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PUTTING RIO PRINCIPLE 10 INTO ACTION

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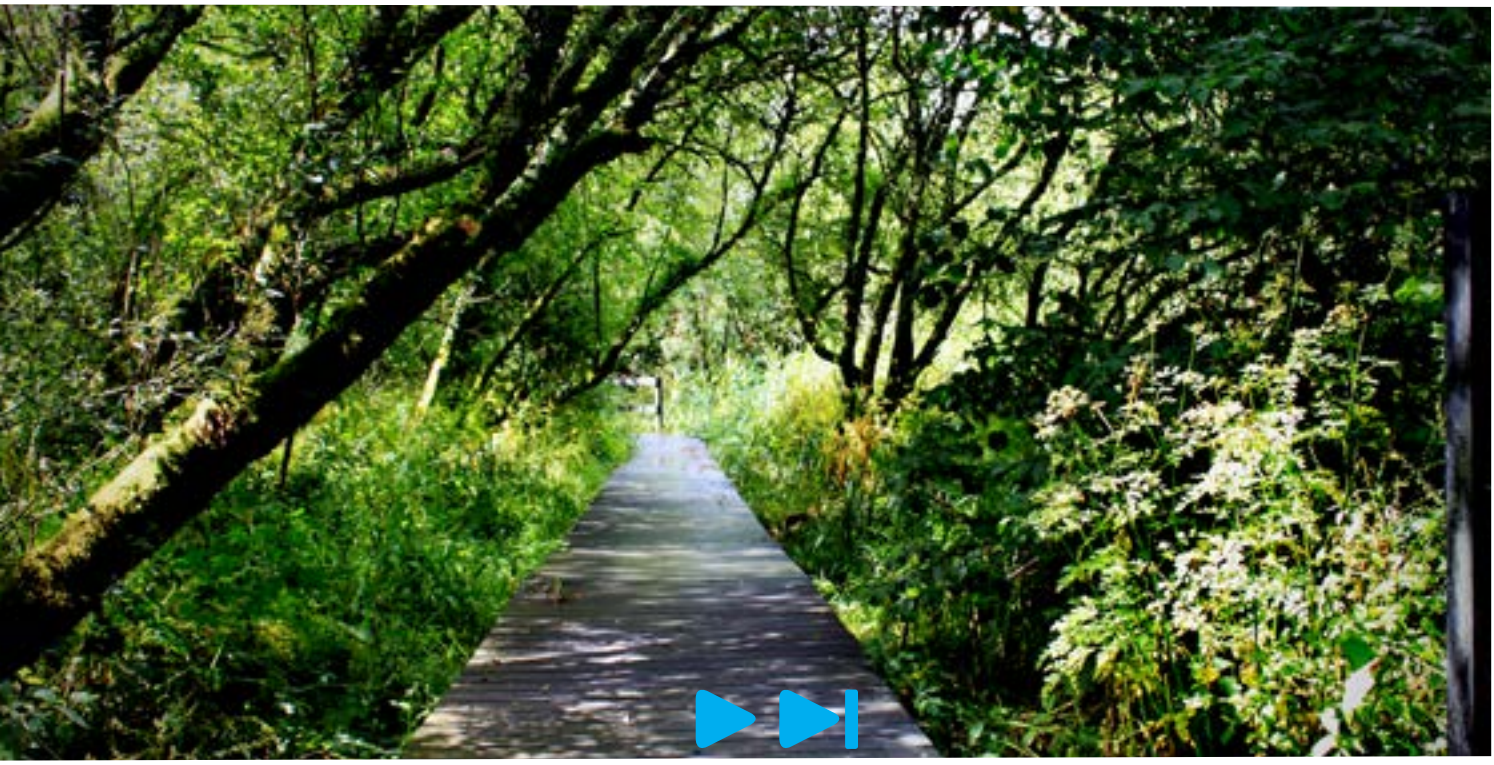
An Implementation Guide



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PUTTING RIO PRINCIPLE 10 INTO ACTION:

An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters

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This book was written by Stephen Stec for and on behalf of the World Resources Institute (WRI) and UNEP, assisted by Jesse Worker, under the guidance of Alexander Juras of UNEP and Lalanath de Silva of WRI.

The project to draft an implementation guide to the Bali Guidelines on Rio Principle 10 was developed by UNEP's Major Groups and Stakeholders Branch in cooperation with UNITAR and WRI. The project is one component of a multi-year umbrella project involving UNEP, UNITAR and UNDP as partners to promote the implementation of the Bali Guidelines. The Guide was drafted over the course of two years with significant input gathered from three regional workshops in Latin America, the Caribbean, and Middle East/North Africa. One of the key foundational references was the "Commentary" to the Guidelines drafted by Sylvia Bankobeza of UNEP. The Guide was also presented publicly on the UNEP website in draft form on two occasions, in late 2014 and early 2015, during which comments were received from CEDHA, IPEN, ICCA, Australia and the United States. An explanatory note on the comments and how they were taken into account is available from UNEP upon request.

To support the author in the drafting of the Guide, UNEP established an Advisory Group (AG) consisting of a geographically diverse group of experts with vast experience in matters related to Rio Principle 10. While nominally independent, the AG included academics, NGO representatives, international organization staff, and government officials. The AG worked primarily through remote correspondence, but in December 2014, UNEP convened a special meeting of members of the AG in Washington DC to thoroughly review an advanced draft of the Guide. Throughout the drafting of the Guide, the AG's advice, consideration and substantive contributions proved invaluable.

The members of the AG were: Danielle Andrade (Jamaica Environment Trust), David Banisar (Article 19), Sylvia Bankobeza (UNEP), Lalanath De Silva (WRI), Ritwick Dutta (LIFE, India), Jonas Ebbesson (Stockholm University), Timothy Epp (US EPA), Sandor Fulop (Environmental Management and Law Association, Hungary), Achim Halpaap (UNITAR), Amrei Horstbrink (UNITAR), John Knox (UN Special Rapporteur), Irina Krasnova (Russian Academy of Justice), Daniel Magraw (Johns Hopkins University), Fiona Marshall (UNECE), Reinford Mwangonde (CJF, Malawi), Somrudee Nicro (Thailand), Benson Ochieng, (Institute for Law and Environmental Governance, Kenya), Marc Pallemaerts (Amsterdam University), Brian Preston (Land and Environment Court of New South Wales), Barbara Ruis (UNEP), Andrea Sanhueza (Chile), Roberta Solis Ribeiro (Brazil), Jorge Daniel Taillant (CEDHA, Argentina), Valeria Torres (UN ECLAC), Magdolna Toth Nagy (Hungary) and Jesse Worker (WRI). Brian Preston deserves special acknowledgment for his outstanding contribution to the section on access to justice. Additional input was provided by the following persons: Andrei Andrusevych (Ukraine), Jiri Dusik (Integra Consulting Ltd.), Carole Excell (WRI), Tsvetelina Filipova (REC), Jerzy Jendroska (Opole University), Shereen Kandil (US EPA), Luc Lavrysen (EU Judges for the Environment), Pia Macarena Slanzi (Article 19), Miriam Markus-Johansson (Sweden), Jeremy Wates (European Environment Bureau) and Haiya Zhang (China). While the subject did not make it into the final version of the Guide, the author is grateful to Professors Timo Koivurova, Willemien DuPlessis and Anne Powers for an interesting exchange on non-regression. The author is also immensely grateful to the teams at UNEP, UNITAR and WRI, led by Alexander Juras, Achim Halpaap and Lalanath de Silva, and would especially like to express appreciation to Fatou Ndoye of UNEP and Jesse Worker of WRI for their practical, moral and substantive support. All of the above should share in the credit for what this Guide achieves; any errors, naturally, are those of the author alone.

This Guide is dedicated to the memory of the late Professor Marc Pallemaerts of the University of Amsterdam, distinguished member of the Advisory Group, who passed away during the drafting of the Guide.

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Environmental issues are a concern of every human being and the participation of all is more important than ever. There are encouraging signs that environmental management is becoming more inclusive, attitudes are changing and that awareness is rising about the need to ensure the survival of our planet through sustainable, equitable and environmentally sound development.

The active engagement of civil society has played a key role in this progress. The role of civil society will continue to be crucial as the world embarks on implementation of the newly adopted 2030 Agenda for Sustainable Development.

Rio Principle 10 has been at the forefront of strengthening citizens' environmental rights so that members of the public and their representative organizations can play a full role in addressing the multi-dimensional challenges facing our world today — from climate change, biodiversity loss and poverty reduction to increasing energy demands, rapid urbanization, and air and water pollution.

The success of the landmark 1998 UN ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998) in providing a mechanism

for holding governments to account through its twin protections of environmental and human rights has served as a model for the rest of the world. Now, in the region of the UN Economic Commission for Latin America and the Caribbean, more than 20 states have embarked on a similar venture.

Many other parts of the world also want to harness the energy of an informed and concerned public to address urgent environmental issues. To support this aim, the United Nations Environment Programme has been at the forefront of fashioning voluntary guidelines on the implementation of Rio Principle 10. In 2010, the UNEP Governing Council adopted the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

The current publication is intended as a tool to help countries implement the Bali Guidelines. The Guide collects examples of legislation and action from countries in a variety of regions and stages of development, demonstrating the viability of Principle 10 ideas in a wide variety of contexts.

The Guide also provides countries with practical ways to address uncertainties that can arise during the drafting and implementing stages of new legislation. It is therefore an essential reference for policymakers, legislators and officials at all levels of government. Furthermore, it contains important guidance for members of the public, including nongovernmental organizations, seeking to exercise their rights, as well as for those in the private sector. The Guide will equally interest practitioners and academics specializing in Rio Principle 10 issues.

UNEP has produced a valuable tool that will support efforts by countries around the world to adopt national legislation and to take other innovative actions reflecting the Principle 10 concepts. I commend this publication to all those with an interest in promoting environmental democracy and sustainable development.

Ban Ki-Moon
United Nations Secretary-General

Foreword

Five years ago the UNEP Governing Council adopted the Bali Guidelines to help national governments put Principle 10 of the Rio Declaration into action by facilitating broad access to information, public participation and justice in environmental matters.

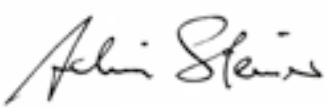
The Bali Guidelines represent a milestone for both environmental law and sustainable development, and this Implementation Guide is designed to transform them into reality.

Building on vast experience at the national level, the Bali Implementation Guide is a practical tool to help countries develop and enhance the national legislation and institutions required to deliver Rio Principle 10. This guide includes examples of best practice, analyses each of the elements, provides case studies on implementation and outlines potential implications for institutional arrangements.

In order to engage people in environmental targets at the local level, we must be able to demonstrate credible progress on our existing commitments. Hence, this timely launch of the Bali Implementation Guide also provides a strong foundation from which to build momentum in support of the Sustainable Development Goals.

I would like to acknowledge the hard work of everyone involved in producing this guide. In particular, I would like to thank all the teams at the United Nations Institute for Training and Research and the World Resources Institute. I would also like to thank the Government of Norway and the Abu Dhabi Global Environment Data Initiative for their generous support with funding.

This implementation guide is a significant opportunity for individual nations to better equip themselves to deliver Rio Principle 10 for their own people and to contribute to the wider efforts of all the nations united in this effort.



Achim Steiner
United Nations Under-Secretary-General, and
Executive Director United Nations Environment Programme

The Bali Guidelines

In February 2010 a milestone was achieved in the field of environmental law and sustainable development when the Special Session of the UNEP Governing Council, Global Ministerial Environment Forum (GMEF) in Bali, Indonesia, unanimously adopted the 'Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (The "Bali Guidelines"). The Bali Guidelines seek to assist countries in filling possible gaps in their respective relevant national legislation, and where relevant and appropriate in sub-national legal norms and regulations at the state or district levels, etc., ensuring consistency at all levels to facilitate broad access to information, public participation and access to justice in environmental matters.

The Bali Guidelines are voluntary, developed at the behest of States that wished to improve implementation of Principle 10 of the 1992 Rio Declaration on Environment and Development (Rio Principle 10). While self-standing, they may also be useful in the context of international cooperation between and among States, with the involvement of international organizations and programs.

"About the Guide and How to Use It"

Many nations around the world have decades of practice in access to information, public participation and access to justice in environmental matters that can prove useful to countries wishing to strengthen their current legislation and practice. Regional groupings of States in the pan-European region and in Latin America and the Caribbean have adopted or taken steps towards adoption of international legal instruments on application of Rio Principle 10. In the region of the United Nations Economic Commission for Europe, the Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (Aarhus, 1998) (the Aarhus Convention) provides a wealth of experience based on more than a decade of implementation across a broad spectrum of industrialized, transitional and developing countries. Also important are the global declarations and action plans starting with the Stockholm and Rio Declarations and the foundational work of the Brundtland Commission published as "Our Common Future."

This Guide is intended to be a practical tool for the use of governments, major groups and stakeholders, legal professionals, implementing authorities and others engaged in the application of Rio Principle 10. The Guide (like the Guidelines) is neither proscriptive nor binding. Rather, it includes a full range of actual examples of implementation of national law and practice to support policymakers, legislators and public authorities in their daily work of applying the Bali Guidelines and realizing the provisions of Principle 10 in practice. It can be used to assist States in undertaking their own gap analysis of national legislation. It takes into account the range of diversity of systems of law throughout the world and aims to fit this diversity. Consequently, the inclusion of a particular example of law or practice may not constitute a positive example in all respects and does not imply endorsement.

The Guide provides both a general overview and a detailed guideline-by-guideline analysis of the Bali Guidelines. Its modular approach with discrete sections, boxes and graphics on various aspects of the Guidelines can be used for training. In its analysis, the Guide draws first and foremost on examples from national legislation and practice. Additionally, examples from law and practice under relevant international and regional legal instruments, jurisprudence, and academic writings, are sometimes presented in text boxes where they reinforce national examples, provide guidance when national examples are absent, or provide additional details that are consistent with national examples.

Readers can find an overview of the Bali Guidelines' origins and their content in the main introduction and in the introductions to the different sections. These introductions give the policy background and describe the Guidelines' structure, the main provisions, and options for application.

Policy makers and public authorities involved in the task of applying Rio Principle 10 through national legislation, or developing mechanisms for its implementation in the context of varying national legal systems, will need more detailed analysis. Therefore, the Guide also analyses each Guideline to help the reader understand its elements, various options for application, case examples related to implementation, and where appropriate the implications for institutional arrangements. In addition, public authorities or advisors faced with specific problems of implementation or interpretation can use the Guide as a reference.

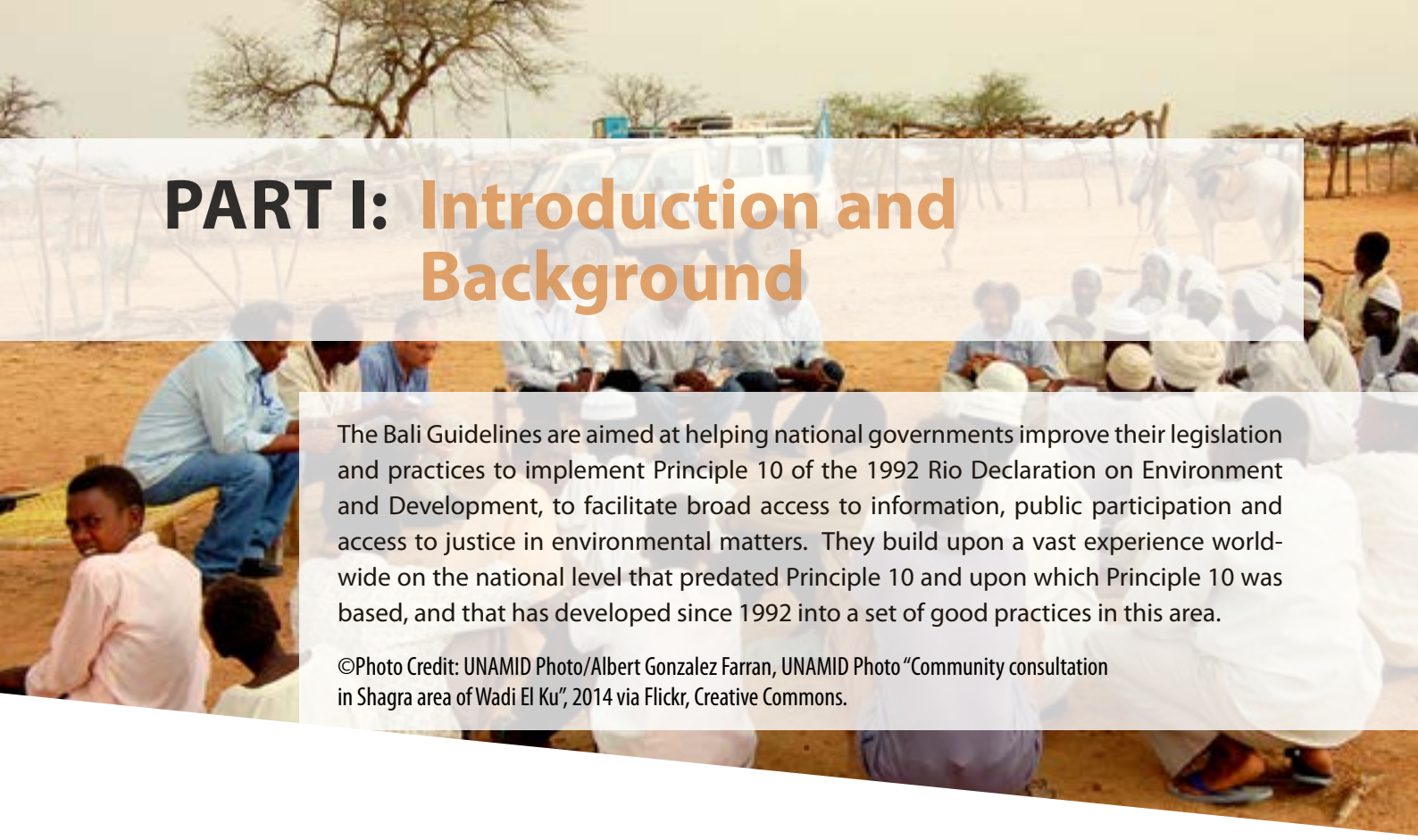
Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ADR	Alternative dispute resolution
AG	Advisory Group
AMS	Automated Measuring System
AQI	Air Quality Index
ASEAN	Association of Southeast Asian Nations
BELPO	Belize Institute of Environmental Law and Policy
CBD	Convention on Biological Diversity
CC	Compliance Committee (Aarhus Convention)
CDAT	Chemical Data Access Tool
CDR	Chemical Data Reporting
CEC	Certificate of Environmental Clearance
CEDHA	Center for Human Rights and Environment (Argentina)
CELAC	Community of Latin American and Caribbean States
CEMESP	Center for Media Studies and Peacebuilding
CIC	Central Information Commission
CJEU	Court of Justice of the European Union
CJF	Citizens Justice Foundation (Malawi)
CONAMA	Executive Committee of the National Commission of the Environment
COP	Conference of the Parties
CSCE	Conference on Security and Co-operation in Europe
CSR	Corporate social responsibility
DG	Directorate General
DoPT	Department of Personnel, Public Grievances and Pensions
DPSIRO	Driving forces, pressures, state, impact, response, and outlook
EAB	Environmental Appeals Board
ECE	see UN ECE
ECLAC	see UN ECLAC
ECHO	Enforcement and Compliance History Online
ECOLEX	Environmental legislation database of IUCN/UNEP/FAO
ECSO	Environmental civil society organization
ECT	Environmental courts and tribunals
EDI	Environmental Democracy Index
EDO	Environmental Defender's Office
EfE	Environment for Europe
eGRID	The Emissions & Generation Resource Integrated Database
EIA	Environmental impact assessment
EID	Environmental Impact Declaration
EIS	Environmental Impact Study
EMA	Environmental Management Act
EMLA	Environmental Management and Law Association
ENVSEC	Environment and Security Initiative

EPCRA	Emergency Planning and Community Right-to-Know Act
ESD	Education for Sustainable Development
EU	European Union
EUFJE	European Union Forum of Judges for the Environment
FAO	Food and Agriculture Organization of the United Nations
FAQ	Frequently asked questions
FGO	Ombudsperson for Future Generations
FOI	Freedom of information
FOIA	Freedom of Information Act
FPIC	Free, prior and informed consent
GEF	Global Environment Facility
GMEF	Global Ministerial Environment Forum
GMO	Genetically modified organism
HOJAPI	Hoteles Jamaica Pinero Limited
HPVIS	High Production Volume Information System
HRC	Human Rights Committee
ICCA	International Council of Chemical Associations
ICCM	International Conference on Chemicals Management
ICT	Information and communication technology
IFAI	Federal Institute for Access to Information and Data Protection
IFI	International financing institution
ILO	International Labour Organization
INALI	National Institute of Indigenous Languages
IPE	Institute of Public and Environmental Affairs
IPEN	International POPs Elimination Network
IUCN	International Union for Conservation of Nature
IRM	Independent Reporting Mechanism
JET	Jamaica Environment Trust
JIRS	Judicial Information Research System
LACC	Liberian Anti-Corruption Commission
LEC	Land and Environment Court of NSW
LGEEPA	General Ecological Balance and Environmental Protection Act of Mexico
MEA	Multilateral environmental agreement
MEP	Ministry of Environmental Protection
MOP	Meeting of the Parties
NAFTA	North American Free Trade Agreement
NEPA	National Environment and Planning Agency (Jamaica)
NGO	Non-governmental organization
NGT	National Green Tribunal of India
NIP	National implementation plan
NJCA	Northern Jamaica Conservation Association
NRCA	Natural Resource Conservation Authority
NRDC	Natural Resources Defense Council
NSW	New South Wales

NSWLEC	see LEC
OAS	Organization of American States
ODA	Overseas development assistance
OECD	Organisation for Economic Co-operation and Development
OGP	Open Government Partnership
OPS	Overarching Policy Strategy
OSCE	Organization for Security and Co-operation in Europe
OVOS	State ecological expertise (Russian acronym)
PEC	Planning and Environment Court of Queensland
PHILJA	Philippine Judicial Academy
PITI	Pollution Information and Transparency Index
Plan-EA	Draft plan environmental assessment
PM	Particulate matter
PRTR	Pollutant release and transfer register
REACH	Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals
REC	Regional Environmental Center for Central and Eastern Europe
REDD	Reducing Emissions from Deforestation and Forest Degradation
Reg DaRRT	Regulatory Development and Retrospective Review Tracker
RENA	Regional Environmental Network for Accession
RIMES	Regional Integrated Multi-hazard Early Warning System for Asia and Africa
RTI	Right to information
SAICM	Strategic Approach to International Chemicals Management
SDWA	Safe Drinking Water Act
SEA	Strategic environmental assessment
SEA	Environmental Evaluation Service (Chile)
TAI	The Access Initiative
TRI	Toxics Release Inventory
TSCA	Toxic Substances Control Act
TSCATS	TSCA Test Submissions
UNCED	United Nations Conference on Environment and Development
UNCSD	United Nations Conference on Sustainable Development
UN DESA	UN Department of Economic and Social Affairs
UNDP	United Nations Development Programme
UN ECE	United Nations Economic Commission for Europe
UN ECLAC	United Nations Economic Commission for Latin America and the Caribbean
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
USAID	United States Agency for International Development
US EPA	United States Environmental Protection Agency
WCSD	see UNCSD
WRI	World Resources Institute
WSSD	World Summit on Sustainable Development

PART I: Introduction and Background



The Bali Guidelines are aimed at helping national governments improve their legislation and practices to implement Principle 10 of the 1992 Rio Declaration on Environment and Development, to facilitate broad access to information, public participation and access to justice in environmental matters. They build upon a vast experience worldwide on the national level that predated Principle 10 and upon which Principle 10 was based, and that has developed since 1992 into a set of good practices in this area.

The United Nations Conference on Environment and Development (UNCED) convened in Rio de Janeiro from 3-14 June 1992. It was a global conference, with 172 countries represented, 108 by their heads of state, and 2400 NGO representatives. Including the parallel Global Forum, more than 17,000 persons attended the conference.

BOX 1: Principle 10 of the Rio Declaration on Environment and Development states:

> 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.

The 1992 Rio Declaration[1] represents a clear global political expression of common concerns in the field of the environment and sustainable development. The efforts of the international community to work in good faith to solve problems of common concern in the field of global environmental change is assisted by the Rio Declaration's 27 Principles. One of the most important sets of considerations is found in Rio Principle 10.

Rio Principle 10 and sustainable development

Principle 10 acknowledges the key role of information, participation and justice in the transition towards environmentally sound and sustainable development. Over the years, Principle 10 has provided a globally-recognized framework for the development of national standards and laws for access to information, public participation in decision-making, and justice, in environmental matters. It has been characterized as an

1 U.N.G.A., A/CONF.151/26 (Vol. I), 12 August 1992, Annex I.

instrument of "environmental democracy."[2]

The three components, elements, or "pillars" of Rio Principle 10 have a long history.

- *Information* is essential to enable members of the public to participate meaningfully in public affairs and to make informed decisions about their lives. Access to environmental information is therefore important in its own right as an absolute value as well as in the role it plays in facilitating and enabling meaningful participation. General information rights are increasingly recognized since the adoption of the UN Charter, while the need for public access to information on the environment became critically apparent with disasters such as the Bhopal gas leak in 1984 and the Chernobyl nuclear disaster in 1986.
- *Participation* helps the public realize its potential to take part in public affairs, while it also improves the outcomes of policy and decision-making by bringing information, analysis and considerations to bear. Not only can the quality of decisions be improved, the partictipation of the public by itself improves the likelihood that decisions will be implemented with the support and participation of the affected public. From the point of view of public authorities, public participation can be seen as having three main objectives: information, public engagement, and conflict resolution. The information objective allows authorities to gain access to information not otherwise available, and helps the authority to diagnose problems and needs, develop alternative solutions, and evaluate the consequences of alternatives. The public engagement objective builds capacities, empowers citizens, legitimizes the authority's role and the role of stakeholders, and develops confidence and trust. Finally, public participation helps defuse conflicts.
- The *remedy and redress* component of Rio Principle 10 promotes accountability and the rule of law. It recognizes that the achievement of sustainable development depends upon the judicious use of fair and impartial administrative and judicial mechanisms to establish enforceable norms. Access to justice ensures that standards for implementation of the Principle's information and participation provisions will be fostered and upheld in a fair, judicious and effective manner.

Access to information, public participation and access to justice were important topics in 1983 when UN Secretary General Javier Perez de Cuellar nominated Gro Harlem Brundtland to lead the World Commission on Environment and Development. The Brundtland Commission Report - "Our Common Future" - published in 1987, set forth the policy framework and laid the groundwork for the political outcomes of the 1992 Rio Conference on Environment and Development. The Brundtland Report recognized the key role of NGOs, independent scientists and the public in identifying environmental and social risks and changes resulting from human activities, "in assessing environmental impacts and designing and implementing measures to deal with them, and in maintaining the high degree of public and political interest required as a basis for action."[3] The Brundtland Report made this plea to the international community:

> In many countries, governments need to recognize and extend NGOs' right to know and have access to information on the environment and natural resources; their right to be consulted and to participate in decision-making on activities likely to have a significant effect on their environment; and their right to legal remedies and redress when their health or environment has been or may be seriously affected.[4]

Ten years after Rio, Principle 10 was reconfirmed and elaborated by the 2002 Johannesburg Plan of Implementation of the World Summit on Sustainable Development (WSSD). Principle 10 was again

2 E.g., Kofi Annan, Foreword, "The Aarhus Convention: An Implementation Guide" (2000); Ban Ki-Moon, Foreword, "The Aarhus Convention: An Implementation Guide" (2d. ed., 2014).
3 "Our Common Future," Ch. 12, Part III, para. 67.
4 Ibid., para. 72.

reconfirmed in the Rio+20 Conference on Sustainable Development in 2012. The conference outcome document stated the need for renewed commitments in order to achieve full implementation of the Rio Principles, and in Paragraph 44, acknowledged the role of civil society and the importance of enabling all members of civil society to be actively engaged in sustainable development. See Appendix C. Paragraph 99 of "The Future We Want" further encouraged action at regional, national, sub-national, and local levels to promote access to information, public participation, and access to justice in environmental matters, as appropriate.

Rio Principle 10 in national law

The Bali Guidelines have a specific focus on national legislation as they are titled, "Guidelines on the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters," in recognition of the fact that access to information, public participation and access to justice in environmental matters are primarily carried out through national legal frameworks.

For Rio Principle 10 to fulfill its role as a mechanism to enhance decision-making, it should be applied by States at all levels of government and in all branches of administration according to the subject matter of the decision. For a particular decision-making process, application of Principle 10 can take place at one or more levels, including the national level, federal units, or sub-national and local jurisdictions. In a complex case, more than one level of government may have responsibilities and authority in relation to the application of the Principle.

Rio Principle 10 is a key part of a country's transition towards a system of environmental governance that will lead towards sustainability. Justice of the High Court of Brazil Antonio Herman Benjamin, and then-U.S. EPA General Counsel Scott Fulton developed a set of seven core precepts that set a basis for good environmental governance (those related to Principle 10 are set out in **bold**):

1. Environmental laws should be clear, even- handed, implementable and enforceable;
2. **Environmental information should be shared with the public;**
3. **Affected stakeholders should be afforded opportunities to participate in environmental decision-making;**
4. **Environmental decision-makers, both public and private, should be accountable for their decisions;**
5. Roles and lines of authority for environmental protection should be clear, coordinated, and designed to produce efficient and non-duplicative program delivery;
6. **Affected stakeholders should have access to fair and responsive dispute resolution procedures; and**
7. Graft and corruption in environmental program delivery can obstruct environmental protection and mask results and must be actively prevented.[5]

While Rio Principle 10 is a driver for the four precepts in some societies, in others good administrative practice has developed through reform of the general administrative procedure laws.[6] Participation of the

5 Antonio Herman Benjamin and Scott Fulton, "Effective National Environmental Governance – A Key to Sustainable Development," draft paper presented at the First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability," Kuala Lumpur, 12-13 October 2011.

6 In the United States, for example, the Administrative Procedure Act (1946) and the Freedom of Information Act (1966) preceded the adoption of corresponding standards in the field of environmental law, such as the National Environmental Policy Act (1969) and the Emergency Planning and Community Right to Know Act (1986). In other societies, it was the environment that first became the focus of public concern, and that drove the process of adopting legal provisions for information disclosure, public comment, citizen suits, and court review found throughout domestic environmental legislation. This was the case in Europe in particular, with the adoption of the 1985 Directive on Environmental Impact Assessment in the European Union, and the expansion of civic space on environmental issues in Eastern Europe in the last days of the Soviet Union in reaction to the Chernobyl disaster. Sandor Fulop, former Ombudsman for Future Generations of Hungary, has noted that "even the rules about state secrets in Hungary came from [application of Rio Principle 10]." India followed the same approach with the adoption of the 1986 Environment (Protection) Act.

public in regulatory and decision-making has been considered to be a means of facilitating the goals of public authorities – by providing for an adequate exchange of information between authorities and the public, developing community consensus, and enabling a favorable public view towards procedures and outcomes.[7] Measures for implementing Rio Principle 10 may involve the establishment of enforceable rights and procedures in domestic law, designation of responsible authorities, training of public officials, and development of legal cultures of compliance. In this Guide, references to rights and obligations are to those granted by States to persons within their territory and rights granted by States by agreement with other States. Fortunately, there is a wealth of existing examples from national law and practice of means to implement the principle.

According to one recent study,[8] at least half of the nations of the globe have adopted comprehensive legislation aimed at guaranteeing access to environmental information, whether through general, cross-cutting information laws, or through laws dealing specifically with environmental information. One of the most important tools for environmental information – the pollutant release and transfer register (PRTR)[9] - is also spreading globally among States, beginning with the advanced industrialized economies. Tools such as PRTRs demonstrate that regional initiatives can also grow in a bottom-up fashion; there are now integrated or harmonized regional PRTR systems for North America, the European Union and the UNECE region. While environmental impact assessment (EIA) has been adopted in over 120 countries, not all EIA laws incorporate standards for access to information and public participation. The same may be said for strategic environmental assessment (SEA) laws. It is more difficult to measure progress related to access to justice in environmental matters. However, by 2010, 41 countries had established independent environmental tribunals of one form or another.[10]

Regional groupings have called upon national governments to apply Rio Principle 10 as a priority. See discussion on Pan-African Conference on Access to Information and collaborative initiative of the Organization of American States in Section 2.1.3, below.

Rio Principle 10 on the international level

International efforts to establish standards for application of Rio Principle 10 support national authorities in their efforts to promote Rio Principle 10 on the national level. Authorities in Lebanon, for example, have pointed to the importance of international agreements in getting the attention of parliamentarians to consider legislation aimed at access to environmental information and public participation in environmental decision-making.[11]

The precise measures adopted for application of Rio Principle 10 on the national level will vary depending upon the characteristics of each individual country and its legal and policy framework. However, States should take into account international best practices. An overview of milestones in the development of Rio Principle 10 implementation measures is presented in Appendix B ("The Road to the Bali Guidelines").

Binding international agreements, non-binding international instruments, international jurisprudence, and

7 See, e.g., James R. Hanchey, "The Objectives of Public Participation" at 15, in US Army Corps of Engineers, IWR Research Report 82-R1: "Public Involvement Techniques: A Reader of Ten Years Experience at the Institute for Water Resources."

8 Banisar, David, Sejal Parmar, Lalanath de Silva, and Carole Excell, "Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice" (20 October 2012). *Sustainable Development Law & Policy*, Vol. XII, No. 3, Spring 2012. Available at SSRN: http://ssrn.com/abstract=2164685 or http://dx.doi.org/10.2139/ssrn.2164685

9 See discussion under Guideline 4.

10 See Pring and Pring, "21st Century Environmental Dispute Resolution - Is there an ECT in your future?" (2015) (forthcoming, 33 *Journal of Energy & Natural Resources Law*).

11 Middle East and North Africa Regional Workshop on the Implementation of Rio Principle 10 and the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, Amman, Jordan (12-13 May 2014) (notes of author). The representative added that the "fast track of assistance is not fruitful," and the focus of international organizations should be on promoting international standard-setting.

State practice provide a rich background of experience for States to consider in their efforts to effectively implement Rio Principle 10.[12] Paragraph 99 of "The Future We Want," the outcome document from the Rio+20 Conference, specifically brought attention to the regional level as an important focus for action in promoting Rio Principle 10 in recognition of significant activity at that level. The most highly elaborated international legal instrument applying Rio Principle 10 so far is the above-mentioned Aarhus Convention, adopted under the auspices of the United Nations Economic Commission for Europe (see Box 2).

12 Since 1992, the idea of a global treaty on Rio Principle 10 has been on the table at a number of international summits and conferences the concept was most recently proposed by Brazil in the preparation process for the Rio+20 Conference. Similar calls were heard from the European Committee of the Regions, and the Declaration of the 64th Annual UN DPI/NGO Conference.

BOX 2: The Aarhus Convention

National legislation in the UNECE region has been shaped and influenced by the regional platform of the Aarhus Convention. The Aarhus Convention is the first international, legally-binding instrument specifying detailed obligations of Parties aimed at effective implementation of Rio Principle 10. The Convention entered into force on 30 October 2001. As of November 2014 there were 47 Parties to the Convention, including 46 States and the European Union. It is open to accession by any United Nations Member State with the approval of the Parties. The Aarhus Convention also spawned the first international legal instrument on pollutant release and transfer registers (PRTR) the Kyiv Protocol on PRTR (Kyiv, 2003), which had 33 Parties as of November 2014. Through the implementation of the Aarhus Convention over more than a decade, a valuable body of State practice and legal interpretation of the convention has developed. An important mechanism for improving the Convention's implementation on the national level has been the Compliance Committee (CC),[13] which can accept communications from members of the public.[14] All findings reached by the CC through the 2014 MOP were endorsed by the MOP. The CC cases relate to such important issues as reasonable costs (Spain), intellectual property rights in EIA documentation (Romania) and the public functions of private bodies (UK). The Convention Secretariat operates a highly informative website, www.unece.org/env/pp/welcome.html.

UN Secretaries General Kofi Annan and Ban Ki-Moon have both recognized the Convention as "the most ambitious venture in the field of environmental democracy under the auspices of the United Nations" and noted that the Convention, while regional, has global significance as a "possible model for strengthening the application of Principle 10 in other regions of the world."[15] Convention provisions have been used as a model by States outside the UNECE region for provisions of national legislation.[16] UNEP has called it an "advanced articulation" of Principle 10,[17] and the European Court of Human Rights has applied its standards in part as ancillary to the rights contained in the European Convention on Human Rights.[18] There have been numerous cases in the Land and Environment Court of New South Wales that have referred to the Aarhus Convention.[19]

13 Article 15 of the Aarhus Convention on review of compliance, requires the Meeting of the Parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention." At its first session (October 2002), the Meeting of the Parties (MOP) adopted decision I/7 on review of compliance and elected the first Compliance Committee. The Compliance Committee consists of nine members who serve as independent experts in their personal capacity. NGOs can nominate members to be considered for election. Since its establishment, the Committee has reached a number of findings with regard to compliance by individual Parties, which are submitted to the MOP for action. The Compliance Committee also monitors the implementation of its findings and recommendations by the Parties found to be in non-compliance and reports to the MOP on the progress made. The contribution of the compliance mechanism to improving the implementation of the Convention by clarifying the Convention's obligations are well recognized. The International Bar Association's Presidential Task Force on Climate Change Justice and Human Rights recommended the extension of the principles of the Aarhus Convention to other regions of the world, and particularly its Compliance Committee model. See "Achieving Justice and Human Rights in an Era of Climate Disruption" (Report of the International Bar Association Presidential Task Force on Climate Change Justice and Human Rights, July 2014).

14 The compliance mechanism can be triggered by a Party, the Secretariat or a member of the public. As of November 2014, all but one of the 106 cases taken up by the Compliance Committee was initiated by a communication from the public, demonstrating the importance of this mechanism in refining and upholding the regime of the Convention. The other was the subject of both a submission by a Party and a communication from a member of the public. See submission ACCC/S/2004/1 by Romania concerning Ukraine, and communication ACCC/C/2004/3 concerning Ukraine.

15 Stec and Casey-Lefkowitz, "The Aarhus Convention: An Implementation Guide" (1st ed., 2000), *Foreword.* Ebbesson et al., "The Aarhus Convention: An Implementation Guide" (2d. ed., 2014), *Foreword,* page 3.

16 For example, Chile based the definition of "environmental information" in the revised General Environmental Framework Law (2010), Law No. 20.417, on the respective provision of the Aarhus Convention. Jorge Bermudez Soto, "El acceso a la información pública y la justicia ambiental," *Revista de derecho (Valparaíso)* n.34 (2010).

17 UNEP Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (2006), at 109.

18 See *Taskin and others v. Turkey* (10 November 2004).

19 These include *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234 at 256 [151], *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2009) 170 LGERA 22 at 30 [29] and *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (No 3) (2010) 173 LGERA 280 at 288 [32] - 289 [33].

BOX 2: The Aarhus Convention (continued)

Within the UNECE region, the European Union is of particular interest as a regional economic integration organization with competence over many laws and policies related to sustainable development at the Union level. All EU Member States and the European Union itself are parties to the Convention. Several pieces of EU legislation have been adopted or amended in order to implement the Aarhus Convention. A number of the Bali Guidelines are covered by binding EU legislation, which can serve as useful models for applying Rio Principle 10 and the Bali Guidelines in the national context.[20]

20 For example, Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

Also, an initiative for a regional instrument has advanced within the UN Economic Commission for Latin America and the Caribbean (see Box 3).

BOX 3: Regional initiative in Latin America and the Caribbean

At the United Nations Conference on Sustainable Development (Rio+20), held in Rio de Janeiro in June 2012, the **Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development (A/CONF.216/13)** was signed. In this Declaration, signatory countries recognized that despite their efforts and progress, there is a need for agreements to ensure the full exercise of rights of access. Therefore, signatory countries committed, with the support of the Economic Commission for Latin America and the Caribbean (ECLAC) as technical Secretariat, to develop and implement a Plan of Action for 2012-2014, in order to advance the implementation of a regional instrument for the rights of access to information, participation and justice in environmental matters for Latin America and the Caribbean.

Thus far, the Declaration has been signed by 19 countries: Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Plurinational State of Bolivia, St. Vincent and the Grenadines, Trinidad and Tobago and Uruguay.

The process has continued through regular meetings of focal points over the course of 2012, 2013 and 2014. A Road Map, a Plan of Action to 2014 and the common vision for a regional instrument on access rights relating to the environment have been adopted. In the 2013 Lima Vision for a Regional Instrument on Access Rights Relating to the Environment, signatory countries agreed on the following values and principles that will inspire and guide the regional instrument: equality, inclusion, transparency, proactivity, collaboration, progressive realization and non-regression.

At the Fourth Meeting of the Focal Points, held in November 2014 at ECLAC headquarters, signatory countries decided to commence negotiations on the regional instrument on rights of access to information, participation and justice regarding environmental matters. To this end, a negotiation committee was created, consisting of representatives from the signatory countries, with significant participation by the public. The process will be steered by the Presiding Officers, with the support of the Economic Commission for Latin America and the Caribbean as technical Secretariat, with a view to concluding negotiations on the regional instrument by December 2016. The Presiding Officers include Chile and Costa Rica as co-chairs, and Argentina, Mexico, Peru, Saint Vincent and the Grenadines and Trinidad and Tobago.

The regional importance of the Principle 10 implementation was acknowledged in the outcome documents of the First Summit of the Community of Latin American and Caribbean States (CELAC) and the CELAC-EU summit,

BOX 3: Regional initiative in Latin America and the Caribbean

both held in January 2013. The Santiago Declaration adopted at the former summit states that the Community "appreciate initiatives for regional implementation of the 10th Principle of the 1992 Rio Declaration, regarding the rights of access to information, participation and environmental justice, as a significant contribution to the participation of organized community committed to sustainable development." The Declaration also reiterated the right of citizens to participate in the formulation, implementation and monitoring of public policies. The outcome document of the Summit of CELAC and the European Union states: "We acknowledge the importance of implementing Principle 10 of the 1992 Rio Declaration at the Earth Summit, and reiterate the importance of advancing initiatives in this matter."

Source: ECLAC, see also http://www.cepal.org/rio20/principio10/

Regional organizations may develop model laws or other sets of standards that provide a template for national legislation. One example is the Model Inter-American Law on Freedom of Information (see Box 7 under Section 2.1.3, below).

Soft law instruments on Rio Principle 10 have also been developed on the regional level. One example is the Inter-American Strategy for Promotion of Public Participation in Sustainable Development Decision-Making, a policy framework adopted by the Organization of American States in 2001. As mentioned above, in 2011 the Pan African Conference on Access to Information called on the UN Economic Commission for Africa to develop a regional convention on access to environmental information, public participation and access to justice based on Rio Principle 10 and the UNEP Bali Guidelines.

Several international human rights bodies have considered basic rights relevant to access to information and public participation in environmental matters in their decisions. In the case of Claude-Reyes et al. v. Chile,[21] for example, the Inter-American Court of Human Rights affirmed that the freedom of thought and expression protects the right of all individuals to request and receive access to State-held information, and the positive obligation of the State to provide it, with certain permitted exceptions. Such bodies have also found that States are required to implement duties of access to information and other duties related to Rio Principle 10 in order to safeguard other rights from environmental harm. This has sometimes resulted in more extensive protections. For example, the European Court of Human Rights has developed jurisprudence on Article 8 of the European Convention on Human Rights (on the right to privacy, home and personal correspondence) that mirrors the linkage between Rio Principle 10 and the right to a healthy environment, and required more information to be made available than the right to information would otherwise have required.[22]

Together with other mechanisms such as transboundary EIA, the implementation of Rio Principle 10 is a means for States to enhance their application of the principle of prevention. The International Court of Justice in the *Pulp Mills on the River Uruguay case (Argentina v. Uruguay),* in para. 101, stated:

> The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' *(Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its

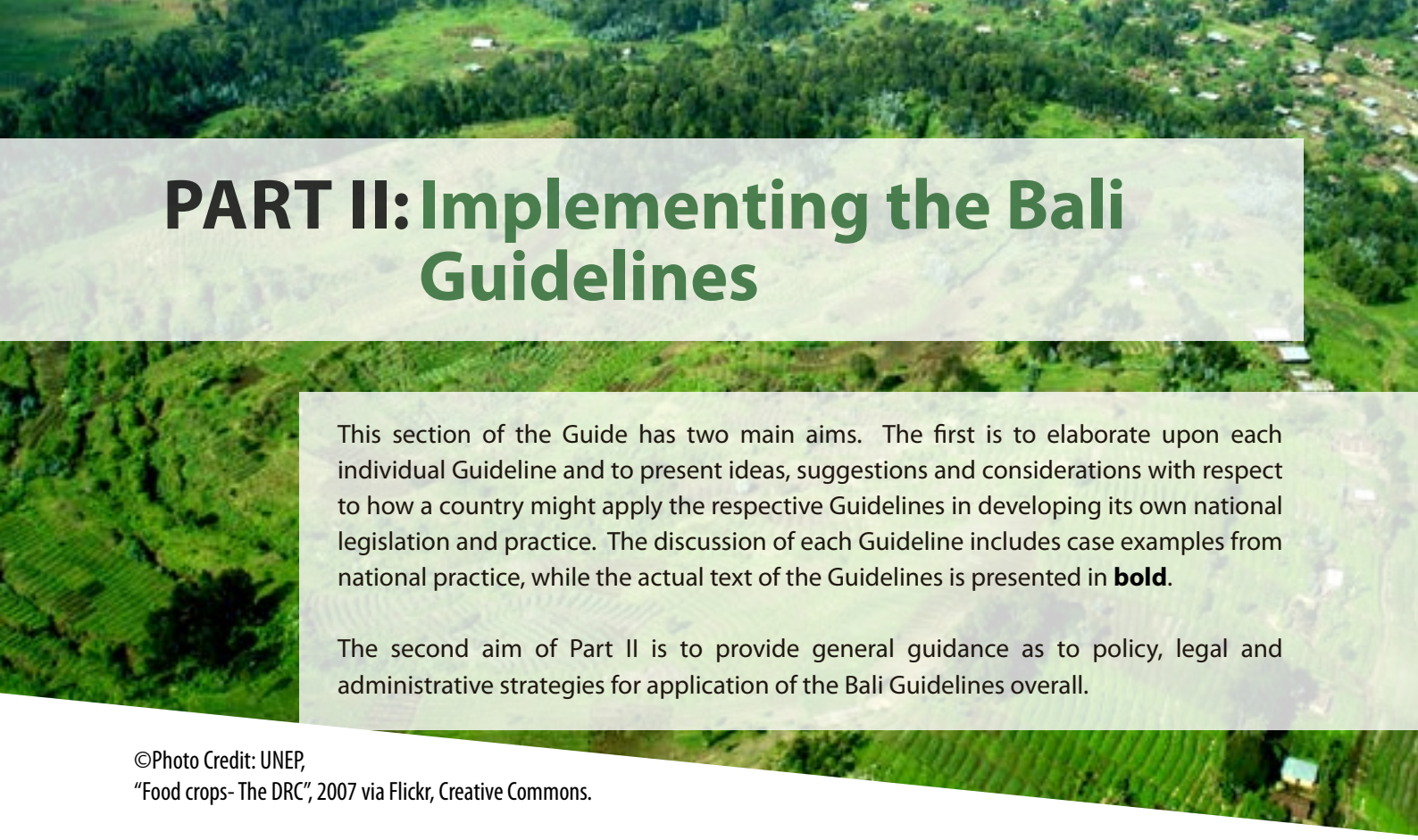
21 *Trillium Case (Claude-Reyes et al. v Chile),* Inter-Am. Ct. H.R. (ser.C) No. 151 (19 September 2006).

