studied from a broad, pluralistic perspective. This has been the case with the Committee on Biological Diversity (CONADIB)[69] and with the creation of specific consultative groups, such as the Peruvian National Group on Biosafety. Institutional participation has also been adopted in Paraguay where Law No. 40/90 created the National Commission on the

[59] *See also* COLOMBIA CONST. art. 330 (requiring the government to ensure the participation of representatives from indigenous community in decisions regarding the exploitation of natural resources in their territories).

[60] Law No. 99 of Dec. 22, 1993, art. 69.

[61] *Id.* art. 72.

[62] *Id.* art. 71.

[63] *See* www.legislatura.gov.ar/1legisla/constcba.htm#_Toc405121815 (last visited June 4, 2002). Article 63 of the 1996 Buenos Aires Province Constitution states that the Legislative, Executive or "Comunas" can convoke public audiences to discuss matters of general interest for the city with the obligatory participation of competent public officials. These audiences are mandatory in the case of projects related to urban development, industrial edifications, and the use of public goods.

[64] *See* www.oas.org/usde/isp/1pgmissi.htm (Legal provisions, Findings) (last visited July 28, 2002).

[65] Reglamento de Participación Ciudadana en el Procedimiento de Aprobación de los Estudios de Impacto Ambiental Presentados al Ministerio de Energía y Minas, approved by Ministerial Resolution No. 728-99-EM/VMM, published Diario Oficial El Peruano, Sept. 1, 2000.

[66] [Bolivia] Public Participation Law No. 1551/1994, art. 2.

[67] *Id.* art. 7.

[68] The CARs are regulated by Supreme Decree No. 022-2001-PCM, which approved the Reglamento de Organización y Funciones del Consejo Nacional del Ambiente-CONAM, published Diario Oficial El Peruano, Aug. 3, 2001, art. 59.

[69] To see CONADIB functions and constitution, consult Title VIII Supreme Decree No. 068-2001-PCM, published June 20, 2001 – Reglamento de la Ley sobre Conservación y Aprovechamiento Sostenible de la Diversidad Biológica.

Defense of Natural Resources, which includes the participation of the private sector and civil society.

E. Access to Justice

This subsection examines how the ISP conceives of access to justice, specific ISP recommendations to promote access to justice, and regional advances at the national level.

1. Concept

Public participation and access to courts are closely linked. Any member of the public who has a sufficient and legitimate interest should be ensured access to an action or a review of his case by a court of law. In fact, access to justice is understood as the opportunity to obtain a specific and complete solution to an environmental conflict from judicial or independent administrative authorities. Access should be nondiscriminatory in that all persons should have an equal opportunity to protect their rights through judicial redress and to obtain through this process results that are fair and just.

Environmental jurisprudence has increased in the region through the 1990s. In fact, the concepts of environmental and participatory rights that are enshrined in constitutions and legislation in the region has successively been defined made concrete by public interest court cases. Currently, this right of access to justice has itself constituted an increasingly important instrument in requiring accountability in public institutions.

2. ISP Recommendations

The ISP establishes some basic recommendations for action related to access to justice that could guide states in guaranteeing the right. Specifically, the ISP focuses its recommendations on two main points: the right to appeal before an independent administrative or judicial body, and the guarantee of sufficient legal standing. Specifically, ISP provides that meaningful access should be assured by providing legal standing—in essence, the legal right to appear before judicial or administrative bodies—for all affected and interested parties; the right of appeal to or review by, when pertinent, a higher governmental authority; through alternative dispute resolution mechanisms to promote settlement; and through maintenance of independence among authorities responsible for implementation, appeals, and oversight.[70]

The ISP leaves as a matter for national law to define the terms "interested parties" and "sufficient interest." However, the ISP recommends the extension of legal standing to interested or affected persons, organizations, and where pertinent, communities, with particular emphasis on persons and communities traditionally marginalized, including women and vulnerable groups such as indigenous populations, youth and disadvantaged racial and ethnic minorities (including disadvantaged populations of African descent).[71]

3. Advances in the Region Towards Access to Justice

Although judiciaries throughout the region have contributed to the creation of environmental jurisprudence, the defense of environmental and social interests before courts still faces many barriers. The principal barriers are the lack of an appropriate legal framework in which to protect the frequently diffuse interests; the limited capacities of judges to review conflicts with complex legal and scientific issues; and corruption. Attempts to reduce these barriers have led to the creation of specific environmental actions, specialized environmental tribunals, funds to mitigate environmental problems, and the extension of legal standing, among other measures.