22 This jurisprudence has been developed through a line of cases including *Lopez Ostra v. Spain,* 41/1993/436/515 (9 Dec 1994); *Guerra v. Italy,* 116/1996/735/932 (19 February 1998); *Oneryildiz v. Turkey,* 48939/99 (30 November 2004); *Taskin and others v. Turkey,* 46117/99 (10 November 2004); *Fadeyeva v. Russian Federation,* 55723/00 (5 June 2005); *Oluic v. Croatia* 61260/08 (20 May 2010); *Dubetska v. Ukraine,* 30499/03 (10 February 2011).

> disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment' *(Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996).[23]

At the same time, there is no consensus in the international community that human rights obligations specific to the environment have been established in any globally applicable, binding instrument or as a matter of customary international law.

23 See also Judge Weeramantry's concurring opinion in the *Gabcikovo-Nagymaros (Hungary-Slovakia) case* that reached the same conclusion. Weeramantry also indicated that the concept of sustainable development can give rise to additional norms.



PART II: Implementing the Bali Guidelines

This section of the Guide has two main aims. The first is to elaborate upon each individual Guideline and to present ideas, suggestions and considerations with respect to how a country might apply the respective Guidelines in developing its own national legislation and practice. The discussion of each Guideline includes case examples from national practice, while the actual text of the Guidelines is presented in **bold**.

The second aim of Part II is to provide general guidance as to policy, legal and administrative strategies for application of the Bali Guidelines overall.

The Bali Guidelines consist of 26 Guidelines divided into three sections corresponding to the three components or "pillars" of Rio Principle 10, preceded by a brief explanation of the purpose of the Guidelines (the "Purpose Clause"). The three headings are "Access to information" (Guidelines 1-7), "Public participation (Guidelines 8-14), and "Access to justice" (Guidelines 15-26).

While broken into sections, it is important to take into account the interdependence of the Guidelines regardless of which component they relate to. The free flow of relevant information is critical to enabling the public to participate actively and effectively. The outcomes of public participation can build good practice in public administration that in turn promotes greater access to information and a better understanding of the importance of access to justice. Of course, access to justice supports and guarantees access to information, public participation; and a well-functioning system with respect to the latter will minimize the need for recourse to access to justice. For example, early public participation in project screening, scoping and evaluation may reduce the likelihood that projects will be challenged through judicial processes. Access to justice also may apply to remediation for environmental harm.

The provision-by-provision guidance on the Guidelines begins with an overview of each section (purpose clause, access to information, public participation, and access to justice) including a discussion of general considerations and principles for each topic, and general implementation guidance. Then, the Guide provides examples and explanation with respect to each individual Guideline.

1. The Purpose Clause

The Bali Guidelines begin with a "Purpose Clause":

The purpose of these voluntary guidelines is to provide general guidance, if so requested, to States, primarily developing countries, on promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes. In doing so, the guidelines seek to assist such countries in filling possible gaps in their respective legal norms and regulations as relevant and appropriate to facilitate broad access to information, public participation and access to justice in environmental matters.

The guidelines should not be perceived as recommendations to amend national legislation or practice in cases where existing legislation or practice provides for broader access to information, more extensive public participation or wider access to justice in environmental matters than follows from these guidelines.

While not providing direct guidance on the subject matter (that is, Rio Principle 10) the Preamble nevertheless aids in the interpretation of the Guidelines by providing context and background.

In the first place this clause emphasizes that the Guidelines are voluntary. As such they do not purport to establish binding norms but do present existing standards in the field. Moreover, the Guidelines give "general" guidance, consistent with the understanding that specific, detailed guidance can be provided for each individual State taking into account its specific characteristics. Further language on this point is found with the reference to "the framework of … national legislation and processes." Some programs, tools and mechanisms that are available for individualized assistance are discussed in more detail throughout the Guide.

The Purpose Clause emphasizes the genesis of the Guidelines in Rio Principle 10 and reminds States of the political commitment that they have made to the Rio Declaration (see Part I). As such, States should endeavor to fill any existing gaps in their legal and institutional frameworks for implementation of Rio Principle 10, and the Guidelines are a tool for doing just that. The Guidelines should help States to employ a systems approach to implementation of Rio Principle 10.

The last sentence of the first paragraph and the second paragraph of the Purpose Clause indicate that the Guidelines present a "floor" and not a "ceiling," reflecting a minimum standard based on State practice that may be exceeded when appropriate. Countries with existing good practices should not look to the Guidelines as establishing norms on their own, and should uphold their standards and further improve upon them wherever possible. The goal, as stated in the Purpose Clause, is "broad access to information, public participation and access to justice in environmental matters."

BOX 4: China's Great Leap Forward: the 2014 amendments to the Environmental Protection Law

In 2014 the Chinese National People's Congress issued the first comprehensive revision of the Environmental Protection Law since it was originally passed in 1989. China, a highly decentralized country, has taken the approach of establishing a national framework law that is primarily implemented on the level of local authorities. The introductory part of the law includes "integrated governance" and "public participation" as basic environmental protection principles. Chapter 5 of the law, on "Information Disclosure and Public Participation," is significant to the application of Rio Principle 10. For the first time, China has established a national level policy that guarantees the "right" to environmental information, involves the public in decision-making, and establishes consequences for public authorities if they fail to implement the law. Some provisions of the law are discussed below under individual Guidelines.[24]

24 See also Tseming Yang, "The 2014 Revisions of China's Environmental Protection Law" (16 October 2014) Swiss Re Centre for Global Dialogue <http://cgd.swissre.com/global_dialogue/topics/Environmental_liability/The_2014_Revisions_of_Chinas_Environmental_Protection_Law.html>.

2. Access to Environmental Information

2.1 Overview

The first seven Guidelines pertain to the first pillar of Rio Principle: 10 access to information. The following table provides a summary of the main recommendations in each Guideline and the elements for application.

©Photo Credit: Practical Action, "Women gather in Shagra- a region of Wadi El Ku to participate in environmental consultations for farmer field schools", 2014, via Flickr, Creative Commons

Guideline 1

Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to Guideline 3), without having to prove a legal or other interest.

Guideline 2

Environmental information in the public domain should include, among other things, information about environmental quality, environmental impacts on health and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

Guideline 3

States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

Guideline 4

States should ensure that their competent public authorities regularly collect and update relevant environmental information, including information on environmental performance and compliance by operators of activities potentially affecting the environment. To that end, States should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.

Guideline 5

States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment.

Guideline 6

In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public[25] to take measures to prevent such harm is disseminated immediately.

Guideline 7

States should provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information.

Guideline	Subject	Implementation elements
Guideline 1	Access to environmental information held by public authorities	"Any person" principle No interest to be proved Timeliness, affordability and effectiveness
Guideline 2	What environmental information should be in the public domain?	Environmental quality Environmental impacts on health and factors affecting them Information about law and policy Meta-information
Guideline 3	Limited grounds for refusal to provide information	According to law Interpreted narrowly Public interest test
Guideline 4	Public authorities to collect and update various types of environmental information	Information on environmental performance and compliance by operators Mandatory systems that ensure adequate information flow to public authorities about proposed and existing activities which may significantly affect environment
Guideline 5	State of the environment reporting	Reasonable intervals Up to date Includes quality and pressures on environment
Guideline 6	In event of imminent threat to human health or environment, immediate dissemination of all information which could enable the public to prevent or mitigate harm from the threat	Emergency preparedness and response systems Systems for collection and dissemination of information related to potential emergencies
Guideline 7	Provide means for and encourage effective capacity-building	Aimed at public authorities and the public To facilitate effective access to information

2.1.1 Considerations on Guidelines 1-7 (access to environmental information)

The Bali Guidelines deal with access to environmental information in two aspects. First is that members of the public may request information held by public authorities. This request for access only applies to information that is actually held by the authorities – it does not by itself require the public authorities to generate environmental information. However, it is increasingly recognized that the public authorities need to have essential information at their disposal to be able to carry out their responsibilities, whether for environmental protection or for other matters. And it is further recognized that the public needs to have access to this information in a structured, cost-effective, user-friendly way in order to make use of it and to assist public authorities in carrying out their obligations (see Guidelines 4-5, below). Consequently, the

25 **"The public" may be defined as one or more natural or legal persons and their associations, organizations or groups.** [This footnote is in the original Guidelines.]

second aspect of access to environmental information is now considered essential to the good functioning of environmental authorities – that is, the duty of authorities to gather and structure information in publicly-accessible databases and to publicly disseminate information (see Guidelines 5-6below). The mechanism of the pollutant release and transfer register, or PRTR, is one important tool in this regard. Other important mechanisms for active dissemination of information include environmental information systems based upon reporting and monitoring data related to air, water, soil, wastes and chemicals, EIA, SEA and integrated permitting.

While the focus of Rio Principle 10 and the instruments that have been developed to implement it has been on information held by public authorities, many States have developed legislation with provisions aimed at making more accessible environmental information held by the private sector. In the European Union, voluntary mechanisms such as eco-labelling, eco-auditing or corporate social responsibility (CSR) reporting promote access to environmental information held by the private sector. The EU is also working on a methodology to assess the environmental footprint of products. Those mechanisms may be regulated in the legislation but remain voluntary.

It is generally considered good practice today for private entities dealing with environmental information to put mechanisms in place for public information, consultation and awareness. Private entities may even work in cooperation with NGOs that undertake a watchdog function towards polluters.

The Bali Guidelines draw upon the practice that has developed worldwide to define when it is proper to withhold certain information from disclosure. The general rule is that disclosure is the preferred option. When a legitimate, legally recognized interest is at stake, and where that interest can demonstrably be adversely affected, a public authority may be permitted under national law to restrict access to information. Where these requirements are met, legislation implementing Principle 10 could strike a fair balance between granting the public access to information held by public authorities and protection of such legitimate, legally recognized rights and interests. Clear definitions of terms such as "commercial business information" are very important in establishing fair, balanced and enforceable regimes.

Moreover, several legal systems have gone further to define a "public-interest test" in which the value of having information in the public domain can be weighed against any legally protectable interest, such that in many cases even such information would be subject to disclosure.

Another general principle is to separate information that is withheld from disclosure in a way that ensures that the maximum amount of information is made available to the public. This may require careful balancing, in particular to protect the privacy of the individual and other fundamental rights.

2.1.2 Integrated/strategic approach to access to environmental information

Based on practical experience, the first seven Bali Guidelines through their application can help States to consider issues of legal consistency, legislative adequacy, institutional arrangements, and capacities in the practical implementation of Rio Principle 10's environmental information element. In a large number of States the Bali Guidelines will support the implementation of existing constitutional provisions on freedom of information, or the fulfillment of obligations subscribed to under international human rights instruments recognizing these rights.[26] Access to environmental information provisions can also be found in general

26 Regional processes can support cohesion and clarification of norms by bringing developments on the national level in a number of States together. This may result in restatements in jurisprudence providing clear expressions of implementation requirements. The Inter-American Court of Human Rights, interpreting the American Convention on Human Rights in the case of *Claude-Reyes v. Chile,* stated: '[T]he right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds." In the same way as the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information. ... Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obli-

access to information laws, specific environmental information laws or general environmental laws.[27]

States should take a strategic approach to access to environmental information, integrating the principle in their operations at all levels of government. See discussion at Part II, Section 1 above. In order to ensure access to environmental information, the public administration needs to follow specific procedures. Therefore, constitutional or framework legal provisions alone are not enough. They should be backed up with procedures that members of the public can make use of. For example, public administration laws should establish administrative structures and procedures for public authorities to follow upon receiving a request for information. Such procedures should also include protections for information that may not be made publicly available. (See Box 5).

BOX 5: Nepal's Right to Information Act

Nepal's Right to Information Act adopted in 2007 was adopted to give effect to the constitutional guarantee of the right to information under Article 27 of the Constitution. It seeks to provide Nepali citizens with the right to access information held by any public agency and obliges those agencies to proactively update and publish any information related to their function (S. 5). The Act enumerates these types of information, which include decision-making processes, expenditures, and appeals information, among several others. The Act also clearly defines the grounds on which information can be refused (S. 3.3). The Act requires maximum disclosure in case certain information is exempt from disclosure (S. 3.4)

The Act resulted in the creation of the independent National Information Commission in 2008. While the Act does not implement all of the Bali Guidelines, in that it provides access only to Nepalese citizens, it provides strong legal protections for those that it does protect, including:

- Timeliness: If agencies cannot provide the information immediately, they are required to within 15 days of the application.
- Applicants may be charged a fee, but it cannot exceed the amount incurred for providing the information. If the fee is deemed to be more than the cost, the requester can appeal to the Information Commission.
- There is an appeals procedure and a compensation mechanism.

Link: http://www.ccrinepal.org/legal-provision/rti-act-2007

The more environmental information there is in the public sphere, the less need there is for specific information requests. Thus, a proactive environmental information policy that regularly compiles and disseminates information in a user friendly way may reduce administrative burdens and make it easier for public authorities to carry out their responsibilities. Making information available electronically can vastly increase capacities to disseminate information. Countries such as Estonia have adopted a "principle of electronic government" that can greatly increase efficiency.[28] Building a culture of open access to environmental information takes time, however, not just on the part of administrative cultures, but also in terms of public awareness. Authorities in Lebanon, for example, are sensitive to the fact that the public may be skeptical at first about the quality of information that it gets from public authorities, and building trust may take time.[29]

gation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.' *Claude-Reyes et al. v. Chile,* paras. 76-77 (footnotes omitted).

27 See Box 36 under Guideline 7, below, re ratings organizations. See also UN Doc. A/HRC/25/53 (30 December 2013).

28 Riina Randver (editor) (2006). "Information Technology in Public Administration of Estonia. Yearbook 2005". Tallinn: Ministry of Economic Affairs and Communications.

29 Middle East and North Africa Regional Workshop on the Implementation of Rio Principle 10 and the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, Amman, Jordan (12-13 May 2014), presentation of Lebanon (notes of author).

Responsibilities with respect to environmental information need to be clear and unambiguous. Typically, all public authorities need to have some awareness and training about information requests, even if this involves merely referring members of the public to other responsible authorities. However, public authorities that possess environmentally relevant information generally have specific designated authorities that are responsible for dealing with the public.

2.1.3 Legislative mechanisms

BOX 6: Chile's Environmental Evaluation Service (SEA).

This innovative semi-autonomous public service housed in the federal government provides to the public full online access to requests, approvals, rejections, observations and other communications that are a part of any environmental impact study and permitting procedure. Through the SEA, stakeholders concerned over potential environmental threats from industrial projects can monitor the government's interactions with private and public actors in an environmental licensing procedure. Interested parties can search the administrative database to access all of the related documentation on public file and review the licensing process simply by entering a project or company name.

For more information see: http://www.sea.gob.cl

In some regions of the world the path towards freedom of information has arisen through general legislation or administrative tradition providing that all information, with certain limitations, held by public authorities is accessible to the public. The Freedom of Information Act of the United States is one example, and FOI-type laws are now common throughout the world. The NGO Article 19 maintains an online mapping project to show countries with national laws and regulations on the right to information.[30] As of January 2015, Article 19's mapping project showed that such laws and regulations are widespread, with particular gaps, however, in Africa and the Middle East.

States can find support for development of law and policy through regional platforms for cooperation. In Africa, for example, the Pan-African Conference on Access to Information, a technical body of the African Union, included the following in the African Platform for Access to Information (September 2011):

Environmental Information: Governments and inter-governmental organisations should increase their efforts in implementing Principle 10 of the 1992 Rio Declaration on the Environment and Development on the right of access to information, public participation and access to justice on environmental issues. Governments should adopt appropriate legislation and regulations to promote access and proactive release of environmental information, guarantee openness, fight secrecy in institutional practices, and repeal that which hinders public availability of environmental information. Governments´ capacity to supply environmental information and civil society organisations´ demand for such information, as well as engagement in decision-making processes and the ability to hold governments and other actors accountable for actions affecting the environment should be strengthened.[31]

In the context of the Organization of American States (OAS), a massive collaborative effort was undertaken ending in 2008 with the aim of establishing regional standards for access to information, without specific reference to environmental information. One of the outcomes of this effort was a set of recommendations on access to information issued by the Committee on Juridical and Political Affairs of the OAS Permanent

30 See http://www.article19.org/maps/.
31 See https://bch.cbd.int/protocol/outreach/apai-declaration.pdf (accessed 5 November 2014).

Council.[32]

To assist countries in developing their legal frameworks for freedom of information, regional associations of States have sometimes developed model acts. One such example is the Model Inter-American Law on Access to Public Information (see Box 7). The African Union has adopted a similar model law.[33]

Other regions of the world have approached access to information from the perspective of environmental

BOX 7: Model Inter-American Law on Access to Public Information (2010)

In the 2004 Declaration of Nuevo Leon, the Heads of State of the Americas declared that "access to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation and promotes effective respect for human rights." The Heads of State then affirmed their commitment "to provid[e] the legal and regulatory framework required to guarantee th[is] right."

Accordingly, OAS Member States, via General Assembly resolution AG/RES. 2514 (XXXIX-O/09), requested the preparation of a Model Inter-American Law on Access to Information to provide States with the legal foundation necessary to guarantee the right to access to information, as well as an Implementation Guide for the Model Law to provide the roadmap necessary to ensure the law functions in practice.

The Model Law was drafted under the auspices of the Department of International Law and was approved by the General Assembly in 2010. It consists of 74 articles covering: definitions, scope and right of access; measures to promote openness; accessing information held by public authorities; exceptions; appeals; the establishment of an information commission; promotional and compliance measures; and transitory measuresand is accompanied by a commentary and implementation guide available on the website of the OAS.

Source: www.oas.org

information, due to a high level of social awareness and concern about the environment. This was the case, for example, in the European Union where a directive on access to environmental information was first adopted in 1990. Among EU Member States, in fact, both approaches can be found. Finland, the Netherlands and Sweden are among the countries with general access to information laws that make the question of whether information is "environmental" or not unnecessary. The UK has a general freedom of information law and environmental information regulations. Denmark and Argentina have both a general information law and a specific law on environmental information. Where both kinds of laws exist, attention should be paid to consistency. Some countries with general, information laws have analysed them to see whether they meet the requirements of Rio Principle 10.

Where a particular country or countries adopt frameworks for both general freedom of information and access to environmental information, care has to be taken to ensure that the regimes work together and there are no inconsistencies. In the European Union, a difference in the regulations in these two spheres resulted in potentially confusing differences in the treatment of information requests depending on whether the general transparency rules or the access to environmental information rules were being applied.[34]

32 OEA/Ser.G, CP/CAJP-2599/08 (21 April 2008).
33 See Model Law on Access to Information for Africa, http://www.achpr.org/files/news/2013/04/d84/model_law.pdf
34 In Case T-264/04, *WWF-EPO v. Council of the European Union*, the European Court of First Instance ruled that the "concept of document must be distinguished from that of information". Thus, under the Access to Documents Regulation (1049/2001), the Community institutions were only obliged to disclose information held in the form of a formal document, as opposed to "... any information in written, visual, aural or electronic or any other material form" as defined in Article 2, paragraph 3, of the Aarhus Convention (and Article 2, paragraph 1 (d), of the Aarhus Regulation). At the time the case was brought, the Aarhus Regulation had not yet been promulgated and today this unduly narrow interpretation of document/information would no longer apply. Adapted from "The Aarhus Convention: An Implementation Guide" (2d. ed.), p. 51.

Consistency should also be sought between general access to information rules and sector-specific information regimes. In the EU, aside from the EU Aarhus Regulation and the Transparency Regulation, sector-specific rules have been established under crop protection and chemicals legislation. The latter establish a presumption of confidentiality for certain categories of data provided by companies. The purpose of confidentiality protection is to enable operators to submit data that allows specific substances or products to be assessed for their risks to public health and the environment to public authorities with the assurance that the data will not be disclosed to competitors. Public requests requiring the disclosure of such information would be considered on a case-by-case basis.

What is environmental information? Legislation should include clear definitions in order to increase legal certainty, avoid ambiguity and arbitrariness, and facilitate access to information. Several terms used in the Guidelines have been defined in international legal instruments or in national legislation, helping to establish standards for good practices. Terms such as "environmental information" and "public authorities" are discussed where relevant under the discussion of the Guidelines below. For example, "environmental information" is discussed under Guideline 2, which concerns the types of information that should be made available to the public.

2.2 Guía para la implementación de cada directriz

2.2.1 Guideline 1

Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to Guideline 3), without having to prove a legal or other interest.

Discussion

Guideline 1 contains the general goal for public authorities to provide environmental information in response to a request. National legislation may limit access to information in accordance with any optional exceptions adopted as indicated in Guideline 3 (see the discussion of Guideline 3).

Guideline 1 applies the "any person" principle, using a formulation that is found in many international agreements and is indicative of the nature of the right as a fundamental right. A natural person is a human being, while "legal person" refers to an administratively, legislatively or judicially established entity, such as a partnership, corporation or foundation, with the capacity to enter into contracts on its own behalf, to sue and be sued, and to make decisions through agents. Legal personality is defined under national law. Groups of natural persons can often form informal grassroots organizations and such informal groups may also be recognized as having the status of persons in their own right.

Note that the Guideline does not distinguish between citizens and non-citizens, or residents and non-residents. Access to information is for everyone, regardless of citizenship or residency. Some States, moreover, take measures to protect the identity of information requesters by allowing for anonymous or pseudo-anonymous information requests.

This principle is underlined by the statement that the requester should not have to prove a legal or other interest. Thus, public authorities should not impose any condition for supplying information that requires the applicant to state the reason he or she wants the information or how he or she intends to use it. Requests should not be rejected because the applicant does not have an interest in the information.

The term "public authorities" should be broadly defined. States should carefully define the term "public authorities" to include not just agencies, ministries, institutions, departments and other bodies of government at any level (national, regional, local), but also certain other bodies or persons. In general, the definition could extend to any natural or legal person with public responsibilities or functions or providing public services. Such a definition would ensure that privatization, outsourcing or other such changes would not result in a lessening of responsibility and accountability towards the public.

Guideline 1 applies to environmental information "held by public authorities," which may include information produced by authorities as well as information obtained from third parties. Where a particular legal system includes rules for exceptions to disclosure of information based upon legitimate, legally recognized interests, it is good practice for authorities to develop systems for consultation with third parties supplying information in order to assess whether any such exception is potentially applicable.[35] See also Guideline 3.

The public's access to information should be "affordable, effective and timely." Many countries have a general rule of public administration that publicly held environmental information may be inspected or viewed without charge at certain places and times. With careful consideration to maintain affordability, public authorities may charge for the material costs related to the fulfillment of information requests.

However, certain considerations should be taken into account in assessing any costs. First, as specified in the Guideline, they should be "affordable." "Affordability" should be measured relative to average personal or family incomes in a community. In cases where costs are assessed, the levies should be set in a way that does not discourage access. This may mean, as for example the European Court of Justice has determined in a case against Germany,[36] that it is not reasonable to expect the public to compensate the authorities for all the costs, particularly indirect ones, incurred to the State budget. Second, in many jurisdictions it is also established that only the material costs of copying documentation may be charged, and not administrative time or other costs. Reviewing bodies may compare levies with market costs. Such was the case in a communication against Spain to the Aarhus Convention Compliance Committee, which determined that the charges for copying levied by a municipality were excessive in comparison with local commercial copying charges.[37] Thirdly, there should be transparency with respect to any charges levied, through the publication of cost schedules. Finally, so as to ensure that access to information can be enjoyed by everyone regardless of financial circumstances, the law should include provisions for waiver of costs based on inability to pay.

Environmental information requests may have a special, less-costly regime because of the special interest in encouraging public involvement in the solution of environmental problems. Ireland is the only country in Europe to charge a fee for information requests under its Freedom of Information Act, but if the information request involves environmental information, there is no charge in accordance with special regulations adopted in consequence of the European Union Directive on access to information on environmental matters.[38]

It should be noted that increasingly, public authorities are finding it practical to place environmental information on the Internet. The proactive dissemination of information is often required by the public authority's duties, and moreover the posting of information in this way reduces the administrative resources dedicated to responding to information requests, as well as the costs of the public in gaining access to the information. Political statements on the importance of new technologies and communications, such as the Joint Declaration on Freedom of Expression and the Internet made by UN, OAS, OSCE, and ACHPR in

35 See, e.g., EU Regulation on Access to Documents (Reg. 1049/2001).
36 Case C-217/97.
37 *Spain ACCC/2008/24,* ECE/MP.PP/C.1/2009/8/Add.1, 30 September 2010.
38 See http://www.environ.ie/en/Aboutus/AccesstoinformationontheEnvironment/ (accessed 10 November 2014).

2011, recognize that access to the Internet is an important means to secure access to information. In many communities, however, particularly rural ones, Internet access is still relatively difficult and expensive, so publicly accessible information points (through public libraries or local government offices, for example) should also be established.

One of the elements of whether access to information is "effective" involves the form of the information. Environmental information may be in any material form and could include both raw data and processed information. See also Guideline 2. The requestor of the information may specify the form in which he or she would like to receive it. In some communities, members of the public may not have access to computers and require paper copies of documents. In other cases, receiving an electronic version of the information requested may be cost-saving. It can also facilitate processing of information and comprehension of long and complex documents through the use of search and other functions. Many countries are now releasing information in "open data" format to facilitate use. In some cases it may be reasonable for the authority to make the information available in another form, particularly if it is already publicly available in another form.

Nigeria has expressly recognized and addressed the situation where a significant proportion of the population may need to request information orally, by including in its Freedom of Information Act the option for a member of the public to make an "oral application for information," which is then reduced to writing by the public authority and a copy thereof furnished to the applicant, and also allows applicants to request information through third parties.[39]

Generally the public authority should upon request provide copies of the actual documents containing the information, rather than summaries or excerpts prepared by them. The requirement that copies of actual documents should be provided ensures that members of the public are able to see the specific information requested in full, in the original language and in context.

Whether access to information is timely depends both on administrative practice and on the deadlines for response contained in the implementing legislation, which should take into account the nature of the case. Many public bodies have a general practice that they will respond to information requests "as soon as possible," regardless of any deadlines contained in the law. This may mean in a specific case that the information is provided within a few days. At the same time, the applicable law will provide a time limit within which the public authority is legally obliged to respond to the information request. While this limit may vary from jurisdiction to jurisdiction, a 15- to 30-day time period for responding to a request is common practice. If this proves insufficient, the law may provide for an additional period, provided that the reasons for the extension are given and that the extension is justified according to legal standards.

Some jurisdictions mandate a shorter time limit for communicating refusals to provide information. This is because the determination of grounds for refusal can be made relatively quickly, and also because a shorter time limit may lead to quicker appeals. Because of the possibility of appeal, a refusal to provide information generally must be in writing, stating the grounds therefor. In Belgium, for example, not only must the reason for every partial or complete refusal be given in writing, but the authority must also specify the options open for appeal. In France, the authority must specify the provisions of law on which the refusal is based.

Sometimes a member of the public may submit an information request to a public authority that does not hold the information in question. The public authority should in that case promptly forward the request to the responsible public authority. In any case, time limits should be counted from the submission of the

39 Nigeria FOI Act, Sections 3.3 and 3.4.

initial request, and there should be a specific time limit for transferring a request. In Jamaica, for example, the time limit for responding to a request for information under its Access to Information Act is 30 days while the time limit for transferring a request is 14 days after receipt of the request.[40] The time limits for response to information requests should be taken into account in other legislation where a request for information can be reasonably expected to take place. For example, in EIA or other decision-making processes involving environmental information, the setting of public hearings should allow a sufficient time for the public concerned to obtain relevant information from public authorities.

40 Jamaica Access to Information Act 2002, S. 7(4)(a); 8(2)

BOX 8: Liberia's Freedom of Information Act

In 2010, Liberia became the first country in West Africa to enact a comprehensive right to information act when it passed its Freedom of Information Act. As of 2014, Liberia's FOIA was ranked the 4th best by the Centre for Law and Democracy's Global Right to Information Rating Index. The law includes the following relevant provisions for Guideline 1:

- Protects the right of access to information for natural and legal citizens: *"Every person, irrespective of their nationality or residence, may request, receive, reproduce and retain any information held by (1) a public authority or (2) private entity that receives public funds or engages in public functions or provision of public service; provided that in respect of private entities, the information shall relate to the public funds, benefit, functions or service."*[41] *"'Person' means any individual, partnership, corporation, joint venture, trust, estate, unincorporated entity, government or any juridical entity."*[42]
- Keeping with good practice, the Liberian FOIA expands the right of access to cover private entities as well as individuals acting on behalf of public ministries, agencies or institutions.[43]
- The law promotes effective access by not placing onerous requirements on the requester. No justification is required for the request, procedures are clear, and no identifying information of the requester is required.[44]
- The law allows for 30 days to respond to the request, with an extension of 30 days if reasonable cause is provided.[45]

See http://www.liberianembassyus.org/uploads/documents/Liberia%20Freedom%20of%20Information%20Act%202010x.pdf

41 Liberia Freedom of Information Act, 2010; S.3(2); http://www.liberianembassyus.org/uploads/documents/Liberia%20Freedom%20of%20Information%20Act%202010x.pdf
42 Liberia Freedom of Information Act, 2010; S.1(3.4);
43 Liberia Freedom of Information Act, 2010; S.1(3.6–3.7).
44 Liberia Freedom of Information Act, 2010; S.3(3–5).
45 Liberia Freedom of Information Act, 2010; S.3(9).

A comprehensive system taking into account many of the considerations above can be found in Brazil (see Box 9).

Guideline 1's language is consistent with the recognition of a general principle that all individuals have a right to request and be granted access to information held by public authorities (with certain restrictions). At its 102nd session in July 2011, the United Nations Human Rights Committee adopted General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights, stating: "Article 19, paragraph 2 embraces a general right of access to information held by public bodies." Similar decisions have been reached in the context of the Inter-American Court of Human Rights interpreting the American Convention on Human Rights *(Claude Reyes v. Chile)*, and the European Court of Human Rights interpreting the European Convention on Human Rights *(Társaság a Szabadságjogokért v. Hungary)*.

BOX 9: Access to information in Brazil and the use of information technology tools

Brazil's access to information law (LAI in Portuguese), Law n. 12.527, entered into force on 16 May 2012. Implementation of the law was greatly facilitated by the development of an online system to process requests for information. The system, called e-sic (the electronic version of the "system of information to citizens" that needs to be established by every branch of government at every level), was developed by the Office of the Comptroller General of Brazil.

The e-sic allows every citizen or legal person to request information from federal ministries and agencies. Using the system, the requesting party can make a request, monitor its treatment by the responsible agency, receive a response by email (including accompanying documents), appeal whenever a request is denied or the response is deemed insufficient, present complaints or provide any feedback, as well as consult about any information regarding his/her request.

The system was designed to facilitate the exercise by any citizen of his/her constitutional right of access to public information. It has also helped the government monitor information requests in the federal executive branch and generate important statistics and data about the implementation of the LAI and its use by citizens.

The Office of the Comptroller General, through the e-sic, is able to monitor whether federal agencies respond to requests within the timeframe and deadlines provided by the law, as well as the quality of responses.

The e-sic can be used for any information request, regardless of the underlying subject of the information request or to which agency it is addressed. As such, it is being used to access public information from the Ministry of Environment and its related agencies, like the Brazilian Institute for the Environment and Natural Renewable Resources – IBAMA[46].

Access to the e-sic is free of charge. The only requirement is that the requester registers in the system and creates an account. By law, the government has twenty days, renewable for another ten days, according to the complexity of the information being sought, to respond to a request. Due to the use of the e-sic, the average amount of time used to respond to requests has been eleven days.

Furthermore, statistics on information requests and appeals, and data on profile of people who have submitted requests are available on the e-sic website and can be downloaded by citizens, including in machine-readable open data formats.

The e-sic can be accessed at http://www.acessoainformacao.gov.br/sistema/.

46 IBAMA is the agency in charge of issuing environment licenses.

Multilateral environmental agreements (MEAs), such as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Stockholm Convention on Persistent Organic Pollutants, and the Minimata Convention on Mercury consistently contain provisions on access to information. Certain agreements that recognize free, prior and informed consent of local communities also are concerned with access to information, such as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity in the transboundary movement, transit, handling and use of all living organisms.

Application of Rio Principle 10 can help countries in establishing a culture of "open government." Several countries have undertaken activities and made commitments related to Rio Principle 10 in the context of the Open Government Partnership (see Box 10).

BOX 10: The Open Government Partnership (OGP)

OGP was launched in 2011 to provide an international platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens. Since then, OGP has grown from 8 countries to 65 participating countries (as of January 2015), where governments and civil society are working together to develop and implement ambitious open government reforms, including the introduction of open government data management systems. The OGP holds summits to take stock and mark progress. OGP country reports of commitments and/or shadow reports or statements from the OGP countries at annual or regional meetings provide insights into the perceived benefits of OGP membership. In its 2013 summit, notice was taken of 1,115 separate commitments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. The list of commitments can be found in a database maintained on the OGP website (see http://www.opengovpartnership.org/independent-reporting-mechanism). The 29 environmental commitments span environmental democracy, environmental and natural resource management, extractive industries, and corporate sustainability. For example, Chile and Costa Rica include their leadership of the Latin American and Caribbean regional initiative on Rio Principle 10 as a commitment under the OGP (see Box 3 in Part 1, Section 3). Indonesia has committed to develop the "One Map Portal" to promote efficiency in forestry management. This initiative will digitize data and information related to primary and secondary forests on a single portal base map for the use of all sectoral ministries dealing with land tenure, land concessions, and land-use licensing, streamlining licensing of all concession types in Indonesia (logging, palm oil, mining etc.) and setting the basis for "central-regional collaboration to build trust and a foundation towards better natural resources governance and bureaucratic reform" (according to the Independent Reporting Mechanism (IRM) report). Finally, Ghana has made commitments to strengthen its legislative framework to manage oil revenues and to guarantee the independence of the committee that will monitor the use of such revenues.

Source: Report of the OGP Openness in Natural Resource Working Group, "Natural Resource Commitments: OGP Countries" (Draft, November 2014).

2.2.2 Guideline 2

Environmental information in the public domain should include, among other things, information about environmental quality, environmental impacts on health and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

Discussion

Guideline 2 covers two main points. First, in summary fashion it makes reference to several of the kinds of information that are often considered to be "environmental information," while clearly indicating this is a non-exhaustive list. Second, the Guideline highlights the need for public authorities to hold and to actively disseminate certain environmental information in the public interest. In developing a legal framework to implement Rio Principle 10, clear definitions are needed. Most national legislation elaborating access to environmental information provisions under Rio Principle 10 includes a detailed definition of "environmental information." UN ECLAC has surveyed the legislation of States in the Latin America and Caribbean region and has extracted the common elements of the definition in this region (see Box 11). On the international level, the Aarhus Convention uses a definition of environmental information that is currently applicable in at least 46 countries and the European Union (see Box 12).

From these examples one method of defining "environmental information" is to break down the definition into categories and within each category to provide an illustrative list. The lists should be non-exhaustive. The benefit of this approach is the crafting of a definition that is as broad in scope as possible, a fact that should be specifically mentioned at the time of its adoption so that it can be taken into account in its interpretation.

BOX 11: Common elements of definitions of environmental information contained in legislation on the environment in Latin America and the Caribbean

The legal definitions of environmental information in the region vary from one country to the next. However, there are certain basic elements common to the countries that have this type of legal provision. On the whole, environmental information is defined as encompassing all information relating to the environment irrespective of the format or medium in which it is produced or found.

Furthermore, in most legislative systems, environmental information is recognized as such particularly if it deals with:

- The state of the environment and/or one or other of its physical, cultural or social elements.
- The interaction of the society with the environment, including activities, projects and circumstances that can have an impact on the society or the environment.
- Plans, policies, programmes or actions relating to management of the environment.

To give a good practice example from the LAC region, Chile has defined environmental information as follows [Chile Basic Act on the Environment No. 20.417 from 2010 (unofficial translation)]:

"'Environmental information' means any information in written, visual, aural, electronic or any other registered form held by the Public Administration on:

(a) The state of elements of the environment, such as air and atmosphere, water, land, landscape, protected areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.

(b) Factors, such as substances, energy, noise, radiation and residues, including radioactive waste, emissions, spills and other releases to the environment, affecting or likely to affect the elements of the environment within the scope of the number indicated above.

(c) Administrative measures on environmental matters or which affect or may affect the elements and factors indicated in letters (a) and (b), and their supporting measures, policies, norms, plans and programmes.

(d) Reports on compliance of the environmental legislation.

(e) Economic and social analyses as well as other studies used in environmental decision-making in relation to administrative measures and its foundations, indicated in letter (c).

(f) The state of human health and safety, conditions of human life and cultural heritage sites inasmuch as they are or may be affected by the state of the elements of the environment indicated under letter (a) or by any other factor or measure indicated under letters (b) or (c).

(g) Any other information related to the environment or the elements, components or concepts defined in Article 2 of the law."

Source: Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2. October.

It should also be noted that environmental information can consist of both processed information and raw data and that both kinds of information should be encompassed within any definition.

The second focus of Guideline 2 is the need for public authorities to actively disseminate information to the public. National legislation implementing the information pillar of Rio Principle 10 typically involves both the right of the public to receive information upon request and the obligation of authorities to

BOX 12: Definition of "environmental information" in the Aarhus Convention (Art. 2, para. 3)

"Environmental information" means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

gather, organize and disseminate information so that the public is informed about environmental matters. Guideline 2 specifies some of the kinds of information that should be put into the public domain.

The term "environmental quality" may be considered to include the state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements. The Access Initiative (TAI) stated in its comments to the Guidelines that an indicative list of elements of "environmental quality" may also include:

- Air and water quality information
- Pollution from toxics and hazardous substances
- Licenses and permits including planning decisions
- Protected areas and biodiversity information
- Enforcement and compliance data sets
- Environmental impact assessments[47]

Guideline 2 also refers to "environmental impacts on health and factors that influence them." Based on State practice, factors that influence environmental impacts on health may include substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, and cost-benefit and other economic analyses and assumptions used in environmental decision-making. This section of the Guideline could also cover risk factors such as the presence, handling and storage of toxic and hazardous substances.

The Guideline brings special attention to some of these factors, that is, legislation and policy, as information about legislation and policy is often considered as a special category because of the role of legislation and policy in defining rights and procedures and facilitating access to information. Various initiatives, such as the ECOLEX database of UNEP, FAO and IUCN, www.ecolex.org, have attempted to collect environmental legislation from around the world and make it publicly available in electronic form.

47 Commentaries to the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters: A compilation of comments from Governments and Non-Governmental Organizations to enhance the quality of the guidelines (comments of The Access Initiative World Resources Institute) (available from UNEP).

Finally, the Guideline introduces the concept of "meta-information" when it refers to "advice about how to obtain information." Meta-information is information about how to acquire and use information and is a foundation of environmental education and capacity-building. It is linked to the public participation pillar because effective use of the tools of public participation requires the public to have knowledge not only of the information that will be relevant to a particular decision-making process, but also of information about their opportunities to participate in the decision-making process. States recognize the importance not only of the public knowing of their opportunities to participate but also how to effectively use those opportunities. This implies that the public should have a real practical understanding of the public participation procedures open to them, including various methods in which they may use them effectively and the nature of the results that might be expected from their participation. See also the discussions under Guidelines 8, 9, 10 and 14.

Authorities should proactively facilitate the use of environmental information through the meta-information mentioned above as well as other capacity-building measures, and should work to eliminate barriers and obstacles to access to environmental information.

The information provided by public authorities should be reliable, accurate and up-to-date. Moreover, it should be available for the public in different forms including electronic systems, websites, community meetings and other traditional forms, broadcast media including television and radio, and social media. Information should also be targeted to audiences with varying levels of technical acumen and should include non-technical versions where appropriate. In cases of countries with multiple languages and/or native tongues, international best practice recognizes that environmental information should be available in all languages.

As standards and methods develop, one of the most important tools for dissemination of environmental information has been the Pollutant Release and Transfer Register (PRTR), the international standard for pollution registers and inventories. This mechanism is discussed further under Guideline 4.

The types of environmental information systems discussed above are important mechanisms for meeting this Guideline. Lesotho provides an example of national legislation from Africa that outlines responsibilities in this area (see Box 13).

BOX 13: Lesotho Environment Act of 2008

> The Act requires the Director of the Department of Environment "to collect, analyse and disseminate environmental information" including to, inter alia: "gather information on environmental and natural resources", "analyse information related to the environment and natural resources", "disseminate information to public and private users", "exchange information with NGOs, regional or international organizations", "coordinate with other ministries", and "establish guidelines and principles for gathering, processing and disseminating environmental info".
>
> *Source:* http://www.environment.gov.ls/legislation/read_document.php?srchDocID=DOC5c6de5

The public needs to be aware of environmental conditions for reasons of public safety where potentially high levels of pollution are present. China, for example, has been affected by severe air pollution in recent years. In 2008 China took a great leap forward with the adoption of new measures on open environmental information and real time online pollution disclosure (see Box 14).

BOX 14: China's Measures on Open Environmental Information (2008) and real time online pollution disclosure

Today, millions of Chinese consult mobile devices daily to check on local levels of a range of pollutants and air quality measurements, via the aqicn.org website. This phenomenon is a result of a 2008 regulation and will be reinforced by the entry into force of China's new Environmental Protection Law in 2015 (see Box 4 under Part 2, Section 1).

In 2008, the Chinese Ministry of Environmental Protection (MEP) began implementing "Measures on Open Environmental Information", requiring governments to disclose (among others):

- Environmental laws, regulations, and standards
- Allocation of emission quotas and permits
- Environmental emergency plans
- Environmental quality statistics
- Information related to pollution penalties and fees
- Information on companies that are violating standards or are culpable for major pollution accidents

These measures were the first of their kind in China.[48] The Pollution Information and Transparency Index (PITI), a joint effort between the Natural Resources Defense Council (NRDC) and the Institute of Public and Environmental Affairs (IPE), has tracked the level of pollution source disclosure from 113 Chinese cities since the measures went into effect. While the average score has increased each year since 2009, the rate of progress has slowed and reached a "bottleneck", according to the report, with key gaps around enterprise emission data, EIA documentation, and routine supervision records.[49]

Meanwhile, in 2013, smog levels in several major Chinese cities reached crisis levels, In December 2013, more than 80% of cities with official air monitoring devices failed to reach national air quality standards.[50] China is the world's largest coal consumer and many industrial factories were failing to meet pollution standards. During the same period, the provinces of Shandong, Zhejiang, and Hebei started publishing real time pollution monitoring data from key sources. Then in January 2014, a new MEP regulation went into effect requiring all provinces to publish real-time pollution monitoring data from major emitters. This will cover 15,000 factories and 179 cities—a remarkable achievement in a short period of time, if implementation continues.[51]

There is reason for optimism, as this coincides with other recent measures, such as the "Atmospheric Pollution Prevention Plan" that the State Council released in September 2013 and a February 2014 announcement that will award $1.65 billion to cities and regions that make significant progress on pollution reduction. The focus is on particulate matter (PM) 10 and 2.5.[52]

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48 US Environmental Protection Agency, "Measures on Open Environmental Information" (Unofficial English translation), 2008. *www.epa.gov/ogc/china/open_environmental.pdf*

49 Institute for Public and Environmental Affairs and Natural Resources Defense Council, "Bottlenecks and Breakthroughs"; 2012; http://www.ipe.org.cn/Upload/Report-PITI-2012-EN.pdf

50 Edward Wong, "China to reward cities and regions making progress on air pollution," *New York Times*; 13 February 2014. http://www.nytimes.com/2014/02/14/world/asia/china-to-reward-localities-for-improving-air-quality.html?_r=0

51 Institute for Public and Environmental Affairs, "Blue Sky Roadmap Report II: Real Time Disclosure Begins" (Press Release), 14 January 2014. http://www.ipe.org.cn/Upload/file/IPE%E5%85%AC%E5%91%8A/%E8%93%9D%E5%A4%A9%E8%B7%AF%E7%BA%BF%E5%9B%BEII/Blue-Sky-Report-II-Press-Release-EN.pdf

52 Edward Wong, "China to reward cities and regions making progress on air pollution," *New York Times*; 13 February 2014. http://www.nytimes.com/2014/02/14/world/asia/china-to-reward-localities-for-improving-air-quality.html?_r=0

2.2.3 Guideline 3

States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

Discussion

In many States, public authorities hold information on behalf of and in service to the public, and as such the information "belongs" to the public. Because States recognize the value of the broadest possible access to information, refusals to provide requested information should be well-grounded and strictly limited. This Guideline should not be taken to either encourage or discourage States on whether to introduce grounds for refusal of an information request.