The defense of environmental interests generally rests on traditional administrative, civil, and penal actions. Few countries recognize the possibility of specific environmental actions or appeals. Constitutional actions based on provisions ensuring environmental quality as well as the protection of human rights constitute a powerful set of tools that complement actions before civil courts, penal courts, and administrative bodies or courts. The most successful "environmental" actions have been linked with the protection of property rights rather than with the creation of specific environmental responsibilities and environmental damage reparation, unless they had direct consequences on human health. Finally, the actions brought by individuals and NGOs to protect the environment are more common than those from public prosecution institutions.[72]

The intervention of tribunals in environmental conflicts in the region has been based upon constitutional actions,[73] mainly in those countries where the right of a healthy environment has been constitutionally enshrined with specific provisions to make it effective. This has been the case in Chile, in which the 1980 constitution

[70] ISP, *supra* note 8, ch. 2.1.3, at 23.

[71] *Id.*, ch. 2.2, at 23.

[72] Raul Brañes, *El Acceso a la Justicia Ambiental en América Latina: Derecho Ambiental y Desarrollo Sostenible*, *in* El Acceso a la Justicia Ambiental en América Latina, Memorias del Simposio Judicial Realizado en la Ciudad de México del 26 al 28 de Enero del 2000, Serie Documentos sobre Derecho Ambiental, No. 9, Programa de las Naciones Unidas para el Medio Ambiente (PNUMA) y Procuraduría Federal de Protección al Ambiente del Gobierno de México (PROFEPA) Ciudad de México, México (2000), at 45.

[73] Isabel Martinez, *El Acceso a la Justicia Ambiental en América Latina durante la Década de los Noventas: Reformas y Desarrollos*, *in* Environmental Law in Developing Countries, IUCN Environmental Policy and Paper No. 43 (2001).

led to the development of significant environmental jurisprudence.[74] The Constitution in Chile explicitly recognizes in Article 20 an environmental action termed *recurso de protección* or a "protection appeal" that may be brought when the right to live in a pollution-free environment is affected by an illegal act from any person or public authority. Other constitutions have streamlined this right through actions created for the defense of public, collective, or diffuse interests, also called "class actions." In Article 43, Argentina's 1994 Constitution includes the *acción de amparo* which may be brought by affected persons, ombudsmen, and civil society organizations against any act or omission that impairs constitutionally acknowledged rights, including the right to environmental conservation, consumers protection, and others rights that are shared collectively. Similar actions have been included expressly in the constitutions of Brazil,[75] Ecuador,[76] and Venezuela.[77] In such cases, the standing is generally broad, being open to individuals, civil society associations, public prosecutors, ombudsmen, municipalities, and public enterprises, among others—except that Bolivia grants legal standing only to directly interested individuals.

However, the lack of explicit class actions for the constitutional defense of collective interests may inhibit the defense of environmental rights in some countries. This has been the case in Colombia,[78] whose constitution did not include the collective right to a healthy environment as a fundamental right due to the existence of an *accion de tutela*, although this gap has been overcome jurisprudentially. Similarly in Mexico, the 1999 constitution does not include a right to a healthy environment as a diffuse right but as an individual right to be defended by an *acción popular*.[79]

In civil courts, Chile's framework environmental law foresees the creation of specific environmental actions to be brought before Civil Tribunals, including the *acción indemnizadora* to obtain indemnity for environmental damage and the *acción ambiental* for reparation of an environmental impairment.[80] The standing for the first action corresponds to directly affected individuals, and the standing for the second action is limited to natural or legal persons who have suffered the damage, municipalities when the events occurred in their territory, and the state.

Brazil also has created a specific public action of responsibility when there has been harm to the environment, consumers, or the artistic, aesthetic, or historic patrimony.[81] In this civil action, legal standing includes the nation, states, municipalities, autarchies, public enterprises, foundations, mixed economy societies, and environmental NGOs.[82] In practice, the Public Prosecutor or *Ministério Público* has played a prominent role in using these actions for environmental protection.[83] Brazil's Constitution provides that the *Ministério Público* should promote and bring civil public actions to protect the public and social patrimony, the environment, and other diffuse interests.[84] To guarantee the role of the institution, Brazil has placed special emphasis on providing the *Ministério Público* with sufficient resources and assuring its impartiality by establishing tenure for its officials and by ensuring adequate salaries. The *Ministério Público* is critical in resolving conflicts through, for example, innovative agreements and environmental repair mechanisms to address environmental conflicts.[85] Citizens are also able to present an action before Costa Rica's *Fiscalia Ecologica* (the environmental prosecutor's office) against any environmental impairment.

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[74] Domingo Kokisch, *El Acceso a la Justicia Constitucional en Chile, in* EL ACCESO A LA JUSTICIA AMBIENTAL EN AMÉRICA LATINA, *supra* note 73, at 130.

[75] BRAZIL CONST. art. 5(LXXIII) ("Qualquer cidadâo é parte legítima para propor açâo popular que vise a anular ato lesivo ao patrimônio público ou de entidade de que o Estado participe, à moralidade administrativa, ao meio ambiente e ao patrimônio histórico e cultural, ficando o autor, salvo comprovada má-fé, isento de custas judiciais e do ónus da sucumbência.").

[76] ECUADOR CONST. art. 95 (stating that every person, representing his own interest or as a legitimate representative of a group will be able to bring an *accion de amparo* against any activity—by a public authority or an individual—that may prejudice his fundamental rights, including environmental rights).

[77] VENEZUELA CONST. art. 26 (providing that every person is ensured access to judicial and administrative bodies to defend his rights and interests, including collective or diffuse rights and interests).

[78] COLOMBIA CONST. art. 88 (foreseeing the possibility of initiating a popular action against any impairment over collective interest, including environmental rights, but leaving the regulation of this action to a later law).

[79] In the 1999 Mexico Constitution in Articles 103 and 107, the right to a healthy environment is included among the individual guarantees in whose defense the Constitution allows an affected person to initiate a *juicio de amparo*. However, the defense of the right presents additional barriers: the origin of the violation of the right has to be found in authority laws or acts and the defense of the right is only possible for the affected person.

[80] Ley de Bases del Medio Ambiente No.19,300 (March 9, 1994).

[81] Law No. 7,347/1985, Lei da Açao Civil Pública (July 24, 1985)

[82] *Id.* art. 5.

[83] According to the Confederaçao Nacional do Ministério Público, 97.6% of the initiated public civil actions correspond to the Minitério Público initiative. Sílvia Capelli, *Gestao Ambiental no Brasil: Sistema Nacional de Meio Ambiente-Do Formal a Realidad*, at 15, presentation made at the International Conference on Environmental Legislation Implementation and Enforcement in Latin America, Buenos Aires, Argentina, May 28-29, 2002.

[84] BRAZIL CONST. art. 129(III).

[85] *See* Capelli, *supra* note 83, at 16.

To protect diffuse (including environmental) interests through civil cases, the recent reform process of Peru's Civil Procedures Code has taken some remarkable steps. Article 82 of the Law defines a diffuse interest and broadens legal standing to include the public prosecutor, regional governments, local governments, and native and campesino communities and associations, among others.[86] It also provides that a decision that does not respond to the original claim will automatically be placed under Supreme Court jurisdiction, and that a decision that responds to the claim will be binding even on those parties that did not intervene in the civil process. Finally, the law provides that the relief set forth in the decision must be used for environmental repair or conservation.

Apart from Brazil, Chile, and the reforms recently introduced in Peru, most of the other countries in the region lack a specific civil environmental action and provide access to justice in environmental matters only through traditional civil actions. Hence, there is a limited but evolving framework on civil responsibility in Latin America. In most countries, current legal frameworks are inadequate to defend diffuse interests and ensure environmental responsibility. It becomes particularly evident in cases of claims for environmental repair, since the civil system only grants legal standing to persons with direct and subjective rights, preventing the access to justice in defense collective rights through public civil actions. Therefore, there is no adequate parallel in regular courts to the class actions that are contemplated in constitutional cases.[87]

Criminal codes and laws have increasingly incorporated environmental crimes, and these crimes increasingly are prosecuted. Prosecution of environmental crimes has its foundation in a number of Latin American constitutions, such as those of Brazil, Colombia, and Paraguay. Other countries have enacted special criminal environmental laws, such as Venezuela's 1992 Environmental Crimines Law and Brazil's 1998 Environmental Crimes Law, which includes criminal responsibility for legal persons such as corporate entities.[88] These laws have had important repercussions in protecting the environment in those countries.

At the administrative level, most Latin American environmental legislation has an administrative character and many environmental conflicts arise from disputes between administrative bodies and citizens regarding the implementation of environmental laws. In most cases, environmental laws normally require that citizens first file a complaint before an administrative body. In practice, most of the cases have related to the approval of EIAs.