Grounds for refusal should be specified in the law. This is to ensure the equal and consistent application of the rules and norms and is also critical in the case of appeals or further proceedings. Grounds for refusal of an information request, in whole or in part, fall into two categories. First, information requests may fail to meet specific legal requirements or be defective in some way. In such cases there should normally be an opportunity to correct deficiencies and to resubmit requests.

For example, a request may be manifestly unreasonable or formulated in too general a manner. One question is whether the request can be reasonably understood and complied with. Another is whether the request is vexatious, in that it clearly does not have any real purpose or value, and is designed solely to cause disruption or annoyance, or to harass. A high burden should be required to make use of such grounds. In order to ensure the proper application of such grounds for refusal, standards and rules should be set. A request should not be considered manifestly unreasonable or too general simply because of the volume and complexity of the material requested. Other mechanisms, such as justified extensions of time limits to comply, are used to address such a situation. In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information.[53]

It should also be understood that addressing an information request to the "wrong authority" (see discussion under Guideline 1) should not constitute grounds for refusal. The practice in such cases is for the public authority receiving the request to forward it to the responsible authority and to notify the requestor. In addition, the

BOX 15: The obligation to forward a request to the proper authority

In Chile it is an obligation for the public authority that receives a request to transfer it to the public authority that possesses the information being requested.

"If the government body requested is without competence to deal with requests for information or does not possess the documents requested, it immediately shall send the request to the responsible authority under the legal system, to the extent that it is possible to be identified, and inform the petitioner. If it is not possible to identify the competent body or if the information requested belongs to multiple agencies, the executing authority shall communicate the circumstances to the applicant". Article 13 of Law No. 20.285 on Access to Public Information (2008).

Under the Chilean law, authorities are also obliged to notify requestors if their requests do not meet any of the four formal legal requirements, and in case of defect, to give the member of the public an opportunity to cure any such defects.

53 See ACCC/S/2004/1 (Ukraine) and ACCC/C/2004/3 (Ukraine), ECE/MP.PP/C.1/2005/2/Add.3, para 33.

running of time limits is generally not affected; thus a refusal and notification on these grounds should be sent almost immediately to allow for the responsible authority to reply within the legal timeframe (see Box 15).

The second category of grounds for refusal involves substantive exemptions from disclosure, and thus may be more contentious as disputes about application of exemptions can be difficult to resolve. There may be legitimate reasons why, in limited circumstances, certain information that is requested by the public might be protected from disclosure. In particular, the law may provide for exceptions where disclosure of information would adversely affect a recognizable, legitimate and protectable legal interest involving individual privacy, public safety, national security, or specific economic rights. These exceptions can be further broken down into two sub-categories those involving a State interest, and those involving a private interest. These distinctions may be important in terms of applying the public interest test, discussed below.

As discussed further below, laws that provide for restrictions on access to information should clearly and unambiguously state the cases where such restrictions are applicable, should guide authorities to interpret exemptions narrowly, and should allow for the application of a public interest test that could override such legitimate interests in particular cases.

In practice, the types of interests that have been recognized as giving rise to legal protection, and which may in appropriate cases justify refusals to provide information where adversely affected, taking into account the public interest in disclosure, include the following:

(a) The confidentiality of the proceedings of public authorities[54]
(b) International relations, national defence or public security[55]
(c) Active proceedings before a court including the ability of a person to receive a fair trial
(d) Commercial and industrial confidentiality, unless the information is about emissions, discharges or deposits
(e) Intellectual property rights
(f) The confidentiality of personal data or files
(g) Interests of a third party that has supplied information without that party being under, or being capable of being put under, a legal obligation to do so, and where that party has not consented to the release of the material
(h) The environment to which the information relates, such as breeding sites of rare animals

An example of a law providing legal protections for privacy interests can be found in Mexico (see Box 16). The Mexican law starts from the presumption that information about a particular person belongs to that person and can only be retained by authorities for necessary, reasonable and limited purposes. This approach can be contrasted with other systems that seek to limit harm to persons from improper disclosure of information but do not tackle the question of the right of authorities to hold the information in the first place.

Clear definitions of terms such as "confidential commercial information" are very important in establishing fair, balanced and enforceable regimes. The Strategic Approach to International Chemicals Management (SAICM) is a voluntary initiative to help countries manage chemicals within their borders to reduce the harmful impact of chemicals on human health and the environment. SAICM was adopted by the

54 A further distinction may be made between an interest in maintaining the non-disclosure of certain internal communications in order to promote the free flow and full consideration of information within public administration working in a professional manner, and an interest in preventing the disclosure of "materials in the course of completion" that have not ripened into the state of an outcome that could reasonably be attributed to any person.

55 An example of a public security provision can be found in the EU Seveso III Directive (2012/18), recital 19(3): "In order to promote access to environmental information … the level and quality of information to the public should be improved. In particular, persons likely to be affected by a major accident should be given sufficient information on the correct action to be taken in that event. Member States should make information available on where to find information on the rights of persons affected by a major accident. Information disseminated to the public should be worded clearly and intelligibly. In addition to providing information in an active way, without the public having to submit a request, and without precluding other forms of dissemination, it should also be made available permanently and kept up to date electronically. At the same time there should be appropriate confidentiality safeguards, to address security-related concerns, among others."

BOX 16: Publicity and privacy under Mexico's information laws

Mexico's Federal Access to Information law (2002, amended 2006) and the 2007 constitutional amendment to Article 6 explicitly guarantee the right of access to information and establish minimum benchmarks for federal and state governments to follow with legislation. The law is recognized by scholars around the world as being one of the most advanced of its kind. The Centre for Law and Democracy ranks it 7th on the Global RTI Rating.

Article 6, Section 1 of the constitution states: "All information held by any authority, body, or organ, at federal, state and municipal levels, is public and can only be reserved temporarily for reasons of public interest in the terms established by law. In the interpretation of this right the principle of maximum disclosure must prevail."

Additionally, Section 2: "The information related to privacy and personal data will be protected in terms and with the exceptions established by law."

Section 3: "Everyone, without having to prove any interest or justify their use, shall have free access to public information, and to personal data, and the correction of these."

Section 7: "Failure to comply with the provisions on access to public information shall be punished in the manner provided by law."

Source: http://www.freedominfo.org/regions/latin-america/mexico/mexico2/; See also: Misrahi, Yemili and Mendiburu, Marcos, "Implementing Right to Information: A Case study of Mexico," The World Bank; 2012.

International Conference on Chemicals Management (ICCM) in Dubai (United Arab Emirates), in February 2006. Under SAICM, participating States and organizations adopted, inter alia, the Overarching Policy Strategy (OPS), which deals in part with knowledge and information. The SAICM OPS includes provisions relevant to striking the balance between disclosure and protecting legitimate, legally-protected interests (see Box 17).

BOX 17: Excerpts from paragraph 15 of the SAICM OPS

"The objectives of the Strategic Approach with regard to knowledge and information are:

(a) To ensure that knowledge and information on chemicals and chemicals management are sufficient to enable chemicals to be adequately assessed and managed safely throughout their life cycle;

(b) To ensure, for all stakeholders:

(i) That information on chemicals throughout their life cycle, including, where appropriate, chemicals in products, is available, accessible, user friendly, adequate and appropriate to the needs of all stakeholders. Appropriate types of information include their effects on human health and the environment, their intrinsic properties, their potential uses, their protective measures and regulation;

(ii) That such information is disseminated in appropriate languages by making full use of, among other things, the media, hazard communication mechanisms such as the Globally Harmonized System of Classification and Labelling of Chemicals and relevant provisions of international agreements;

(c) To ensure that, in making information available in accordance with paragraph 15 (b), confidential commercial and industrial information and knowledge are protected in accordance with national laws or regulations or, in the absence of such laws or and regulations, are protected in accordance with international provisions. In the context of this paragraph, information on chemicals relating to the health and safety of humans and the environment should not be regarded as confidential …."

In some systems, members of the public have been successful in requesting non-confidential summaries of protected information.

The principle of severability, or separation of information, also should be clearly stated in the law, so that the maximum amount of information may be disclosed and only information that is strictly subject to the grounds for refusal may be redacted.

Moreover, the Guideline indicates that, to invoke any of these grounds, it is typically necessary to establish in the law that certain conditions must be present. In the first place any such interests to be recognized should be legally-protected, that is, they should give rise to rights and expectations based in law. This is to ensure that the interpretation of the scope of legal protections is consistent and is judicially determined, and is not dependent upon the ad hoc determinations of particular authorities. An example of an exhaustive list of grounds that can justify non-disclosure is shown in Box 18.

BOX 18: South Africa's Promotion of Access to Information Act

The 2000 Promotion of Access to Information Act (Act 2 of 2000) establishes a detailed system for consideration of information requests to public and private bodies. The law establishes grounds for mandatory refusal of information requests and grounds for discretionary refusals. The law also establishes a public interest test to be applied in cases of discretionary refusals.

The general categories for refusal are the following:

- Mandatory protection of privacy of third party who is a natural person
- Mandatory protection of certain records of the South African Revenue Service
- Mandatory protection of commercial information of a third party
- Mandatory protection of certain confidential information, and protection of certain other confidential information, of a third party
- Mandatory protection of safety of individuals, and protection of property
- Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings
- Mandatory protection of records privileged from production in legal proceedings
- Defence, security and international relations of the Republic
- Economic interests and financial welfare of the Republic and commercial activities of public bodies
- Mandatory protection of research information of a third party, and protection of research information of a public body
- Operations of public bodies
- Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources

Within these categories the law specifies circumstances in which refusal to disclose information is mandatory and where the information request may be refused subject to the public interest test in Section 46. Section 46 of the law provides for mandatory disclosure of information in the public interest for the discretionary categories of information, in instances where the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision related to the category in question.

The South African government has also produced a citizens' guide to the law. See "Section 10 Guide in terms of the Promotion of Access to Information Act No 2 of 2000" (PAIA), available at http://www.dfa.gov.za/department/paia.pdf.

Source: http://www.dfa.gov.za/department/accessinfo_act.pdf

Secondly, under international good practices, it is not sufficient for the legally-protected interest to merely exist it must also be adversely affected, requiring an inquiry as to whether there will be any actual harm to the holder of the interest in the case of disclosure.[56] For example, in some jurisdictions, an EIA study can be copyrighted. This is to protect the author of the study from unauthorized reproduction and loss of profits. However, the fact that copyright exists cannot justify withholding the information contained in the EIA study from the public. The purpose of the EIA study is to comprise a part of the public file in connection with an administrative procedure and it is produced with full expectation and understanding that it will be publicly accessible. Legitimate intellectual property interests in such circumstances cannot be adversely affected by disclosure to the public.[57]

But a finding of harm to a legally recognized interest does not end the inquiry, as the interest in the public disclosure of the information should be balanced against the harm to the holder of the interest. Access to information advocates furthermore have pointed to certain categories of the public interest which presumably would always override private interests in the information e.g., information about violations of human rights, corruption, or crimes against humanity.[58] An example of the application of the public interest test on the national level with respect to a horizontal access to information law is given in Box 19.

56 See, e.g., European Union Directive 2003/4/EC, Art. 4, para. 2.
57 A similar case involving Romania was decided by the Aarhus Convention Compliance Committee (see Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008).
58 See also *Open Government Standards-– Accountability Pillar,* p. 6.

BOX 19: Liberia's public interest test

In 2013, Liberia's newly minted Independent Information Commission, established by the 2010 FOIA (see Box 8 under Guideline 1), faced its first serious challenge. The year before, the Center for Media Studies and Peacebuilding (CEMESP) filed an information request with the Liberian Anti-Corruption Commission (LACC) to release the asset declarations from all the cabinet ministers and their deputies. The LACC initially agreed and then decided against releasing the documents invoking an executive order and a privacy clause in the constitution.[59]

In January, 2013, CEMESP filed a complaint with the Information Commissioner to compel LACC to make the documents available. After nearly four months during which CEMESP alleged there was no response, it filed a writ of mandamus with the Supreme Court to force the Information Commissioner to act on the request (the Commissioner, for his part, contends that the lack of facilities and resources prevented him from taking action until June, 2013). On July 23rd, Mark Bedo-Wla Freeman, Liberia's Information Commissioner, ordered the LACC to release the asset statements, and while doing so, he invoked the public interest test of the FOIA, writing in his statement that:

> "…the harm to be occasioned by disclosure of the asset declaration forms is outweighed by the public interest in having the information disclosed. The asset declarations are part of efforts to fight corruption in Liberia. And this objective cannot be achieved if we fail or refuse to disclose the contents of asset declaration forms."[60]

59 "Liberia's Freedom of Information Law faces first legal test," AllAfrica.com; 9 May 2013; http://allafrica.com/stories/201305100517.html
60 Liberian Independent Information Commission; Decision: Ref: IIC-D001-07-2013; 23 July 2013. http://www.freedominfo.org/2013/07/liberian-commissioner-orders-release-of-asset-disclosures/

Because there are inevitably cases where the public interest in disclosure of environmental information will outweigh the private or other interests of persons in keeping the information out of the public eye, an issue is whether Parties may choose to consider the public interest

(i) categorically across an entire issue;

(ii) case-by-case in each decision on whether to release information; or
(iii) may provide some latitude for case-by-case determinations within the framework of policies or guidelines.[61]

The Aarhus Convention, for example, has multiple provisions requiring the public interest test to be applied; Article 4, para. 3(c) and para. 4 both include application of a public interest test in determinations of whether certain information may be withheld from disclosure. The Convention does not provide specific guidance on how to balance the "public interest," but it does establish an entire category of information that is, information that relates to emissions to the environment[62] – where it is doubtful that an exception could ever be applied. This is based on the principle that an emitter loses any proprietary interest over substances once they enter the environment and leave the area of the emitter's effective control.[63] The Convention is clear that the grounds for refusal of information must be applied in a "restrictive way," see Article 4.4 footer, allowing for the maximum amount of information to be disclosed. Thus the Convention indicates that the public interest should generally be given great weight.

Yet the question whether the balancing test should be done categorically or on a case-by-case basis is not an easy one to answer. In European Union law based upon the Aarhus Convention, the issue of categorical versus case-by-case determinations of the public interest test was considered. The European Court of Justice determined that only case-by-case determinations could ensure the proper balancing.[64]

The grounds on which a request can be refused should be periodically evaluated with regard to how narrowly the exception is worded or interpreted by agencies and the courts. Finally, in any case where information is not fully disclosed, general administrative law would typically require relevant public authorities to state the legal basis and reasons for the refusal,[65] and to inform the applicant about the possibilities for appeal. Where such requirements are not already present according to the general administrative code, they could be imposed through a specific law. (See also discussion under Guideline 15.)

2.2.4 Guideline 4

States should ensure that their competent public authorities regularly collect and update relevant environmental information, including information on environmental performance and compliance by operators of activities potentially affecting the environment. To that end, States should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.

Discussion

Public authorities should collect, update and possess information that is relevant to the undertaking of their public responsibilities and functions. This Guideline pertains to environmental information (see discussion under Guideline 2), and brings particular attention to types of such information: information on environmental performance and compliance by operators of activities potentially affecting the environment. States can consider establishing systems that ensure a regular flow of information from operators, monitoring systems, researchers and others to the responsible public authorities. This is typically achieved by imposing reporting requirements on regulated entities or requiring applicants for

61 The Aarhus Convention: An Implementation Guide, 2d. ed., (2013), page 85.
62 One definition of emissions is "direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air water, or land" (see the European Union's Integrated Emissions Directive 2010/ 75/EU). However, the European Court of Justice has held that in the context of access to documents emissions should be defined widely and not limited to emissions from installations. See *Greenpeace and PAN Europe v. Commission,* T-545/11 (2013).
63 See "The Aarhus Convention: An Implementation Guide," 2d. ed., (2013), at 88, 90.
64 In C-266/09 (*Commission v. the Netherlands*) the European Court of Justice held that Article 4 of Directive 2003/4/EC should be interpreted to require that the balancing exercise it prescribes between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the interests involved.
65 Michael D. Bayles presented reasoned decisions as one of the core attributes of procedural justice in *Procedural Justice: Allocating to Individuals* (1990).

administrative decisions to provide information. Governments can also establish rules or guidance for information flow from operators, applicants and other regulated entities directly to the public.

Increasingly, public authorities are meeting the obligation to provide active environmental information through environmental information systems (naturally, this does not avoid the obligation to respond to information requests). The development of environmental information systems serves a broader purpose in terms of the full range of environmental responsibilities of public officials and to enable the use of the information by the public. By developing integrated information systems not only are the public able to access environmental information, but also efficiencies in public administration can be introduced.

Establishing systems of information flow will help the government to ensure that public authorities possess and update the relevant information. This guideline implies the establishment of reliable systems for collecting information. It also implies reliable systems for storing information, including through publicly accessible lists, registers and files. Once the flow of information is established and the information is held in well-organized files or registers, public authorities will find that the information can be updated immediately upon receiving new reports from operators and others. Air emissions and ambient air quality, which are usually monitored daily, provide good examples (see Box 28 under Guideline 5 below).

Environmental information systems, combined with mechanisms for sharing information and cooperation across disciplines, can act as a multiplier of effects aimed at achieving sustainable development goals. The same information can be interpreted in widely different ways by professionals operating in "information silos" in different fields. For example, nature protection, forestry and hunting authorities often interpret the same data in different ways. Greater transparency can help to engage professionals in dialogue on values and help them to work together. Compiling and structuring information to reflect the values of all the users and interest groups heightens opportunities for understanding and cooperation.

What constitutes "relevant" information depends on the public functions and responsibilities of the respective public authority. For example, relevant information for some public authorities may include air and drinking water quality information, particularly in cities, or in rural areas, water quality information and information on rainfall and humidity. With regard to activities potentially affecting the environment, relevant information would include the permits issued to the operator as well as information on its performance with respect to air emissions, water discharge and waste deposit, raw or hazardous materials used or stored on site, and manufacturing or other processes undertaken on site. For authorities responsible for permit applications, the relevant information would include the statements, assessments and analyses of potential environmental impacts.

- An indicative list of the kinds of information that could be included in environmental information systems includes:
- Air & water (surface and groundwater) quality information
- Soil and land monitoring data
- Protected areas and biodiversity information, including forests
- Information on pollution and emissions from point sources
- Presence, handling, disposal and storage of wastes, toxics and hazardous substances
- Information on noise and radiation exposure
- Licenses and permits including planning decisions
- Enforcement and compliance data sets
- Environmental impact assessments

Access-Info Europe's "Transparency Standards" include a list of essential information for proactive dissemination according to "international standards" (see Box 20).

BOX 20: The Open Government Standards on proactive publication of information

- Institutional information: Legal basis of the institution, internal regulations, functions and powers.
- Organizational information: Organizational structure including information on personnel, and the names and contact information of public officials.
- Operational information: Strategy and plans, policies, activities, procedures, reports, and evaluations—including the facts and other documents and data being used as a basis for formulating them.
- Decisions and acts: Decisions and formal acts, particularly those that directly affect the public—including the data and documents used as the basis for these decisions and acts.
- Public services information: Descriptions of services offered to the public, guidance, booklets and leaflets, copies of forms, information on fees and deadlines.
- Budget information: Projected budget, actual income and expenditure (including salary information) and other financial information and audit reports.
- Open meetings information: Information on meetings, including which are open meetings and how to attend these meetings.
- Decision-making & public participation: Information on decision-making procedures including mechanisms for consultations and public participation in decision-making.
- Subsidies information: Information on the beneficiaries of subsidies, the objectives, amounts, and implementation.
- Public procurement information: Detailed information on public procurement processes, criteria, and outcomes of decision-making on tender applications; copies of contracts, and reports on completion of contracts.
- Lists, registers, databases: Information on the lists, registers, and databases held by the public body. Information about whether these lists, registers, and databases are available online and/or for on-site access by members of the public.
- Information about information held: An index or register of documents/information held including details of information held in databases.
- Publications information: Information on publications issued, including whether publications are free of charge or the price if they must be purchased.
- Information about the right to information: Information on the right of access to information and how to request information, including contact information for the responsible person in each public body.

Source: www.opengovstandards.org

Many countries use public registries that contain information on activities that have an impact on the environment. For instance in Jamaica, several environmental laws that regulate the use of different natural resources, such as those on water abstraction, forestry, and air quality emissions, require the relevant regulators to establish public registries where the public can view applications and permits for activities free of cost.[66] Information required to be maintained in Jamaica's air pollutant discharge license register includes applications for air pollutant discharge licenses, issued air pollutant discharge licenses, and control orders.

It is important to include contact information, guidance and meta-information in the environmental information systems so as to facilitate use of the information by the public. Registers, lists and files should

66 See Section 21 of the Natural Resources Conservation (Permits and Licences) Regulations 1996; Section 25 of the Water Resources Act 1996; Section 73 of the Forest Regulations 2001; Section 48 of the Natural Resources Conservation Authority (Air Quality) Regulations 2006.

be made accessible to the public free of charge. Registers are often kept in paper files at a centralized public office where the public is welcome to come and inspect the files. The introduction of electronic means of storing information has greatly increased the ability of the public to gain access to environmental information, either through computer terminals at public offices, or by active dissemination of the information over the Internet.

Environmental laws may require operators of activities potentially affecting the environment to monitor and report, and to disclose, information on environmental performance and compliance with laws and permits. Pollution laws commonly impose requirements to notify the competent public authority of any pollution incident causing or threatening material harm to the environment (see, for example, s 148 of the *Protection of the Environment Operations Act 1997* of New South Wales, Australia). Conditions laid down in land use or resource permits may also require monitoring and reporting generally, and notification of incidents causing or threatening environmental harm particularly. Typically, information is required to be reported and notified to the responsible public authority, and also to the public directly via publication on publicly accessible websites, maintained by the public authority or operator. Obligations and systems for dissemination of specific information to specific target groups for a particular purpose make up a part of the active information dissemination responsibilities of authorities that has been called "super-active" information.

The National Environmental Authority of Panama provides a good example of a public authority that has been proactive in maintaining up-to-date electronic databases in a user-friendly format. Its website (www.anam.gob.pa) contains an "Environmental Information" section that includes interactive maps, environmental legal texts, environmental indicators, environmental management tools, statistics, information on progress in the REDD (Reducing Emissions from Deforestation and Forest Degradation) programme and a list of sanctions for administrative offenses committed in protected areas with details of paid an unpaid fines.[67] Another good example is that of Chile (see Box 21).

BOX 21: Chile's National Environmental Information System

Chile's recent reform of its environmental legislation explicitly mentions the information to be included in the National Environmental Information System, established under the 1994 Environmental Law:

Article 31 ter. the Ministry of Environment shall administer a National Environmental Information System, subdivided regionally, which shall include:

a) The texts of treaties, conventions and international agreements, as well as the laws, regulations and other administrative acts on the environment or in relation to it.

b) Information about the state of the environment, specified in Section ñ of Article 70.

c) Data or summaries of the information specified in the previous section, derived from the monitoring of activities that affect or may affect the environment.

d) The administrative authorizations associated with activities that may have a significant effect on the environment, or in its place the precise indication of the authority that holds such information.

e) The list of public authorities that hold environmental information that is deemed to be publicly accessible.

f) The decisions of the Inspector General of the Republic in environmental matters.

g) The final decisions of the Tribunals of Justice in proceedings of an environmental character.

h) All other decisions or resolutions of general character emanating from authorities on environmental matters.

67 Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

The US EPA has developed state of the art policies, programs and products aimed at environmental information, both generally and specifically. The EPA experience is valuable in providing benchmarks for the gradual development of comprehensive environmental information systems. The EPA also provides assistance to other countries in this area. Some of the main tools and public resources available are described in Box 22.

BOX 22: US EPA information policies and tools

EPA's Environmental Information Access Strategy (2009). http://www.epa.gov/nationaldialogue/FinalAccessStrategy.pdf

Data Finder. A single EPA webpage with links to a vast selection of EPA data sources, organized into topics such as air and water that are in easily downloadable formats. http://www.epa.gov/datafinder

Where You Live. Search your environment by locality. http://www.epa.gov/epahome/whereyoulive.htm

ECHO - Drinking Water. The Enforcement and Compliance History Online (ECHO) tool allows the public to search to see whether drinking water in their community met the standards required under the Safe Drinking Water Act (SDWA), which is designed to safeguard the nation's drinking water and protect people's health. ECHO also includes a feature identifying drinking water systems that have had serious noncompliance. http://echo.epa.gov

Chemical Data The Chemical Data Access Tool (CDAT) provides a range of chemical-specific information submitted to EPA under the Toxic Substances Control Act. http://java.epa.gov/oppt_chemical_search

The CDAT enables searches of the following databases:

CDR - This database includes non-confidential information on the manufacture (including import), process and use of chemicals reported under the Chemical Data Reporting (CDR) rule.

eDoc - The eDoc database includes a broad range of health and safety information reported by industry under TSCA Sections 4,5,8(d), and 8(e).

TSCATS - The TSCA Test Submissions (TSCATS) database is an online index to unpublished, nonconfidential studies covering chemical testing results and adverse effects of chemicals on health and ecological systems.

HPVIS - The High Production Volume Information System (HPVIS) is a database that provides access to health and environmental effects information obtained through the High Production Volume (HPV) Challenge.

Declassified CBI - This database includes health and safety studies and other information submitted to EPA in which chemical identities have been declassified, as part of EPA's effort to increase transparency in TSCA.

AirNow website. A collaboration involving several agencies, the AirNow website provides the public with easy access to national air quality information, offering daily Air Quality Index forecasts as well as real-time AQI conditions for over 300 cities across the US, and providing links to more detailed state and local air quality websites. http://www.airnow.gov/index.cfm?action=airnow.main

Environmental Characteristics of Electric Power Generation in the United States

eGRID - The Emissions & Generation Resource Integrated Database is a comprehensive source of data on the environmental characteristics of almost all electric power generated in the United States. These environmental characteristics include air emissions for nitrogen oxides, sulfur dioxide, carbon dioxide, methane, and nitrous oxide; emissions rates; net generation; resource mix; and many other attributes. http://www.epa.gov/cleanenergy/energy-resources/egrid/index.html

Pollutant Release and Transfer Registers

As mentioned under Guideline 2, one of the most important tools for dissemination of environmental information is the Pollutant Release and Transfer Register (PRTR), the international standard for pollution registers and inventories. The first PRTR-type system in the world was the Toxics Release Inventory developed under the Emergency Planning and Community Right-to-Know Act (EPCRA), passed by the U.S. Congress in 1986. In 1994 President Bill Clinton announced that use of the 50 priority pollutants had decreased by an average of 40% since its passage. Currently regional PRTR systems are in place in the European Union[68] and North America, and over 40 countries worldwide have PRTR systems in place. Other country examples can be found in Chile, Mexico, Georgia, Israel, Serbia, former Yugoslav Republic of Macedonia and Kazakhstan, among others. Under the 2003 Kiev PRTR Protocol, UNECE Member States are establishing harmonized national registers.[69] China's 2014 amendments to the Environmental Protection Law include several new obligations for polluters and public authorities that constitute steps towards establishing a PRTR system. The Organization for Economic Cooperation and Development (OECD) operates an important web portal for global information and cooperation on PRTR at www.prtr.net.

BOX 23: Pollutant Release and Transfer Registers

What is a PRTR?

A pollution inventory or register, also known as a "pollutant release and transfer register" (PRTR), is a database of potentially harmful releases (emissions) to air, water and soil, as well as of wastes transferred off-site for treatment or disposal. Typically, facilities releasing one or more of a list of specified substances must report periodically as to what was released, how much and to which environmental media. This information is then made available to the public both as raw data and in the form of analyses and reports. The development and implementation of such a system adapted to national needs represents one component towards developing a means for the government, enterprises and the public to track the generation, release, further use and disposal of various hazardous substances from "cradle to grave".

Why develop a PRTR?

The most dynamic aspect of PRTRs is their ability to stimulate pollution prevention and reduction. A company that reveals the quantities of pollutants that it is releasing into a neighbourhood becomes the focus of public scrutiny and this can cause a reassessment of accepted levels of releases. Mere publication of the quantities of pollutants released into the environment begins to involve the public in the decision-making underlying continued pollution of the environment, and by reducing releases, a company and/or regulator can demonstrate publicly their commitment to environmental improvement.

The reporting of releases can often yield a double dividend. Many companies have found that the quantitative analysis of waste streams and associated costs (in lost materials or disposal costs for example) can actually result in changes to operations that produce considerable financial savings.

The information gathered through PRTRs can be used for a variety of purposes. The initiation of pollution reduction programmes (by individual companies or by sectors) has been one result, but data can also be analysed to set priority targets (particular substances or geographic areas) at the local or national level. A consistent, regional PRTR system can achieve the same goals at an international level. PRTR data can be used to judge compliance with permit conditions, or to analyse the effectiveness of pollution control laws. Educational programmes can also use PRTR data to illustrate pollution problems.

Quoted from *The Aarhus Convention: An Implementation Guide*, 2d. ed., p. 115.

68 See http://prtr.ec.europa.eu/
69 See http://www.unece.org/env/pp/prtr.html.

BOX 24: Chile's PRTR

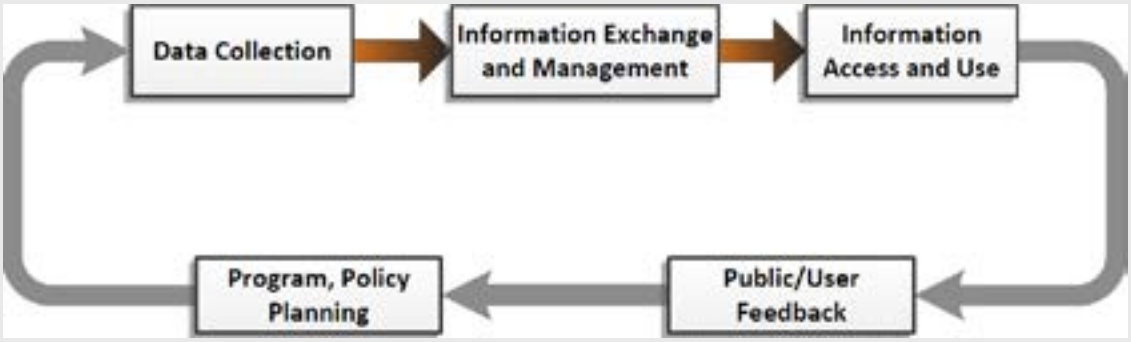
In 2005, the Executive Committee of the National Commission of the Environment (CONAMA) adopted Agreement No. 277, which approved the constitution of the operational committee to govern the coordination of the country's new PRTR. The committee includes representatives from all the major ministries—over 15 in all. Chile's PRTR website contains accessible information, including a FAQ page in Spanish and English that explains the sources of air and water pollutants, their impact on health, and how they can be avoided, amongst other information (http://www.mma.gob.cl/retc_ingles/1316/w3-propertyvalue-16307.html). Users can search for simple or more detailed reports, can make queries and can easily contact numbers where they can lodge complaints on emissions, dumping, gas leaks, water quality problems and more.

Source: http://www.mma.gob.cl/retc_ingles/1316/w3-article-51498.html

The US EPA has developed an informative set of materials on PRTR, including how to set up information registers, how to ensure the quality of information, how to manage information accessibility and stakeholder input, and other information standards (see Box 25).

BOX 25: The environmental information life cycle for PRTR (adapted from US EPA)

Environmental information involves many different types of professionals (i.e., lawyers, bureaucrats, policy makers, scientists, chemists, IT specialists, etc.) to turn data into information. Understanding this uncovers opportunities to improve the quality, access, and use of the information.



Following the environmental information life cycle above will also provide a framework for evaluating existing efforts.

Program, Policy, Planning

Many PRTR programs may find themselves using data collected by existing programs while newer programs may be able to define the information being collected and how it will be used. Considerations for including not only chemical releases from facilities, but also the permits and standards governing those releases, will improve stakeholder use and understanding. Planning for information from multiple media such as air, land and water will also help to provide a more complete picture of the releases of pollutants of concern. The planning process should also include a quality management plan to ensure consistent, comparable, and usable data is collected.

See: http://www.epa.gov/quality/ for information about EPA's Quality Program.

See: http://www2.epa.gov/toxics-release-inventory-tri-program/tri-data-quality on TRI data quality efforts

Data Collection

Sampling, analysis, data preparation and storage are all important components of this activity. Most importantly, the associated metadata must deliberately be included that identifies when, where,

BOX 25: The environmental information life cycle for PRTR (adapted from US EPA)

how, why, and who collected it so the data will have maximum credibility and documented quality for current and future analysis. This is also the first stage of converting sampling and analysis observations and results into electronic formats so great care should be taken to properly transcribe written information. Open source software including spreadsheets may be the most economical means to store data for analysis. It is preferable to do as much of the documentation and reporting into electronic formats to reduce data entry errors such as wrong units, missed decimal places, incorrect spellings, etc.

See: http://water.epa.gov/grants_funding/cwsrf/upload/2006_10_20_cwfinance_final-tribal-guidance.pdf Page 4-18 starts a practical discussion on environmental quality metadata.

See: http://www2.epa.gov/toxics-release-inventory-tri-program/electronic-reporting-toxics-release-inventory-data-final-rule to learn about the importance of electronic reporting for EPA's TRI.

Information Exchange and Management

Ensuring common terminology such as consistent naming of facilities and parameters collected is a critical need and part of implementing "data standards". Without data standards it will not be possible to integrate data and information from different programs or agencies. A system to receive, store and retrieve data, including the important metadata should include several data quality checks as part of the overall quality management program. A network using services to exchange data between programs, agencies, or other authorized users may be a good way to share data over the Internet without the burden of collecting the data into one master database. Refreshing, or updating, the data should occur on a regular and predetermined basis.

See: http://www.epa.gov/fem/data_standards.htm on environmental data standards

See: http://www.exchangenetwork.net/toxics-release-inventory-tri-flow-implementation-guide/ on using an exchange network to share TRI data among stakeholders

Information Access and Use

Central to this activity is the ability of stakeholders and the public to find, understand, and use the information through access interfaces and analysis tools. To achieve this it is suggested that a tabular and/or graphical summary of the data at various geographic scales as well as a mapping capability be included to visualize the information and explore potential geographic relationships. Training materials including guidance documents, workshops, and Webinars would help all users understand how to access the data and more importantly to use the data for the intended purposes.

See: http://www.epa.gov/pollutantdischarges/ on a public access tool to improve the access and analysis of wastewater discharge data

See: http://www2.epa.gov/toxics-release-inventory-tri-program/tri-data-and-tools for TRI public access tools

Public/Stakeholder Feedback

Stakeholder participation in all aspects of the environmental information life cycle will facilitate cooperation and improvements in the quality and use of the data. In fact, allowing the public to question the data and information, provide their own data for consideration, and receive a response to each of the requests, without repercussions, will ultimately result in greater accountability of facilities, reduction in releases and improvements in data quality.

See: http://www.epa.gov/quality/informationguidelines/ on Information Quality Guidelines and error correction

See: https://echo.epa.gov/help/how-to-report-error on how to report a data error on facility releases

National legislation should grant adequate powers to public authorities to collect and update the information. Relevant authorities should have enforcement powers to compel members of the regulated community to provide information in cases of non-compliance. PRTR regimes, for example, are often developed gradually, with information collected on an annual basis for a relatively small number of substances in relatively large quantities at the outset. As experience and capacities grow, the PRTR covers more substances at lower threshold amounts. Information-related powers should be geared towards gathering the necessary information to fulfill such requirements.

Indigenous communities

Environmental information systems should be designed taking into account the needs of the public. Information may need to be given in multiple languages in some countries, or special provisions may need to be made for specific populations, including indigenous peoples. See Box 26.

BOX 26: Access to information for indigenous peoples

Mexico and Costa Rica have been noted as positive examples for taking into account the needs of indigenous peoples and ensuring that information is available in translation. The Mexican Federal Institute for Access to Information and Data Protection (IFAI) and the National Institute of Indigenous Languages (INALI) signed a cooperation agreement in 2011 to guarantee right of access to information for the 7 million persons who speak indigenous languages in the country, many of them as their sole language.

In Costa Rica, the Law No 9097 of 2013 regulating the right of petition, lays down special provisions for native or indigenous communities, stating in Article 5 that members of such communities are entitled both to assistance from the Ombudsman or the National Commission of Indigenous Affairs in making applications in Spanish and to a prompt response.

Source: Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

The public has an interest in knowing whether operators of facilities are in compliance with environmental rules. The US EPA enforcement authorities publish and annually update the Concluded EPA Enforcement Cases Map, which is an interactive map showing information on enforcement actions and cases, including civil enforcement actions taken by EPA at facilities, criminal cases prosecuted by EPA under federal statutes and the U.S. Criminal Code, and cases in which EPA provided significant support to cases prosecuted under state criminal laws. The indicators on the map generally mark the location of the site or facility where the violations occurred or were discovered.[70]

Ecolabeling is another method of disseminating environmental information. It aims to help to "identify products and services that have a reduced environmental impact throughout their life cycle, from the extraction of raw material through to production, use and disposal."[71]

2.2.5 Guideline 5

States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment.

70 See, e.g., http://www2.epa.gov/enforcement/enforcement-annual-results-concluded-cases-map-fiscal-year-fy-2014.
71 European Commission Ecolabel website, http://ec.europa.eu/environment/ecolabel/.

Discussion

State of the environment reports have been a standard method of providing a comprehensive snapshot of information on the environment for several decades. In the Latin America and Caribbean region, for example, countries with domestic legal obligations to produce information on the state of the environment at specified intervals include Argentina, Belize, Bolivarian Republic of Venezuela, Chile, Guyana, Haiti, Mexico, Panama and Uruguay. In some cases, free trade agreements include the obligation to produce and disseminate information on the environment on a regular basis. In Colombia, this obligation is enshrined in the Constitution.[72]

72 Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

BOX 27: Australia's State of the Environment reports

The Minister for the Environment is required by the Environmental Protection and Biodiversity Conservation Act 1999 to produce a publicly available report on the state of the environment every 5 years.

The fundamental objectives of State of the Environment reporting are to make relevant and useful information on the state of the Australian environment available to the Minister, the department and more broadly to support decisions about environmental policies and management at national and regional scales, and to give the public access to accurate, up-to-date information on the state of the Australian environment.[73]

There are equivalent requirements in most Australian State and Territory jurisdictions. For example, the Environmental Protection Authority produces a State of the Environment report for South Australia every five years, the most recent of which was released in 2013. The report's assessment methodology is based on "driving forces, pressures, state, impact, response, and outlook (DPSIRO)".[74] Section 10 of the State Protection of the Environment Administration Act 1999 requires the New South Wales Environment Protection Authority to produce and report on the state of the environment every three years.[75] Other jurisdictions with State of the Environment reporting include Victoria, Queensland and the Australian Capital Territory.[76]

There are other types of public reports on the environment. Public authorities with responsibility for administering environmental legislation may be statutorily required to produce an annual report on their operations. For example, the New South Wales National Parks and Wildlife Service is required by s 144B of the *National Parks and Wildlife Act 1974* (NSW) to produce an annual report under the *Annual Reports (Departments) Act 1985* (NSW).

73 Australian Government, Department of the Environment, "State of the Environment Reporting," available at http://www.environment.gov.au/topics/science-and-research/state-environment-reporting (accessed 3 March 2014).
74 South Australia Environmental Protection Authority, "State of the Environment Reporting," available at http://www.epa.sa.gov.au/soe_2013/index.html (accessed 3 March 2014).
75 See NSW State of Environment reports, http://www.epa.nsw.gov.au/soe/.
76 See Victoria Commissioner for Environmental Sustainability, https://www.ces.vic.gov.au/soe/about-state-environment-reporting; Queensland Dept. of Environment and Heritage Protection, http://www.ehp.qld.gov.au/state-of-the-environment/report-2011/; ACT Commissioner for Sustainability and the Environment, http://www.environmentcommissioner.act.gov.au/publications/soe.

The frequency of such reports varies, with annual or biennial reports being most common. Whether a particular country can produce annual or biannual reports will depend on the scope of the report and the capacities of the public authorities. It is not uncommon for the frequency of state of the environment reports to be three or four years. The addition of PRTR and other electronic databases makes it easier to produce annual reports.

This Guideline may also be understood to refer to other types of reports on the state of the environment, including the kinds of reports based on monitoring data that are discussed under Guideline 4. Air quality, for example, can typically be subject to continuous monitoring for some parameters, and this information can now be structured and made publicly available in real time online (see Box 28).

BOX 28: Turkey's Air Quality Monitoring Network

To fulfill its obligations under environmental legislation and to meet the requirements of EU directives (Turkey is a candidate country for EU membership), Turkey has, since 2005, put into place a network of 122 stationary and 3 mobile automatic air-monitoring stations around the country to constitute an Air Quality Monitoring Network. The data are disclosed in hourly average values and made instantly available at www.havaizleme.gov.tr. Also, mobile phones with Internet applications may be used to access such data at http://mobil.havaizleme.gov.tr. While the relevant regulation requires 13 parameters to be measured, the stationary stations are used mainly to measure concentrations of SO2 and PM10, with other parameters gradually being incorporated. Dioxins are measured on an annual basis at cement plants and other facilities.

The Communiqué on Continuous Emission Monitoring System obligates plants to establish real-time online information systems about their facilities' emissions to air. This Communiqué describes the quality assurance procedures needed to assure that an Automated Measuring System (AMS) installed to measure emissions to air is capable of meeting the requirements on measured values found in legislation. Emission monitoring results are collected in real time and are recorded in a database held within DG EIA, Permitting and Inspection, in the Department for Measurement and Monitoring of the Ministry of Environment and Urbanization.

Source: Ministry of Environment and Urbanization of Turkey; RENA Assessment: Review of Turkish Implementation and Enforcement Procedures in the Environment Sector (December 2011), www.renanetwork.org

Environmental reports should be issued regularly and should include information on both the quality of the environment and the pressures on the environment. "Pressures on the environment" can mean many things in the context of the report. For example, the Czech state of the environment report includes information on the causes of change in the environment, the state and development of environmental elements, the consequences of environmental changes for the human population and developments in environmental law and policy.

Reports under this Guideline should be publicly disseminated. Dissemination can take many forms. For example, Georgian legislation requires that a report on the state of the environment be published every three years. The report is also made available in electronic format through the website of the Aarhus Centre Georgia.

Countries should ensure that state of the environment reports progressively become available electronically. Producing reports electronically can enable functions such as search so that the public can more easily make comparisons over time.

Proactive publication of environmental information also reduces administrative costs to public authorities, ensuring more rapid delivery of information without the necessity of handling requests for information. Properly structured information systems also enable information to be regularly updated, sometimes approaching real-time information. Moreover, by making the information available in detailed form, the public can use the information in ways that vastly multiply the resource capacities of the authorities. For example, the public can restructure and analyse information in new ways that will contribute to public debate on a wide range of social and environmental issues. The media and research institutions are also enabled in their tasks through the wide availability of environmental information.

In designing environmental information systems, attention should be paid to ensuring the widest possible dissemination of information in forms that will be user-friendly and accessible. Meta-information including information about how to use the data, how the data is put together, how to access additional information, and contact information for responsible authorities, should be included. Free or low-cost delivery systems such as the Internet or environmental information centers are preferred.

2.2.6 Guideline 6

In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public[77] to take measures to prevent such harm is disseminated immediately.

Discussion

Guideline 6 indicates that public authorities should inform the public in the event of environmental emergencies. Its requirement to disseminate information is triggered by any "imminent threat" of harm to human health or the environment. This means that actual harm does not have to occur for the immediate dissemination of information to be needed. No distinction is drawn between threats caused by human activities or by natural causes.

Environmental emergencies generated by industrial accidents or other accidents involving hazardous substances such as those at the Chernobyl nuclear facility in Ukraine and at chemical facilities in Bhopal, India, and Seveso, Italy, have brought attention to the public's need to know and to be heard about major accidents that may affect them.

Under the Guideline, the specific information that public authorities should release includes all information that could enable the public to take measures to prevent the harm that is threatened. At a minimum, the information should be targeted to the public that may be affected by the imminent threat, but widespread dissemination may often be the most efficient means of informing the public. Many emergency situations have potential transboundary effects, so notification and information across borders and in multiple languages may be critical. Information to enable the public to take preventive or mitigation measures can, inter alia, include the nature of the threat including physical, chemical and biological characteristics, safety recommendations, predictions about how the threat could develop, results of investigations, and reporting on remedial and preventive actions taken.

BOX 29: International law concerning industrial accidents

Following the Chernobyl accident, the international community adopted the 1986 Convention on Early Notification of a Nuclear Accident. With 119 Parties as of the end of 2014, the convention is concerned with notification between States but is significant as the first global convention mandating the provision of specific environmental information. The UNECE Industrial Accidents Convention includes provisions on access to information, public participation and access to justice. Article 9, paragraph 1, of that Convention requires its Parties to ensure that adequate information, including certain minimum information, is given to the public in the areas capable of being affected by an industrial accident arising out of a hazardous activity. Article 9, paragraph 2, requires the Party of origin to give the public in the areas capable of being affected an opportunity to participate in relevant procedures on prevention and preparedness measures; the public of the affected Party must be given equivalent opportunity to that of the public of the Party of origin. Article 9, paragraph 3, requires Parties to provide natural or legal persons who are being or are capable of being adversely affected by the transboundary effects of an industrial accident, with access to justice equivalent to those available to persons within their own jurisdiction.

Regional and national legislation on industrial accidents typically includes provisions specifying what type of information must be made permanently available to the public. This may include general information about how the public will be warned, if necessary, and adequate information about the appropriate

77 "The public" may be defined as one or more natural or legal persons and their associations, organizations or groups. [This footnote is in the original Guidelines.]

behavior in the event of a major accident or indication of where that information can be accessed. Some facilities may be classified as particularly risky and additional requirements will apply. For example, legislation may require that all persons likely to be affected by a major accident originating in a certain category of establishment regularly receive clear and intelligible information on safety measures and requisite behavior in the event of a major accident. The European Union Seveso Directive on industrial accidents,[78] for example, includes an annex specifying the minimum information required.

Laws and regulations related to emergency planning and right-to-know typically include public participation provisions as well. Public participation may be required in the establishment of emergency plans, in the planning, permitting or construction of high-risk facilities, in modifications to such establishments, and in any construction or development in the vicinity of such facilities that may increase the risk or consequences of an industrial accident.

Special provisions may be in place for workers in facilities that handle or use hazardous substances. In the US, the Material Safety Data Sheet is required to be attached to hazardous materials in the workplace. The same is required under EU law under Annex II of EU Regulation (EC) No 1907/2006 (REACH), amended by Regulation (EC) No 453/2010, which mandates what information should be included in the SDS.

Due to the urgency in preventing harm the Guideline calls for "immediate" dissemination of information. Dissemination without delay can help save lives and prevent damage in situations involving an imminent threat to human health or the environment. In 1998, a case before the European Court of Human Rights dealt with this issue.[79] The Government concerned had neglected to release essential information that would have enabled citizens to assess the risks they and their families might run if they continued to live in a town particularly exposed to danger from accidents at a local fertilizer production factory. The Court held that, by failing to provide timely information, the State did not fulfill its obligation to secure the applicant's right to respect for their private and family life under Article 8 of the European Convention on Human Rights.

In order to implement legislation related to this Guideline, States should designate the public authorities responsible for dissemination of information in particular circumstances and should require public authorities, especially local government, to develop emergency preparedness plans. Attention should be given to the notification of local authorities, hospitals and fire and emergency medical services that can be immediately called upon. Local authorities are the best placed to distribute some types of information. Personnel should be adequately trained including through the use of drills, particularly in the handling of hazardous substances. Various media should be used for notification of the public depending upon local circumstances, which may include radio, television, public warning systems, and the Internet.

2.2.7 Guideline 7

States should provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information.

Discussion

This Guideline takes into account the fact that citizens may need assistance in order to get access to environmental information. Similar provisions are found elsewhere in the Guidelines with respect to public participation and access to justice (see Guidelines 14 and 25).

78 Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances.
79 *Guerra v. Italy,* App No 14967/89, [1998] ECHR 7, ECHR 1998-I.

BOX 30: Improvements in Bangladesh's early warning system in collaboration with Regional Integrated Multi-hazard Early Warning System for Asia and Africa (RIMES)

In 2009 Bangladesh made significant improvements to its early warning system in connection with floods. RIMES aided Bangladesh's Meteorological Department and Flood Forecasting and Warning Center with technology transfer and capacity-building to improve lead times for weather and flood forecasting. The Government of Bangladesh was able to mobilize $28 million from the Climate Resilient Fund to improve a comprehensive early warning system. Besides longer lead times, improvements include:

- Seasonal forecasting
- Flash flood early warning
- Extreme weather event forecasting
- Storm surge modeling
- "Monsoon forum": a twice a year dialogue between national and local level users[80]

Flood forecasting and river level monitoring is accessible online during the monsoon season.[81]

See http://www.unescap.org/features/bangladesh-improves-disaster-early-warning-system-with-ESCAP-support

http://www.rimes.int/em/flood-early-warning-system-developed-by-rimes-and-cfan-in-bangladesh-a-positive-example-of-dialogue-between-scientists-and-communities/

80 Bangladesh Water Development Board: Flood Forecasting and Warning Center, available at http://www.ffwc.gov.bd/ (accessed 3 March 2014).
81 ibid

BOX 31: Argentina daily fire risk maps

Since 2000 in connection with the requirement to develop National Fire Management Plans, Argentinian authorities issue daily fire risk maps using the Haines Index and meteorological data. The maps are published via the Web.

See: http://www.smn.gov.ar/?mod=dpd&id=4.

The language is similar to that found in legal instruments related to Rio Principle 10, in recognition of the need that members of the public may have for assistance in making use of their rights and opportunities. Guidance and training materials related to these instruments could provide useful tools for planning and implementing specific capacity-building activities. The three Guidelines on capacity-building also recognize that environmental education and awareness-raising are important foundations for the implementation of Rio Principle 10 (see Box 32).

Because officials act in the public service, it is reasonable to expect that they should help to facilitate the public's use of their opportunities under Rio Principle 10, by providing information, guidance and encouragement. Assistance and capacity-building can additionally build trust and respect between decision makers and stakeholders. In Austria, for example, the 2008 government program included the objective of an innovative, cooperative, efficient and high-quality public administration with the guiding theme of enhanced citizen orientation. The Czech Republic includes training on public rights of access to environmental information in the introductory training of new civil servants. Access to justice has also been a theme of capacity-building (see under Guideline 25).

BOX 32: Environmental education and awareness

The obligation to promote environmental education and environmental awareness among the public is consistently found in a number of international instruments, including principle 19 of the Stockholm Declaration; Article 6, paragraph (a) (i), of UNFCCC; Article 13 of the CBD; Article 19 of the Convention to Combat Desertification; and various paragraphs of Agenda 21. Initiatives to promote environmental education have also been taken in several international forums. For example, the United Nations declared 2005–2014 the United Nations Decade of Education for Sustainable Development, with UNESCO as the lead agency for its implementation.

In Peru, an entire chapter of the Environmental Act is devoted to environmental education (Section III, Chapter 4). Environmental education is defined here as a comprehensive process that imparts knowledge, attitudes, values and practices for developing activities in an environmentally sound manner (Article 127). Moreover, the environmental authority and the Ministry of the Environment are called upon to coordinate educational programmes to ensure that they include environmental matters. Apart from covering natural processes and the way living beings function and interact with nature, this education also seeks to encourage citizen participation in environmental issues and to impart knowledge of the legal framework of rights and duties in relation to environmental protection. In relation to this last point, public and private media outlets are expected to participate in dissemination (Articles 289-130).

Costa Rica's Organization of the Environment Act (Law No. 7554) also includes a chapter on environmental education and research. It stipulates that the State, the municipalities and other public and private institutions should ensure that due attention is paid to environmental concerns at all times in formal and non-formal education and curriculums at all levels with a view to adopting a culture of respect for the environment so as to achieve sustainable development (Article 12).

Source for examples: Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

Renowned advocate M. C. Mehta convinced the Supreme Court of India in 1991 that the State had a legal duty under the Indian constitution and laws to create public awareness of environmental issues.[82] The Court consequently ordered public service announcements on the environment to be made through public media, specifically at cinemas, and over national radio and television.

China's 2014 amendments to the Environmental Protection Law include a provision calling upon people's governments at all levels to encourage self-governing grassroots organizations, social organizations and environmental volunteers as one means to facilitate a favorable atmosphere for environmental protection.[83]

This provision can also be considered in the light of legal norms in the field of environmental education. The Indian Supreme Court's order to implement environmental education courses was carried out only gradually, but over time it resulted in a model syllabus adopted by the National Council for Educational Research and Training. Building the capacities of members of the public to gain access to information and to use it should begin at an early age. Many schools include environmental awareness in their curricula. An example of a standardized environmental education package for school children is shown in Box 33.

"Providing means for" and "encouragement" can take many forms. One important measure is for public authorities to have dedicated staff responsible for capacity-building.

82 *MC Mehta v Union of India,* 1992 AIR 382; 1991(2) Suppl. SCR 378; 1992 SCC(1) 358. See also M. C. Mehta, In the Public Interest (Prakriti Publications, 2009), at 441-445.
83 Art. 9. See EU-China Environmental Governance Program (unofficial translation).

BOX 33: Green Packs

The Green Pack is a multimedia environmental education kit for teaching children between the ages of 11 and 14 about environmental protection and sustainable development. The Green Pack is produced by the Regional Environmental Center for Central and Eastern Europe and is intended for teachers and pupils in schools throughout Europe. Since its launch in 2002, the Green Pack has been produced in 20 languages for 18 countries.

The online version, http://www.greenpackonline.org, includes 23 toolkit topics, with information specific to each of the 15 countries. Green Pack Online also features downloadable lesson plans in all local languages, as well as tests, dilemma games and film clips. To date, more than 40,000 teachers in these countries have received training on how to use the Green Pack and about 4.5 million students have been educated through its interactive multimedia materials. A "Green Pack Junior" for younger students was launched at the 2007 "Environment for Europe" Ministerial Conference in Belgrade, followed by the "Green Steps" package for families and households.

In November 2014, the Green Pack was selected as one of the 25 worldwide best Education for Sustainable Development (ESD) practices at the UNESCO ESD Conference in Nagoya, Japan.

Source: Regional Environmental Center for Central and Eastern Europe, http://education.rec.org

Electronic information tools, such as user-friendly websites, are efficient means to assist the public to gain information on how to exercise their rights under national legislation implementing Rio Principle 10. However, not all members of the public may be able to access such tools, in particular the elderly, illiterate, poor, etc. More traditional information tools, such as brochures or written guidance, e.g., on how to request information or initiate a review procedure, should also be used. Both kinds of tools should, however, be in addition to, not in place of, measures to ensure that officials provide guidance and assistance in person. For example, officials may need to help members of the public to refine their requests for information to be clearer or more specific.

Capacity-building aimed at the authorities themselves is also critically important. Public officials above all others need to have knowledge of national legal and policy frameworks and international obligations. They also need to be trained in practical skills, including records management and financial management to institute new practices.

As with other aspects of Rio Principle 10, governments may need to make special provisions for certain populations such as the indigenous, ethnic or religious minorities, or the disadvantaged.

BOX 34: Aarhus Centres

Since 2002, the Organization for Security and Cooperation in Europe (OSCE), in close cooperation with the Aarhus Convention Secretariat, has supported the creation of Aarhus Centres and Public Environmental Information Centres in a number of countries of Central Asia, South-Eastern Europe and the Caucasus region, in many cases also with the involvement of the Environment and Security Initiative (ENVSEC see www.envsec.org), a partnership of several international organizations. As of 2014, Aarhus Centres, or Public Environmental Information Centres, had been established in 13 countries (Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Serbia, Tajikistan and Turkmenistan). In 2009, OSCE supported the development of a set of guidelines on the strategic orientation, set-up and activities of Aarhus Centres. Many of those involved in the Aarhus Centre initiative meet at regular intervals to exchange experiences and lessons learned. An Aarhus Centre for the European Union was established by the NGO Client Earth in 2011.

India's Right to Information Act has given rise to several success stories, but continues to face implementation difficulties (see Box 61 under Guideline 15). Price Waterhouse Coopers has issued a report on 'Understanding the Key Issues and Constraints in implementing the RTI Act' (June 2009). To assist in implementation, the National Green Tribunal of India (NGT) produces a manual about itself under Section 4(1)(b) of the Right to Information Act, see http://www.greentribunal.gov.in/writereaddata/notice/RTI-Manual-NGT-1Oct2014.pdf (accessed 31 August 2015). The Act also establishes training programs to build capacity for implementation (see Box 35).

BOX 35: Capacity-building under India's Right to Information Act

Right to information requests have had large impacts in exposing corruption since the Right to Information Act was passed in 2005. The law required capacity-building to be undertaken by institutions including the Department of Personnel and Training, the Central Information Commission and State Information Commissions. Training programs are required for officials under the 2005 Right to Information Act.[84] In 2005, the Department of Personnel, Public Grievances and Pensions (DoPT) embarked on a 5-year partnership with the United Nations Development Programme (UNDP) on RTI stakeholder training effort that succeeded in training nearly 100,000 stakeholders.[85] Despite this impressive number, a 2012 World Bank case study on implementation found that 60% of public information officers had not received training and that this was identified through interviews as a constraint on implementation.

Source: http://rti.gov.in/

84 Government of India, "Right to Information Act". 2005.
85 "Implementing Right to Information: A case study of India", The World Bank; 2012. http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/RTI-CS-India-RevFin-LJ.pdf

Certain of the Guidelines in this section are aimed at increasing the capacities of the public to make use of opportunities for access to environmental information. Specific capacity-building tools are discussed further below under Guidelines 4 and 7. Among the most effective tools that authorities can use to promote the public's access to environmental information is to appoint dedicated officials as contact points for public information functions. However, care has to be taken that these officers serve as more than a screen for the public towards certain authorities as well as an opportunity for corruption. The special officer ought to act as a mediator who can help to achieve maximum transparency. Other such mechanisms include the active promotion of access to environmental information through an ombudsman, commissioner or other responsible officer.

Training of public authorities at all levels is essential in order to ensure that the public meets with proper responses to its information requests. It is sometimes necessary to ensure that public authorities understand the public policy goals related to broad access to environmental information. Financial resources are needed to build the capacity of the public to request access to environmental information.

Conversely, the public may face obstacles in gaining access to environmental information where these tools and mechanisms are not in place. Perhaps the biggest obstacle to access is the lack of understanding of public authorities and a poor attitude towards cooperation with the public or respect for basic rights. Public authorities can fall under the phenomenon of "regulatory capture" in which they come under the influence of the regulated community, and become more responsive to those in positions of power and influence, while automatically discounting the interests of the general public. They may even take on a protective attitude towards the interests of the establishment. The problem of regulatory capture can act as a barrier to the public obtaining access to information held by the regulator.

Various organizations have begun monitoring States on legislation and implementation with respect to general access to information. These organizations have developed systems of indicators with the intention of marking progress or lack thereof over time. See Box 36. The specific freedom of information ratings systems may be considered also in connection with sets of indicators related to Rio Principle 10 (see discussion at Part II, Section 1).

BOX 36: Right to information ratings systems

The Center for Law and Democracy and Access-Info Europe have developed the RTI Rating System for assessing the strength of the legal framework for guaranteeing the right to information in a given country. At the heart of the methodology for applying the RTI Rating are 61 indicators, drawn from a wide range of international standards on the right to information, as well as comparative research into right to information laws from around the world. Country legislation is evaluated according to seven thematic areas: right of access, scope, requesting procedures, exceptions and refusals, appeals, sanctions, and protections and promotional measures. The RTI rating system shows that countries with high scores tend to have adopted access to information laws within the last five years, reflecting the progress made in international standard setting in this field. Features of the stronger laws include clear procedures for information requests and strong oversight bodies. The index focuses on the legal framework and does not measure quality of implementation. The "top 5" countries for access to information according to the 2013 RTI index are Serbia, India, Slovenia, Liberia and El Salvador.

See http://www.rti-rating.org

3. Public Participation in Environmental Decision-making

3.1 Overview

The next seven Guidelines relate to the second pillar of Rio Principle 10 that is, public participation in environmental decision-making. The following table provides a summary of the main recommendations in each Guideline and the elements for implementation.

©Photo Credit: Vít Hassan, "A little group of boys from a Umm Bororo tribe", 2006 via Flickr, Creative Commons.

Guideline 8

States should ensure opportunities for early and effective public participation in decisionmaking related to the environment. To that end, members of the public concerned[86] should be informed of their opportunities to participate at an early stage in the decision-making process.

Guideline 9

States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.

Guideline 10

States should ensure that all information relevant for decision-making related to the environment is made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.

Guideline 11

States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

Guideline 12

States should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any such review process to the extent that circumstances permit.

86 "The public concerned" may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest. [This footnote is in the original Guidelines.]

Guideline 13

States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment.

Guideline 14

States should provide means for capacity-building, including environmental education and awareness-raising, to promote public participation in decision-making related to the environment.

Guideline	General requirements	Implementation elements
Guideline 8	States should ensure opportunities for public participation in environmental decision-making	Early Effective Decision-making related to the environment Concerned public to be informed
Guideline 9	States should proactively seek public participation and ensure adequate opportunities	As far as possible Make efforts Transparent Consultative Adequate opportunity for public to express views
Guideline 10	States should ensure all relevant information available	Objective Understandable Timely Effective To public concerned
Guideline 11	Due account of public comments; final decisions to be public	Reasoning
Guideline 12	Participation to occur again when a decision is reviewed	Where previously unconsidered circumstances have arisen Environmentally significant To the extent that circumstances permit
Guideline 13	Public input into preparation of legally binding rules, and policies, plans and programmes	At an appropriate stage Rules that might have a significant effect on environment Policies, plans and programmes relating to environment
Guideline 14	Capacity-building to promote public participation in environmental decision-making	States should provide Environmental education Awareness raising

3.1.1 Considerations on Guidelines 8-14 (public participation in environmental decision-making)

Public participation is one of the key means for introducing community values into decision-making, and is perhaps the most legitimate means for taking into account long-term societal relations, even extending between generations, and values. The value of public participation in governance and decision-making is increasingly recognized. The 2014 Constitution of Tunisia is one of the most recent examples of a State expressly embracing a participatory, civil society framework as the basis of popular sovereignty.[87] Another

87 See preamble to the 2014 Constitution, which refers to the aim of "building a participatory, democratic, republican regime, under the framework of a civil State where sovereignty belongs to the people." Unofficial translation, Jasmine Foundation.

important statement of the principle is found in Article 10, paragraph 3 of the Treaty on European Union: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen."

Participation increases a sense of ownership over outcomes, enhances the legitimacy of decision-making, and leads to greater social cohesion. This Guideline recognizes both the benefits of public participation in environmental decision-making, and the challenges that can be faced. From the point of view of public authorities there are several benefits to public participation. One is the likelihood that public participation will result in better quality decisions, based upon a greater range of information. The kinds of information that can be enhanced through public participation include local knowledge that will inform decision makers and ensure that a final project design is practical and implementable. Participation can also help solve problems through more robust design solutions developed with local expertise. The process of dialogue in public participation increases public acceptance and support of final decisions, particularly if it can be demonstrated that public concerns were adequately addressed. Finally, public participation supports social cohesion generally, by showing respect for the rights of citizens and the public, and promoting further dialogue and public involvement in civic affairs.

The Environmental Commission of Trinidad & Tobago in the *Talisman Case*[88] stated the benefits of public participation in environmental decision-making as follows:

- It improves the understanding of issues by all parties
- Finds common ground and determines whether agreement can be reached on some issues
- Highlights tradeoffs that must be addressed in making decisions; and
- Improves the general understanding of the problems associated with a project, as well as the overall decision-making process

Furthermore as stated by the commission, "environmental assessments are intended to generate higher quality information about potential environmental impacts" through a policy of consultation to improve the quality of decisions by giving an opportunity for the proponent and decision maker to address "concerns, issues and values." Moreover, it can be a useful tool to avoid socio-environmental conflicts. The Peruvian Ombudsman Office has stated that out of the 214 social conflicts during 2011, 55% were considered socio-environmental conflicts, particularly in relation to mining companies and local communities.[89]

At the same time, a proactive approach will help to overcome some of the obstacles to effective public participation. These include unfamiliarity with the culture of participation, a general lack of trust and cooperation between authorities and the public, pro forma participation where decisions are essentially made in advance, poor design of procedures giving few real opportunities, and weak capacities and resources.

Public participation is typically implemented both as a right for those potentially affected by a particular proposal for decision-making, and an administrative tool for improved quality of decision-making. Both aspects of public participation need to be taken into account. In order to meet these dual goals, certain elements should be put into place. The quality of public participation matters—the stage at which the public is engaged, the information provided, whether they get feedback on their input, etc. While quality of information is important, it is essential that the concerned public have access to all information that is relevant to the decision-making procedure, to the maximum extent allowable by law. Public participation

88 *Talisman (Trinidad) Petroleum Ltd. v. Environmental Management Authority,* Case No. EA3 of 2002.
89 Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

needs to take place early in the decision-making process, when all options are open. It should have the potential to influence the decision. In some cases, as a result of the public participation procedure, it will become obvious that a proposed activity should be radically changed, or even abandoned completely.

Information available to the public should be kept up to date, and in some cases non-technical summaries of information should be generated in order to help facilitate public participation. States should also take other measures to build capacities for public participation, including through environmental education and awareness raising.

On the other hand, public participation does not shift ultimate responsibility for public administration away from the duly charged official. The decision-making power remains in the hands of the public authorities, which have to take into account the outcome of the public participation in their decision-making, as appropriate, and must give the proper weight to the comments received.

The term "environmental decision-making" is discussed further below but may include permits and approvals including environmental impact assessment (EIA) procedures, strategic environmental assessment (SEA), spatial planning, sectoral planning, resource management, nature conservation and biodiversity, marketing approval of chemicals and GMOs, legislative drafting, etc. Another area of environmental decision-making involves participatory approaches in governance mechanisms related to community land or water rights, such as village water committees. At a minimum, any administrative procedure where an environmental authority is either the main decision-making authority or has consultation responsibilities should be qualified as environmental decision-making.

Consideration of environmental impacts in decision-making has risen to the level of an accepted standard in transboundary situations, which was described by the International Court of Justice in the Pulp Mills Case[90] as a general rule of international law. The standards for EIA moreover include full access to environmental information and participation for the public concerned.

Whereas access to environmental information employs the "any person" principle, public participation in environmental decision-making is particularly aimed at the "public concerned" that is, members of the public with a particular stake or interest in the decision-making process. The public concerned can vary depending on the type of decision-making and the subject.

Any consultation with interested parties and the public should be carried out properly. To be proper, consultation should be undertaken at a time when proposals are still at a formative stage; consultation should include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for both consultation and response; and the product of consultation must be conscientiously taken into account when the ultimate decision is made.[91]

A recent court decision from Jamaica reinforces many of these basic principles and shows how complex sets of interests have to be fairly and reasonably dealt with in environmental decision-making (see Box 37). Jamaica additionally serves as an example for common law countries that may not have a specific legislative framework, but where the common law results in application of recognized legal standards even where consultation is undertaken voluntarily.

90 *Argentina v. Uruguay* (2010), at p. 14.
91 See *R. v. North and East Devon Health Authority; Ex Parte Coughlan* [2001] QB 213 at 258 [108]. See also B J Preston, 'Consultation: One aspect of procedural propriety in administrative decision-making' (2008) 15 *Australian Journal of Administrative Law* 185, 187-192 (elaborating on the four requirements for proper consultation).

BOX 37: The Pear Tree Bottom case[92]

Pear Tree Bottom, located on the north coast of Jamaica, was an ecologically sensitive coastland, slated for designation as a protected area under Jamaica's Policy for creating a National System of Protected Areas. In July 2005, the Natural Resource Conservation Authority (NRCA) granted a permit to a Spanish hotel development company, Hoteles Jamaica Pinero Limited (HOJAPI) for the construction of a 1,918-room hotel on the site. Shortly thereafter, NGOs Northern Jamaica Conservation Association (NJCA) and Jamaica Environment Trust (JET) and four local residents applied to the Supreme Court of Jamaica for judicial review of the decision of the NRCA and the National Environment and Planning Agency (NEPA) to grant the permit.

The main issues addressed by the court were whether the NRCA failed to properly consult with other relevant government departments as provided by statute and whether the public meetings held by NRCA and NEPA met the legitimate expectations of the public. Jamaica had not enacted regulations to deal with the procedure for conducting EIAs and consulting the public and instead relied on NEPA's internal guidelines.

The Court quashed the decision to grant the permit, holding in part, that the agencies failed to meet the common law legal standard for consultation because they withheld from the public the marine ecology report and two addenda to the EIA. The court also found the agencies abused their decision-making power by knowingly circulating an incomplete EIA, thereby increasing the possibility that the public would make inaccurate and erroneous conclusions about the impact of the development at Pear Tree Bottom. This action deprived the public of information necessary to make a fully informed and intelligent decision and constituted a breach of the public's legitimate expectation of fair and meaningful participation. The court applied the 'Sedley definition' for the legal standard for public consultation which was approved by Lord Woolf in *R v North and East Devon Health Authority, Ex Parte Coughlan* (2001) Q.B. 213, 258:

> It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council Ex p. Gunning (1985)* 84 LGR 168.

The court cited the Chalillo Dam case quoting, in particular, from the dissenting opinion of Lord Walker of Gestingthorpe that "the rule of law must not be sacrificed to foreign investment, however desirable."

Source: Danielle Andrade, Jamaica Environment Trust. The case is described further in Andrade, Danielle E., Excell, Carole and Gonzalez, Candy, Citizen Enforcement of Procedural Rights in the Environmental Impact Assessment Process in Belize and Jamaica, INECE 9th International Conference on Environmental Compliance and Enforcement, 2010.

92 *The Northern Jamaica Conservation Association and Others v. The Natural Resources Conservation Authority and Another* (2006) claim no. HCV 3022 of 2005, available at http://supremecourt.gov.jm/content/northern-jamaica-conservation-association-et-al-v-natural-resources-conservation-authority (accessed 21 January 2015).

In 2014 the Meeting of Parties of the Aarhus Convention adopted a decision that took note of a set of recommendations on the implementation of the Convention's public participation provisions in Articles 6-8. See Box 38. As the Aarhus Convention is a fully elaborated binding international legal instrument, some of the recommendations are specific to individual provisions of the Convention that may not be widely adopted outside the applicable geographic scope of the Convention. But as they are based on State practice, many of the recommendations will also prove useful to non-Parties anywhere in the world seeking to improve application of relevant legislation related to Rio Principle 10's second pillar. The Maastricht Recommendations, therefore, may be consulted in connection with Bali Guidelines 8-14 as providing

specific good practice examples in addition to those discussed in this Guide.

BOX 38: Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters[93]

Prepared through an open and participatory process with public commenting, the Maastricht Recommendations were adopted on 1 July 2014 at the Fifth MOP of the Aarhus Convention. The recommendations are quite detailed, consisting of 190 paragraphs and an annex. Several recommendations in the document are aimed at helping States to prepare the legal framework and design specific public participation procedures within decision-making. Other recommendations deal with individual paragraphs of the Convention on such matters as early and effective public participation, time frames, notification, contents of documentation, updating information, hearings and other procedures for taking comments, taking into account the outcome, and publication. Flexibility, monitoring and active consultation are key elements, along with adequate resources, training and standards of public administration and service. The annex concerns tasks in a particular public participation procedure that may be delegated to another public authority, an independent entity, or the project proponent. This guidance was needed to address differences in environmental decision-making within the States that are Parties to the Convention due to legal traditions and historical events and would therefore be of possible relevance to non-Parties.

93 ECE/MP.PP/2014/8, available at http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppppdm/pp-dm-recs.html

Public participation in environmental decision-making provides an opportunity to take into account the interests of different actors in society, including the nine "major groups" identified in Agenda 21: business and industry, children and youth, farmers, indigenous peoples and their communities, local authorities, non-governmental organizations, the scientific and technological community, women, and workers and trade unions. Some of the major groups may require special consideration, due to the fact that they have been historically disadvantaged or marginalized (women, indigenous peoples), have been underrepresented (children and youth), or have faced logistical obstacles due to distance, expense or difficulty in travel (farmers, indigenous peoples). States, organizations and stakeholders have considered the involvement of such groups in relevant decision-making and policymaking as a matter of environmental justice.

Particular forums provide platforms for exchange of good practices and the development of international standards with respect to particular groups. To give an example, good practices for the involvement of indigenous peoples in decision-making have taken great strides in recent times due in no small part to the increased recognition of the role that indigenous peoples play in nature conservation and the protection of the world's natural heritage. The World Conservation Congress among others has specifically brought attention to the role of indigenous peoples in conservation and the application of a rights-based approach to reduce poverty and conserve nature.

Rio Principle 10 and the Rights of Indigenous Peoples

The doctrine of free, prior and informed consent (FPIC) holds that indigenous and resource-dependent communities have a right to be fully informed about and fully participate in decisions relating to the resources on which they are dependent.[94] FPIC has been recognized in many international forums. The International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples recognizes FPIC

94 Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, Permanent Forum on Indigenous Issues, 4th sess, Provisional Agenda Item 4, UN Doc E/C.19/2005/3 (17 February 2005).

(Articles 15 and 16). The Inter-American human rights system has recognized rights related to the doctrine in the case of Saramaka People v Suriname[95] where the Court held that it was imperative for the safeguarding of indigenous communities to have adequate consultation, and prior and informed consent. However, it is important to keep in mind that there is currently no international consensus about the interpretation of FPIC and consequently, the content of such consent can vary greatly depending on the location.

Articles 18, 19 & 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples state:

> Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> Article 32 (2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

In UN discussions, elements of a common understanding of FPIC have been identified.[96] For example, States should seek FPIC from indigenous and resource-dependent communities prior to activities that may impact land or other natural resources these communities use or occupy. To be meaningful, informed consent must be sought sufficiently in advance of any decisions by the State or third parties, or any commencement of activities by the operator that will affect communities and their lands, territories and resources. Following is a brief explanation of some of the elements of FPIC.

Free: Decision-making and information-gathering by potentially affected communities must in no way be limited by coercion, threat, manipulation, or unequal bargaining power. Consent must be entirely voluntary.

Prior: To be meaningful, informed consent must be sought sufficiently in advance of any decisions by the State or third parties, or any commencement of activities by the project proponent that will affect communities and their lands, territories, and resources.

Informed: Disclosure of information concerning the nature, purpose, expected impacts, risks, and benefits of the proposed development must be made fully and accurately, in a form that is both accessible and understandable to the affected communities with an understanding of how they specifically will benefit, and how these benefits compare to projected impacts and potential worst-case scenarios (and alternatives). Furthermore, potentially affected communities must be fully informed of their own rights and understand the legal processes guiding implementation of the project.

Consent: Consent does not necessarily mean that every member of affected communities must agree, but rather that consent will be determined pursuant to customary law and practice, or in some other way agreed upon by the community. The affected communities need to specify which person/entity will represent them, and the project proponents must respect the representative(s) chosen by the community as the only

95 *Saramaka People v. Suriname*, Inter-American Court of Human Rights (Series C) Case N° 185, 12 August 2008.
96 Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, Permanent Forum on Indigenous Issues, 4th sess, Provisional Agenda Item 4, UN Doc E/C.19/2005/3 (17 February 2005).

legitimate provider(s) of consent. For many persons, the term "consent" connotes that the consent must be un-coerced and entirely voluntary; for these persons, the term "free" is redundant.[97]

In some regimes, States have considered how to apply the doctrine in particular circumstances and have developed policy guidance. One example is the Akwé: Kon guidelines developed under the Convention on Biological Diversity. See Box 39.

97 See Anne Perrault et al., Partnerships for Success in Protected Areas: The Public Interest and Local Community Rights to Prior Informed Consent (PIC), 19 Geo. Int'l Envtl. L. Rev. 475, 490 (2007).

BOX 39: Akwé: Kon[98]

The Convention on Biological Diversity has adopted a set of voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. See CBD COP Decision VII/16 and COP Decision VIII/28 on "biodiversity-inclusive" impact assessment. With respect to Rio Principle 10, several provisions of the Akwé: Kon Guidelines are intended to ensure the effective participation of indigenous and local communities, while paragraph 62 of the guidelines deals with transparency and accountability.

98 Available at http://www.cbd.int/doc/publications/akwe-brochure-en.pdf (accessed 14 February 2015).

3.1.2 Integrated/strategic approach to public participation in environmental decision-making

States should take a strategic approach to public participation in environmental decision-making, integrating the principle in their operations at all levels of government. The forms and characteristics of public participation in decision-making differ depending on the nature of the decision, the scope of its impacts, and the interests needed to be taken into account. Back in 1969, Sherry R. Arnstein wrote an article entitled "A Ladder of Citizen Participation"[99] in which she proposed a framework for eight rungs on the ladder in the three main categories of "citizen power," "tokenism" and "non-participation." See Figure 1. Arnstein's framework has been hugely influential and has morphed over the years into other "ladders of participation." The US EPA's International Public Participation Guide[100] and the International Association for Public Participation's Public Participation Spectrum,[101] for example, describe five stages: inform, consult, involve, collaborate and empower. One can look at the geographical scope of decision-making and show that on the most local level, communities usually have a greater level of power,[102] while for decisions with national or international scope, complex, democratic processes tend to be applied. Similarly, where the impacts of a particular decision-making process are largely felt by specific individuals or groups, those individuals or groups should have more rights and guarantees with respect to the substance, procedure and fairness of the process.

Members of the public who participate in decision-making can be frustrated by a failure to understand at which level and in which processes it is best to focus their efforts. An individual or group participating in a specific decision-making procedure can find that they have issues with policy-level or planning decisions that are not under consideration, for example in the area of urban development. Where mechanisms are not in place for resolution of "big picture" issues on the strategic, planning level the tensions in society that

99 Arnstein, Sherry R. "A Ladder of Citizen Participation," *JAIP*, Vol. 35, No. 4, July 1969, pp. 216-224.
100 Available at http://www2.epa.gov/international-cooperation/public-participation-guide (accessed 14 February 2015).
101 Available at http://www.iap2.org.au/resources/iap2s-public-participation-spectrum (accessed 14 February 2015).
102 In 2014 the new Tunisian Constitution , at Article 139, makes special mention of the requirement of public participation at the local level, with respect to certain strategic decisions, as follows: "Local authorities shall adopt the mechanisms of participatory democracy and the principles of open governance to ensure broader participation by citizens and civil society in the preparation of development programmes and land management and monitoring of their implementation, in accordance with law." Unofficial translation, Jasmine Foundation.

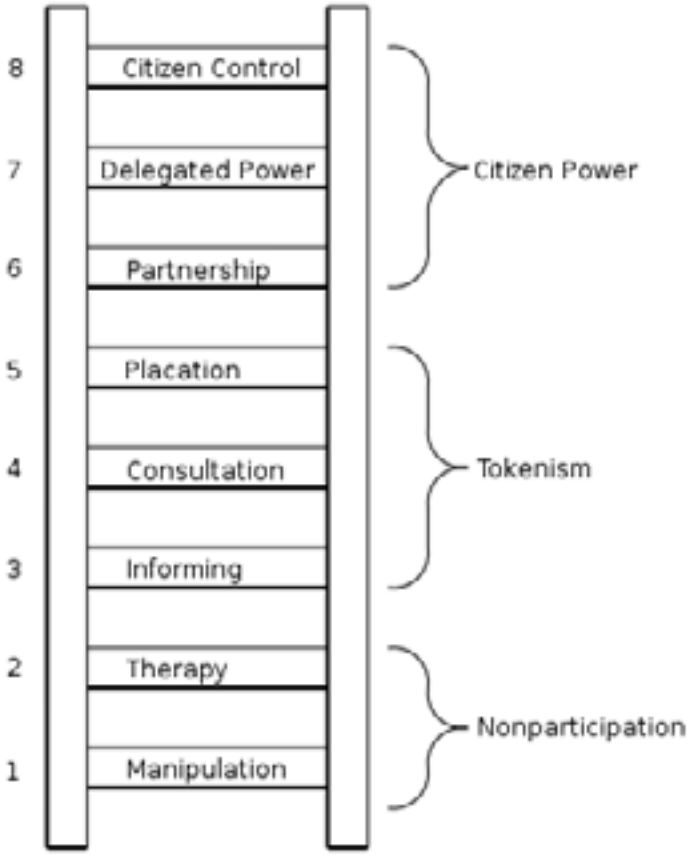


Figure 1. Eight rungs on the ladder of citizen participation

could be addressed at that level tend to emerge in specific decision-making processes. This has the effect of frustrating the public participation procedure and eliminating its benefits to decision-making.

The principle of integrated decision-making requires the representation of a wide variety of interests in a particular process or procedure. Consequently, one of the important aspects of application of Rio Principle 10 in this area is to establish mechanisms for interministerial consultation and coordination. This can extend to the establishment of permanent committees or bodies for such purposes. Interministerial coordination is particularly needed at the level of strategic decision-making (see discussion under Guideline 13, below).

3.1.3 Legislative mechanisms

While not the only type of environmental decision-making procedure covered by Rio Principle 10, EIA is certainly one of the most significant. The International Association for Impact Assessment defines "impact assessment" as "the process of identifying the future consequences of a current or proposed action."[103] There are many forms of impact assessment, many of which have environmental aspects. EIA is an iterative and deliberative procedure aimed at minimizing adverse environmental impacts in planning and permitting. It is part of a family of decision-making procedures that includes integrated permitting.

EIA is included in the Rio Declaration (Principle 17) and the International Court of Justice has stated that, at least in a transboundary context, "it may now be considered a requirement under general international

103 IAIA, "What is Impact Assessment?" (October 2009).

law."[104] EIA in various forms can be found in the vast majority of countries around the globe.[105] International standards in EIA have been adopted through regional conventions, by international financing institutions, through international professional organizations, and via State practice. Predominantly, standards for EIA include fully elaborated public participation procedures. EIA is not necessarily a decision-making procedure in itself, although in some systems it does have the effect of a final administrative act. In many systems it is a sub-procedure that takes place within an administrative permitting procedure, such as development consent.

Consideration of the environmental impacts in strategic decision-making, including the development of plans, programs, policies, legislation and rulemaking, can be enabled through Strategic Environmental Assessment. SEA is increasingly being recognized as important particularly in terms of how SEA and EIA can work together. Where SEA is absent, or the public lacks capacity to participate on the strategic level, the public often attempts to conduct policy battles on the EIA level, which can be very frustrating for all concerned. It is important for there to be understanding of the levels of decision-making and where action can be sought, but also for the opportunities for the public to participate in the different levels of decision-making to be complementary and well-coordinated.

A related type of environmental decision-making is integrated permitting or licensing, which typically applies to ongoing activities not subject to EIA. Licensing decisions where activities have potential significant environmental impacts may be subject to public participation that is comparable to that found in EIA procedures. Depending on the systems in place, such decision-making may be in the form of integrated permitting, sectoral permitting, environmental auditing, or ecological expertise. Other types of decisions that may fall under a definition of "environmental decision-making" include rate-setting, approvals for the introduction of new products into commerce, including genetically-modified organisms (GMOs) or chemical substances, and decisions aimed at remediation.

International financing institutions (IFIs) such as the World Bank have adopted elaborate safeguards policies that include EIA, SEA and access to information. World Bank financing is contingent upon a country's meeting international obligations in this area. OB/BP 4.01 is the World Bank's umbrella policy on environmental and social impact assessment. Stakeholder participation is an essential element of the policy. For the Nam Theun 2 hydroelectric project in Lao PDR, for example, 400 meetings were held over a 10-year assessment process, as well as international consultations in four countries. The results of the participation process included the creation of open dialogue among stakeholders, adoption of the National Policy on Environmental & Social Sustainability for the Hydropower Sector, the creation of a Watershed Management & Protection Authority and improved understanding of riparian risks in the international Mekong River system.[106]

Two multilateral environmental agreements in the region of the UN Economic Commission for Europe, when taken together, set forth regional standards for public participation in environmental impact assessment. These two conventions are the Convention on Transboundary EIA (Espoo Convention) and the Aarhus Convention. The interaction between these two conventions has been analysed recently in the context of guidance prepared under the Espoo Convention. See Box 40.

104 See *Pulp Mills case (Argentina/Uruguay)*. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, concurring opinion of Judge Weeramantry, I.C.J. Reports 1997, p.7; ILC Draft Articles on Prevention of Transboundary Harm, Art. 7 and commentary; UN Convention on the Law of the Sea, Art. 206.

105 For example, as early as 2005, 18 out of 23 African countries in one survey were determined to have EIA-related legislation. See UN Economic Commission for Africa, "Review of the Application of Environmental Impact Assessment in Selected African Countries" (December 2005).

106 Agi Kiss, Regional Safeguards Advisor, World Bank. "Environmental and Social Impact Assessment and Strategic Environmental and Social Assessment at the World Bank." Presentation at MOP6, Espoo Convention (Geneva, 4 June 2014).

BOX 40: Requirements for public participation at the national level under the Aarhus Convention

The application of relevant provisions of the Aarhus Convention complements the application of Article 2, paragraph 8, of the Espoo Convention, in carrying out public participation within the EIA procedure. Article 6, paragraph 2, of the Aarhus Convention sets out detailed requirements for notifying the public concerned about a specific decision-making procedure. The notification could be either by public notice or individually, as appropriate. The national framework should clearly:

a) Provide that the public is informed early in the decision-making process, in an adequate, timely and effective manner; and

b) Specify at a minimum the mandatory contents of the public notice (in accordance with the Convention), such as the description of the proposed activity, the responsible authority, and the decision-making process (its nature, commencement and expected duration, the opportunities for public participation during the process, the information available – in particular the relevant environmental information – and the ways the public concerned may obtain further information, etc.).

When designing a national framework it should be borne in mind that, according to the Aarhus Convention Compliance Committee, journalist comments on a project in the press or on television programs are not a sufficient way to assure notification in compliance with Article 6, paragraph 2, of the Aarhus Convention.[107]

Parties must establish a national framework with specific time frames for public participation procedures for the different phases within the decision-making process. Such timeframes should be reasonable, allowing for enough time for informing the public and for the public to prepare and participate effectively.

Article 6, paragraph 4, requires that public participation take place early in decision-making. National legislation should provide for public participation when all options are still open so as to guarantee that any public participation procedure is not a mere formality. This requirement goes hand in hand with the requirement for early notification of the public (see above), and also with the requirement that Parties, where appropriate, encourage dialogue and exchange of information between project developers and the public concerned, even before the permit application is submitted.

Effective public participation depends on all relevant information being available to the public concerned to enable it to make informed comments. Following the requirement in the Convention, national legislation should require that competent authorities provide the public concerned with access to all information relevant to the decision-making, free of charge, and as soon as available. This implies that the provision of information should not be limited only to selected parts of EIA documentation, should not depend on the volume, and information held by the project developers cannot be excluded. Public authorities may withhold some information in specified cases, based on the exemptions under the Convention. But rules must specify that any grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. As a general rule, the entire EIA report should be made available.[108]

Under Article 6, paragraph 7 of the Aarhus Convention, procedures for submitting comments must allow for the public to freely submit any comments (information, views, etc.) that the public considers relevant to the proposed activity. Moreover, Article 6, paragraph 8, requires Parties to ensure that the final decision takes due account of the outcomes of public participation. This means that the final decision should include the reasoning upon which the decision was based and should provide explanation and evidence on how the outcomes of the public participation procedure were taken into account. This is consistent with Article 6, paragraph 1, of the Espoo Convention.

107 ACCC/C/2009/37 (Belarus), ECE/MP.PP/2011/11/Add.2, para 86.
108 ACCC/C/2005/15 (Romania), ECE/MP.PP/2008/5/Add.7, para 27.

BOX 40: Requirements for public participation at the national level under the Aarhus Convention (continued)

Finally, according to Article 6, paragraph 9 of the Aarhus Convention, Parties must ensure that the public is informed of the final decision, promptly after the decision is taken, and must make the decision and the reasons and considerations on which it is based publicly accessible (see also Art. 6, paras. 1 and 2, of the Espoo Convention). Implicit in Article 5, paragraph 2 of the Aarhus Convention is the requirement that public authorities must maintain all the relevant documents including the application, EIA documentation and final decision, in publicly accessible lists, registers or files.

Source: General guidance on enhancing consistency between the Convention and environmental impact assessment within State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia (ECE/MP.EIA/2014/2), endorsed through decision IV/8 of the Meeting of the Parties to the Espoo Convention, available at www.unece.org.

Other important types of procedures where public participation opportunities exist include planning permit hearings and legislative hearings at various levels of government. An important tool available in some countries is the people's legislative initiative under which a petition subscribed to by a particular number of citizens can give rise to the obligation of the legislature to consider a concrete legislative proposal.[109]

3.1.4 Implementation tools and obstacles including challenges faced by the public

Public authorities that are dedicated to improving public participation often bring attention to the lack of awareness and capacities of members of the public. Public authorities play a critical role in building capacities. As mentioned under Guideline 7, in India it is even considered a constitutional duty for public authorities to build the public's capacities to participate in environmental decision-making. Financial resources have to be made available to build the capacity of the public to make use of opportunities in the field of public participation in environmental decision-making. Certain of the Bali Guidelines are aimed at increasing the capacities of the public to make use of the opportunities for public participation. Specific capacity-building tools are discussed further below under Guidelines 9 and 14.

Public authorities and members of the public can work in partnership to improve environmental performance and protect the environment. In many societies, the public traditionally plays a significant role in environmental monitoring. Concerned citizens are the "eyes and ears" on the ground and often have the same ultimate goals as authorities and other stakeholders. Enhancing the role of the public in monitoring can build trust as well as develop knowledge. In societies with longstanding practice of public involvement in monitoring, the public usually also participates in designing and establishing monitoring programs.

Conversely, the public may face obstacles in participating when these tools and mechanisms are not in place. Perhaps the biggest obstacle to access to opportunities for participation is the lack of understanding of public authorities of the importance of public participation and the role it can play, reflected in a poor attitude towards cooperation with the public or respect for basic rights. Public authorities can often be more responsive to those who are perceived to be in positions of power and influence, and sometimes automatically discount the interests of the general public. They may even take on a protective attitude towards the interests of the establishment. Attention should be paid to the incentives in place in public administration. Training of public authorities at all levels is essential. It is sometimes necessary to ensure

109 This mechanism is present for example in Latin America. See Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

that public authorities understand the public policy goals of public participation requirements. Public authorities should be sensitized, inter alia, to the fact that public participation can resolve conflicts and contradictions at an early stage, avoiding more costly and time-consuming procedures later.

As introduced above, the public needs to be aware of the levels of decision-making and where there are opportunities to participate and influence particular types of issues. If members of the public look to fight policy battles in specific EIA approval processes, there will be disappointment and process failures.

Finally, authorities and the public have to guard against efforts by project proponents to stay under decision-making thresholds in an effort to avoid public participation. One well-known tactic is for a single owner or operator to engage in activities through separate small enterprises in order to keep under size limits. This can be guarded against through rules about reviewing participation in the case of a substantial change to a decision-making procedure.

3.2 Provision-by-provision guidance on implementation

3.2.1 Guideline 8

Guideline 8

States should ensure opportunities for early and effective public participation in decisionmaking related to the environment. To that end, members of the public concerned[110] should be informed of their opportunities to participate at an early stage in the decision-making process.