In this sense, access to justice through administrative bodies has been promoted through a variety of mechanisms. In some instances, citizens must first go through administrative appeals before going to court to suspend damaging acts. For example, Costa Rica has created a specialized administrative court, the *Tribunal Ambiental Administrativo*, as an independent administrative body to hear any action against activities violating environmental laws. The Tribunal has jurisdiction to hear actions initiated by private parties or public bodies against any public or private person or entity that may have violated environmental and natural resources laws.[89] The creation of environmental public prosecutors inside administrative bodies has also occurred in Costa Rica through the *Contraloría Ambiental* and the *Procuraduría Ambiental y de la Zona Marítimo Terrestre*. Any person can use these bodies to identify and complain about an environmental violator, and the only requirement for formally bringing the lawsuit is that the complainant must identify the affected persons and describe the facts.[90] Mexico's *Procuraduría Federal de Protección al Ambiente (PROFEPA)* is a public prosecutor's office that reports to the Secretary of Environment and Natural Resources and it is in charge of monitoring the implementation of environmental laws.[91] The PROFEPA receives, investigates, and submits to the competent authority actions initiated by private parties on environmental matters. The legal standing before these bodies has been expanded from only individuals with a direct interest to also include social organizations.

Brazil is an example of a country where access to justice is ensured through several measures. One measure is the creation of specialized tribunals and itinerant environmental tribunals that function on boats in the Mato Grosso Province, an area in the biodiversity-rich Pantanal region which is also difficult to access. The judges, *Ministério Público*, and judicial civil servants receive environmental claims that emerge in these areas, resolving them through conciliatory processes or judicial actions.

[86] Law No. 27752, Ley que Modifica el Articulo 82 del Codigo Procesal Civil sobre Patrocinio de Intereses Difusos, DIARIO OFICIAL EL PERUANO (June 8, 2002).

[87] Brañes, *supra* note 2, at 74, 97. For example, in Argentina, individuals are the only ones that can bring an action for environmental reparation when the damage affects directly their rights or their patrimony. The only mechanism open to NGOs is an *accion de amparo*, a constitutional mechanism that seeks to cease damaging acts. However, an *amparo* will not permit NGOs to seek environmental damages.

[88] *E.g.*, [Venezuela] Ley Penal del Ambiente, published Mar. 1, 1992; [Brazil] Lei de Crimes Ambientais No.9,605 published Feb. 13, 1998, *available at* www.socioambiental.org/website/noticias/naintegra/docs/rtf/crimeamb.rtf (last visited June 5, 2002). In addition, Mexico reformed its Criminal Code in 1996 to include a chapter on environmental offenses.

[89] Decreto 25084-MINAE Reglamento de Procedimientos del Tribunal Administrativo, published March 26, 1996. *See* www.cesdepu.com/org/Tribunal%20Ambiental%20Administrativo.htm (last visited June 7, 2002).

[90] To view the requirements and content of the complaints, see www.crnet.cr/~defensor/dhr940_13.html (last visited June 7, 2002).

In 1998, the tribunal processed approximately 60 cases related to damage to flora and fauna.[92] Another interesting Brazilian initiative in environmental management has been the empowerment of environmental NGOs to manage ecological reserves, natural protected areas, and other areas of ecological interest.[93]

Finally, other noteworthy measures to facilite environmental protection through courts are found in Argentina, which allows public interest litigants to avoid the risk of being charged with court costs if they lose—*beneficio de litigar sin gastos*—when there is proof of lack of resources,[94] and in Colombia and Brazil with the creation of funds to redress environmental damages.[95]

F. The Central American Water Tribunal

At the regional level, participatory mechanisms have been reflected in the creation of regional institutions such as the Central American Water Tribunal.[96] This Tribunal has its foundations in the Central American Water Declaration of June 1998[97] and in the experiences of other water tribunals, such as the Brazil Water Tribunal created in 1993. The Tribunal began functioning in 2000 and has reviewed eleven cases concerned with conflicts in different shared rivers in the region. These include a hydroelectric project on the Lempa River in El Salvador and Honduras and a case in the San Juan River in Costa Rica and Nicaragua against the two countries for their failure to prevent deterioration of the river basin.[98]

This institution is constituted as an ad hoc, independent body that seeks to facilitate the resolution of water resource conflicts in the region by disseminating information and promoting the awareness and participation of civil society. This organization was created to allow citizens to protect and vindicate environmental and collective rights. It puts into practice civil society's capacity to act when governments fail to protect the environment against economic interests that cause environmental violations. Specifically, the Tribunal receives, processes, and reviews environmental complaints from citizens, communities, civic associations, and NGOs. The organization is not legally binding but seeks to raise public awareness and to organize diverse sectors of civil society to prosecute those individuals responsible for damaging or abusing water resources and aquatic environments in the region.

III. THE ISP'S POTENTIAL

The ISP was developed in a political context in which the promotion of democracy and transparency in government necessarily involves participatory mechanisms. At the same time, countries in the region now recognize the need to follow and adapt to the current international trends towards sustainable development. The OAS is the main political forum for the discussion and promotion of such values at the regional level. The OAS facilitates multilateral dialogues and allows progressive steps to be taken to strengthen democracies and human rights protection, as well as fight corruption and poverty, and it seeks to engage civil society in these dialogues.