Discussion

This general introductory guideline may be applied to all forms of environmental decision-making, including day to day, specific decision-making with potential environmental impacts such as permitting, licensing, and approval of projects based on environmental impact assessments, as well as strategic decision-making such as policy making, planning and development of programs, and legislation and rulemaking. It can also apply to decisions taken during monitoring and reporting. The Guideline's two sentences and footnote cover a wide range of concepts related to public participation that should be reflected throughout legislative frameworks and procedures aimed at implementing Rio Principle 10. These include timeliness and effectiveness, the stages of decision-making, scope of interest and concern, and specific procedures such as notification.

Because almost any decision-making can be "related" to the environment, for legislative purposes States often establish that forms of environmental review involving public participation are required in cases where there are potential "significant" environmental impacts. The term "significant" has a legal meaning that can be defined in law or developed through practice. For example, the Espoo Convention includes the following criteria to be used in determining the environmental significance of activities:

(a) Size: proposed activities which are large for the type of the activity;
(b) Location: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed

110 "The public concerned" may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest. [This footnote is in the original Guidelines.]

development would be likely to have significant effects on the population; and

(c) Effects: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.[111]

The determination of the scope of impacts is a part of the screening phase of environmental decision-making. The European Commission has developed guidance for national authorities on EIA screening.[112]

"Early public participation" means that the public can participate at an early enough stage in the decision-making to have an effective impact on the decision being considered. While some countries may implement policies aimed at preparing well for participation and going beyond what is in the law, "early" in the sense of the Guideline is meant to encourage legal standards for participation that are triggered towards the beginning of decision-making. The earlier in the decision-making process the public becomes involved, the more effective its participation can be. Early public participation in local governance systems ensures ownership and buy-in, which has been found to improve the sustainability of projects.[113] Putting off public participation reduces flexibility in decision-making and may make it harder to take on genuine improvements or consider alternatives that may be supported by proponents and stakeholders alike.

Early public participation may be seen as participation when all options are open (i.e., no decisions on the project, permit, licence, program, policy or plan of any type have been made). Therefore, authorities should not enter into agreements with project proponents that would narrow the potential range of decisions prior to conducting public participation. For example, the ability to consider a "no action" alternative (also called the "zero option") under which a proposed activity may be withdrawn implies that a full range of potential decisions is under consideration. Early participation in this sense "has special significance if the proposed activity concerns a technology not previously applied in the country and which is considered to be of high risk and/or to have an unknown potential environmental impact."[114] Whether a participation opportunity is early in the decision-making process is determined by assessing the entire decision-making process from inception to conclusion to determine when public participation should be conducted in order to meet the goals of participation.

It may be that it is appropriate for the legal framework to mandate public participation at more than one stage in a particular decision-making process. As the approval process for certain projects is often quite complex, for example requiring a cluster of permits, the general requirements for public participation should be determined separately in each relevant phase, that is, for each discrete step where the procedure meets the definition of environmental decision-making. The elements of public participation may be streamlined or incorporated by reference into particular steps of the complex process, taking care that the participants retain opportunities for appeal. See also discussion under Guideline 13 on strategic decision-making.

Just because a country has a long history of environmental assessment does not mean its system provides adequate public participation opportunities. For example, the equivalent system in some Eastern European, Caucasus and Central Asian countries (called OVOS or expertiza) does not envision the involvement of environmental public authorities at the early stages of the permitting process, and consequently it is very difficult to meet standards for early public participation.

111 Espoo Convention, Appendix III.
112 European Commission, Guidance for EIA screening, (Luxembourg, Office for Official Publications of the European Communities, June 2001). Available from http://ec.europa.eu/environment/archives/eia/eia-guidelines/g-screening-full-text.pdf
113 See J. Foti et al., "Voice and Choice" (World Resources Institute: June, 2008), available at http://www.wri.org/publication/voice-and-choice.
114 Maastricht Recommendations, para. 16.

"Effective" public participation has many aspects. A framework for effective participation should include specific and detailed legal provisions guaranteeing rights and specifying obligations. Some of these aspects involve the opportunities for members of the public to express their views, such as through public hearings and the submission of comments. These are covered under Guideline 9. Another set of issues is covered under Guideline 11, having to do with the requirement to take into account comments received, and to issue a reasoned decision. Of course effective participation is also dependent upon the implementation of the information and justice pillars of Principle 10 as well. Timely information is an invaluable resource for participation. Finally, participation cannot be effective if members of the public do not have the capacities or resources to be able to participate effectively. Guideline 14 pertains to capacity-building.

One of the issues covered under Guideline 8 is timing. Public participation procedures should include reasonable time frames for the various phases, permitting sufficient time for informing the public and for the members of the public concerned to prepare and participate effectively during the decision-making process. The timing of the opportunities to participate should be compatible with those pertaining to public access to the relevant information, so as to facilitate informed public participation, and should take into account social considerations, such as holidays.

Timeliness is also mentioned in connection with the notification of the public concerned about the nature of the relevant decision-making process, and the opportunities, procedures and criteria for participation. See Box 41.

BOX 41: Means of notification in Poland

Under the Polish Act on Access to Information on the Environment, Public Participation and Environmental Impact Assessment of 3 October 2008, the notification of the public is the responsibility of the competent authority (i.e., the authority responsible for making the decision or adopting a strategic document) and must be provided by the following means:

- Placing the information on the Internet homepage of the authority (via a so-called "Public Information Bulletin").
- Publishing the information in the customary way at the seat of the authority (usually by placing the information on the notice board).
- Posting notices in the vicinity of the proposed project.
- In the case of proposed plans, programmes, policies, etc., by publication in a newspaper of applicable geographical circulation.

If the competent authority is not located in the affected community, it must ensure publication in media used by the community affected, through the local press or in a manner commonly used there.

In addition, the Administrative Procedure Code requires those having a legal interest in the decision-making (usually immediate neighbours) to be notified by individual notice (usually by registered letter).

Source: Adapted from The Aarhus Convention: An Implementation Guide (2d. ed.), p. 135.

Another example is provided by the Estonian Environmental Impact Assessment and Environmental Management Systems Act, which requires public notice via announcements on the website of the authority, newspapers, posters in public places (library, post office, school, bus stop), direct letters to persons concerned, and direct letters to umbrella NGOs.

A full EIA-type process will take a substantial amount of time in a complex decision-making or planning procedure it will typically take many months and will require systematic planning. Authorities may face

pressures from developers or other authorities to shorten the time span for assessment procedures but these should be resisted. Not only does the public participation timeframe need to be maintained, but also the timeframe for the development of the technical documentation and the assessment study. When adjusting legislation to introduce public participation, care should be taken to maintain necessary timeframes for other stages of the process.

In Trinidad & Tobago, for example, Section 35 of the Environmental Management Act (2000) provides that the Minister of Environment may issue an order designating activities that are subject to a "Certificate of Environmental Clearance" (CEC) for the purpose of determining the environmental impact that may arise out of any new or significantly modified construction, process, works or other activity. The law provides for procedures to be applied in the case that an EIA is to be prepared. Where an EIA is required, a CEC cannot be issued unless the public consultation provisions of Section 28 of the law are complied with.

Colombia provides an example of a comprehensive EIA system (see Box 42).

BOX 42: Colombia: EIA regulations: Decree 2820 of 2010[115] (EIA regulations) and Decree 330 of 2007 (public hearing regulations)

115 http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=45524

The Colombian EIA regulations require the environmental authority to make the EIA available to the public within five days of receiving it. The Institute of Hydrology, Meteorology and Environmental Studies is required to make available to the public any environmental information that has been produced from studies or monitoring from the EIA process. The draft EIA is made available for public commenting through the Internet or at the Ministry office. The public can be involved in the EIA scoping process although the environmental authority ultimately determines the scope. In relevant cases, the authority is required to consult indigenous and African-descent communities (Decree 2820, Article 15).

The Colombian public may also participate in public hearings on the environment under Decree 330[116] (2007). Hearings can be requested by a petition of 100 persons or 3 non-profits, as well as by government agencies and elected officials. The opinions, information, or documents that the public presents at the public environmental hearing is required by this decree to be given due account by the environmental authority.

(A summary of the EIA regulations in English can be found at: http://eialaws.elaw.org/eialaw/colombia)

116 http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=22974

The Guideline includes a footnote defining the "public concerned" as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. This term, which is used for the public participation provisions of the Guidelines, creates a standard different from the "any person" principle of the access to environmental information guidelines. Practices for public participation take account of the differing levels of interest that members of the public may have in a particular decision-making process, and give priority to those members of the public that have a discernible connection to the process or outcome, either through being potentially affected, or by having a recognizable interest.

It should be kept in mind that the public concerned may include persons living outside the borders of the country where the decision-making is taking place, as environmental impacts often cross State boundaries. States often enter into bilateral agreements on transboundary cooperation in environmental matters that may cover, inter alia, procedures for the consideration of transboundary impacts in environmental decision-making. There are several good examples of bilateral agreements negotiated in the context of the

Espoo Convention, and the Convention itself provides a roadmap for dealing with EIA in a transboundary context. With advances in communications, moreover, the inclusion of transboundary publics in public participation procedures is becoming easier. Consequently, a practice has developed of including the public concerned across borders automatically, without the need for bilateral arrangements. In principle, the public concerned that lives in a potentially affected State should have the same opportunities for public participation as that of the public in the State of origin.

The Guideline makes special mention of environmental non-governmental organizations (NGOs), which are sometimes referred to as environmental civil society organizations (ECSOs). The NGO Global Network made up of NGOs affiliated with the United Nations defines an NGO as "any non-profit, voluntary citizens' group which is organized on a local, national or international level."[117] The footnote in this Guideline states that, for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest. The issue of legal interest was thoroughly debated in the negotiation of the Aarhus Convention, and a similar formula to that found in this Guideline was adopted. The issue is fully discussed in The Aarhus Convention: An Implementation Guide (both editions), available online. See also the discussion of standing, below, under Guideline 18.

In the case of EIA, the identification of the public concerned is a part of the scoping process that determines the potential impacts of a proposal. Persons who are potentially affected should be considered a part of the public concerned. The emphasis should be on providing the public concerned with information in locally relevant forms that make it accessible and understandable. The public concerned should be given the opportunity to consult the information necessary to participate effectively in the process. Such information could be provided through websites or other appropriate media and, if possible, directly to members of the public concerned having requested to be so notified or having otherwise been identified as in need of direct communication. Where appropriate, the relevant authorities should give the public additional assistance and explanations.

Standards have developed through State practice for the contents of the notification sent to the public concerned at the commencement of an environmental decision-making procedure.[118] These standards determine that the contents of the public notification should include, at a minimum:

1. Information on the proposed activity: that is, a brief description including its location, the potential environmental impacts, the time-frame for the proposed activity and the relevant approval process.
2. Full contact information for the relevant authority responsible for the public participation procedure.
3. Information on the public participation procedure, including the opportunities for public participation, the types of information that are to be made available, where applicable the availability of information in different languages, and how to access said information.

The description of the activity should make clear the nature and magnitude of the potential effects. Overly general descriptions that do not cause the public concerned to focus on the potential effects of the decision-making may be ineffective. A notification about general discussions concerning waste management issues in a region will generate far less interest than a notification of the construction of a major landfill in the neighborhood.

117 See http://www.ngo.org/ngoinfo/define.html (accessed 10 November 2014).
118 See, for comparison, Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014; European Commission, "Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects" (2013), available at http://ec.europa.eu/environment/eia/pdf/Transboundry%20EIA%20Guide.pdf (accessed 13 May 2015).

It is also important to develop standards on the method of informing the public concerned. See Guideline 11.

The US EPA has developed a toolkit that can be applied in any country to assist authorities in elaborating and implementing public participation in environmental decision-making (see Box 43).

BOX 43: US EPA – public participation and the online Guide

The U.S. Environmental Protection Agency's Public Participation Guide is an online toolkit located on the Office of International and Tribal Affairs website, www.epa.gov/international/public-participation-guide. It was developed under U.S. State Department's Middle East Partnership Initiative, initially for the Middle East and North Africa. As the interest for public awareness, transparency, and engagement has grown throughout the world, USEPA has implemented the fundamentals of public participation in many of its programs in several regions.

The Guide provides tools for public participation and outreach in environmental decision-making, and is designed to help decision-makers identify some of the best practices for planning, designing, and implementing a meaningful public participation program through case studies and other resources.

Along with the guide, USEPA occasionally holds workshops to:

- Share the key features and foundations of the Public Participation Guide;
- Discuss the importance of public participation in environmental decision making, along with its challenges and opportunities;
- Provide information on best practices both from the developed and developing countries, as well as the different sectors;
- Discuss different tools and techniques used throughout the regions; and
- Allow for participants to make connections and build a network of support on public participation.

The country-specific workshops that USEPA has conducted have been in partnership with a counterpart agency or ministry. In coordination with those environmental agencies, USEPA helps to identify the appropriate participants to attend the workshops (e.g. partnering NGOs, academia, media, and international organizations). The workshops include expert presentations, interactive discussions, small group break-out sessions on best practices and case studies, and group deliberations on various public participation strategies and tools. For example, in Indonesia the public participation workshop training focused on public participation and Environmental Impact Assessments (EIAs).

Participation in EPA's public participation workshops is typically very diverse. For example, in a workshop conducted in Morocco for the Middle East and Africa, attendees included 94 participants representing government agencies, NGOs, media, academia, and international organizations. Some participants were chosen because USEPA has a partnership with them; others were chosen because they work on public participation or have the ability to change policy. The opportunity for cross-sectoral dialogue has proved productive. For example, during the workshop in El Salvador, the media and environmental government agency spoke candidly about the importance of transparency and understanding.

The USEPA starts the workshops by setting guidelines for respect of each other's ideas, thoughts, and perspectives. It then seeks to establish trust and familiarity within the group so that the discussion can be more productive and honest. At one workshop, USEPA created a large map of the regional representation present at the workshop. Participants were encouraged to make five connections with each other and hang cards on the map with details that they learned about each other. "Energizers" were introduced—culturally appropriate ways of getting people up and moving around to stay relaxed and comfortable.

Aside from the creative activities conducted, these workshops also produced action plans. In Morocco, after

BOX 43: US EPA – public participation and the online Guide (continued)

the general workshop, USEPA conducted a smaller one-day action planning session with Sub-Saharan Africa. The participants from Sub-Saharan Africa were chosen because USEPA currently works on projects with these partners. The participants were broken into smaller groups based on the USEPA projects within these countries. These action plans call for on-the-ground public participation activities, (i.e. public meetings, stakeholder interviews, etc.), that will help move the project USEPA is working on, forward.

To maintain momentum following workshops, USEPA sends a quarterly public participation newsletter to stakeholders and fosters relationships made at the various workshops through follow-up surveys and emails after workshop events. USEPA also plans to hold a public participation day in order to bring back various participants to talk about the progress they have made and challenges they still face in implementing public participation. Additional follow-up includes a public participation Facebook page, blog, and online refresher courses for training of trainers.

Source: Shereen Kandil, US EPA

USEPA also has numerous online resources relating to specific public participation requirements (e.g., for particular legislation such as the Safe Drinking Water Act), its policies on public participation, the rationale behind public participation and its benefits and specific technical guidance on all aspects of public participation procedures, such as how to plan and budget for public involvement, how to identify the public concerned, how to provide technical and financial assistance for public involvement, how to do outreach, how to manage consultations, how to take comments into account, how to overcome barriers to public involvement, etc. These are available at EPA's public involvement website: http://www2.epa.gov/open.

3.2.2 Guideline 9

States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.

Discussion

Key words in this Guideline include "proactively," "transparent," "consultative," "efforts to ensure," and "adequate opportunity."

This Guideline recognizes both the benefits of public participation in environmental decision-making, and the challenges that can be faced. In many types of administrative decision-making, members of the public concerned will have a recognizable interest, and will automatically be granted legal status and rights in the procedure. But Guideline 9 goes beyond Guideline 8 in recognizing that public authorities can help to ensure that public participation in environmental decision-making is made even more effective. This may require special efforts, for example in the inclusion of hard-to-reach and marginalized groups.

In the same way that the access to information pillar consists of both "passive" and "active" elements, the public participation pillar through this Guideline emphasizes the proactive involvement of public authorities in promoting public participation. This Guideline can also be read to encourage States to engage private or public project proponents and to encourage them to take a proactive approach towards the public, by identifying the public concerned, entering into discussions, and providing information before an application has been filed. States might include provisions in law that place obligations on project proponents to do so.

China's rapid development has created an acute problem with air pollution. The government has embraced broader public participation as a means of reaching greater acceptance and legitimacy of governmental decisions. In April 2014, China adopted amendments to the Environmental Protection Law that officially promote public participation. (See Box 44).

BOX 44: China's 2014 amendments to the Environmental Protection Law (effective 1 January 2015)

Article 56. The project owner of a construction project for which an environmental impact report should be prepared pursuant to the law shall explain relevant situations to the potentially-affected public when preparing the environmental impact report, and solicit public opinions. The competent department that is responsible for the examination and approval of environmental impact assessment documents for the construction project shall make public the full text of environmental impact reports of the construction project upon receipt thereof with exception of commercial secrets and confidential circumstances as specified by the State. In the case of a construction project failing to solicit sufficient public comments, they shall request the project to fulfill the task.

Source: EU-China Environmental Governance Program (unofficial translation).

While transparency is a recurring theme with respect to Rio Principle 10, and has been discussed above in connection with relevant international political declarations, this is the first reference to transparency within the Guidelines themselves (there is another mention of transparency with respect to access to justice under Guideline 19). Transparency is a broader term than "openness" in that it covers more than the mere fact that information is in principle available. The term implies that open information is also being used and applied in practice in order to uphold the integrity of processes and procedures and to hold actors accountable. Consequently the mechanisms for accountability are also an important component of transparency. The term "consultative" includes an implication of cooperation and mutual respect.

A proactive approach to public participation will often require public authorities to deal with financial obstacles to participation and other capacity issues. Financial issues should not be an impediment for civil society to participate. Minimum financial resources are needed to ensure fair, equitable and balanced participation. The Inter-American Strategy for Public Participation in Decision-Making for Sustainable Development promotes the development of alternative and flexible funding mechanisms for sustainable development projects that promote public participation.

Ensuring an adequate opportunity for members of the public to express their views requires reasonable time limits in the various phases of the process. Time limits should be set taking into account related legislation. For example, if a member of the public could potentially need to file an information request to prepare for participation in a particular decision-making process, the time limit for responding to an information request should be taken into account. Thus, if 30 days is the reasonable period of time for gathering relevant information through official requests, then the period of time between the notification and any public hearings or submission of comments would need to be rather longer than 30 days to ensure an opportunity to get information, review it and compose comments based upon it.

Ensuring an adequate opportunity for members of the public to express their views also requires taking into account the specific circumstances of specific groups and individuals. In some cases, it will be necessary to take into account levels of literacy and the use of various minority or non-official languages. In other cases, it might involve setting the locations of meetings and consultations in order to reach groups or individuals that are potentially affected. Traditional forms of decision-making such as tribal methods

for reaching consensus may need to be taken into account. This will often require substantial dialogue and trust-building. For some marginalized or vulnerable communities public consultation in the form of meetings can be effective because of the opportunity for interaction with proponents. Informal meetings nevertheless should respect good practices and values including early notification, neutral chair, use of non-technical language, etc. Care should be taken to manage the inherent 'inequitable power dynamics' where the proponent has superior finances, technical expertise and access to relevant information.

Making participation relevant

Irrespective of the characteristics of the decision-making process in question, it should be noted that special efforts may have to be made to facilitate the effective participation of some groups and members of the public concerned. Participation can be affected by power imbalances within communities and household family relations. Specific measures should be considered to ensure equal participation by both men and women. Public participation procedures should take into account the fact that indigenous groups, minorities, or other populations may have their own methods for reaching decisions, such as consensus-building processes, that may not always easily fit within standard multi-stakeholder decision-making. Special efforts may also be required when illiteracy is widespread or when minorities lack adequate understanding of the (official) language(s) being used in the decision-making process.

Public participation procedures should take into account the fact that indigenous groups, minorities, or other populations may have their own methods for reaching decisions, such as consensus-building processes, that may not always easily fit within standard multi-stakeholder decision-making. Sometimes complex consensus processes can offer advantages, particularly where individuals are fearful of reprisals for expressing themselves freely. International standards in the field based upon instruments such as the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 should be taken into account in this regard.

Special efforts could be made to facilitate attendance such as by providing transport costs or local focus group meetings. Local authorities can often play a critical role as mediators to ensure that relevant groups are involved. Youth should be included as well.

BOX 45: Chile's 2010 amendments to the General Environmental Framework Law (Law 20.417 modifying Law 19.300).

The 2010 amendments to Chile's environmental law created several new agencies, including the Environmental Evaluation Service, which is in charge of ensuring public participation in Environmental Impact Studies (EIS) and Environmental Impact Declarations (EID). Prior to the amendments, public participation was only required for EISs, that is, for projects with potential significant environmental impact. EIDs are optional and can only be initiated by a public authority. The Environmental Evaluation Service must take into account public comments, and the Service's determination is subject to appeal. The new rules require the authority to consider the social, economic, cultural and geographic characteristics of the population affected by the project. The authority is also required to take special efforts to adapt participation to vulnerable, geographically isolated, or indigenous communities.

Link: http://www.iclg.co.uk/practice-areas/environment-and-climate-change-law/environment-and-climate-change-law-2013/chile

Under some legal systems the proponent of a particular activity conducts the public participation procedure, while in other systems a public authority does it (see Box 45). There is no clear standard and

the choice of whether the proponent or an authority is responsible for the public participation procedure depends on a number of factors, including the level of sophistication of various parties, the likelihood that a proponent will conduct a fair and professional procedure, the effect of conflicts of interest, concerns about corruption, and the availability of professional consultants. The above-mentioned Inter-American Strategy for Public Participation promotes an equitable distribution of the cost burden of a public participation process among all relevant actors as well as incentives and mechanisms to ensure the accountability and transparency of expenditures on projects dealing with sustainable development and environment. This approach has been criticized, however, as contributing to inequities and flying in the face of the polluter pays principle where authorities require community members to share the costs and burdens of a participation process equally with well-resourced proponents. Some countries place the responsibility (and the cost, applying the polluter pays principle) onto the proponent, while requiring the proponent to make use of a certified professional service. In Ontario, Canada between 1988 and 1996 certain bodies including the Environmental Assessment Board had the power to require a project proponent to provide funding in advance to intervenors in a permit application proceeding in order to ensure their effective participation.[119]

For decisions that impact land or other natural resources that indigenous and resource-dependent communities use or occupy, informed consent should be sought sufficiently in advance of any decisions by authorities, or any commencement of activities by an operator that could affect communities or their lands, territories, and resources.

In appropriate situations, the public authorities may need to address security concerns. It is critical for public authorities to ensure the safety and security of the individuals or groups who may wish to express their views. One aspect of ensuring that members of the public concerned have an adequate opportunity to express their views is that members of the public concerned should be free from intimidation and external pressures. States may need to take measures to protect and empower vulnerable populations, as well as environmental defenders, activists, and other members of the public, individually or organized, who are seeking or promoting a healthy environment.

No person should be threatened, intimidated or harmed in any way for trying to realize their right to a healthy environment through seeking access to information, participating in procedures, or enforcing rights through access to justice. The UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has brought attention to this issue (see Box 46)

3.2.3 Guideline 10

States should ensure that all information relevant for decision-making related to the environment is made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.

Discussion

Ensuring all relevant information is made available:

A practical way of meeting the goal of Guideline 10 to ensure that "all information relevant" for a particular decision-making procedure is made available, is to adopt standards for the contents of documentation available for public consultation during environmental decision-making. The information relevant to a particular decision-making depends on the type of decision-making.

119 See Michael Jeffery, 'Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-making' (2002) 19 *Arizona Journal of International & Comparative Law* 643.

BOX 46: Protecting defenders of natural resources and land rights

The international NGO Global Witness has documented an alarming rise in the incidence of killings of people defending environmental and land rights, showing that over 900 persons have been killed while taking peaceful action to defend environmental and land rights between 2002 and 2013.[120]

Following are excerpts from the report of the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment:

> "39. The rights of freedom of expression and association are of special importance in relation to public participation in environmental decision-making. The Special Rapporteur on the situation of human rights defenders has said that those working on land rights and natural resources are the second-largest group of defenders at risk of being killed (A/HRC/4/37), and that their situation appears to have worsened since 2007 (A/68/262, para. 18). Her last report described the extraordinary risks, including threats, harassment, and physical violence, faced by those defending the rights of local communities when they oppose projects that have a direct impact on natural resources, the land or the environment (A/68/262, para. 15).
>
> "40. States have obligations not only to refrain from violating the rights of free expression and association directly, but also to protect the life, liberty and security of individuals exercising those rights. There can be no doubt that these obligations apply to those exercising their rights in connection with environmental concerns. The Special Rapporteur on the situation of human rights defenders has underlined these obligations in that context (A/68/262, paras. 16 and 30), as has the Special Rapporteur on the rights of indigenous peoples (A/HRC/24/41, para. 21), the Committee on Economic, Social and Cultural Rights, the Inter-American Court of Human Rights, and the Commission on Human Rights, which called upon States 'to take all necessary measures to protect the legitimate exercise of everyone's human rights when promoting environmental protection and sustainable development' (resolution 2003/71)."

Source: UN Doc. A/HRC/25/53 (2013).

120 Global Witness. "Deadly Environment: The Dramatic Rise in Killings of Environmental and Land Defenders" (2014), available at http://www.globalwitness.org/sites/default/files/library/Deadly%20Environment.pdf (access 21 January 2015).

In the context of environmental impact assessment, certain standards for the contents of EIA documentation available for the public to review have developed over time. UNEP's Division of Technology, Industry and Economics has produced valuable guidance documents and other publications on EIA practices and procedures worldwide.[121] One particular model for standards in this area is the UNECE Convention on Transboundary EIA (Espoo Convention). This convention includes an Appendix that sets forth the minimum contents of EIA documentation (see Box 47).

Standards are also under development globally with respect to other types of environmental decision-making. For example, the contents of the application for an integrated permit for industrial emissions may be specified in the law and this information may be publicly accessible pursuant to a public participation procedure. Other matters that may typically be included in documentation are: specific data with respect to emissions, materials and energy use; technological measures used, particularly for emissions control; measures for prevention, reuse, recycling and recovery of waste; monitoring plans; and expert studies and reports.

Nevertheless, even if the standards of documentation are complied with, the public concerned should have access to any other relevant information that is potentially available, including for example information held by the proponent of an activity. Considering that public authorities have the duty to take into consideration

121 http://www.unep.ch/etb/publications/enviImpAsse.php

BOX 47: Contents of the EIA documentation under the Espoo Convention (Appendix II)

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

all information relevant to their functions, it would seem inescapable that any information that is pertinent to the decision-making should also be accessible to the public. It should also be remembered that the information obligations under public participation laws work in parallel to any rights the public has to request information held by public authorities.

"Objective, understandable, timely and effective manner"

In the case of EIA, for example, documentation is often prepared by the project proponent. The project proponent may be biased in favor of its proposal and is not always in the best position to ensure the objectivity of the information presented. State practice under the Espoo Convention has shown that it is important for the public authorities to closely supervise the preparation of EIA documentation, especially for those projects where there are potential transboundary impacts (within the Convention's scope), as the public authorities will have responsibilities towards neighboring countries to guarantee that EIA is properly carried out. But this observation is equally valid for EIA within the boundaries of a single State.

An emphasis should be placed on provision to the public concerned of information in locally relevant forms that make it accessible and understandable. The members of the public concerned should be given every opportunity to consult the information necessary to participate effectively in the process. Traditionally, documentation has been accessible through the possibility to examine or view the file or dossier in a public office at times convenient for the public, and this method may still be efficient in some societies. Increasingly, such information is provided through websites, but websites alone may not be sufficient to reach the public concerned. It is quite common in appropriate cases to supplement the general availability of the documentation by direct communication to certain segments of the population or individuals with special needs. Authorities often keep registers of individuals and organizations that have requested to be notified of certain categories of decision-making.

An important standard for making information "understandable" is the requirement for the documentation to include a "non-technical summary." This is potentially an important aid in facilitating a basic

understanding of the decision-making process and the proposal itself and its importance should not be underestimated. The non-technical summary, despite its importance, is often overlooked or even resisted by project proponents, for whom the idea of reducing their detailed technical work into layman's terms may be unwelcome, but with time and practice the non-technical summary becomes a key part of the documentation. Guidance on the development of non-technical summaries has been developed through the International Association for Impact Assessment.[122] Not just the summary, but the whole environmental impact documentation should be written in a way that is understandable by an educated layperson.[123]

As mentioned above, the availability of information in various languages, particularly indigenous ones, and the opportunity to provide comments and inputs in such languages, may need to be facilitated.

"Timely" includes the obligation to update information continuously and as soon as it becomes available. Note that the coming to light of new information in the middle of a complex decision-making procedure can sometimes trigger the obligation to recommence the procedure or to start a new procedure (see Guideline 12).

The general availability of environmental information greatly increases the ability of the public to analyse information and to prepare for effective participation. See the discussion under Guideline 4.

Costs may be an important issue. It is general practice that the documentation should be open for examination or inspection free of charge at public offices at reasonable times. The standards for costs of copying information should be the same as those applied to the costs of copying information in fulfillment of an information request (see Guideline 1).

Finally, it is important to consider the question of ownership of documentation. The work product contained in an environmental impact assessment or other documentation in environmental decision-making represents a great deal of professional effort. Claims of intellectual property interests in such documents, however, have prevented members of the public from gaining access to EIA documentation in several countries. Usually after administrative or court challenges the information has to be made available, but in order to prevent misunderstandings, it is helpful for States to establish in their laws or policies instructions to authorities on how to deal with this issue. See also the discussion on intellectual property rights under Guideline 3.

While intellectual property rights could prevent unauthorized copying and distribution of materials, particularly for profit, they may not be used to justify withholding documents from public examination and inspection. It should be clarified that the documentation is being produced for a public purpose and therefore would be subject to the legitimate needs and interests of the relevant administrative procedure. Furthermore, a holder of intellectual property rights ordinarily would need to show a potential for harm to such rights, which is hardly the case from the public's mere access to documentation in order to participate in a public proceeding. To facilitate the ability of members of the public and organizations to share information, collaborate and compile comments, the law should also ensure that members of the public generally have the right to copy and distribute the information in EIA documentation for non-commercial purposes.

Particular information of a proprietary nature may be redacted in a limited manner from documentation where legal requirements are met. Some countries have made specific legal provision, however, that certain

122 See http://www.iaia.org/iaia09ghana/documents/cs/CS7-3_Jesus_Good_Practice_Criteria.pdf (accessed 10 November 2014).
123 See B J Preston, 'Adequacy of Environmental Impact Statements in New South Wales' (1986) 3 *Environmental Planning & Law Journal* 194 at 203. See *also Silva v. Lynn*, 482 F.2d 1282 at 1285 (1st Cir. 1973) *and Environmental Defense Fund v. Corps of Engineers*, 348 F. Supp. 916, 933 (W. D. Miss. 1972).

information cannot be considered confidential under any circumstances. An example is the European Union's provisions on genetically modified organisms (GMOs). Under the relevant Directive, under no circumstances can the following be considered confidential: a general description of the genetically modified organism or organisms concerned, the name and address of the applicant for the authorization of the deliberate release, the intended uses and, if appropriate, the location of the release; the methods and plans for monitoring the genetically modified organism or organisms concerned and for emergency response; and the environmental risk assessment.

3.2.4 Guideline 11

States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

Discussion

This Guideline deals with how public authorities handle the outcome of the public participation process and the public nature of administrative decision-making.

General administrative laws almost universally require administrative decisions to be based on reasons and to be justified or "motivated" through explanation. This is not least due to the need for a clear record of the administrative process in the event of an appeal. It is therefore of critical importance that detailed records be kept of the comments submitted by the public and of the way in which these were handled. But more generally, these types of standards build trust in institutions and demonstrate that participation in civic affairs is a legitimate mechanism for resolving social issues. Where the public has an opportunity to participate in the administrative process, including by expressing opinions and putting forward proposals, the substance of the public's participation is an element to be taken into account. As a public authority needs to apply legal standards in considering comments, legislative guidance is important.

In some societies, decision-making with respect to major development projects requires the affirmative consent of the population. This may not be appropriate or practicable everywhere, but in some States it is understood that public approval is a prerequisite to major projects. The notion of free, prior and informed consent (FPIC) is discussed above at Section 3.1.1 in connection with the rights of indigenous peoples. The extension of this concept generally has some precedent, and it has reasons for application in particularly sensitive areas or areas where potential impacts on traditional lifestyles or indigenous peoples are significant. An example of a legal framework for consent is found in Barbuda (see Box 48).

BOX 48: Obtaining the consent of the people of Barbuda

Barbuda is a dependency within the State of Antigua and Barbuda. In 2007 the Parliament of Antigua and Barbuda adopted an act confirming that all land in Barbuda is the common property of the people of Barbuda, as defined in the act, held by the Crown in trust for the Barbudans. The consent of the people of Barbuda is required for any "major development," defined as a development which will cost in excess of $5.4 million, or one which "will have a significant impact on the economy, environment or infrastructure." The consent of the people of Barbuda needs to be secured at two stages of the decision-making: first, to the principle of the proposal; and second, once the detailed proposal has been approved by the Council and Cabinet.

Consent is secured according to regulations prescribed in law that cover, inter alia, the form and contents of notification, the requirements for a quorum of a meeting to decide on the proposal, the method of giving consent, and the persons entitled to vote. Consent shall be decided by a majority of persons present or casting ballots, as the case may be.

Barbuda is a unique situation in that all land on the island is held in common and ownership is prohibited. It should therefore be noted that the majority voting system in Barbuda should not automatically be considered acceptable for all cultures, nor would such a system necessarily fulfill the conditions for "taking into account" public comments.

In most circumstances, however, "taking due account" does not imply a veto power held by the public as is the case in Barbuda, nor does it shift the responsibility for decision-making from the public authority to the public. "Taking due account" of public comments should be understood as, at a minimum, the duty of the competent authority to respond to the substantive concerns and arguments put forward in the comments. In the context of strategic decision-making, in 2008 Austria's Council of Ministers adopted Standards on Public Participation to assist government officials, which, inter alia, state that:

> 'Take into account' means that you review the different arguments brought forward in the consultation from the technical point of view, if necessary discuss them with the participants, evaluate them in a traceable way, and then let them become part of the considerations on the drafting of your policy, your plan, your programme, or your legal instrument.

Taking due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment. It does not amount to the right of the public to veto the decision. In fact it would be virtually impossible to satisfy all comments, particularly as many are in conflict with each other. Public participation does not require that the final say about the fate and design of the project rests with the local community living near the project, or that its full acceptance is always needed. However, the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was accepted or rejected on substantive grounds. Where comments are disregarded or rejected without any discussion of the merits, this requirement is not met. A failure to take into account properly the outcomes of public participation could constitute a procedural violation of administrative law, and could invalidate the administrative decision or give rise to rights to challenge the decision.

States should consider what mechanisms are provided in the law for ensuring that public comments are taken into account in formulating the decision. For example, if the law obligates the decision-maker to consider each public comment and give reasons why it was rejected or accepted and if accepted, to explain how it was incorporated into or affected the decision, this provides evidence that the comment was actually taken into account.

It is good practice for public authorities to respond to a comment at the same level of specificity or generality as that of the comment itself. Where comments are quite specific, the public authority should address them in detail while general comments can ordinarily be responded to in general terms. This practice helps to encourage the public to submit fully articulated and detailed comments.

The following guidance on practical measures to take into account the outcome of public participation is quoted from *The Aarhus Convention: An Implementation Guide* (2d. ed.), p. 56*:*

> Taking due account of the outcome of public participation can be facilitated by certain logistical measures, such as the registration of written comments and the recording of public hearings.

BOX 49: Benefits of reasoned decisions

There are many benefits to be gained from giving reasons in a decision. Among them:

- Formulating reasons requires the decision maker to identify the issues, process evidence systematically and to state and explain conclusions. This increases the reliability of the decision.
- A reasoned decision on file can assist future decision makers facing similar circumstances, and can assist bodies in developing clear, consistent and regular decisions.
- Reasons may assure the parties that the hearing has given them a meaningful opportunity to influence the decision maker and to limit the risk of error.
- Public exposure to the reasons behind a decision increases confidence and shows that relevant arguments and evidence have been understood and properly taken into account.
- Reasons may provide the basis for further proceedings, such as appeals, acting as a further control over the quality of decision-making.
- Authorities can be held accountable for their decisions and acts if the reasons are shown.
- Reasons help to uphold decisions under review, by showing that they are not made arbitrarily or contrary to law.

Source: Adapted from J. M. Evans et al., Administrative Law: Cases, Text, and Materials, 3rd ed. (Toronto, Edmond Montgomery Publications Ltd, 1989) pp. 309-344[124]

124 See also "The Aarhus Convention: An Implementation Guide," 2d. ed., (2013), at 158.

A table documenting the comments submitted and the ways in which they have changed the draft may be a good method when many comments are received, because similar arguments can be clustered in the table. For comments not taken on board, the table can be used to record why they were rejected. Where the wording of the proposed text is important, e.g., legislative proposals, it may be useful to integrate comments directly in the draft text, using track changes to make them visible. In some situations, it may be possible to meet with those who submitted comments to explain which arguments will or will not be taken on board and why.

A good practice used in some countries in handling comments received is to require the relevant authority to respond directly to the substance of the comments. For this purpose, comments that are substantially identical may be grouped together. Some countries require the substance of all comments to be addressed in a written document justifying the final decision, which may be called a 'response document'. This written document may also be used to satisfy [administrative law requirements that decisions] be given in writing along with the reasons and considerations on which they are based.

For rulemaking and other forms of strategic decision-making, many countries have precise requirements related to the generation of a response document addressing comments received. An example of a fictional but realistic response document to a rulemaking procedure has been developed by the State of California and is available at http://www.oal.ca.gov/res/docs/pdf/Sample_FSOR.pdf.

Publicity of administrative decisions involving matters of public interest is very often a standard of administrative law. The public should be promptly informed when the decision has been taken, in accordance with appropriate procedures. Members of the public or stakeholders that actually participated may have additional rights to notification. Most States have definite timeframes for notification of final decisions to parties and the public. Whatever the timeframe for informing the public that exists under national law, it should be reasonable, taking into account the availability of additional legal procedures for challenging

the final decision. It would not be reasonable, for example, for the proponent of a project to be notified about the final decision substantially in advance of the public notification. If the project is approved, the proponent might commence construction before members of the public have an opportunity to appeal, which might lead to irreparable harm to the environment or human health.

The public nature of the decision applies to the text of the decision along with the reasons and considerations on which the decision was based, including the handling of comments that is, the fully motivated decision in legal form demonstrating evidence of the taking into account of public comments. However, the manner of notification can vary according to local circumstances, and does not require individual delivery of the entire dossier to the entire public concerned. Under the law, different agencies have varied procedures and ways of making decisions public. At a minimum the concerned public should be informed of the final decision and how and where the full documentation on the decision can be accessed. Mechanisms for notification might include public announcements, news items and interviews in the local media; posting of information in heavily trafficked areas; information sent by mail to the public concerned; local loudspeaker broadcasts and announcements made in a traditional manner (e.g. village assemblies, etc.). They may also include innovative use of information and communication technologies through interactive exhibitions and electronic tools.

As discussed under Guideline 9, it may be necessary to meet the requirements of Guidelines 11 as well in more than one language, for example when minority or indigenous communities are involved. India's 2006 Law on EIA includes an appendix setting forth the procedures for public hearings. According to Article 6.5 of this appendix, a "statement of the issues raised by the public and the comments of the applicant shall also be prepared in the local language and in English and annexed to the proceedings" of the public hearing. The Indian regulations further require the proceedings of the public hearing to be conspicuously displayed at local government offices and posted on the Internet.

3.2.5 Guideline 12

States should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any such review process to the extent that circumstances permit.

Discussion

Guideline 12 deals with the situation where new information may arise during a decision-making procedure or following the conclusion of a decision-making procedure. It includes the general principle that public participation is an essential part of decision-making and should be based upon all the information available at any given time. Thus, if new information comes to light, the public should have the opportunity to participate in its consideration. As far as possible, this should be on the same terms as in a standard public participation procedure.

A review could be prompted by changes to operating activities, where there were unconsidered environmental issues or where there is new understanding of issues because of additional research. Affected communities or the public concerned could in fact be the source of the additional information that comes to light. Many countries allow for public participation in the reconsideration or updating of operating conditions in connection with permit renewal. For example, in the European Union, public participation is required if a permit issued under the Industrial Emissions Directive is subsequently reconsidered and updated.

The approach of the Aarhus Convention in such situations is to apply the provisions and standards related

to public participation in the initial decision-making procedure mutatis mutandis, which means "with the necessary changes" based upon practical considerations.[125] The implication is that the requirements should be applied to the maximum extent except where justifiable in the interests of efficiency. For example, where the new information relates to only a small part of a project, without affecting substantially the remainder, it would only be necessary to conduct public participation on the potentially affected elements of the decision-making. However, it may be that the implications of the new information, due to an understanding of synergistic or cumulative impacts for example, would require a complete repeat of the decision-making process. The Espoo Convention takes a similar approach with respect to the necessity to consult with neighboring States on whether to revise the decision in the light of new information.

This provision brings attention to the fact that environmental decision-making may be extremely complex. In scoping, for example, proponents, authorities, or experts should consider cumulative environmental impacts, not only those of the proposed activity itself, but also the interaction of the impacts of the proposed activity with environmental effects from other activities. Consequently the proposal of a new, unrelated activity may have a profound effect on a particular existing proposal.

"To the extent that circumstances permit" introduces an objective set of criteria to be interpreted in the light of the purposes and objectives of Rio Principle 10. Thus, any departure from the full application of public participation standards in the case of a review process should be limited to that which is unavoidable based on the circumstances.

3.2.6 Guideline 13

States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment.

Discussion

While the previous Guidelines have been slightly more focused on so-called "specific" decision-making that is, decisions on concrete activities for which a type of permitting, consent or approval procedure is required – public participation is also an important and essential element of other types of decision-making. One category of decision-making is "strategic" decision-making at the level of plans, programmes, policies, and legally binding rules. The Guidelines recognize that the public has an important role to play in the development of such strategic decisions in order to improve their performance and quality and heighten their legitimacy. As discussed in the introduction to this section, the precise parameters of public participation in strategic decision-making typically will differ from that of specific decision-making. In some States, the public will have similar opportunities to those offered in the case of specific decision-making (see examples below).

Governments and legislatures have long recognized the value of inviting stakeholders to participate in strategic decision-making, planning and legislative drafting procedures. Authorities usually welcome dialogue in order to help fashion rules, policies, plans and programmes that optimize the economical use of resources and have a high chance of implementation. Individuals and groups that are potentially affected and therefore directly interested in a particular procedure can usually be counted on to provide their views, insights and concerns actively and forcefully. Economic planning has sometimes verged into the realm of joint decision-making where voluntary agreements with industrial sectors have become the norm. States can benefit from institutional structures, mechanisms and partnerships that formalize such processes.

125 Aarhus Convention, Article 6, paragraph 10. For further commentary, see "The Aarhus Convention: An Implementation Guide," 2d. ed., (2013), pages 158-9.

Strategic environmental assessment

The mechanism of Strategic Environmental Assessment, or SEA, has become a standard instrument for the consideration of environmental impacts in the development of plans, programmes and policies and can also be applied to rulemaking and development of legislation. As in the case of EIA, SEA does not necessarily culminate with a legally binding decision, but may exist as a process or phase within a greater, complex procedure. Some instruments on SEA, such as the European Union Directive on SEA, specifically mention plans and programmes, but not policies. The purpose of SEA is to ensure that the environmental consequences of relevant strategic decisions are identified and assessed before their adoption so that measures can be taken to minimize and mitigate such consequences. SEA requirements are applicable to strategic decisions in various sectors, including transport, energy, waste, water, industry, telecommunications, tourism, town and country planning and land use, "which are likely to have significant effects on the environment" (European Union SEA Directive) or "which are likely to have significant environmental, including health, effects" (2003 Kyiv SEA Protocol to the Espoo Convention). The most advanced international instrument on SEA is the 2003 Kyiv SEA Protocol to the Espoo Convention, adopted in the UNECE region and in force since 2010.

According to the UNECE Espoo Convention Secretariat, SEA:

> "… is a systematic and anticipatory process, undertaken to analyse the environmental effects of proposed government plans, programmes and other strategies, and to integrate the findings into decision-making. It involves the public and environmental and health authorities, giving them a say in government planning: the responsible authority has to arrange for informing the public and consulting the public concerned, and the decision-maker has to take due account of comments received from the public and from the environmental and health authorities. Such assessments are most commonly carried out for land-use planning at various levels of government, but are also applied to other sectoral plans, such as for energy, water, waste, transport, agriculture and industry."[126]

BOX 50: SEA in China

In China, SEA of planning instruments is covered under the EIA Law. Article 11 of the law requires planning authorities to hold public hearings and expert meetings or employ other methods to solicit comments and suggestions from relevant authorities, institutions and the public on draft plan environmental assessment (Plan-EA) reports. The responsible authority is required to seriously consider comments and suggestions received and to produce an explanatory response document as a part of the final Plan-EA report.

In a pilot study in East and Southeast Asia, it was found that some provincial SEAs involved the organization of public meetings or the conducting of surveys, while others used traditional consultations where village leaders spoke on behalf of local communities.

Source: J. Dusik and J. Xie, "Strategic Environmental Assessment in East and Southeast Asia: A Progress Review and Comparison of Country Systems and Cases" (World Bank: 2009).

The term "legally binding rules" may include rules, regulations, proclamations, decrees, orders and guidelines made by the executive branch of government at various levels, as well as laws, sub-laws and regulations promulgated, passed or adopted by legislative bodies. To fall under this Guideline, such acts must have legal force and be legally binding on the general public or on specific persons intended.

126 UNECE Press Release, "New international treaty to better integrate environmental and health concerns into political decision-making" (6 July 2010), http://www.unece.org/press/pr2010/10env_p22e.html (accessed 21 January 2015).

Legally binding rules are not confined to environmental rules but can include rules in other sectors such as construction, industry, mining, transportation and energy that have potentially significant environmental effects. Legally binding rules can be adopted at various levels of government, including where applicable the local, district, regional, federal unit or state level.

BOX 51: Public participation in legislative drafting and policy development in Morocco and Chile

Morocco's 2009 decree on public participation and right to information requires all draft regulations and laws to be made publicly available on the Internet for public comment. The interactive web page can be found at www.sgg.gov.ma. Public authorities are required to respond to the comments.

Morocco conducted extensive public consultation in the development of the national Charter on Environment and Sustainable Development, adopted in 2011. The government conducted 16 regional consultations with 8,527 total participants, who submitted 3,351 recommendations. An additional 2,000 recommendations were submitted via a website that had 127,000 visitors. Parallel consultations were held with 46 professional associations, political parties, and non-governmental organizations, generating a further 400 recommendations.

Source: Morocco case study, available at http://www.epa.gov/international/public-participation-guide/Tools/workshops.html#rabat (accessed 21 January 2015).

Chile's online e-PAC site for public participation in environmental regulations (emissions and environmental quality norms and pollution prevention plans) is found at http://epac.mma.gob.cl/Pages/Home/index.aspx.

In States with strong separation of powers, public participation in the activities of the legislative branch may depend upon the adoption of self-governing rules by parliaments and other assemblies. Legislative bodies often conduct public hearings and seek public comments in their deliberations. Attention to this distinction may be important in ensuring that appropriate levels of public participation are achieved in all forms of strategic decision-making relevant to the environment. It should also be remembered that the executive branch of government often plays a major role in the drafting of legislation that is eventually adopted by legislative bodies. The work of the executive branch in drafting legislation may be made subject to public participation requirements.

The terms "policies, plans and programmes" may not have specific legal definitions but should be understood in a common sense manner with the aim of ensuring broad participation. A policy is often a proposed or adopted course or set of principles for action such as a wetland or forest conservation policy, an energy policy, or a transport policy. It differs from law in that it is aimed at achieving particular outcomes or results, and sets administrative directions in a particular area. A policy usually has a legal basis, but also the adoption of a policy can result in new legal measures aimed at implementation. Policies often include proposals for laws but may contain proposals for administrative actions only.

A plan is a detailed proposal or statement of commitment or intent that establishes a set of specific actions aimed at achieving a particular goal or set of goals, taking into account relevant circumstances. A plan is often related to a policy in that it establishes priorities for action to implement the policy. For example, a State may adopt a policy to apply integrated river basin management principles in a particular watershed, and responsible authorities will then be tasked with developing a set of priority actions to meet the established goals, taking into account the physical and economic characteristics of the basin. Other examples may include land use planning, nature conservation planning, sectoral planning, etc.

A programme typically, though not always, has a longer-term horizon than a plan. The measures specified in a programme are often more flexible and general than those in a plan and can be refined on the basis of assessments and stocktaking. Examples could include a malaria eradication programme, prenatal health programme, natural resources management training programme, or sustainability education programme.

BOX 52: Public participation in preparation of plans - Development plans in EU Member States and applicant countries

EU law requires public participation in the drawing up of development plans for the allocation of EU financial assistance under EU structural funds. EU structural funds are intended for:

- Promoting the development and structural adjustment of regions whose development is lagging behind.
- Supporting the economic and social conversion of areas facing structural difficulties.
- Supporting the adaptation and modernization of education, training and employment policies and systems.

Council Regulation (EC) No. 1083/2006 of 11 July 2006 repealing Structural Funds Regulation (EC) No. 1260/1999 and laying down general provisions for the European Regional Development Fund, the European Social Fund and the Cohesion Fund requires Member States seeking financial assistance from the funds to submit development plans developed in "partnership" between the public administration and "social and economic" partners, including those representing civil society and environmental partners. The development plans should include an analysis of the situation prepared by a Member State and the priority needs for attaining the objectives of structural funds, together with the strategy, the planned action priorities, their specific goals and the related indicative financial resources.

In some countries (such as Ireland and the United Kingdom) these "partnership arrangements" between the public administration and social and economic partners require public review of the draft development plans through public hearings and by the provision of written comment on the draft plans. They also enable NGOs to participate — with the same rights and duties as public authorities and other social and economic partners — in the committees that monitor the preparation of development plans. For example, in Ireland, since 2009 the Environmental Pillar (a representative group for some 27 environmental groups nationally) is regularly asked for its comments on plans involving structural funds, such as the EU 2020 growth strategy, along with other social partners, to ensure that policymaking takes environmental issues into account.

Source: The Aarhus Convention: an Implementation Guide, 2d. ed., p. 177

In the development of SEA legislation it is useful to identify the types of strategic decisions that are covered and for which public participation is required. This can be done through the adoption of annexes or lists containing descriptions of specific types of decisions, and/or criteria for establishing categories of strategic decisions falling under the law. In some cases it may be useful to determine that certain strategic decisions will undergo SEA automatically, while other categories of strategic decisions will undergo a screening test to determine whether there are significant potential environmental impacts. In case of a positive determination by the relevant authority, SEA would be required. The SEA legislation in some countries simply makes SEA mandatory for strategic decisions "relating to the environment," which can be determined through reference to other legislation.

SEA legislation should have certain characteristics common to other types of environmental decision-making instruments, such as transparency, fairness, clarity and effectiveness, as well as procedural standards such as early opportunities for participation. In fact, some countries have adopted SEA legislation that

mirrors certain aspects of EIA legislation. Information and notification provisions for SEA may be based upon or may be similar to those found in EIA legislation and may provide for the use of various methods of information generation and dissemination. Time frames should be reasonable and coordinated with those of other relevant processes. However, as SEA typically involves matters on a strategic level that are of general application, it is less important to distinguish between the general public and the public concerned. Thus, notification and the provision of information may in fact be simpler in the case of SEA since mechanisms for broad public dissemination may more often be used. And, as in other types of environmental decision-making, public authorities can increase the effectiveness of SEA through proactive efforts to involve the public.

BOX 53: US EPA's Regulatory Development and Retrospective Review Tracker (Reg DaRRT)

Reg DaRRT is an online database that provides information to the public on the status of EPA's priority rulemakings and retrospective reviews of existing regulations. Reg DaRRT includes rulemakings that have not yet been formally proposed, those that are open for public comment, those for which EPA is working on a final rule, and those that have been recently finalized. In addition, Reg DaRRT includes retrospective reviews of rules that have already been finalized and are undergoing review to determine if they should be modified, streamlined, expanded, or repealed. The database is available at http://yosemite.epa.gov/opei/RuleGate.nsf/content/about.html?opendocument.

The regulations.gov website provides information for the public to learn about and comment upon proposed regulations and related documents published by the U. S. Federal Government.

BOX 54: The mechanics of publishing draft rules

Slovenia's "Act amending the Environmental Protection Act" specifies the process for public participation in the adoption of regulations that could significantly influence the environment. Under that Act, ministries and the competent authorities must make draft regulations available to the widest public and enable the public to express their opinions and comments on each draft regulation. As set out in the "Instructions on public participation in adopting regulations which may significantly impact the environment", draft regulations are to be published on the Ministry's website, together with a notice inviting the public to provide their comments. The deadline for comments is to be stated in the notice and must not be shorter than 30 days. Comments may be submitted in electronic or written form. Following the publication of the adopted regulation in Slovenia's Official Gazette, a document summarizing the official position on the publics' comments regarding the draft regulation is also published on the Ministry's website.

Source: The Aarhus Convention: An Implementation Guide, 2d. ed., p. 184 (footnotes omitted)

Interministerial coordination is a problem faced by governments around the world. Croatia, with a long coastline, is an example of a State that has established successful coordination between marine authorities and sectoral planning authorities. Increasingly the mechanism of interministerial consultation through permanent or ad hoc coordination bodies has been adopted as a means of combating technocratic, silo-type policymaking and decision-making. Some governments have taken advantage of this development in order to apply the public participation principle efficiently. Consequently, interministerial coordination bodies often allow space for the participation of observers from among the public and NGOs. Some governments have established elaborate mechanisms that include opportunities for environmental civil

society to choose one or more representatives to participate in the work of such bodies.[127] Environmental civil society organizations may self-organize through an "ECSO Forum" in order to designate the best representatives for particular processes.

Public commenting in rulemaking has a long history in some countries. This history has played a major role in developing standards for response documents (see above under Guideline 11). (See Box 54).

3.2.7 Guideline 14

States should provide means for capacity-building, including environmental education and awareness-raising, to promote public participation in decision-making related to the environment.

Discussion

Guideline 14 can be compared to Guidelines 7 and 25, which express the same ideas with respect to capacity-building on access to environmental information and access to justice. See under Guideline 7 for a discussion of capacity-building generally and in particular the role of environmental education and awareness-raising.

Governments that understand and appreciate the value of public participation should be on the front line in building capacities and encouraging public participation. The Dominican Republic is one of many States that publishes the results of public participation in EIA procedures in a national journal.

The Inter-American Strategy for Public Participation recognizes the role of education and training in developing and strengthening the capacity of individuals and groups to participate (see Box 55).

BOX 55: Capacity-building under the Inter-American Strategy for the Promotion of Public Participation in Decision-making for Sustainable Development

The Inter-American Strategy for the Promotion of Public Participation in Decision-making for Sustainable Development was developed under the auspices of the Organization of American States (OAS) in 2001 in response to a mandate given to the OAS by the 1996 Bolivia Summit Conference on Sustainable Development. The Strategy was itself developed through an open and broad participatory process over a three-year period.

In the area of capacity-building, the Strategy advises governments to:

- Develop and support formal and non-formal education and training programs for government officials and members of civil society to improve their opportunities and capacity to participate effectively in sustainable development decision-making processes.
- Promote increased investment in training and education programs that stimulate public participation and provide the necessary knowledge of the issues being considered.
- Develop or reform education and training programs for participation appropriate to national or local contexts, taking into account the framework of instruments and policies regarding participation.

Source: https://www.oas.org/dsd/PDF_files/ispenglish.pdf

Capacity-building is needed to enhance understanding of legal rights and procedures, and how to interpret and use basic scientific and technical information. Guidance on public participation needs to take into account the details of national systems, including the applicable law, rules, practices and procedures. It

127 For example, in Hungary, environmental NGOs have held annual meetings or forums in which they could nominate as many as 50 delegates to participate in various national bodies.

has become common for environmental NGOs to develop public participation guides. One example is the guide, "Stand Up, Speak Up" in Belize (see Box 56). Another example is the Environmental Defender's Office in New South Wales, the first public interest environmental law center in Australia.[128] Public authorities also often produce guidance materials for public participation. The US EPA's guidance materials, including those used in international workshops, are described under Guidelines 4 and 8, above.

BOX 56: NGO public participation guides

"Stand Up, Speak Up: Guide to Public Participation in Belize"

Produced by the Belize Institute of Environmental Law and Policy (BELPO), this guide, available in English and Spanish, helps citizens in Belize to participate actively and effectively in decision-making processes that impact the local environment. It is aimed at empowering citizens who are interested in the impacts of new development or who want to stop illegal activity, such as the destruction of a mangrove forest or the dredging of a protected lagoon. The Guide tells them where to start and how to get the information they need, and gives them agency contacts for reporting illegal activities and tips for holding government agencies accountable for enforcing the law. The Guide focuses on three laws in Belize that were written to give the public a stronger voice in policy: the Freedom of Information Act, the Ombudsman Act, and the Environmental Protection Act. The Guide also provides sample text for letters, complaints, and press releases.

A main goal of the Guide's author, BELPO President Candy Gonzalez, was to design a guide that is accessible to the majority of people in Belize. Candy said she pictured something that was "informative but not intimidating or condescending." The Guide is available through free downloads or hard copies can be picked up from BELPO's office.

128 The EDO's publications and guides can be found at http://www.edonsw.org.au/publications and http://www.edonsw.org.au/legal_guides. The EDO also produces a free weekly bulletin with updates on EDO cases, information on draft policies, plans, programs and legislation, links to EDO submissions and publications, and alerts for opportunities to comment on activities that may impact the environment. The bulletin can be accessed at http://www.edonsw.org.au/ebulletin.

4. Access to Justice in Environmental Matters

4.1 Overview

The final twelve Guidelines relate to the third pillar of Rio Principle 10 that is, access to justice in environmental matters. The following table provides a summary of the main recommendations in each Guideline and the elements for application.

©Photo Credit: UNEP, "Collapsed Supermarket- Haiti", 2010.

Guideline 15

States should ensure that any natural or legal person who considers that his or her request for environmental information has been unreasonably refused, in part or in full, inadequately answered or ignored, or in any other way not handled in accordance with applicable law, has access to a review procedure before a court of law or other independent and impartial body to challenge such a decision, act or omission by the public authority in question.

Guideline 16

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters.

Guideline 17

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the State related to the environment.

Guideline 18

States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice.

Guideline 19

States should provide effective procedures for timely review by courts of law or other independent and impartial bodies, or administrative procedures, of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment. States should ensure that proceedings are fair, open, transparent and equitable.

Guideline 20

States should ensure that the access of members of the public concerned to review procedures relating to the environment is not prohibitively expensive and should consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Guideline 21

States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

Guideline 22

States should ensure the timely and effective enforcement of decisions in environmental matters taken by courts of law, and by administrative and other relevant bodies.

Guideline 23

States should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues.

Guideline 24

States should ensure that decisions relating to the environment taken by a court of law, other independent and impartial or administrative body, are publicly available, as appropriate and in accordance with national law.

Guideline 25

States should promote appropriate capacity-building programmes, on a regular basis, in environmental law for judicial officers, other legal professionals and other relevant stakeholders.

Guideline 26

States should encourage the development and use of alternative dispute resolution mechanisms where these are appropriate.

Guideline	General requirements	Implementation elements
Guideline 15	Access to review procedures relating to information requests	Any person who has made a request Court of law or other independent, impartial body Handling not in accordance with law
Guideline 16	Access to review procedures relating to public participation	Any member of the public concerned Court of law or other independent, impartial body Substantive or procedural legality Decisions, acts or omissions
Guideline 17	Access to review procedures relating to public or private actors	Any member of the public concerned Court of law or other independent, impartial body Substantive or procedural legality Decisions, acts or omissions Affecting the environment or allegedly violating substantive or procedural legal norms relating to environment
Guideline 18	Liberal standing provisions	Broad interpretation of rules Effective access to justice

Guideline	General requirements	Implementation elements
Guideline 19	Effective procedures for timely review	Fair Open Transparent Equitable
Guideline 20	Access should be not prohibitively expensive and assistance should be available	Appropriate assistance mechanisms Financial and other barriers
Guideline 21	Prompt, adequate and effective remedies	Injunctive relief Compensation Restitution
Guideline 22	Timely and effective enforcement	
Guideline 23	Information provided about access to justice procedures	Adequate information Related to environmental issues
Guideline 24	Decisions to be publicly available	As appropriate In accordance with national law
Guideline 25	Promoting capacity-building programmes	Regular basis Judicial officers Legal professionals Stakeholders
Guideline 26	Alternative dispute resolution	To be encouraged Where appropriate

4.1.1 Actualizing rights related to Rio Principle 10

The last sentence of Rio Principle 10 states: "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." Of all the principles adopted in Rio in 1992, Principle 10 is the only one to call upon States to provide specific domestic remedies to individuals and groups based on legal process. The third element of Rio Principle 10 might properly be described as a foundation upon which the access to information and public participation pillars stand. Its language guides States towards employing a rights-based perspective for realization of the goals of access to information and public participation in environmental decision-making. Fully half of the 26 Bali Guidelines deal with access to justice, demonstrating the importance of the rights-based approach in implementing Principle 10. Without adequate legal protection of the rights and opportunities afforded under national law, they are meaningless.

The rights-based approach to implementation of Rio Principle 10 is widely accepted. The World Conservation Congress at its 4th Session at Barcelona, Spain, in 2008 made a clear connection between the rights-based approach and nature conservation,[129] and at its 5th Session at Jeju, Korea, in 2012 adopted the IUCN "Policy on Conservation and Human Rights for Sustainable Development."[130] China was one of the most recent States to acknowledge the rights-based approach in connection with Rio Principle 10, with the adoption of amendments to the Environmental Protection Law in 2014 that include the following: "Citizens, legal persons and other organizations shall have the right to obtain environmental information, participate [in] and supervise the activities of environment protection in accordance with the law."[131] Laos, Ecuador and Honduras are among countries where pilot projects on rights-based approaches to environmental protection are underway. On the regional level, the Latin America and Caribbean process to develop an instrument on Rio Principle 10 expressly applies a rights-based approach.

129 IUCN Resolution 4.056.
130 IUCN Resolution 5.099.
131 Article 53. EU-China Environmental Governance Programme (unofficial translation).

From the perspective of the public, an individual's access to environmental information, to procedures for participation in decision-making that may affect him or her, and to redress and remedy to enforce relevant rules and procedures, are a means of ensuring a high level of environmental quality. In many States, this goal is expressed in terms of the right to a healthy environment and other rights, such as rights to life, health, and an adequate standard of living. The vast majority of States worldwide have constitutional or statutory provisions concerning a right to a healthy environment.[132] The 2014 Constitution of Egypt, for example, at Chapter II, Section II, Article 46 states: "Every individual has the right to live in a healthy, sound and balanced environment. Its protection is a national duty. The State is committed to taking the necessary measures to preserve it, avoid harming it, rationally use its natural resources to ensure that sustainable development is achieved, and guarantee the rights of future generations thereto."[133]

In implementing Rio Principle 10, States should consider the relationship between the Principle and their adherence to relevant agreements as incorporated in their internal legal order. As John Knox, the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, stated in his March 2014 report to the UN General Assembly:

> Human rights law includes obligations relating to the environment. Those obligations include procedural obligations of States to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in environmental decision-making, and to provide access to remedies. The obligation to facilitate public participation includes obligations to safeguard the rights of freedom of expression and association against threats, harassment and violence.[134]

Information, participation and justice as embodied in Rio Principle 10 relate to fundamental rights found in several international legal instruments. For example, Article 19 of the Universal Declaration of Human Rights states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19, paragraph 2 of the International Covenant on Civil and Political Rights states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The UN Human Rights Committee has specifically stated that the right to information is an indispensable element of Article 19.[135] Regional expressions of the acknowledgement of the fundamental right to access to information are numerous. For example, the Inter-American Juridical Committee of the Organization of American States, at its 73**rd** Session, held in Rio de Janeiro in 2008, adopted a set of principles on the right of access to information, stating in part: "Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions in keeping with a democratic society and proportionate to the interest that justifies them."[136]

Article 25(a) of the International Covenant on Civil and Political Rights states that citizens shall have the right and opportunity "to take part in the conduct of public affairs, directly or through freely chosen representatives." Participation rights are linked with other fundamental rights, such as freedom of association and the right to petition authorities.

In the words of the UN Special Rapporteur on the adverse effects of the illicit movement and dumping of

132 See database at envirorightsmap.org (accessed 22 January 2015).
133 See envirorightsmap.org/listing/Egypt (submitted by Ioana Raducu, UC Irvine) (accessed 22 January 2015).
134 UNGA Doc., A/HRC/25/53 (20 December 2013).
135 UN HRC General Comment No. 34. UN Doc. CCPR/C/GC/34, 12 September 2011.
136 OAS/Ser.Q, CJR/RES.147 (LXXIII-O/08) (7 August 2008).

toxic and dangerous products and wastes on the enjoyment of human rights, the rights to information and participation are "both rights in themselves and essential tools for the exercise of other rights, such as the right to life, the right to the highest attainable standard of health, the right to adequate housing and others."[137]

Both the Inter-American Court of Human Rights[138] and the European Court of Human Rights[139] have recognized the link between freedom of expression, access to information, and democratic governance. The latter body has stated:

> Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question.[140]

Elements of a general right of access to information, grounded in freedom of expression provisions, have been recognized by the African regional human rights system[141], as well as by the Human Rights Committee (HRC) overseeing compliance with the International Covenant on Civil and Political Rights[142]. The African Commission on Human and Peoples' Rights, moreover, noted that States must provide accurate information on the nature and consequences of the projects that could affect the lives of communities, groups or individuals, in order for them to be able to participate properly in decision-making processes.[143]

The right to an effective remedy under law is also recognized in global human rights instruments, such as Article 8 of the Universal Declaration of Human Rights, which states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Regional instruments such as the American Convention on Human Rights also recognize the right to an effective remedy granted in accordance with a due procedure in cases of violations of rights protected by the Convention, and the Inter-American Court of Human Rights has declared that the right to an effective remedy before a competent judge is a fundamental element of a democratic society.[144]

The Organization of American States has made express reference to the *Claude-Reyes* case[145] in affirming that the right of access to information is a fundamental part of freedom of expression, and adopted a Model Inter-American Law on Access to Public Information in 2010. In Africa, the African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17-23 October 2002, adopted the Declaration of Principles on Freedom of Expression in Africa. The African Union also adopted a model law on access to information in 2013.[146] The 2013 ASEAN Human Rights Declaration includes rights

137 A/HRC/7/21, p. 2. See Report of the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53, para. 30. The latter report includes an overview of the statements of UN bodies in support of this notion. See para. 32.
138 *Trillium Case (Claude-Reyes et al. v Chile),* Inter-Am. Ct. H.R. (ser.C) No. 151 (19 September 2006).
139 Case of *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, Eur. Ct. H.R. (14 April 2009); case of *Österreichische Vereinigung zur erhaltung, starkung under schaffung eines wirtschaftlch gesunden land- und forstwirtschaftlichen grundbesitzes v. Austria* (Application no. 39534/07); case of *Youth Initiative for Human Rights v. Serbia* (Application no. 48135/06).
140 *Taşkin v. Turkey*, 2004-X European Court of Human Rights 179, para. 119. See also *Öneryildiz v. Turkey*, 2004-XII European Court of Human Rights 1, para. 90 (applying the right to information in connection with the right to life); *Ogoniland* case, para. 53 (deriving obligations from the right to health and the right to a healthy environment); Inter-American Court, *Claude-Reyes et al. v. Chile,* Judgment of 19 September 2006 (ordering the State to adopt necessary measures to ensure rights of access to State-held information).
141 African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, ¶ 53 (2001).
142 Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, at para. 8, U.N Doc. A/CONF.157/23 (12 July 1993).
143 See *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v. Kenya*, African Commission on Human and Peoples' Rights, Communication 276/20003, 2010.
144 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights (Series C) Case N° 79, 31 August 2001.
145 *Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights (Series C) Case No. 151, 19 September 2006.
146 See http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.

of information and participation.[147] Participation is also included in the 2012 ASEAN Bangkok Resolution on Environmental Cooperation.

As exemplified by the Chinese Environmental Protection Law that came into force 1 January 2015, the recognition of rights of the public often necessarily entails obligations on the part of public authorities. Article 53 (see above) continues: "The competent environmental protection administrations of the people 's governments at various levels and other departments with environmental supervision responsibilities shall disclose environmental information pursuant to the law, improve public participation procedures, and facilitate citizens, legal persons and other organizations to participate in, and supervise, environmental protection work." Moreover, the right to a healthy environment includes the responsibility to protect the environment for the benefit of present and future generations and to achieve sustainability. It is by the responsible exercise of these rights that persons can hope to realize the goals of the first sentence of Principle 1 of the Stockholm Declaration: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."[148]

4.1.2 Considerations on Guidelines 15-26 (access to justice in environmental matters)

The vast majority of Principle 10-related access to justice cases in practice pertain to access to information. A much smaller number relate to complaints concerning actual participation, and only a tiny percentage of cases brought concern problems with, or lack of, access to justice. For example, the practice of EMLA, a Hungarian environmental legal defense NGO, shows that over more than a decade, more than 90% of its cases related to the first pillar.

Implementing the access to justice component of Rio Principle 10 requires procedures and remedies to be provided to members of the public so they can pursue any rights of access to environmental information and rights and opportunities to participate in environmental decision-making provided under national law, as well as guaranteeing certain other protections under national laws relating to the environment. Access to justice helps to create a level playing field for the public seeking to enforce such rights. It also helps to strengthen a State's implementation of the first two elements of Rio Principle 10, and many aspects of access to justice support the effective application of national laws relating to the environment in general. The public's ability to help enforce environmental law adds important resources to government efforts.

In particular with regards to general enforcement of environmental law (see Guideline 17), it may be necessary for public authorities to take measures to protect the identity of individuals that bring complaints, for fear of retribution. Laws in such areas are sometimes called "whistleblower protection" laws. China's recent amendments to the Environmental Protection Law specifically provide for the protection of confidential information about an informant about pollution or ecological damage, as well as the informant's legitimate rights and interests.[149]

4.1.3 Integrated/strategic approach to access to justice in environmental matters

States should take a strategic approach to access to justice in environmental matters, integrating the relevant principles in their operations at all levels of government. Access to justice may involve administrative appeals or other non-judicial mechanisms, but as access to justice also introduces the involvement of a separate branch of government – the judicial branch – its organization on the national level should take

147 http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration.
148 The link between Stockholm Principle 1 and the subject matter of Rio Principle 10 was expressly made in "Our Common Future," paras. 81-82.
149 Article 57. EU-China Environmental Governance Programme (unofficial translation).

BOX 57: Rio +20 Declaration on Justice, Governance and Law for Environmental Sustainability

On 20 June 2012, a group of high-ranking representatives of the legal community, including chief justices, heads of jurisdiction, attorneys general, auditors general, and chief prosecutors, at the conclusion of an international conference held in conjunction with the Rio+20 WCSD, adopted a declaration, stating, inter alia:

"Without adherence to the rule of law, without open, just and dependable legal orders the outcomes of Rio+20 will remain unimplemented …

"Environmental law is essential for the protection of natural resources and ecosystems and reflects our best hope for the future of our planet …

"An independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law …

"Environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and rule of law, predicated on:

"(a) fair, clear and implementable environmental laws;

"(b) public participation in decision-making and access to justice and information, in accordance with Principle 10 of the Rio Declaration, including exploring the potential value of borrowing provisions from the Aarhus Convention in this regard;

"(c) accountability and integrity of institutions and decision-makers, including through the active engagement of environmental auditing and enforcement;

"(d) clear and coordinated mandates and roles;

"(e) accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies;

"(f) recognition of the relationship between human rights and the environment; and

"(g) specific criteria for the interpretation of environmental law."

Source: http://www.unep.org/rio20/Portals/24180/Rio20_Declaration_on_Justice_Gov_n_Law_4_Env_Sustainability.pdf (accessed 15 February 2015).

into account the specificities of the judiciary system, while embracing flexible mechanisms for dispute resolution. Because environmental matters are often complex and may require specialized expertise, it has proven useful in many countries for a special environmental tribunal to be set up. As of 2014, 41 countries around the world had some kind of specialized environmental tribunal. The first such tribunal was set up in the Australian State of New South Wales (see Box 58).

A whole range of legal mechanisms should be available to legal communities in order to make use of access to justice as a mechanism to support the transition to sustainability. For example, many judicial systems allow for the submission of amicus curiae by non-parties to a case as an aid to a court's decision-making. Renowned Pakistani environmental advocate Parvez Hassan's watershed environmental case[150] in the 1990s led to him being asked to submit amicus briefs in scores of cases over subsequent years, and he thinks this has advanced dialogue on the national level.

150 *Zia v. WAPDA* [1994] SC 693.

BOX 58: The world's first comprehensive environmental court

The Land and Environment Court of New South Wales was established in 1980, the first tribunal of its kind. It was the first specialist environmental appeals court in the world. The Court's jurisdiction includes merits review, judicial review, civil enforcement, criminal prosecution, criminal appeals and civil claims about planning, environmental, land, mining and other legislation. The Court has an appellate and a review jurisdiction in relation to planning, building, environmental, mining and ancillary matters.

Jurisdiction is exercised by reference to the subject matter of the proceedings. This may involve matters that have an impact on community interest as well as matters of government policy. The Court has summary criminal jurisdiction and appellate criminal jurisdiction in relation to environmental offences.[151]

The LEC website can be found at http://www.lec.justice.nsw.gov.au/

Amicus and other similar mechanisms can increase stakeholder dialogue, leading to consensus recommendations to courts, which in turn has helped contribute to shorter and more efficient litigation generally.

151 A summary of the court's work may be found in Brian Preston, "Benefits of judicial specialization in environmental law: the Land and Environment Court of New South Wales as a case study," 29(2) *Pace Env. L. Rev.* 386 (2012).

4.1.4 Legislative mechanisms

While typically it is the legislature that establishes courts and defines their jurisdiction, it will often require special expertise on judicial administration and the involvement of the judicial authorities to organize procedures and processes for addressing environmental cases. See Box 59.

BOX 59: Twelve critical decisions for establishing environmental tribunals

In the book "Greening Justice: Creating and Improving Environmental Courts and Tribunals" (TAI, 2009),

Pring & Pring present the 12 critical decisions for establishing environmental courts and tribunals. They are:

- Type of Forum – specialized courts, chambers, independent or quasi-independent tribunals, ombudspersons or other specialized forum
- Legal Jurisdiction laws covered and limits to jurisdiction, enforcement powers;
- ECT Decisional Level(s) – administrative, trial or appellate
- Geographic Area – national, regional or local
- Case Volume – mandatory or discretionary factors
- Standing – open or restrictive
- Costs – court fees, costs, attorneys' fees and fee-shifting rules
- Access to Scientific-Technical Expertise – internal (belonging to the tribunal) or external (belonging to parties)
- Alternative Dispute Resolution (ADR) – mediation, ombudsperson
- Competence of ECT Judges and Decision-makers – qualifications, selection, training, salary
- Case Management
- Enforcement Tools and Remedies – for prosecutors and tribunals

4.1.5 Implementation tools and obstacles including challenges faced by the public

There are, at present, numerous obstacles to access to justice in many countries. In some countries, members of the public, including NGOs, are denied standing to bring a legal challenge for violation of their rights or to enforce the law. In other cases, review procedures, although formally in place, are too costly for the public to use in practice. Yet another obstacle may be that bodies with judicial functions lack authority to provide injunctive relief or other appropriate remedies to effectively enforce their decisions. These and other barriers weaken the ability of the public to seek redress if public authorities or private persons do not comply with national environmental law. Guidelines 15-26 are intended to address such issues.

©Photo Credit: Nevil Zaveri, "Gust of wind, Thar desert", 2012 via Flickr, Creative Commons.

4.2 Provision by provision guidance on implementation

4.2.1 Guideline 15

States should ensure that any natural or legal person who considers that his or her request for environmental information has been unreasonably refused, in part or in full, inadequately answered or ignored, or in any other way not handled in accordance with applicable law, has access to a review procedure before a court of law or other independent and impartial body to challenge such a decision, act or omission by the public authority in question.

Discussion

This guideline relates to the justice and accountability mechanism for access to information under Rio Principle 10. Its application helps to ensure the effective implementation of the legal framework for access to environmental information on request.

As the first Guideline in the section on access to justice, several concepts and considerations relevant to the remainder of the Guidelines occur here for the first time. For example, the "court of law or other independent and impartial body" is a term also found in Guidelines 16, 17, 19, 24 while similar terms are used in other Guidelines.

An "other independent and impartial body" besides a court could include an administrative tribunal or in certain cases an ombudsman or information commissioner. In the Nordic countries, where the office of ombudsman originated, the officer gets it power from parliament, although it is not part of any branch of government. The ombudsman has jurisdiction to review all aspects of public administration to ensure the "proper exercise of administrative powers". Many of the complaints handled by the ombudsman deal with access to information. However, an ombudsman or commissioner may not have powers comparable to those of a court. The ombudsman by taking a case does not imply a legal right to any review procedures. He/she also does not issue legally binding decisions, and cannot provide certain remedies, such as injunctive relief. On the other hand, the ombudsman does not have strict standing rules for bringing a complaint. Where a person does not achieve the intended results through the ombudsman, he or she may still have opportunities to seek review in the courts in some countries. The ombudsman is discussed further under Guideline 26.

Where a State provides access to a review procedure before an independent and impartial body in accordance with this Guideline, it is not precluded from providing additional opportunities for redress. For example, the opportunity to petition an authority for reconsideration of its initial decision in the light of additional persuasive evidence can achieve a quick and satisfactory result and avoid the expense and delay of a formal procedure. Similarly, second-instance administrative decisions may resolve disputes without the need for recourse to judicial or quasi-judicial mechanisms.

The handling of an information request in a manner not in accordance with law can take place when the request is unreasonably refused or denied wholly or answered only partially or inadequately or otherwise not handled according to law.

The meaning of "independence" includes protection from the influence of public authorities at various levels of government.[152] Fixed budgets for the judiciary branch and long or life terms for judges are important mechanisms to ensure independence. Independence also requires the body to have the power to establish its own internal rules and procedures.

Independence is enabled by law when the decision-maker is protected against reductions in salary or dismissal from office on account of decisions made. Independence of the decision maker is also guaranteed by selection and appointment processes that are transparent and objective. The members of the review body should be appointed or elected in a manner that is protected against political interference. Impartiality is fostered through the recognition by the State that the decision maker is free to make a decision in keeping with the law and facts even if it does not favour the government. Security of tenure of the judicial or administrative authorities is a key factor in protection against arbitrary influence.

Another key element of independence is the provision of adequate budgets for the body to conduct its business. The financing of the activities of the body should be governed by the body itself, free from the threat of political interference.

Review bodies should also be empowered to carry out their responsibilities. This generally involves powers to examine persons and documents, compel attendance, inspect premises, order remedies, and enforce judgments.

Costs and timing should be reasonable in order to ensure that the public considers the use of access to justice opportunities as a means of achieving its goals.

152 See also B. J, Preston, "The enduring importance of the rule of law in times of change" (2012) 86 *Australian Law Journal* 175 at 180 181; T. Bingham, The Rule of Law (Penguin Books, 2011) at 92-93.

The decisions of review bodies should be binding as a matter of law and institutional arrangements should be in place for their enforcement.

In practice, many States have introduced a tiered appeal structure, with an opportunity first to challenge decisions before an administrative appeal tribunal, and then a judicial body. Some States have even gone further and introduced a quick and efficient procedure involving an internal administrative officer, such as the Information Commissioner in the United Kingdom. Appeals from the Information Commissioner can be taken to the Information Tribunal.

BOX 60: Mexico's Federal Institute for Access to Public Information (IFAI)

The Federal Institute for Access to Public Information (IFAI) was established in 2003 by the passage of Right to Information (RTI) legislation. IFAI is responsible for protecting the public right to information and ruling on public appeals when information requests are denied. When it was created it was one of the first of its kind.[153] It functions as an administrative court to oversee the implementation of the RTI law. The IFAI is independent and its decisions are binding for all federal agencies covered under the law. Citizens may appeal IFAI decisions; however federal officials cannot. The IFAI is required to provide a resolution within 50 days of an appeal. The appeals process has been described as "straightforward", and citizens do not need a lawyer for appeal.[154] From 2008 to 2013, information requests have increased 35%, from 105,000 to 143,000.[155]

In February of 2014, Mexican President Enrique Pena Nieto signed a decree of Constitutional reforms that gave Constitutional autonomy to the IFAI. The reforms also created autonomous access to information agencies in the 31 states and Federal District. New groups are now subject to transparency laws, including political parties, labor unions, trusts, and any other entities or individuals who receive public funds.[156] The number of commissioners was increased from five to seven.

Most civil society groups praised the reforms but there is still debate over finding the equilibrium between disclosure and protecting information related to national security.[157]

153 World Bank, "Implementing Right to Information: A case study of Mexico"; http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/RTI-Mexico-Final-2.pdf
154 ibid
155 IFAI, 2013. *Estadisticas e indicadores*. http://inicio.ifai.org.mx/SitePages/AIP-Estadisticas.aspx (accessed 31 August 2015).
156 Embassy of Mexico in Malaysia, "Transparency Reform," 12 February 2014. http://embamex.sre.gob.mx/malasia/index.php/mexico-today/373-transparency-reform
157 Franzblau, Jesse, "Mexican Senate Approves Reforms to Access Regime," FreedomInfo.org, 22 November 2013. http://www.freedominfo.org/2013/11/mexican-senate-approves-reforms-to-accessregime/

BOX 61: India's Central Information Commission (CIC)

The CIC was established by the 2005 Right to Information Act. It is part of the Ministry of Personnel, Public Grievances, and Pensions. It consists of a Chief Information Officer and 10 Information Commissioners who are appointed by the President of India on recommendation from a committee. The CIC has the same powers as a civil court in India and its decisions are binding.[158] It is given considerable autonomy in its decision-making power; however its budget and staff are still dependent on approval from the State.[159] The number of complaints and appeals that the CIC receives has been increasing steadily, demonstrating greater public awareness of the mechanism. While it received 703 complaints in its first year, it now averages over 9,000 a year.[160] The grounds for appeal are broad and the burden is on the officer who refused the information request to prove that the rules were not broken.[161]

158 http://www.rti-rating.org/view_country?country_name=India#appeals
159 World Bank; "Implementing Right to Information: A Case Study of India"; http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1343934891414/8787489-1344020463266/RTI-CS-India-RevFin-LJ.pdf
160 ibid
161 http://www.rti-rating.org/view_country?country_name=India#appeals

4.2.2 Guideline 16

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters.

Discussion

For courts or other independent and impartial bodies, see under Guideline 15. Whereas Guideline 15 is an access to justice provision enforcing the first pillar of Rio Principle 10, this Guideline is an access to justice provision enforcing the second pillar of Rio Principle 10. It does not apply only to the outcome of environmental decision-making in the form of decisions, acts or omissions but also would require giving members of the public opportunities to challenge decisions, acts, or omissions in any way *relating to* public participation in such decision-making.

BOX 62: Collective actions in Mexican law

In 2011 Mexico approved a raft of amendments to various legal texts such as the Federal Code of Civil Procedure and the General Ecological Balance and Environmental Protection Act (LGEEPA) with a view to legislating for citizen participation and access to environmental justice by collective actions that were introduced in 2010 in Article 17 of the Constitution. With these collective actions the Mexican State has enshrined the legitimate right of certain social groups, when they consider themselves affected by decisions taken by environmental bodies, to petition the judicial authorities to resolve a dispute affecting their rights and order compensation for environmental harm and the restoration of damage caused by deliberate acts. Another significant legislative reform directly affecting the right to information, participation and access to justice in Mexico is the amendment to the Protection Act (Ley de Amparo) to enable any person or group to bring an action before the courts if the Mexican State violates a fundamental right recognized by an international treaty, or fails to take concrete action to safeguard a fundamental right, including in cases pertaining to access to citizen participation, information and/or access to justice in environmental matters.

Source: Economic Commission for Latin America and the Caribbean (ECLAC) (2013), Access to information, participation and justice in environmental matters in Latin America and the Caribbean: Current situation, outlooks and examples of best practices. ECLAC-UNITED NATIONS. LC/L.3549/REV.2.

The Guideline refers to both substantive and procedural legality. The term "substantive legality" refers to legal correctness in substance. A challenge to substantive legality seeks to establish that the decision is based upon an error of law. Lord Diplock, in *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374, described judicial review of "illegality" as whether a decision-maker understands correctly the law that regulates his or her decision-making power and gives effect to it. Lord Diplock would include under substantive legality also the question of "irrationality," that is whether a decision is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." For example, if there is a failure of the process to provide meaningful public participation, even if minimal formality is satisfied, there can be a substantive breach. This can be contrasted with "procedural legality" which considers whether the decision maker has failed to act with procedural fairness under the applicable procedural rules or rules of natural fairness. The violations of procedural rules may or may not lead to erroneous decisions.

The inclusion of "decision, act or omission" makes it clear that a final administrative decision is not necessarily a prerequisite to bringing a challenge. Doing nothing when there is a duty to act may also be grounds for complaint. For example, the failure of a decision-maker to consider certain submissions made

through public participation procedures could be a cause for a judicial challenge.[162] A failure to comply with notification requirements could be a procedural irregularity.[163]

4.2.3 Guideline 17

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the State related to the environment.

Discussion

For courts or other independent and impartial bodies, see under Guideline 15. This Guideline does not specifically relate to the information or participation pillars of Rio Principle 10, but rather consists of an access to justice principle that is directly operational. It deals with the element of Rio Principle 10 recognizing the role of the public in the general enforcement of environmental law. This provision helps give opportunities to the public to meet the duty to protect and improve the environment for the benefit of present and future generations in those States whose constitutions include such a duty. By bringing attention to violations of substantive or procedural legal norms related to the environment, authorities will be mobilized to act. This is one of the most effective mechanisms for taking advantage of the presence, awareness and power of the public to uphold environmental laws and move towards sustainability.

The wording of Guideline 17 is very similar to wording found in some legislation that constitute a kind of actio popularis.[164] See discussion under Guideline 18.

This is also the only Guideline that mentions the private sector. The actions of private actors – in particular business interests seeking to exploit natural resources – can have a serious environmental impact, to the extent that the uncontrolled actions of business entities could seriously undermine ecological services or other environmental values supporting the right to life. See Box 63.

162 See *South East Forest Rescue Incorporated v Bega Valley Shire Council* (2011) NSWLEC 250 (Land and Env. Ct. of NSW).
163 See *Simpson v. Wakool Shire Council* (2012) 190 LGERA 143 (Land and Env. Ct. of NSW).
164 See, e.g., 2005 Portugal country report to Aarhus Convention Conference of the Parties.

BOX 63: "Protect, Respect and Remedy"

The UN Human Rights Council in 2008 adopted the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights, more commonly known as 'the Ruggie Framework' after UN Special Rapporteur Prof. John Ruggie, to express the global standard of expected corporate conduct and provide the baseline for corporate responsibility with respect to human rights as "part of the company's social licence to operate".[165] The framework centres on three "differentiated but complementary" pillars of responsibility: the State duty to protect against human rights abuses by third parties (including business), the corporate responsibility to protect human rights, and the need for more effective access to remedies.

165 HRC 2008; UN 2010.

Substantive and procedural legality are discussed above under Guideline 16. Standing is discussed in more detail under Guideline 18.

BOX 64: Chile's environmental court system

One of the major initiatives of Chile's 2010 amendments (Law 20.417) to the 1994 Environmental Law was to restructure institutions and agencies, resulting in the creation of the Ministry of Environment, Environmental Evaluation Service, and Superintendent of the Environment. The Superintendent, which is tasked with coordinating and executing environmental quality plans and norms, is responsible to ensure compliance and enforcement through the creation of environmental courts.

Three special environmental courts were created in the regions of Antofagasta, Santiago, and Valdivia, but their jurisdiction covers all of Chile. Each court is composed of three judges, appointed by the President with the Senate's approval, from a list of 5 names submitted by the Supreme Court.[166] The composition of the courts include both lawyers and scientific experts, and a major innovation is the use of *amicus curiae* in proceedings.

The court hears cases related to, among other subjects:

- Compensation for environmental damage
- Challenges to rulings by the Committee of Ministers or Executive Director of the Environmental Evaluation Agency (if rulings did not involve an environmental impact assessment)
- Implementation of emission or environmental quality standards
- Claims against resolutions made by the Superintendent
- Claims against the Supreme (presidential) decrees that establish primary and secondary environmental quality standards and emission standards
- Complaints against administrative decisions that annul environmental regulations[167]

166 Iglesias, Enrique and Riesco, Jose, "Chile Chapter—Environment and Climate Change Law 2013", International Comparative Legal Guides, 2013. http://www.iclg.co.uk/practice-areas/environment-and-climate-change-law/environment-and-climate-change-law-2013/chile

167 "Chile: New law creates environmental courts", Library of Congress: Global Legal Monitor, 1 August 2012. http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403263_text

BOX 65: Philippines 117 Environmental Courts and Tribunals

In 2007, the Philippines Supreme Court issued a resolution which created 117 Environmental Courts and Tribunals specifically to hear cases involving natural resources and the environment.[168] Filipino Chief Justice Reynato Puno said at the time "it is now beyond argument that environmental protection is indispensable to support and sustain some of the most fundamental of human rights, such as the rights to life, to health, and to well-being".[169] The Supreme Court is empowered by the 1987 Constitution to settle controversies involving rights and to promulgate any rules it deems necessary for protection of constitutional rights.[170] Section 16 of Article II of the Constitution provided that the State shall "protect and advance the right of people to a balanced and healthful ecology…". The courts hear cases that involve violations of many environmental laws, including the Revised Forestry Code, Marine Pollution, Clean Air Act, Clean Water Act, and several others.[171] The Courts include dozens of Regional Trial Courts, Metropolitan Trial Courts, and Municipal Trial Courts, spread across 12 judicial regions.

In 2010, following a Supreme Court forum on environmental justice the previous year, a groundbreaking set of procedural rules for environmental cases was established to enforce the constitutional right to a "fair and balanced ecology".[172] In addition to that, the objectives of the rules are:

1. To provide a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights

168 Salaverria, Leila, "SC designates 117 environmental courts," Philippine Daily Inquirer, 14 January 2008. http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080114-112156/SC_designates_117_environment_courts

169 ibid

170 Hon.Hilario G. Davide Jr., Sara Vinson, "Green Courts Initiative in the Philippines," Journal of Court Innovation, 2010. http://law.pace.edu/sites/default/files/IJIEA/jciDavide_Philippines%203-17_cropped.pdf

171 ibid

172 ibid

BOX 65: Philippines 117 Environmental Courts and Tribunals (continued)

and duties recognized under the constitution, existing laws, rules and regulations, and international agreements.

2. To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws.
3. To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.[173]

The rules include several provisions that, in concert, enable the court to process and hear cases much more efficiently (see Guideline 19).

173 Republic of Philippines Supreme Court, Manila; "A.M. No 09-6-8-SC: Rules of Procedure for environmental cases," effective 29 April 2010. http://plj.upd.edu.ph/wp-content/uploads/2012/12/Environmental_Rationale.pdf

4.2.4 Guideline 18

States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice.