In this sense, the importance of the ISP resides in its consolidation as a regional initiative to create a policy framework, to direct countries' efforts towards the formulation of public participation policies that ensure citizen participation, and to steer the implementation of such policies at the national level. The ISP represents a new instrument in which agreed principles of public participation are explicitly stated as a turning point in the policies of the region, as well as the future direction for governance. Hence, it is the state parties to whom the ISP is first addressed.

Some of the provisions of the ISP have already been implemented through environmental legislation and institutions introduced in some countries. However, this development has not been uniform in the region. On the contrary, there are evident differences. The advances mentioned in this chapter are generally found in only the countries that have been specifically identified, and do not necessarily apply generally to the region. Moreover, those countries in which participatory mechanisms have been introduced through laws need more consolidated structures to guarantee their implementation. At both the national and regional levels, the ISP proposals are significant for introducing a participatory culture and recommendations for better practices.

The ISP offers guidance to OAS parties by proposing several lines of action on participation. The ISP's concrete implementation is thus left to the discretion of the various nations.

In the region, many legal mechanisms adopted to promote public participation in environmental decisionmaking have been expressed in general frameworks or in instruments that have a voluntary character. In this context, however, there are often situations in which governments do not take the general frame-

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[91] *See* www.profepa.gob.mx (last visited June 7, 2002).

[92] Vladimir Passos de Freitas, *El Acceso a la Justicia Constitucional en Brasil, in* El Acceso a la Justicia Ambiental en América Latina, *supra* note 72, at 124.

[93] Resolução Conama No. 003/88. art. 1.

[94] Sergio Dugo, *El Acceso a la Justicia Constitucional en Argentina, in* El Acceso a la Justicia Ambiental en América Latina, *supra* note 72, at 106.

[95] Martinez, *supra* note 73, at 69.

[96] *See* www.tragua.com (last visited June 18, 2002).

[97] Central American Declaration on Water, done at San José, Costa Rica on July 8-10, 1998, *available at* tragua.com/declaracion.html (last visited July 29, 2002).

[98] *See* www.laprensahn.com/caarc/0009/c03003.htm (last visited June 18, 2002).

works into account and, therefore, implementation is limited. It is essential that general provisions adopted in environmental laws are adequately developed through regulatory mechanisms that allow real implementation. This is also true at the regional level. The ISP seeks to overcome this general lack of concrete actions, mechanisms, and institutions, through well-defined participatory proposals.

Among the different parties that contributed to the elaboration of the ISP, there is a shared understanding about the importance of setting principles of public participation and stating recommendations at a regional level, but also the general perception of significant barriers that may exist in their implementation.[99] A significant percentage of consulted government representatives in Mexico (almost 40 percent), for example, were skeptical about the potential of the ISP to facilitate public participation in decisionmaking on sustainable development issues in Mexico.[100] First, the term "sustainable development" is not entirely understood among governments and different sectors of civil society and has a limited implementation in the countries. Second, not only is there a question of designing participatory mechanisms and allowing participation, but also of guaranteeing participation and generating capacities so that people can actually participate. For that to occur, it would be necessary for governments to adopt programs or specific actions that could demonstrate a real commitment with ISP, its interpretation and viability. Third, the lack of political commitment of governmental bodies, politicians, and civil servants and the lack of a participatory culture represent potential barriers in many countries. Finally, participation should be put in the context of fragile democratic systems, corruption, centralized government, and significant ethnic and cultural differences, which are common features of many countries in the region.

Therefore, there is a need for new instruments that consolidate the principles set out in the ISP to put the principles into practice. It is necessary that new mechanisms develop the ISP in the specific contexts of access to information, access to decisionmaking, and access to justice. This process would be a good opportunity for states to benefit from participatory practices already existing in other countries and to assess and adopt them as appropriate to promote harmonized environmentally sustainable policies.

At the regional level, the OAS must remember the importance that it has to promote legal instruments that illuminate the path by which these participatory recommendations can find viability in practice. It is essential that new regional legal instruments, protocols, accords, or treaties are adopted to follow parallel efforts in other regions.

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[99] *See* www.oas.org/usde/isp/1pgmissi.htm (last visited July, 29 2002) (at Hemispheric Consultation Process, National Consultations Reports); *ISP Feasibility Chapter*, *in* COUNTRIES REPORTS, *available at* www.ispnet.org/reportes (last visited March 8, 2002).

[100] *Id.*