Discussion

Legal standing (also called *locus standii*) refers to the right of a natural or legal person to bring a proceeding before courts, tribunals and administrative bodies. In a particular legal system for a particular category of cases, legal standing could be limited or broad based upon legislation or the jurisprudence of the courts. Guideline 18, however, calls for standing to be liberally available to bring forward proceedings concerned with environmental matters.

The broadest form of standing is *actio popularis* (see also Guideline 17), which involves the right of any person to bring an action in defence of public order. This broad form of standing has an equivalent in the recognition of the right of any person to bring forward legal actions in the public interest, which exists in some legal systems today such as that of India. Portugal is an example of a country in which the legal system allows such actions specifically with respect to environmental matters. Some systems allow for any person to make comments in an environmental decision-making proceeding, and then grant those persons who actually made comments the right to challenge their handling. This is in effect a two-stage *actio popularis*.

Liberal criteria for NGO standing can be found under many regimes aimed at promoting Rio Principle 10. For example, the Aarhus Convention obliges Parties to grant standing to NGOs that work to promote the subject matter of the Convention, and meeting any criteria established under national law.[174] The history of such provisions predates the Rio Declaration by several decades. Switzerland, for example, granted standing to environmental NGOs in 1966.[175]

China's 2014 amendments to the Environmental Protection Law establish standing for social organizations meeting certain criteria to bring litigation before people's courts concerning activities that cause pollution, ecological damage or harm to the public interest. The social organizations to achieve standing must be officially registered, have engaged in public interest environmental protection activities for at least five years, and have a clean legal record.[176]

174 Aarhus Convention, Article 9, para. 3.
175 Federal Heritage and Nature Conservation Act of 1966, cited in Bonine, John E., "The public's right to enforce environmental law," in Stec, Stephen, ed., "Handbook on Access to Justice under the Aarhus Convention" (Szentendre: 2003).
176 Article 58. EU-China Environmental Governance Programme (unofficial translation).

In New South Wales most environmental legislation contains an open standing provision entitling any person to bring proceedings to remedy or restrain a breach of the legislation whether or not any right of that person has been or may be infringed by or as a consequence of that breach. The iconic example of such an open standing provision is Section 123 of the Environmental Planning and Assessment Act 1979 (NSW). The US State of Michigan adopted an early version of liberal standing in the Michigan Environmental Protection Act (1970), which states in relevant part: "any person may maintain an action … for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."[177] Trinidad has an open standing provision in the case of direct private party actions where the environmental authorities fail to act (see Box 68 under Guideline 19 below).

Broad standing has sometimes been conferred through judicial interpretation. Perhaps the most well-known case in which intergenerational equity was relied upon to justify broad standing rights was the Philippines Supreme Court case, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*.[178] The case involved a challenge to timber license agreements that complainants alleged caused deforestation and environmental degradation that would affect future generations of Filipinos. Plaintiffs were a class of minors represented by their parents. The Supreme Court decided:

> We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the 'rhythm and harmony of nature.' Nature means the created world in its entirety. Such rhythm and harmony indispensably include inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[179]

Note the wording in the decision about an "obligation" to protect the right to a healthy environment. It is similar to the formulation in Stockholm Declaration Principle 1 that speaks of the "solemn responsibility to protect and improve the environment for present and future generations." The Minors Oposa case is one of a handful of cases around the world that have given legal meaning to an individual and collective duty to protect the environment.[180]

In the Netherlands, a series of court decisions interpreting standing resulted in a general rule in place by 1987 that environmental NGOs had a legally recognized right to protect the environment. This rule was subsequently codified when the Civil Code was revised.

To meet the provisions of Guideline 18, States should accord standing to appropriate public interest and community groups, including NGOs promoting environmental protection and meeting any criteria

177 MCL 324.1701(1) et seq.
178 33 ILM 173 (1994). See Preston, Brian, "The Role of the Judiciary in promoting Sustainable Development: The Experience of Asia and the Pacific" (2005) 9 *Asia Pacific Journal of Environmental Law* 109 at 180-181.
179 33 ILM 173 (1994) at 185 per Davide J.
180 Another such case is Slovenian Constitutional Court Case U-I-30/95-26, 1/15-1996, brought by the National Association of Ecologists, which based the standing of an NGO to challenge the legality of a development plan on the constitutional "legal interest" in protecting the environment. The case is described in Stec, Stephen, ed. "Handbook on Access to Justice under the Aarhus Convention" (Szentendre: 2003), at 239.

that may exist in national law. Such criteria may include geographical, subject-matter or membership criteria. Consistent with other provisions of the Guidelines, the criteria in national law, if any, should be fair, reasonable and proportional, and interpreted in a restrictive manner taking into account the public interest in conferring broad standing rights.

The Court of Justice of the European Union (CJEU), in the case of *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms* (C-263/08 (2009)), considered a Swedish law that in effect restricted NGO standing rights on a wide range of environmental decision-making to two organizations, national in scope, with more than 2000 members. In dismissing Sweden's arguments that a small, locally established environmental NGO could persuade one of these two organizations to bring an appeal on its behalf, the Court stated that the associations entitled to bring an appeal might not have the same interest in projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the relevant European law, which calls for broad access to justice.

In the "Slovak Brown Bear Case" [CJEU (Grand Chamber), 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09)], the CJEU stated that Member State courts must allow individuals, including NGOs, to challenge any proceedings that are liable to be contrary to EU environmental law.[181]

Some countries have rules related to the jurisdiction of courts and other tribunals that require a real case or controversy involving legally recognized rights or interests to be present. Again, the Aarhus Convention grants broad standing rights to NGOs promoting the subject matter of the Convention by obliging Parties to adjust their legal systems if necessary to recognize the legal rights or interests of these NGOs in the matter in controversy.

Where a member of the public has actually participated in an administrative procedure, or is directly affected by the decision, act or omission of a public authority or private actor with regard to the environment, their legal rights or interests and consequently their standing to challenge such decision, act or omission would generally be recognized in national judicial systems.

Standing may also be applied to the right of third parties to participate in the subject matter of the dispute without being a party, e.g. through the submission of *amicus* briefs.

The term "proceedings concerned with environmental matters" includes at a minimum the types of proceedings contemplated under any of the Guidelines, and particularly those under Guideline 17. Some States have adopted particularly broad standing rules in connection with environmental permitting procedures and in proceedings aimed at establishing the level of sanctions for violations of environmental laws (see Boxes 66 and 67).

181 See L. Lavrysen, Access to Justice in environmental matters. Perspectives from the European Union Forum of Judges for the Environment, UNEA, Nairobi, Kenya (2014).

BOX 66: Colombia's General Environmental Law (1993) Title X, Article 69

Article 69 states: "Any natural or legal person, public or private, without the need to demonstrate any legal interest, can intervene in administrative actions initiated for the issuance, modification, or cancelation of permits or licenses for activities that affect or can affect the environment or for the imposition or revocation of sanctions for noncompliance with environmental laws and regulations."

See https://www.minambiente.gov.co/index.php/normativa/leyes

BOX 67: Costa Rican Constitution's open standing provisions

Article 50

(1) The State procures the greatest welfare of all inhabitants of the country, organizing and promoting production and the most adequate distribution of wealth.

(2) Every person has the right to a healthy and ecologically balanced environment, being therefore entitled to denounce any acts that may infringe said right and claim redress for the damage caused.

(3) The State guarantees, defends and preserves that right.

(4) The Law establishes the appropriate responsibilities and penalties.

4.2.5 Guideline 19

States should provide effective procedures for timely review by courts of law or other independent and impartial bodies, or administrative procedures, of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment. States should ensure that proceedings are fair, open, transparent and equitable.

Discussion

Guideline 19 seeks to reinforce certain general standards of the administration of justice. For courts or other independent and impartial bodies, see under Guideline 15. "Proceedings" may include any proceedings considered under the Guidelines, including those guaranteeing rights or opportunities under the first two pillars of Principle 10 and those providing mechanisms for the direct enforcement of environmental law. Thus, this Guideline should be taken to require fairness, openness, transparency and equity in all judicial or quasi-judicial proceedings in relation to the environment.

The first sentence of the Guideline introduces two other considerations in establishing high standards for access to justice – effectiveness and timeliness. The passage suggests that standards of fairness and prudent judicial administration should be applied in all proceedings related to the environment.

"Timeliness" indicates steady and reasonable progress in proceedings from the time of commencement of the procedure through to its completion. States should review their judicial and administrative caseloads and determine whether cases are being dealt with expeditiously. Legal systems may have different timeframes for implementation and enforcement while some legal systems may not prescribe timeframes at all. For example, in Belarus, appeals and complaints regarding environmental administrative decisions must be considered within one month, with a possible extension of an additional two months.

"Fairness" goes beyond procedural correctness to include the assurance of full consideration being given to various interests in a proceeding, including whether the law and practice give all parties to a particular proceeding the right to fully present their views, evidence and arguments and the right to test the evidence,

views and arguments presented by others. For a judge or arbiter to be fair, he/she must be impartial and free from prejudice, favoritism or self-interest. Still, procedural correctness is also an element of fairness. For example, failure to comply with notification and communication requirements in connection with a judicial proceeding would generally be considered to render the proceeding basically unfair. Finally, fairness is generally considered from the point of view of fairness to the complainant rather than the public authority.[182]

"Equitable" exercise of justice also includes elements of fairness, but it primarily is used in one of two senses. One is in the guarantee of equal (that is, non-discriminatory) treatment under the law regardless of a person's age, gender, national origin, religious affiliation, sexual orientation, etc., such that the balancing of interests undertaken by the tribunal will be based solely upon legally recognizable grounds and considerations. In some cases, steps may need to be taken to "level the playing field" for especially vulnerable individuals or relatively powerless groups.[183]

182 See Aarhus Compliance Committee communication ACCC/C/2008/27 (United Kingdom).
183 See also the discussion about capacity-building under Guidelines 7, 14 and 25. As mentioned elsewhere in this Guide, particular considerations may apply to the rights of indigenous peoples.

BOX 68: Environmental courts in India and Trinidad

India's National Green Tribunal

The National Green Tribunal Act established the National Green Tribunal (NGT) in 2010. The purpose of the NGT is to create an effective and efficient institution to process cases related to environmental protection, natural resource disputes, enforcement of environmental rights, and compensation related to environmental damages. While the NGT was established in 2010, it took civil society pressure and an order by the Supreme Court to ensure it was functioning with an effective grievance mechanism, which did not occur until 2011. However, now it is regarded as fully operational and its rulings are covered frequently by the local press.[184]

The NGT sits as a panel, comprising both judicial members and expert members, specifically a Chairperson (who is a former Supreme Court Judge), judicial members (other judges) and expert members (who have specialised technical expertise). One notable aspect of this is that the NGT can undertake "merit review" in addition to judicial review, thus evaluating the technical arguments for a particular decision in addition to the legal ones.

Civil society groups claim that the NGT serves as an accountability mechanism to the decision-making of the Ministry of Environment and Forests and other agencies.[185]

See www.greentribunal.gov.in

Trinidad's Environment Commission

Section 81 of Trinidad's Environmental Management Act (EMA) establishes a specialist environmental court, called the Environment Commission, with a limited jurisdiction. While the Commission's powers in terms of challenges to EIA decisions are limited, it can hear what are referred to as "Direct Private Party Actions," by which any private party may institute a civil action in the Commission against another party for the violation of an environmental requirement, provided that the relevant environmental management authority has been informed of the breach at least 60 days before the action was brought and has failed to take enforcement action in respect of the alleged violation. The criteria for standing to bring an application are very broad. Section 69 (2) of the EMA provides that "any individual or group of individuals expressing general interest in the environment or a specific concern with respect to the claimed violation shall be deemed to have standing to bring a direct private party action."

184 E.g., Vishal Kant, "Green Tribunal proposes heavy fine for illegal dumping of garbage," The Hindu, 27 February 2014. http://www.thehindu.com/news/cities/Delhi/green-tribunal-proposes-heavy-fine-for-illegal-dumping-of-garbage/article5730212.ece
185 Ritwick Dutta, "Law of the Jungle," The Hindu, 18 October 2013. http://www.thehindu.com/opinion/op-ed/law-of-the-jungle/article5244600.ece?homepage=true

Some of the measures used involve financial barriers, which are discussed under Guideline 20, below. The other use of the term refers to the exercise of the powers of a judge or arbiter to avoid harsh, unreasonable or unmeasured outcomes due to the technical application of the law. See Box 68.

"Open" proceedings are those that are open to the public and not just to the parties to the dispute. The openness of proceedings also ensures that the press and social networks will have access and can report on matters that are in the public interest. Apart from the public nature of the proceedings themselves, transcripts from hearings should be made a part of the public record. Judgments should be published and publicly accessible.

"Transparency" in this context implies beyond mere openness that processes are clear and understandable and take place in the open.

The term "effectiveness" includes many of the matters discussed above, but goes much further. For example, it should be ensured that the obligations of courts of law and other bodies charged with resolving environmental issues are properly defined and that they are adequately resourced and staffed to perform the obligations required of them. Effectiveness also implies that the court or other tribunal will be able to issue a final decision that can be effectively implemented and will achieve a just result. The availability of remedies is an important element in effectiveness of such procedures. See the discussion under Guideline 21.

4.2.6 Guideline 20

States should ensure that the access of members of the public concerned to review procedures relating to the environment is not prohibitively expensive and should consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Discussion

Guideline 20, like the previous Guideline, can be applied to any proceeding considered under the Guidelines, including those guaranteeing rights or opportunities under national legislation implementing the first two pillars of Principle 10 and those providing mechanisms for the direct enforcement of environmental law. Its primary focus is on the costs of access to justice and the ways to reduce such costs in order to eliminate a barrier to access to justice.[186]

Costs of review procedures usually include filing fees, lawyers' fees, costs of collecting evidence, administrative fees of the court or other tribunal, bonds/security for costs, and, if the public concerned is unsuccessful in its claim, possibly the defendant's legal costs. Environmental cases often involve complex technical matters and may therefore be more costly in terms of expert fees than a typical civil or administrative case. Another significant cost is the requirement to post a bond or other security when seeking an injunction. In some jurisdictions this is referred to as an "undertaking for damages," which essentially means that if the applicant is unsuccessful in the claim then it has to compensate the other party for the losses incurred as a result of the injunction. Whether an undertaking is required may be at the discretion of the judge, but is commonly granted where commercial interests are involved.

The "prohibitively expensive" test has both subjective and objective elements. On the one hand the costs should not exceed the resources of the person bringing the challenge, while objectively the costs should not be unreasonable so as to ensure that the public plays a constructive role in protecting the environment.

186 Further discussion on financial barriers to access to justice in environmental matters can be found in B J Preston, "Environmental Public Interest Litigation: Conditions for Success," in K. Uga, ed. *Towards an Effective Guarantee of the Green Access* (Shinzansha, 2014).

One measure could be that costs of commencing and prosecuting an action are prohibitively expensive when they are likely to deter a member of the public on an average wage or an organization dependent on member contributions from bringing forward the review procedure. However, the Court of Justice of the European Union refused to adopt the ability of the "ordinary" member of the public to pay costs as the sole criterion for assessment.[187] In determining whether costs are unreasonable in an individual case, factors may be examined including those related to the merits, such as whether the case has a reasonable prospect of success (as opposed to being frivolous), the importance of the case to the claimant, the importance of the case to the protection of the environment, and the complexity of the issues at hand.

Of the factors above, one of the most significant in terms of justifying cost reduction is the importance of the case to the protection of the environment. As the environment does not have the capacity to defend itself in court, it is often up to private litigants to bring actions in defence of environmental values. Consequently, a case of high environmental importance is the type of case that would justify the elimination or reduction of legal costs borne by the claimant, even if unsuccessful.

Many of the costs of review procedures are easily quantifiable so they can be taken into account and planned for. However, the risk of the losing party being compelled to cover the (litigation) costs of the winning party in the review procedure represents a considerable risk for the review procedure to become prohibitively expensive that is not easily quantifiable. This uncertainty may constitute a strong disincentive to seeking justice. Nevertheless the fact that a litigant continues to prosecute a case with full knowledge of the risks of a cost order does not determine that a cost order is reasonable.

To ensure that access to review procedures relating to the environment are not prohibitively expensive, there is a need to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. The legal rule that "costs follow the event" can be balanced by other rules that will limit those costs and ensure they are not prohibitive. Such mechanisms could for example include cost-caps, legal presumptions against cost awards, protective cost orders, legal aid particularly for poor or vulnerable litigants, financial assistance for scientific and technical expertise, e.g., through court-appointed experts or State laboratories, waivers and cost-recovery mechanisms. The removal of bonding requirements for security in the case of injunctions would also remove a cost barrier to access to justice.

The United Kingdom has made wide use of protective cost orders to limit the costs to claimants whose claims under public interest statutes are ultimately unsuccessful. Norms to be applied and factors to be considered in such determinations have often been developed by the judiciary.[188] Moreover, the UK in 2013 introduced statutory limits for cost awards related specifically to cases brought under the Aarhus Convention. These limits are £5,000 in the case of an individual and £10,000 in the case of an organization.

"Non-financial barriers" includes language barriers, inappropriate timeframes, the requirement to be represented by a lawyer, complicated court procedures and gender taboos. Other barriers to access to justice include limitations on standing, difficulties in obtaining able legal counsel, limitations on gaining access to evidence, in particular expert evidence, unclear review procedures, corruption, a lack of awareness within review bodies of environmental issues and environmental law and weak enforcement of judgments and decisions.

The use of expert evidence is an important consideration in complex environmental cases and can be costly. In civil or inquisitorial systems the court may seek its own expert advice, while in common law or

187 See *R (on the application of Edwards) v Environment Agency* (C-260/11) [2013] 1.W.L.R. 2914; Herbert Smith Freehills LLP (London), Administrative and Public Law e-Bulletin, 31 January 2014.

188 See, e.g., *R. (on the application of Edwards and another) v. Environment Agency and another (No.2) [2013] UKSC 78.*

adversarial jurisdictions environmental cases may essentially turn on a "battle of the experts" in which the party with greater financial resources – such as the project proponent – tends to have the advantage. Reforms have been introduced in some adversarial systems to require experts to enter into direct consultations in order to narrow the issues in dispute. This "concurrent evidence" mechanism also allows the judge to examine the experts together in a directed discussion. It is a widespread mechanism in Australia where it is euphemistically referred to as "hot-tubbing."[189]

189 See Peter McClellan, "New Method with Experts Concurrent Evidence" (2010) 3 *J. Court Innovation* 259.

BOX 69: The Access to Justice Task Force (Aarhus Convention)

The first Meeting of the Parties to the Aarhus Convention (Lucca, Italy 21-23 October 2002) decided to establish a Task Force on Access to Justice to support the implementation of the third pillar of the Convention by inter alia, examining good practices, sharing experience with implementation of particular paragraphs of Article 9 of the Convention and assessing the impact of certain barriers in access to justice such as costs and delays.

The Task Force on Access to Justice:

(a) Provides a platform for sharing of information, experiences and good practices related to access to justice (through e.g. collection and dissemination of relevant practices and establishment of portal for the relevant jurisprudence);

(b) Plans and implements strategic and catalytic capacity-building activities and information exchange, in particular for senior members of the judiciary at the subregional level;

(c) Considers means of facilitating training of trainers on access to justice in environmental matters;

(d) Develops training materials on implementation of Article 9 of the Convention that are adaptable to national priorities and the needs of specific groups of legal professionals;

(e) Examines the way the issue of remedies is handled in a selection of representative countries;

(f) Continues the exchange of information and analytical work on criteria for standing;

(g) Continues the exchange of information on practices in establishment of assistance mechanisms to remove or reduce financial barriers;

(h) Considers practical arrangements for increasing support for public interest lawyers and strengthening the capacities of non-governmental organizations;

(i) Identifies good practice with respect to ensuring that sufficient scientific and technical expertise is available to review bodies dealing with environmental cases;

(j) Continues exploring the potential use of alternative dispute resolution mechanisms as a means to further the objectives of the Convention;

(k) Encourages the involvement of representatives of ministries of justice, the judiciary, other legal professionals, including public interest lawyers and non-governmental organizations specializing in litigation and legal advice on environmental matters, in its activities;

(l) Carries out such other tasks related to access to justice as the Working Group of the Parties may assign to the Task Force;

(m) Presents the results of its work for consideration and appropriate action by the Working Group of the Parties.

The Access to Justice Task Forces have provided a framework for the production of useful materials and guidance in the field over more than a decade of existence. Specific outputs are available on the Aarhus Convention website.

Source: http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/background.html

The effective implementation in countries' legal norms and regulations of the Bali Guidelines can make a significant contribution to remove or reduce these barriers. To facilitate access to competent legal counsel the establishment and support of legal assistance offices that provide free or low-cost legal advice on matters relating to the environment should be considered. Environmental law clinics associated with university or law school education programs have a long and successful history in some countries.[190]

4.2.7 Guideline 21

States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

Discussion

The ultimate objective of any review by courts of law or other independent or impartial bodies is to obtain a remedy for a transgression of law. This fundamental legal principle has found expression in international law from the Universal Declaration of Human Rights onward, providing that States should provide for an "effective remedy" for violations of protected rights. Adequacy means the remedy should compensate fully past damage, prevent future damage and may also require restoration of the status quo ante. The effectiveness of remedies should be assessed against how well the harm envisaged in the law is prevented or rectified by the remedy provided in the law. The requirement that the remedies should be effective means also that they should be carried into effect, that is, capable of efficient enforcement.

As the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has pointed out, human rights bodies have applied the principle of effective remedies to human rights infringed by environmental harm. For example, the Committee on Economic, Social and Cultural Rights has urged States to provide for "adequate compensation and/or alternative accommodation and land for cultivation" to indigenous communities and local farmers whose land is flooded by large infrastructure projects, and "just compensation [to] and resettlement" of indigenous peoples displaced by forestation.[191] The Special Rapporteur on the situation of human rights defenders has stated that States must implement mechanisms that allow defenders to communicate their grievances, claim responsibilities, and obtain effective redress for violations, without fear of intimidation (A/68/262, paras. 70–73). Other special rapporteurs, including those for housing, education, and hazardous substances and wastes, have also emphasized the importance of access to remedies within the scope of their mandates.

At the regional level:

> [The European Court of Human Rights] has stated that individuals must 'be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process.' More generally, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have stated that the American Convention on Human Rights requires States to provide access to judicial recourse for claims alleging the violation of their rights as a result of environmental harm. The Court of Justice of the Economic Community of West African States has stressed the need for the State to hold accountable actors who infringe human rights through oil pollution, and to ensure adequate reparation for victims.[192]

190 See Adam Babich and Jane F Barrett, "Why environmental law clinics?" (2013) 43 *Environmental Law Reporter* 10040.
191 The civil law concept of adequate compensation requires compensation of an amount sufficient to re-establish the *status quo ante,* whether in real terms or comparable terms.
192 UN Doc. A/HRC/25/53, paras. 41-42. See also *ECOWAS SERAP Applicant and Federal Republic of Nigeria Defendant*, JUDGMENT N° ECW/CCJ/JUD/18/12 (December 2012).

In environmental cases, remedies such as compensation and restitution are often insufficient for full restoration of ecological services given the irreversible impacts of many environmentally hazardous acts and activities. Provisional measures, such as injunctive relief, are therefore important remedies to avoid irreversible damage. When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and other review bodies may issue an order to stop or to undertake certain action. This order is called an "injunction" or "interdict" and the remedy achieved by it is often referred to as injunctive relief. An injunction can be final (permanent) or interim (temporary). An interim injunction is granted to restrain activity, or to require a person to undertake some act temporarily until a final decision can be made, and is particularly used in the case of danger of destruction of the *status quo ante*, because evidence is disappearing or avoidable harm is imminent. Usually the party seeking an interim injunction has to demonstrate a likelihood of success on the merits of the claim. Final injunctive relief takes the form of a permanent order to prohibit the activity giving rise to the harm/grievance (prohibitory injunction) or mandate the taking of action to remedy the harm/grievance (mandatory injunction). In some civil law countries an injunction is referred to as an interdict. For the reasons stated above, the promptness of remedies plays a role in whether the remedies can be considered effective. Injunction is a mechanism by which a judiciary body or other body empowered to provide remedies can do so promptly.

"Restitution" is a remedy by which a defendant can be ordered to give up his or her gains from an unlawful activity to the claimant. For example if someone profits unjustly at the expense of the claimant, the profit must be restored to the claimant. Restitution should be contrasted with compensation, which is an order to the defendant to compensate the claimant for his or her loss. It could thus be in the interests of the claimant to seek restitution if the profit that the defendant has made as a result of unlawful behavior, i.e., by transgression of laws relating to the environment, is greater than the loss suffered by the claimant.

"Compensation" refers to monetary payments made to the claimant for losses or damages suffered. The valuation of environmental losses for compensation purposes is a difficult and controversial task. Some countries have a vast experience in economic valuation of environmental damages. Others, like the UK, have developed methodologies for evaluating the severity of damages in connection with sentencing guidelines for criminal or administrative violations of environmental laws.[193] International agreements such as the UN Convention on the Law of the Sea contain detailed legal provisions concerning compensation for environmental harm.

"Restoration" is a reference to relief and remedies requiring restoration of the environment – as for example cleaning up toxic waste spills or restoring a damaged ecosystem. Where damage is irreversible the principle of restoration may be applied to require mitigation. An example of mitigation is requiring a defendant to set aside lands other than those that were damaged irreversibly, in order to create new habitat or green areas, or to undertake construction activities to create new environmental values. The long-term success of mitigation efforts has come into question, however.

Other appropriate measures may include types of remedies in relation to the wrongful exercise of administrative power such as declarations (declaratory relief), quashing of orders (certiorari), orders for re-consideration, mandatory directions (mandamus – see Box 70), and imposition of civil penalties. US law under several environmental statutes allows citizens bringing successful suits acting as "private attorneys general" to collect civil penalties. In specific cases criminal remedies may be appropriate.

193 See Sentencing Council, "Environmental Offences Definitive Guideline" (2014) (effective from 1 July 2014); see also "Costing the Earth: Guidance for Sentencers," UK Magistrates Association (2009).

BOX 70: The writ of continuing mandamus (India, Philippines)

The writ of continuing mandamus has developed into an effective remedy with particular applicability to cases of the general public welfare, such as those involving environmental degradation or restoration. The writ of mandamus is an order by the court to public authorities to compel them to do their duties. It can only apply to a "ministerial" duty – that is, one that is definite and imposed by law. Where an official has a measure of latitude to exercise discretion in a ministerial duty, mandamus can be issued to compel the official to act, but not to direct a particular outcome. The writ of continuing mandamus is appropriate in cases where the necessary actions of authorities are so complex and extended in time that an effective remedy cannot be granted without a continuous plan for monitoring subject to further intervention by the court. Essentially the court retains jurisdiction over the matter for an indefinite period of time. The remedy has been used in India to ensure that public authorities enforce environmental rules to regulate tanneries along the Ganges River.[194] A similar outcome was obtained in the Philippines in the case of the coastal strategy for Manila Bay to ensure that the court's decisions would not be "put to naught by bureaucratic administrative indifference or inaction."[195] In 2010 the Supreme Court of the Philippines adopted special rules of procedure that adopt continuing mandamus as one of the critical legal remedies that may be sought in environmental cases. "Under the Rules a continuing mandamus petition permits the court to retain post judgment jurisdiction to ensure the successful implementation of the reliefs decreed under its decision. Towards this end, the court may, by a directive to be included in the judgment, compel the submission of periodic reports from the responding government agencies as well as avail of other medium to monitor compliance with its decision."[196] In complex cases, a court may establish advisory bodies of experts on technical matters to assist it in monitoring compliance with its orders.[197]

194 *M. C. Mehta v. Union of India* 4 SCC 463 (1987).
195 Presbitero Velasco, "The *Manila Bay case* – The Writ of Continuing Mandamus" (remarks made at the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, Manila, Philippines; 28-29 July 2010. The case is *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008).
196 Ibid.
197 The Philippine Judicial Academy website includes the text of the rules, an annotation and rationale, see: http://philja.judiciary.gov.ph/assets/files/pdf/learning_materials/A.m.No.09-6-8-SC_Rules_of_Procedure_for_Envi_Cases.pdf, http://philja.judiciary.gov.ph/assets/files/pdf/learning_materials/A.m.No.09-6-8-SC_annotation.pdf, and http://philja.judiciary.gov.ph/assets/files/pdf/learning_materials/A.m.No.09-6-8-SC_rationale.pdf.

BOX 71: "Effective Justice?"

In conjunction with the developments in the field under European Union Law, in particular the jurisprudence of the European Union Court of Justice, a study was undertaken in 17 EU Member States on the implementation of Articles 9.3 and 9.4 of the Aarhus Convention. This study resulted in a set of recommendations with respect to barriers, costs and effectiveness of environmental procedures.

The report is available on the EU website at: http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf (accessed 22 January 2015).

The use of criminal law should also be considered in appropriate cases.[198] Some violations of environmental laws are appropriately addressed through criminal sanctions, and members of the public may be in a particularly good position to monitor and detect such violations and to refer such violations to the appropriate public authorities. In such cases, the members of the public may need to be protected from retribution; legal standards can be established and measures implemented for this purpose.

198 See, e.g., Nellemann, C., Henriksen, R., Raxter, P., Ash, N., Mrema, E. (eds.). 2014. *The Environmental Crime Crisis Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources.* A UNEP Rapid Response Assessment. United Nations Environment Programme and GRID-Arendal, Nairobi and Arendal, www.grida.no.

4.2.8 Guideline 22

States should ensure the timely and effective enforcement of decisions in environmental matters taken by courts of law, and by administrative and other relevant bodies.

Discussion

Enforcement of decisions is an essential element of the rule of law. It should be ensured that the laws relating to enforcement of decisions in environmental matters provide the appropriate mechanisms for the successful party to seek timely and effective enforcement. The laws should be adequate and sufficiently effective to remedy any harm caused to the environment, to provide full compensation for such harm and to protect the environment from suffering similar harm in the future.

Some decisions, such as declaratory judgements, are self-enforcing. However, in other cases enforcement may be critical in realizing the intentions behind the decision. An example is injunctive relief, where an investor may be required to stop work on a project worth millions of dollars. If enforcement of the injunction is not effective or timely, it will not be carried out in time to avoid the damages that the injunction was designed to address.

Restorative orders may require a staged approach over an extended period of time. A court or tribunal may need to be involved in ordering investigation, monitoring and report, and may need to supervise and direct restoration over time, taking a precautionary and iterative approach that may involve adaptive management. Appropriate orders may only be possible once initial investigations take place, and initial restoration efforts may need to be evaluated and assessed for performance and modified or adjusted. Particular and valuable experience in this regard has been developed in the New South Wales Land and Environment Court.[199]

The writ of mandamus is a type of injunction directed at public authorities. In order to ensure timely and effective enforcement of decisions in complex environmental cases, courts may need to use innovative mechanisms to ensure ongoing supervision of restoration orders. The writ of continuing mandamus is one such mechanism. See discussion under Guideline 21.

One of the most important powers that a judicial body has to ensure that its judgments are enforced is the power to hold a person in contempt. If a decision is not implemented by one who has a duty to do so, the court may impose a fine on that person or sentence him/her to jail.

The judicial and executive branches of power need to work hand in hand to ensure that judgments are enforced. Usually the judiciary relies upon officers of the executive branch to carry out its orders and to ensure that others do so as well. The power to summon and arrest persons, for example, is generally aided through executive authorities. In appropriate cases where opposition to the execution of an order is great, the executive authorities may resort to force to ensure that judgments are implemented, even to the point of establishing civic order.

The powers of enforcement are linked to the types of remedies that are provided under law. Seizure of property, for example, may be appropriate in certain circumstances both as a means of enforcing a judgment and in order to provide an effective remedy. The freezing of assets or imposition of bans on movement are other enforcement powers that may be available.

199 See Preston, Brian J., "Injunctions in Planning and Environmental Cases" (2012) *Australian Bar Rev.* 84, 99-101.

Penalties are also often imposed in a manner that encourages compliance with court orders. For example, civil fines may be contingent on the behaviour of the defendant, and could be reduced or avoided in case of good behaviour.

The duty of the executive branch to enforce judicial and other decisions extends to the enforcement of judgments where the State or public authorities were the defendants.

4.2.9 Guideline 23

States should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues.

Discussion

This Guideline is aimed at ensuring that the public knows about its opportunities for access to justice in environmental matters. It is linked to other Guidelines that seek to raise awareness, advance environmental education, and engage the public on matters related to Rio Principle 10, including Guidelines 7, 15 and 24. Guidance under those guidelines on matters such as traditional mechanisms for disseminating information, particularly in less developed countries, should therefore be reviewed.

The Guideline uses the term "courts of law and other relevant bodies" rather than the formula used in other Guidelines ("courts of law or other independent and impartial bodies"). Considering that administrative bodies are also mentioned in Guideline 22, it may be assumed that the intention was for Guideline 23 to apply to a broader range of issues than strict access to justice matters. This broad formulation also may include administrative tribunals, environmental inspectorates, environmental ombudspersons, etc.

The general populace should be proactively informed about the availability of access to justice opportunities, Moreover, such information can and should be provided routinely to individual members of the public in connection with procedures related to the other aspects of Rio Principle 10. For example, in the case of responding to a request for environmental information, the public authorities should routinely include information about the possibilities to challenge the legal sufficiency of the response.

For provision of information to the general public, States need to make a special effort to use easily understandable formats and the most appropriate channels of communication, possibly including radio, television and Internet. Jurisprudence of the Court of Justice of the EU has suggested that the mere availability to information in public formats is not enough and that authorities may be required to make special efforts to ensure that the public concerned with a particular environmental matter is directly informed of its access to justice opportunities.[200]

Well-designed, accessible and user-friendly websites of environmental courts or other relevant bodies are important tools in raising awareness, as well as the generation of specific guidance documents on how to use the available opportunities. See Boxes 72 and 73.

200 Case C-427/07, *Commission v. Ireland.*

BOX 72: Interactive websites

The website of the Land and Environment Court of New South Wales (Australia), upgraded in 2012, provides numerous resources in accessible formats for the public to understand what the LEC is and how it serves the public.

The section 'Your legal problem is about' is designed with a consumer orientation and directs people to the right information. 'Types of cases' summarizes all of the main types of cases in the Court and describes the process from beginning to end, with links to all information required. In the helpful materials section, cases are grouped under categories, and annotated legislation is provided with the cases under the relevant statutory provisions.

There are also particular pages on key topics – issues in focus – such as biodiversity, water and heritage. These pages provide links to relevant legislation and cases as well as links to other government information.

'Resolving disputes' applies the concept of the multi-door courthouse – a dispute resolution centre offering a variety of processes to resolve disputes, including adjudication, mediation and conciliation.

'Coming to the Court' provides extensive information for litigants, experts, witnesses, media and the public about practicalities before, during and after various court processes. There is even a graphic of 'who's who' in court to help people.

The Court provides access to all judgments and transparency of proceedings online through tabs and menus such as 'Court lists', 'Transcripts' and 'Judgments'. It also facilities access by categorisation under topics and through production of its judicial newsletter summarising the cases (with links to the judgments).

'E-court' is the electronic filing and management system.

'Practice and procedure' provides links to all the legislation, rules, practice notes and policies.

Other items to click include 'Forms and fees' and 'Facilities and support'.

The 'Publications and resources' tab links to a wealth of information on topics related to the court's special areas of jurisdiction (biodiversity, water, heritage and compensation for compulsory acquisition). There are the Annual Reviews which themselves provide a great deal of information about the court and its performance. The Judicial Newsletters summarize quarterly recent legislation and cases on environmental law. The case summaries are not only of the Land and Environment Court's decisions but also of other courts in Australia and overseas. They provide links to the judgments and legislation. Speeches and papers given by the judges and officers of the Court are available, as well as links to helpful manuals. Link: http://www.lec.lawlink.nsw.gov.au

Other interesting websites include:

Environment Court of New Zealand. Link: http://www.justice.govt.nz/courts/environment-court

BOX 73: US EPA's Environmental Appeals Board guidance documents

Recognizing the importance of providing adequate information to the public about the procedures of a court and that the lack of information could serve as a barrier for the public to effectively obtain access to justice, the U.S. Environmental Protection Agency ("EPA") Environmental Appeals Board ("EAB") has developed various documents both to ensure that the public is fully aware of its procedures, and to aid the public in following such procedures. For example, the EAB has created:

A plain English guide geared to the general public that explains how environmental laws protect the public; the different environmental laws EPA administers; the role of the EAB; the EAB decision-making process; and how can the public effectively participate in EAB proceedings. This guide, entitled Citizens' Guide to EPA's Environmental Appeals Board (Jan. 2013), is available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf (EAB Guidance Documents);

A practice manual geared to practitioners before the EAB that explains functions and powers of the EAB; general filing requirements of documents before the EAB including deadlines; and how to seek judicial review of an EAB decision. This manual, entitled Environmental Appeals Board Practice Manual (Jan. 2013), is available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf (EAB Guidance Documents); and

A "Frequently Asked Questions" section in the EAB website that provides quick answers to commonly asked questions, such as how to contact the EAB; what are the procedural rules that govern appeals to the EAB; what are the format requirements for petitions or appeals filed with the EAB; and where and how to file documents with the EAB. The full list of questions and answers is available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf (Frequently Asked Questions).

4.2.10 Guideline 24

States should ensure that decisions relating to the environment taken by a court of law, other independent and impartial or administrative body, are publicly available, as appropriate and in accordance with national law.

Discussion

For courts or other independent and impartial bodies, see under Guideline 15. This Guideline may be applied to a broad range of decisions taken by various bodies, including relevant judicial or quasi-judicial bodies, administrative bodies, the ombudsman or commissioner's office, and could extend to all administrative authorities with the power to issue final agency decisions, including in areas such as permitting and licensing, planning and programming.

It is an essential component of access to justice that the decisions taken by the reviewing court or other independent or impartial or administrative body are publicly available (see Box 74). This guideline applied to both final decisions and interim binding decisions. The guideline recognizes a need for national flexibility on this matter and states that such decisions should be publicly available as appropriate and in accordance with national law.

See the discussion under Guideline 23 for the example of the Land and Environment Court of New South Wales (NSWLEC) and the measures it takes to make its judgments publicly available, through direct links, cataloguing and classification, special subject webpages, annotated legislation, and the judicial newsletter. For environmental criminal cases, New South Wales has a Sentencing Information System, a component of the Judicial Information Research System (JIRS), maintained by the Judicial Commission of New South Wales. The environmental crime sentencing database within JIRS includes information on:

- the case name, its medium, neutral citation and matter number;
- the class of jurisdiction in the NSWLEC;
- the principal offense and any other offenses;
- the penalty type;
- the penalties imposed and sentencing orders made;
- the variable characteristics of the offense and offender; and
- the reasons for judgment.

Another tool in making decisions publicly available is webcasting. The ability of the public and the press to watch judicial proceedings is a significant component of what makes governments transparent, accessible, and accountable. As technology improves, the number of domestic and international judiciaries that provide webcasting of their court proceedings continues to grow.

BOX 74: Making decisions publicly available

The U.S. EPA Environmental Appeals Board ("EAB") is EPA's final decision maker on appeals of administrative enforcement cases assessing penalties for violations of the major environmental statutes that the EPA administers, and on petitions seeking review of permit decisions of EPA-issued permits. Therefore, it is crucial that the decisions and cases before the EAB are accessible to the public. Accessibility to its decisions not only helps educate EPA, the parties, and the public about the environmental laws and improve compliance among the regulated community, it also fosters transparency, which helps inspire public trust in the decision-making process. All EAB orders and decisions, either interim or final, are publicly available through its website at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf (Board Decisions). In addition, all documents parties file on cases before the EAB are publicly available unless they contain confidential business information, in which case a redacted version is made publicly available. Parties as well as the general public have access to these documents either by visiting the EAB during scheduled hours or by accessing the EAB's electronic docket available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf (EAB Dockets). The EAB's electronic docket provides access to all documents filed in both active and closed cases from January 2006 to the present. The EAB has designed its website to provide the public with multiple ways to search for a decision. Decisions can be searched alphabetically, in reverse chronological order, by appeal number, by statute, and by citation. The EAB also publishes its most significant decisions in a series of bound volumes, entitled Environmental Administrative Decisions (E.A.D.), which may be purchased from the U.S. Government Printing Office, or may be read at several hundred public and law libraries that are designated Federal Depository Libraries.

4.2.11 Guideline 25

States should promote appropriate capacity-building programmes, on a regular basis, in environmental law for judicial officers, other legal professionals and other relevant stakeholders.

Discussion

The above-mentioned "Rio +20 Declaration on Justice, Governance and Law for Environmental Sustainability" (see Box 57 in Section 4.1.2) includes the following paragraph:

> "States should cooperate to build and support the capacity of courts and tribunals as well as prosecutors, auditors and other related stakeholders at national, sub-regional and regional levels to implement environmental law, and to facilitate exchanges of best practices in order to achieve environmental sustainability by encouraging relevant institutions, such as judicial institutes, to provide continued education."

Guideline 25 draws attention to the importance of capacity-building in environmental law for a wide group of judicial officers (such as justices, judges, magistrates, legal assistants and clerks) and other legal professionals (e.g., prosecutors, attorneys, barristers, counsels and solicitors) and other stakeholders. The classification or title of various judicial and legal professionals varies from jurisdiction to jurisdiction. While legal professionals and others dealing with environmental matters are a natural target of such capacity-building, any judicial officer or legal professional may at some point in his/her career encounter an environmental case. Consequently, it is important for capacity-building to be generally available throughout the profession.

Major international conclaves have played an important role in spreading recognition of the need for judicial training programs. One of the most significant such conclaves was the 2002 Global Judges Symposium convened by UNEP in conjunction with the Johannesburg World Summit on Sustainable Development. The Johannesburg Principles on the Role of Law and Sustainable Development adopted there included the express recognition of an "urgent need for regional and sub-regional initiatives to educate and train judges on environmental law" (Principle 3). UNEP's Judges Program[201] grew out of the 2002 Global Judges Symposium. A significant regional initiative following up on the symposium was the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, held in Manila in 2010, convened by UNEP and the Asian Development Bank.

Matters related to Rio Principle 10 are included throughout training programs for judges and legal professionals. Specific training programs have been developed for judges and other legal professionals specifically on the application of environmental and other legislation related to Rio Principle 10 (see Boxes 75 and 76).

BOX 75: Regional capacity-building

The European Union Forum of Judges for the Environment (EUFJE) was established in 2004. Apart from its periodic meetings on topics of interest, the Forum is also involved in the preparation of capacity-building activities for judges in Kiev, Tirana and Almaty. The Asian Development Bank supported the convocation of an Asian Judges Symposium on environmental issues in June 2010 that kick-started discussions on establishment of an Asian Judges Network on the Environment. International assistance organizations have implemented projects to build capacity of beneficiary countries to implement access to justice provisions relevant to Rio Principle 10. The Regional Environmental Center for Central and Eastern Europe and the Organization for Security and Cooperation in Europe implemented a series of projects from 2011 to 2013 in Albania, Belarus, Bosnia and Herzegovina, Kosovo (as defined in UNSCR 1244), the former Yugoslav Republic of Macedonia, Moldova, Montenegro and Serbia on access to justice requirements of European Union and national legislation and relevant court practices, and other means of access to justice (e.g. ombudsman, Aarhus Convention Compliance Committee, international agreements, European Court of Human Rights). Specific activities included round-table meetings for members of the judiciary, officials of ministries of environment and justice, legal professionals and CSOs, as well as trainings for judges and prosecutors, in cooperation with judicial training centres and/or magistrate schools, and of civil society organizations. Five-day Master Class trainings were also conducted in Moldova and Belarus.

Sources: Luc Lavrysen (President of the EUFJE); Kala Mulqueeny, Sherielysse Bonifacio and Jacqueline Esperilla, "Asian Judges, Green Courts, and Access to Environmental Justice: An Asian Judges Network on the Environment," *Journal of Court Innovation* 3:1 (2010) 277; www.sector.rec.org, http://aarhus.rec.org/, www.envsec.org.

201 See http://www.unep.org/delc/judgesprogramme/tabid/78617/Default.aspx. See also Robert Carnwath, "Judges and the common laws of the environment at home and abroad."(2014) 26 *J. Env. L.* 177 at 184-186.

However, this Guideline makes the connection between application of Rio Principle 10 and capacity-building in the general field of environmental law. The above-mentioned EUFJE, for example, also has worked with the European Commission on a co-operation program with national judges that resulted in the Commission contracting the European Institute of Public Administration and later the Academy of European Law to develop training modules on various topics of EU environmental law as well as to organise workshops and seminars on the implementation of EU environmental law. The added value of an action at Union level is to encourage exchange among the different Member States and legal traditions, as well as between the national courts and the Commission, leading towards the uniform implementation of Union law. Multiple workshops have been organised and training modules are available on EU law in areas such as Environmental Impact Assessment (EIA), Nature Protection, Waste, Water, Principles of EU Environmental Law, Protection of Environment through Criminal Law, and Access to Justice in environmental matters. As of early 2014, more than 400 judges and prosecutors from the courts of first instance to the Supreme Courts from 27 Member States had attended training programs organized under this initiative.

BOX 76: Training and capacity-building under the UNEP Judges Program

The UNEP's Judges Program has produced highly useful materials that can be used in national or regional training programs for judges and other legal professionals. These include the *UNEP Training Manual on International Environmental Law*, the *UNEP Judges' Handbook on Environmental Law*, the *UNEP Guide to Global Trends in the Application of Environmental Law by National Courts and Tribunals*, the *UNEP Compendia of Summaries of Judgments in Environment Related Cases*.

The *UNEP Judicial Training Modules on Environmental Law* cover topics such as:

- Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development
- Scope and Content of Substantive Environmental Law
- Scope and Content of National Environmental Law
- How Environmental Cases Come Before Courts
- Managing Environmental Cases
- Evidence in Environmental Cases
- Remedies in Environmental Cases
- Resolving Environmental Disputes

Link: http://www.unep.org/delc/JudicialTrainingModulesEnvironmentalLaw/tabid/102283/Default.aspx

Courses on environmental law are often offered through judicial training centers operated by the judiciary branch of government. See Box 77.

BOX 77: Judicial training centers

I. The Philippines.

In 1998, the Philippine Judicial Academy (PHILJA) was created through Republic Act 8557 to serve as a training school for justices, judges, court personnel, lawyers and aspirants to judicial posts.

PHILJA provides the following trainings programs related to Environmental Law:

a. Orientation Program for New Judges – A two-hour course on Introduction to Environmental Law; and,
b. Specialized Training – A three-day intensive training using case studies on environmental issues and involving other sectors (prosecutors, environmental law groups, environmental agencies and scientists).

In partnership with development organizations such as the United States Agency for International Development (USAID), the United Nations Development Program (UNDP), the Asia Foundation, and the Haribon Foundation, PHILJA has enhanced its curriculum content and developed training manuals and interactive tools, including an "Environmental Law Training Manual" and "Greening the Judiciary: Learning Modules on the Environment".[202] Legal topics cover basic environmental laws, provisional remedies, abatement of nuisance, tort action, damages, evidence, international environmental law, problem areas in prosecution or enforcement, environmental economics, and climate change. Non-governmental organizations specializing in public interest or environmental litigation and advocacy have been invited to the multi-sectoral training programs either as resource persons or participants. PHILJA likewise engaged academics to render expertise in training the judges and legal practitioners.

The process of educating judges and other court personnel on environmental issues has significantly increased the capacity of judges as well as justices of the higher courts to address the complexity of environmental adjudication. However, further exposure to scientific information and techniques in assessing evidence in environmental damage suits is still needed to realize effective and efficient administration of environmental cases.

Reference: Candelaria et al., "Designation of 'Green Benches' in the Philippines"[203]

II. The European Union

With regard to ensuring officials assist the public in seeking access to justice, in 2008, the European Commission launched its "Cooperation with Judges Programme" in Paris. The main objectives of the programme include creating training materials for Member States' judges on the application of EU legislation — including rules regarding access to justice in environmental matters. The material produced through the programme is available free to national judicial training centres.

202 See http://philja.judiciary.gov.ph/special.html.
203 http://www.aecen.org/sites/default/files/GreenCourtsPaper.pdf (accessed 15 February 2015).

Judicial training programs may also be available through international assistance mechanisms. The US EPA has established an international workshop module on building judicial capacity for environmental litigation (see Box 78).

With respect to other stakeholders, this Guideline should be read in conjunction with the previous guideline on the provision of information about how to use access to justice mechanisms. Specific capacity-building activities, such as UN and NGO training, can augment the provision of information by demonstrating to the members of the public concerned real life examples of how they can use the legal system to protect their rights to access to information and public participation under national law. Reports and analyses of real cases of access to environmental justice are useful tools in capacity-building (see Box 79).

BOX 78: International workshop module on environmental law for judges

The U.S. Environmental Protection Agency (EPA) Environmental Appeals Board (EAB) was created in 1992 to act as the final decision-maker on appeals of various administrative decisions made by EPA. As such, the EAB has over twenty years of experience deciding environmental cases and serves as a repository of expertise within the U.S. federal government on environmental administrative adjudication. As one of the few environmental specialty tribunals in the U.S. and the world, the EAB has used its expertise to support U.S. government efforts to promote good environmental governance internationally, with particular focus on building judicial capacity for environmental litigation. In response to requests to assist countries in building stronger institutions and judicial capacity for the adjudication of environmental disputes, the EAB developed and peer-reviewed a 3-day Workshop on Environmental Law for Judges. The workshop's main goals are to strengthen adherence to the rule of law and transparency in judicial decision-making in the environmental context; emphasize the importance of public participation and access to environmental and health information; and to foster improved compliance and enforcement of environmental laws. The workshop is taught by EAB Judges and Senior Staff Attorneys that serve as Counsel to the EAB. The workshop is structured as a three-day capacity-building exchange with modules focusing on: (1) heightening judicial awareness of the importance, complexity, and uniqueness of environmental problems; (2) foundational concepts underlying environmental law and typical features of domestic environmental law; (3) tools for efficiently managing environmental litigation and for transparent decision making; (4) evaluating competing or uncertain scientific evidence; and (5) providing a principled approach to fashioning remedies in environmental cases such as crafting both short and long term remedies to deal with environmental damage or harm, recapture the economic benefit of noncompliance and assess penalties that will serve to create deterrence and improve compliance. The workshop has been delivered, and adapted, in conjunction with and in support of other partners, in a number of countries around the globe including: China, Jordan, the Philippines, El Salvador, Guatemala, Costa Rica, Mexico, and Hungary. The workshop also has been translated into Mandarin Chinese, Bahasa Indonesian, Spanish, and Arabic.

BOX 79: Handbook on Access to Justice Under the Aarhus Convention

The handbook uses case studies to illustrate the obligations of the Aarhus Convention and how they might be enforced or upheld through complaints procedures and other means of access to justice. The first part of the handbook discusses specific issues with respect to the implementation of the access to justice obligations of the convention, analysing and evaluating the results of the case studies. Specific lessons that can be learned from the case studies in connection with these provisions are elaborated in the chapters of the Handbook.

Link: http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/handbook.final.pdf

4.2.12 Guideline 26

States should encourage the development and use of alternative dispute resolution mechanisms where these are appropriate.

Discussion

Alternative dispute resolution (ADR) refers to any means of settling disputes outside the judicial or administrative process. "Alternate dispute resolution mechanisms" include mediation, conciliation, negotiation or arbitration. Both the effect of the outcome and its binding nature can vary among these mechanisms.[204]

204 See also Remo Savoia, "Administrative, judicial and other means of access to justice" in Stephen Stec, ed., "Handbook on Access to Justice under the Aarhus Convention" (REC: 2003), at 41.

Arbitration is the most formal of these mechanisms, and involves detailed procedural rules which nevertheless are more flexible than those applied to judicial proceedings. The neutral third party arbitrator usually has the power to make a final decision (or award) on the basis of the proceedings and the evidence. Consequently, arbitrators are often persons who have prior experience as judges. Arbitration may be binding or non-binding, court-ordered or voluntary. Often there are no opportunities for appeal from an arbitrator's award, barring unusual circumstances.

The Permanent Court of Arbitration has adopted optional rules for arbitrating disputes relating to the environment and/or natural resources, supplemented by environmental conciliation rules adopted in 2002. These rules are potentially available for application in a wide range of disputes, including those among private parties or between private and public parties. Arbitration rules can be adjusted as necessary. In the case of matters falling under Rio Principle 10, it may be necessary to ensure transparency of proceedings and publicity of outcomes in order to effectively implement the Principle.

In mediation, a third party mediator facilitates a dispute resolution process to assist the disputing parties to reach agreement by common consent. The mediator's role is to assist parties, privately and collectively, to identify the issues in dispute and to develop proposals to resolve them. Unlike arbitration, the mediator is not empowered to make decisions. Accordingly, the mediator may meet privately and hold confidential and separate discussions with the parties to a dispute. A prerequisite for mediation to be successful is that national law must allow sufficient room for negotiations.

Conciliation is similar to mediation but the mediator additionally may have expertise in the matter in dispute and may apply this expertise to advise the parties or propose solutions. A conciliator may also be empowered to make non-binding findings of fact.

Many States require conciliation and/or mediation as a compulsory step prior to the commencement of judicial process, which enables an opportunity for dialogue between the parties before the matter reaches court level, thus saving administrative costs. In Argentina for example, Law 26.589 applies this rule to general disputes, not only environmental ones. Courts may also interrupt proceedings to give parties an opportunity to use one of the ADR mechanisms to come to a settlement. The outcome of the ADR process is then subject to approval by the court.

The office of ombudsman, discussed above in connection with judicial and administrative access to justice mechanisms, may also be considered an alternative to such mechanisms, particularly where the rights and power of the ombudsman more closely resemble those of an arbitrator or mediator. The experience of the Ombudsman for Future Generations of Hungary provides an example of an innovative approach to dispute resolution. See Box 80.

Where appropriate, the relevance and use of traditional, community-level alternative dispute resolution mechanisms and processes should be considered.

In the environmental field, mediation has been often used, with arbitration less common but also present. One potential benefit associated with the use of such mechanisms is the possibility to arrive at broadly accepted and thereby potentially long-lasting solutions to disputes.

BOX 80: The Ombudsperson for Future Generations (Hungary)

The institution of the independent Hungarian Ombudsperson for Future Generations (FGO) was established in 2008 and operated until the constitutional reform in 2012, after which the office continued its operation as a deputy to the single Parliamentary Ombudsperson. Concerning access to environmental information, the FGO had overlapping responsibilities with the independent Ombudsperson for Data Protection. In some instances the two ombudspersons worked on cases together and issued joint statements. The findings and suggestions of the ombudspersons were not binding on State bodies. Nevertheless, careful multidisciplinary research and an iterative, deliberative procedure meant that their statements carried great weight and the concerned State organizations followed their findings quite frequently. Because a binding legal judgment at a court or other body was much more likely with a supportive ombudsperson decision, the use of the ombudsperson as an alternative dispute resolution mechanism significantly decreased the risk of litigation.

Access to information in environmental matters was also supported by the FGO through its full access to governmental files and the possibility to use the acquired information in its detailed statements. This way the right to access to environmental information of the concerned communities, organizations and individuals was fulfilled in an easy and undisputable way and, at the same time, application to the office of the ombudsperson was without any fees or costs.

The FGO dealt in its work with all three pillars of Rio Principle 10. It did not stop at the stage of access to information, but analysed the implementation of the right to participate and the right for legal remedies (except for judicial remedies, as the ombudspersons had no power to affect the judicial branch). Most typically the ombudsperson examined substantial environmental protection matters from the viewpoints of constitutional legal bases: the right to health and the right to environment primarily. The constitutional bases were referred to also in procedural issues, such as the right to access to information, the right to a fair procedure and the right to legal remedies, and also some constitutional requirements concerning the quality of legal remedies, such as the right to a fair procedure.

Source: Sandor Fulop, former Ombudsperson for Future Generations of Hungary.

Sometimes ADR mechanisms are formally adopted by institutions as a means of resolving environmental disputes. They can provide a potentially swift and relatively inexpensive means of resolving disputes and also can avoid the consequences of a traditional adverse decision. The potential effect of ADR can thus vary according to the nature of the decision-making process, the issues at stake and the role for ADR that national law permits, among other things. The field of ADR is a growing one and the use of ADR mechanisms is often encouraged. Courts and tribunals find it to be a matter of efficiency to encourage parties to make use of ADR mechanisms. In Costa Rica the tribunal *Ambiental Administrativo*, established in 1995, has a 90-95% settlement rate through mediation.

BOX 81: Dispute resolution under the Planning and Environment Court (PEC) of Queensland (Australia)

The PEC has placed an increasing emphasis on ADR. At least since the 1990s, Australian courts have recognized the desirability of parties to reach consensual agreements in disputes.[205] However, Australian courts recognize also that the mix of public and private interests in most environmental disputes means there are special considerations in fashioning appropriate ADR mechanisms. The PEC employs objective, external expertise to manage its ADR processes to guarantee a gradual, problem-solving approach against a background of the stated public interest goal of achieving ecological sustainability. To that end, the PEC will encourage contestants to have a dispute management plan including the ADR methods discussed above, as appropriate. In fact, the Senior Listings Judge of the Court has stated that he would prefer to see the word "alternative" dropped from the term to signify that it is a tool for case management and not an alternative to a rigid, traditional process.[206]

Elements of a dispute resolution plan may include, for example, all or some of the following:

1. a case management conference, before the ADR Registrar, to discuss the best way for the dispute to be managed;
2. early "without prejudice" settlement conferences between the parties, which may be chaired by the ADR Registrar;
3. expert meetings of the parties experts in the absence of the parties or their legal representatives to discuss areas of professional agreement and disagreement, which may also be chaired by the ADR Registrar; and
4. mediation conducted by the ADR at which the parties, their representative and the expert witnesses all participate.

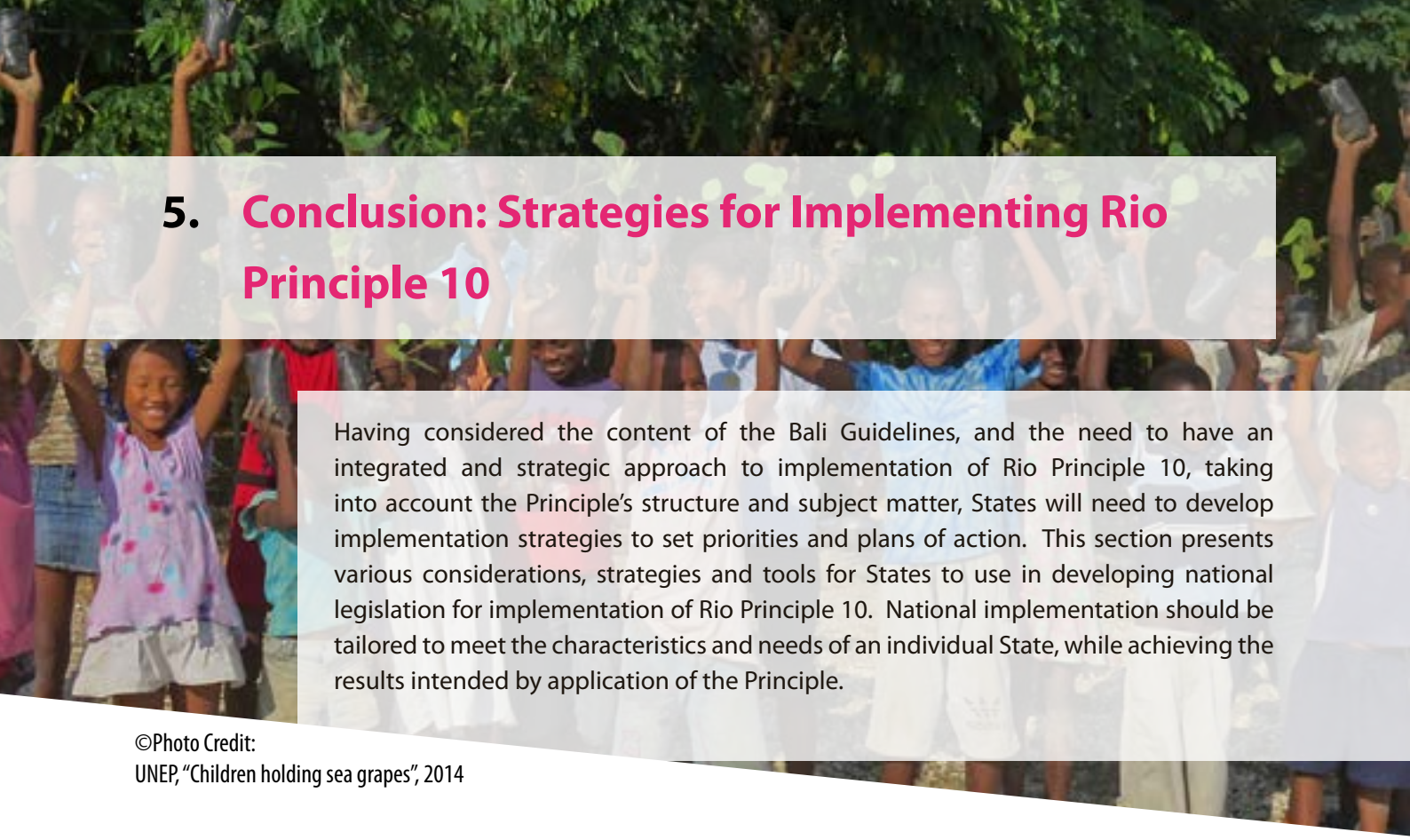
Source: Rackemann, Michael, "The Planning and Environment Court of Queensland: A case study for the Asian Judges' Symposium on Environmental Decision- making, the Rule of Law and Environmental Justice," 2010, available at http://archive.sclqld.org.au/judgepub/2010/rackemann280710.pdf.

205 Rackemann, Michael, "The Planning and Environment Court of Queensland: A case study for the Asian Judges' Symposium on Environmental Decision-making, the Rule of Law and Environmental Justice," 2010.
206 Ibid., at para. 116.

BOX 82: ADR components of US EPA programs

The U.S. Environmental Protection Agency has a robust ADR program. ADR is applied in the work of the US EPA's trial level administrative law judges and by the Environmental Appeals Board for appellate administrative litigation. ADR is an element of US EPA's public participation trainings through the Office of International and Tribal Affairs.

See: http://www.epa.gov/adr/cprc_adratepa.html, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Alternative+Dispute+Resolution%20(ADR)?OpenDocument, http://www.epa.gov/oalj/about.htm#adr, http://www.epa.gov/international/public-participation-guide/Tools/workshops.html



5. Conclusion: Strategies for Implementing Rio Principle 10

Having considered the content of the Bali Guidelines, and the need to have an integrated and strategic approach to implementation of Rio Principle 10, taking into account the Principle's structure and subject matter, States will need to develop implementation strategies to set priorities and plans of action. This section presents various considerations, strategies and tools for States to use in developing national legislation for implementation of Rio Principle 10. National implementation should be tailored to meet the characteristics and needs of an individual State, while achieving the results intended by application of the Principle.

©Photo Credit:
UNEP, "Children holding sea grapes", 2014

Taking the Guidelines as a whole by, for example, considering the way the Guidelines support and interact with each other helps States in employing a strategic approach to implementing Rio Principle 10. Development of a national strategy or plan aimed at implementation of a particular policy goal can greatly increase the resilience of legal and policy solutions. The main considerations and stages of strategy development include:

- identification and mapping – identifying laws and policies, actors and institutions, and plotting their relationships to each other, in the context of an overall set of goals to be reached;
- assessment – analyzing capacities, strengths and weaknesses, gaps and obstacles, needs and prospects for success in order to convey a realistic and in-depth evaluation;
- planning - based on the above, considering necessary steps towards achieving set goals through prioritization and prediction of consequences in a careful, step-by-step manner;
- consolidation and stocktaking – establishing positive outcomes and identifying problems through feedback processes; and
- revision maintaining flexibility in planning so that steps can be adjusted based upon real-world results.

The latter stages, moreover, constitute a policy-making feedback loop that should operate perpetually in order to learn from experience and continuously refine existing law and practice. Each of the stages mentioned are best conducted with adequate stakeholder engagement and participation.

Relevant legal norms and regulations can be found at various administrative levels in a particular country, depending on the constitutional and administrative arrangements. The Guidelines are therefore useful at all appropriate levels of government, ranging from the national or central level to the local or district level. For example, in federal states, which are characterized by a union of partially self-governing states or regions united by a central (federal) government with limited powers, the states or regions may have considerable autonomy in the field of the environment. The same strategic approach outlined above would possibly be needed, therefore, at the level of federal entities.

5.1 Approaches to national implementation planning

States may choose to make use of tried and true methodologies or mechanisms for implementation of Rio Principle 10 in the same manner as for other policies. It is naturally a prerequisite to implementation that Rio Principle 10 has been affirmatively confirmed as a guiding principle for the development of law and policy in a particular country. Once that is the case, the Bali Guidelines are useful in setting the strategy for implementation of the Principle.

The "national implementation plan" or NIP is an established method that can be applied in the case of Rio Principle 10 to monitor and increase implementation. NIPs are useful mechanisms to promote implementation of policy choices and compliance with adopted legal and other mechanisms at national and sub-national levels in a deliberate and proactive manner. The stages in developing NIPs often include evaluations of obstacles to implementation (e.g., conflicting laws, weak institutions and capacities, resistant social norms, public and private sector considerations), action points for overcoming these obstacles, identification of necessary financial and other resources, and methodologies for monitoring implementation and compliance and feedback. NIPs help to focus efforts in areas where a difference can be made – for example, in implementing regulations rather than framework-level laws. NIPs can also include plans for the establishment of new implementation agencies or other institutions, and can address both internal, domestic issues of implementation as well as measures for strengthening international cooperation and assistance. One useful mechanism for stocktaking and monitoring is to conduct periodic, for example annual, agency performance reviews.

Many States have by now amassed substantial practice in the development of NIPs in the context of particular multilateral environmental agreements (MEAs). International organizations and funding mechanisms such as the Global Environment Facility (GEF) also promote the development of NIPs.[207]

The involvement of stakeholders in the development of strategies is especially relevant where those strategies pertain to Rio Principle 10. The public should be involved at an early stage in the drafting of new legislation or amendment of existing legislation aimed at implementing Rio Principle 10.

Initial stages in implementation planning include identification and mapping, stocktaking and assessment. The first stage in particular involves a review of the existing legal, policy and institutional framework, sometimes referred to as a "diagnostic audit." This phase is necessary to determine the adequacy of the mechanisms already in place for access to information, public participation and access to justice. The assessment stage identifies the changes that need to be made to national and sub-national laws and regulations in order to effectuate implementation of Rio Principle 10 with the assistance of the Guidelines. It also examines the institutional setup to ensure that it is rational, comprehensive, and adequately resourced. Another element of assessment is to get a picture of the current capacities of authorities and others tasked with implementation. As a result of the diagnostic audit, needs may be identified that can be addressed through an action plan.

Several steps are required for the diagnostic audit to be transformed into an effective framework for implementation. The needs identified in the diagnostic audit may be complex and challenging. It is therefore necessary to determine how these needs interact and to prioritize the needs based on those that will achieve fundamental and lasting gains with a reasonable investment of time and resources. Framework

207 For further information, see the UNEP Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (2006), pp. 187–193.

BOX 83: Developing implementation strategies for the Aarhus Convention in South Eastern Europe (SEE)

Successful strategies for implementation of the Aarhus Convention in the SEE countries requires certain legislative and institutional changes, as well as changes in practice, to guarantee rights and opportunities for access to environmental information, public participation in decision-making and access to justice in environmental matters. The capacities of government officials at the central and local level and of NGOs also have to be strengthened. From 2001 to 2003, the Netherlands Ministry for Foreign Affairs funded a project to assist SEE countries to develop strategies and action plans for the implementation of the Aarhus Convention through a transparent and participatory process. The project was implemented in Albania, Bosnia-Herzegovina, Bulgaria, former Yugoslav Republic of Macedonia, Romania, Yugoslavia (later Serbia and Montenegro) and Kosovo (as defined by UNSCR 1244) by the Regional Environmental Center for Central and Eastern Europe (REC).

Following a needs assessment in each country, a small group with members from government, NGOs and consultants developed draft implementation strategies and action plans that were submitted to inter-ministerial working groups with NGO participation. The implementation strategies and action plans included gap analysis of legal and institutional frameworks, assessment of practical obstacles in implementation, strategic direction, concrete proposals for short- and medium-term measures, and timelines for action. They also proposed responsibilities, tasks and resource requirements with respect to legislation, institutional frameworks, capacity building, and practical measures for the Convention's implementation. The final strategies were approved by the ministries of environment or by the inter-ministerial working groups.

Albania and the FYR of Macedonia updated their strategies and action plans a few years later. Serbia, after having ratified the Convention, prepared a new assessment on the status of implementation and developed an updated strategy and action plan with the support of the OSCE, which was approved after public consultation in December 2011. The REC provided follow-up support through capacity-building that included workshops, trainings, grants for NGO pilot projects and preparing guidance materials.

Source: Regional Environmental Center for Central and Eastern Europe.

legislation is often already in place, or even constitutional provisions, that accept the fundamental elements of Rio Principle 10. But certain procedural rights may not be provided in the law on access to information, for example. To put Rio Principle 10 into operation, detailed provisions are needed in the law, often contained in sub-legislative instruments, such as regulations, decrees, orders or rulebooks. It could not be expected that public administration and the judiciary would dedicate sufficient time and energy to the consideration of these aspects of access to information without there being a clear legal framework in place.

On the other hand, establishment of the legal rights without effective mechanisms for implementation and enforcement would create an unacceptable situation in which these basic rights could not be guaranteed. Public authorities in general and environmental authorities in particular are typically faced with resource limitations. The lack of human resources is a continuing concern. Assessments must look at resource issues and capabilities at all levels of government. Capacity-building efforts have to be aimed at public authorities as well as stakeholders. In order to make incremental progress, therefore, a complex analysis needs to be made to promote step-by-step progress both in the legal and policy framework and in implementation capacities.

The capacities of the non-governmental sector are important to assess. In many countries, a major focus of efforts should be on building the capacities of the NGO sector in order for it to be able to participate effectively in relevant decision-making. The government should ensure that opportunities for participation reach all sectors of society, including the most vulnerable ones. See also Guidelines 7, 14, 25.

BOX 84: Stages in implementation planning and strategy development

1. "Diagnostic audit" – Phase 1 – review of the existing policy, legal and institutional frameworks.
2. "Diagnostic audit" – Phase 2 – comparison of Phase 1 review with Rio Principle 10 policy goals: identification of gaps. Frameworks for assessment are discussed in the following section.
3. Capacity assessment – assessment of resources and capabilities at all levels of government, business and civil society.
4. Action planning – taking into account results of stages 1-3, concrete steps to be carried out to close policy, legal and institutional gaps.
5. Prioritization – establishing timeframes with clear responsibilities for carrying out actions in a step-by-step manner, with milestones.
6. Stocktaking – feedback loops in order to make necessary adjustments in the light of early experience and increased knowledge.

Following initial steps of implementation, States should periodically assess the state of the law, the functioning of their institutions and the level of implementation of environmental laws and international standards. Often environmental legislation requires public authorities or State institutions to undertake such periodic assessments. International cooperation also provides a context for assessment, including reporting obligations, through a State's membership in international organizations, networks or other cooperative institutions (see next section). For example, environmental compliance and enforcement networks, such as the International Network for Environmental Compliance and Enforcement (www.inece.org), have been established at the global or regional level covering the majority of the countries of the world. These networks establish a way to keep under review the progress made on various compliance and enforcement standards country-by-country.

Regional groupings such as economic integration organizations can also provide a means for raising standards. The European Union requires the establishment of high environmental standards for membership that are monitored by the European Commission. Existing EU law covers relevant subjects including access to environmental information, and public participation in EIA, SEA, integrated permitting, and river basin management. Even for countries that are not yet Member States, the accession process includes progress monitoring in the field of environment. The harmonization of domestic legislation with EU Directives, including those related to Rio Principle 10, is a part of this process.

5.2 International assistance and frameworks for assessment

International assistance and frameworks for assessment take many forms. Bilateral assistance is one mechanism that has proven effective in promoting public participation in targeted countries. Overseas development assistance (ODA) can provide expertise and resources to assist in legal drafting, to conduct legislative or institutional audits, to provide training and capacity-building, or to support exchanges, etc. Some international assistance providers develop standardized toolkits that can be rolled out as needed to recipient countries, for example, US EPA's Public Participation Guide (see Guideline 14).

International or multilateral platforms for assistance including clearinghouse mechanisms are other means. International regimes can provide a context for international assistance to overcome barriers and reach implementation goals. Financial and technical assistance may be available to countries in transition or to developing countries under such frameworks. Finally, international organizations, often in partnership with

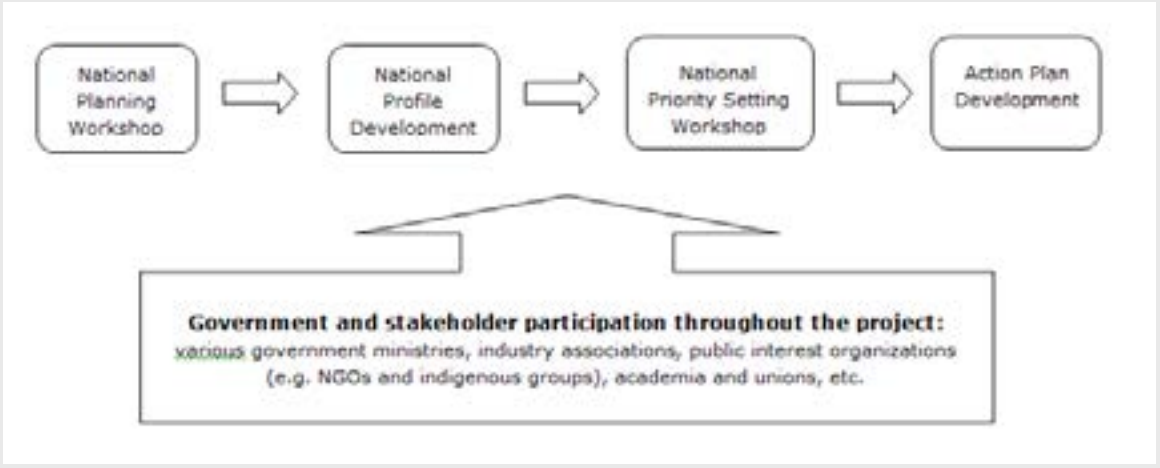
NGOs, or NGOs on their own initiative, play an important role, particularly in developing methodologies and monitoring trends.

Involvement in international regimes may give a structure to certain processes aimed at boosting implementation. For example, reporting obligations and compliance mechanisms under MEAs encourage countries to examine and analyse the level of implementation of the regime on their own territories and to make commitments on actions for improved implementation. Where such reporting mechanisms exist they can provide a framework that even non-parties to particular MEAs can use.

BOX 85: "Country Driven National Profile and Action Plan Development to Implement Principle 10": UNITAR-supported projects in Africa and Central America

Following requests from countries in Africa and Central America, starting in 2009 UNITAR supported Principle 10 pilot projects in 6 Central American countries - Costa Rica, Honduras, Dominican Republic, El Salvador, Nicaragua and Panama - and three Africa countries, - Botswana, the Democratic Republic of Congo and Mali. The projects covered: preparation of a national profile, organization of a national priority setting workshop, development of an action plan, and implementation of selected capacity development interventions. Project features and results included, inter alia:

- High-level commitment from government ministries, public interest organizations, the private sector, academia
- Enhanced collaboration between governmental and non-governmental stakeholders at the national and local levels
- Consensus reached on national priorities for Principle 10 implementation in seven African and Central American countries
- Action Plan development in some countries triggering local level capacity-building activities, e.g. workshops on environmental quality management for municipalities in Costa Rica
- Development of a methodology and guidance document to assist countries in assessing and strengthening national capacities for participatory environmental governance (available in English, French and Spanish)



National Principle 10 Profile Development, Priority Setting and Action Plan Process
*See http://*www.unitar.org/egp/rio-principle-10-projects

BOX 86: The Access Initiative Assessment

At the heart of The Access Initiative's (TAI) work is an assessment toolkit that helps civil society coalitions pinpoint strengths and weaknesses in environmental governance in their countries and identify opportunities to make positive changes. Using a framework of case studies and indicators that evaluate both laws on the books and government practices on the ground, TAI coalitions answer questions such as:

- Does the government inform citizens when pollution poses a health threat?
- Do citizens have a say in how natural resources are used?
- Does the justice system equitably resolve environmental disputes?

Based on experience gained from conducting 32 assessments around the world, TAI updated its assessment toolkit in 2006. As part of the update, web-based software was developed to help TAI coalitions easily conduct assessments, analyse their findings, and store their data. Fifty-four country assessments have been concluded to date. The assessment toolkit has 148 indicators supported by 18 case studies.

An outside analysis in 2010 showed that TAI assessments had contributed to reforms in 29 countries.

There is an introduction guide that can be found here: http://www.accessinitiative.org/resource/the-access-initiative-assessment-toolkit

BOX 87: The Environmental Democracy Index

In 2015, The Access Initiative and the World Resources Institute launched the Environmental Democracy Index (EDI): the first global benchmark of laws protecting access to information, participation, and access to justice in environmental decision-making. EDI consists of 75 legal indicators and 24 practice indicators that score how well a country's national laws measure up to the UNEP Bali Guidelines on Principle 10 while also providing a snapshot of how effective some of these laws are in practice. The indicators allow a range of users to conduct a detailed assessment on the quality, strength, and coverage of their countries' environmental democracy laws. The methodology enables users to compare and rank the scores of indicators, guidelines, pillars and countries against each other, identify gaps as well as model laws. In 2014, it piloted 24 indicators on implementation (or practice) to enable users to answer questions such as: "which countries provide up-to-date air and water quality information for their capital cities?"

The EDI is the first global index to measure the procedural rights of environmental democracy. It provides advocates with a tool to hold governments accountable while also promoting learning and dialogue across sectors and countries. The data it produces may be integrated into other tools and platforms to display environmental democracy data overlays.

The data is published on an online platform with an interactive map to display and compare the scores at multiple levels, with individual country pages for in-depth analysis. Users of the website will be able to understand the rationale behind the scores and discuss them as well. This open data platform will fulfill the vision of providing advocates, researchers, and governments with actionable data in 75 countries around the world in 2014. Through consistent, accessible, and credible evidence, EDI aims to catalyze civil society and governments to identify and address environmental democracy weaknesses within a nation's laws and policies. The index will be conducted every two years to allow benchmarking, and the developers intend to expand its scope to 100+ countries by 2016.

More information can be found here: www.wri.org/tai

The UN Department of Economic and Social Affairs (UN DESA) since 2003 has kept abreast of developments in reporting obligations relating to issues of concern to the Commission on Sustainable Development and the Sustainable Development Council. The Aarhus Convention represents the relevant framework for reporting on national implementation of Rio Principle 10 standards in a region covering 46 States and the European Union (as of January 2014) with a total population of approximately 650 million (see Box 88). The LAC initiative is expected to establish a reporting framework that potentially covers 33 countries with a total population of over 600 million.

BOX 88: Aarhus Convention national implementation reporting framework

Article 10, paragraph 2, of the Aarhus Convention requires the Parties, at their meetings, to keep under continuous review the implementation of the Convention on the basis of regular reporting by the Parties. Beginning with the first ordinary session of the Meeting of the Parties to the Convention, decisions have been taken adopting and refining the framework for Parties to use in submitting reports to the Secretariat.[208] The currently agreed framework consists of 37 questions covering the legislative, regulatory or other measures taken by a Party to meet specific obligations under the Convention, as well as the methods of preparing the NIP, particular circumstances relevant for understanding the report, and compliance issues. Reports are submitted to Meetings of Parties, which take place typically every three years. Reports should be prepared through a transparent and consultative process involving the public and should arrive no later than 180 days prior to the Meeting of the Parties. The Secretariat is tasked with preparing a synthesis report for each session of the Meeting of the Parties, summarizing the progress made and identifying significant trends, challenges and solutions.

The Secretariat to the Aarhus Convention has developed an online application that allows anyone to view national implementation reports and to select particular questions, particular countries, and particular reporting years. The tool is particularly useful for comparing implementation across parties on particular issues and assessing overall implementation of particular obligations.

See: http://apps.unece.org/ehlm/pp/NIR/qwery.asp?LngIDg=EN

208 The reporting format has been further developed in subsequent years through decisions II/10 and IV/4 on reporting requirements.

Appendix A: Full Text of the Bali Guidelines on Rio Principle 10

Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters

Adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A of 26 February 2010

United Nations Environment Programme

Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters

The purpose of these voluntary guidelines is to provide general guidance, if so requested, to States, primarily developing countries, on promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes. In doing so, the guidelines seek to assist such countries in filling possible gaps in their respective legal norms and regulations as relevant and appropriate to facilitate broad access to information, public participation and access to justice in environmental matters.

The guidelines should not be perceived as recommendations to amend national legislation or practice in cases where existing legislation or practice provides for broader access to information, more extensive public participation or wider access to justice in environmental matters than follows from these guidelines.

I. Access to information

Guideline 1

Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to guideline 3), without having to prove a legal or other interest.

Guideline 2

Environmental information in the public domain should include, among other things, information about environmental quality, environmental impacts on health and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

Guideline 3

States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

Guideline 4

States should ensure that their competent public authorities regularly collect and update relevant environmental information, including information on environmental performance and compliance by

operators of activities potentially affecting the environment. To that end, States should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.

Guideline 5

States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment.

Guideline 6

In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public[209] to take measures to prevent such harm is disseminated immediately.

Guideline 7

States should provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information.

II. Public participation

Guideline 8

States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned[210] should be informed of their opportunities to participate at an early stage in the decision-making process.

Guideline 9

States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.

Guideline 10

States should ensure that all information relevant for decision-making related to the environment is made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.

Guideline 11

States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

Guideline 12

States should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any such review process to the extent that circumstances permit.

Guideline 13

States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the

209 "The public" may be defined as one or more natural or legal persons and their associations, organizations or groups.

210 "The public concerned" may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest.

preparation of policies, plans and programmes relating to the environment.

Guideline 14

States should provide means for capacity-building, including environmental education and awareness-raising, to promote public participation in decision-making related to the environment.

III. Access to justice

Guideline 15

States should ensure that any natural or legal person who considers that his or her request for environmental information has been unreasonably refused, in part or in full, inadequately answered or ignored, or in any other way not handled in accordance with applicable law, has access to a review procedure before a court of law or other independent and impartial body to challenge such a decision, act or omission by the public authority in question.

Guideline 16

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters.

Guideline 17

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the State related to the environment.

Guideline 18

States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice.

Guideline 19

States should provide effective procedures for timely review by courts of law or other independent and impartial bodies, or administrative procedures, of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment. States should ensure that proceedings are fair, open, transparent and equitable.

Guideline 20

States should ensure that the access of members of the public concerned to review procedures relating to the environment is not prohibitively expensive and should consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Guideline 21

States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

Guideline 22

States should ensure the timely and effective enforcement of decisions in environmental matters taken by courts of law, and by administrative and other relevant bodies.

Guideline 23

States should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues.

Guideline 24

States should ensure that decisions relating to the environment taken by a court of law, or other independent and impartial or administrative body, are publicly available, as appropriate and in accordance with national law.

Guideline 25

States should, on a regular basis, promote appropriate capacity-building programmes in environmental law for judicial officers, other legal professionals and other relevant stakeholders.

Guideline 26

States should encourage the development and use of alternative dispute resolution mechanisms where these are appropriate.

Appendix B: The Road to the Bali Guidelines

The Bali Guidelines, as the first global strategic document on Rio Principle 10, builds upon a long history of instruments and processes that have promoted access to information, public participation and access to justice in environmental matters.

The road to the Bali Guidelines[211]

1948 Universal Declaration of Human Rights, adopted by the United Nations General Assembly in New York.

1966 International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly in New York on 16 December 1966. Article 19 deals with the "freedom to seek, receive and impart information".

1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration): Principle 1 linked environmental matters to human rights and set out the fundamental right to "an environment of a quality that permits a life of dignity and well-being".

1980 Declaration of Salzburg on the Protection of the Right of Information and of Participation, adopted at the Second European Conference on the Environment and Human Rights at Salzburg, Austria, on 3 December 1980.

1981 African Charter on Human and Peoples' Rights, adopted by the Organization of African Unity (African Union) at Banjul, Gambia, on 27 June 1981. An early reference to the right to a satisfactory environment favourable to human development.

1981 Council of Europe Recommendation No. (81) 19 of the Committee of Ministers to Member States on the access to information held by public authorities*, adopted at Strasbourg, France, on 25 November 1981.*

1982 World Charter for Nature, adopted by the UN General Assembly in its resolution 37/7. The most relevant provisions for the Bali Guidelines can be found in chapter III, paragraphs 15, 16, 18 and 23.

1986 Resolution No. 171 of the Standing Conference of Local and Regional Authorities of Europe on regions, environment and participation, adopted by the Congress of the Council of Europe (i.e., the Standing Conference of Local and Regional Authorities of Europe) at Strasbourg on 14 October 1986.

1987 Our Common Future: report by the World Commission on Environment and Development (Brundtland Report) was a catalyst for the 1992 United Nations Conference on Environment and Development (UNCED) and its Rio Declaration on Environment and Development.

1988 Organization of American States Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), adopted in San Salvador on 17 November 1988, established the right to a healthy environment.

211 This section is adapted from "The Aarhus Convention: An Implementation Guide" (1st and 2d. eds.).

1989 European Charter on Environment and Health, adopted at the First European Ministerial Conference on Environment and Health in Frankfurt, Germany, recognized public participation to be an important element in the context of environment and health issues.

1989 Conference on Security and Cooperation in Europe (CSCE)9 Meeting on the Protection of the Environment, Sofia. All countries present except Romania endorsed conclusions and recommendations affirming the rights of individuals, groups and organizations concerned with environmental issues to express freely their views, to associate with others, to peacefully assemble, as well as to obtain, publish and distribute information on these issues without legal and administrative impediments.

1990 General Assembly Resolution 45/94 of 14 December 1990, recognized that individuals are entitled to live in an environment adequate for their health and well-being.

1990 Draft charter on environmental rights and obligations of individuals, groups and organizations, adopted by a group of experts invited by the Netherlands Government at the Bergen Conference, Norway, on 11 May 1990 and the ECE ***draft charter of environmental rights and obligations***, adopted by an intergovernmental meeting at Oslo on 31 October 1990. These early drafts had an influence on later instruments.

1991 ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), adopted at Espoo, Finland, on 25 February 1991. The Espoo Convention shows the link between public participation and environmental impact assessment. Its Article 4, paragraph 2, is especially relevant for public participation.

1992 Rio Declaration on Environment and Development (Rio Declaration), adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, on 14 June 1992. Rio Principle 10 established the global standard of the relevance of all three pillars to achieving sustainability.

1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention), adopted by the Committee of Ministers of the Council of Europe on 21 June 1993: The Lugano Convention was the first international agreement seeking to create rules concerning access to allow enforcement proceedings before national courts.

1993 North American Agreement on Environmental Cooperation under the Free North American Free Trade Agreement (NAFTA), established recommendatory bodies for access to information, public participation in decision-making and access to justice.

1994 UN Convention to Combat Desertification, adopted 17 June 1994, includes principle of participation of populations and local communities and obliges affected country parties to "promote awareness and facilitate the participation of local populations, particularly women and youth, with the support of non-governmental organizations, in efforts to combat desertification and mitigate the effects of drought." Art. 10, para. 2(f) also calls for effective participation at all levels as part of national action plans for implementation of the convention, and the Convention also provides for access to relevant information.

1994 Draft principles on human rights and the environment. Document of the Economic and Social Council of the United Nations published on 6 July 1994. The draft principles were annexed to the final report of the Special Rapporteur on Human Rights and the Environment, Mrs. Fatma Zohra Ksentini, often referred to as the "Ksentini Report". Part III of the draft principles pertains to all three Rio Principle 10 pillars.

1995 ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making (Sofia Guidelines) were endorsed at the Third Ministerial EfE Ministerial Conference in Sofia on 25 October 1995. The 26 articles deal with all three pillars of Rio Principle 10 and the Guidelines were a starting point for the negotiation of the Aarhus Convention.

1996 International Union for Conservation of Nature recommendation 1.43 on public participation and right to know, adopted by the World Conservation Congress of the International Union for Conservation of Nature (IUCN) at Montreal, Canada, on 23 October 1996.

1997 UN General Assembly Resolution on the Programme for the Further Implementation of Agenda 21, adopted at the Nineteenth Special Session, on 28 June 1997.

1998 ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), adopted at Aarhus, Denmark, in 1998.

2000 Malmo Ministerial Declaration, adopted by the First Global Ministerial Environment Forum, held in pursuance of United Nations General Assembly resolution 53/242 of 28 July 1999 to enable the world's environment ministers to gather to review important and emerging environmental issues and to chart the course for the future, at Malmo, Sweden, on 31 May 2000.

2000 Millennium Declaration, adopted by the UN General Assembly, on 8 September 2000.

2001 Inter-American Strategy for Promotion of Public Participation in Sustainable Development Decision-making, a policy framework adopted by the Organization of American States in 2001.

2002 Johannesburg Declaration on Sustainable Development, and the accompanying ***Plan of Implementation*** reaffirm global commitment to Rio Principle 10, adopted at the World Summit on Sustainable Development, Johannesburg, South Africa, on 4 September 2002.

2003 Kyiv Protocol on Pollutant Release and Transfer Registers (PRTR Protocol), adopted at Kyiv, Ukraine, in May 2003.

2000-06 The safeguard policies of the International Bank for Reconstruction and Development and the International Development Association (collectively, the World Bank), as well as the International Finance Corporation, are revised taking into account international practice with respect to Rio Principle 10.

2006 Declaration of Santa Cruz+10: In this declaration, the Member States of the Organization of American States (OAS) reaffirmed their commitment to Rio Principle 10.

Appendix C: Excerpts from the Johannesburg Plan of Implementation and "The Future We Want"

Excerpts from the Johannesburg Plan of Implementation

163. Each country has the primary responsibility for its own sustainable development, and the role of national policies and development strategies cannot be overemphasized. All countries should promote sustainable development at the national level by, inter alia, enacting and enforcing clear and effective laws that support sustainable development. All countries should strengthen governmental institutions, including by providing necessary infrastructure and by promoting transparency, accountability and fair administrative and judicial institutions.

164. All countries should also promote public participation, including through measures that provide access to information regarding legislation, regulations, activities, policies and programmes. They should also foster full public participation in sustainable development policy formulation and implementation. Women should be able to participate fully and equally in policy formulation and decision-making.

165. Further promote the establishment or enhancement of sustainable development councils and/or coordination structures at the national level, including at the local level, in order to provide a high-level focus on sustainable development policies. In that context, multi-stakeholder participation should be promoted.

166. Support efforts by all countries, particularly developing countries, as well as countries with economies in transition, to enhance national institutional arrangements for sustainable development, including at the local level. That could include promoting cross-sectoral approaches in the formulation of strategies and plans for sustainable development, such as, where applicable, poverty reduction strategies, aid coordination, encouraging participatory approaches and enhancing policy analysis, management capacity and implementation capacity, including mainstreaming a gender perspective in all those activities.

Excerpts from "The Future We Want"

43. We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development. Sustainable development requires the meaningful involvement and active participation of regional, national and sub-national legislatures and judiciaries, and all Major Groups: women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers, as well as other stakeholders, including local communities, volunteer groups and foundations, migrants, families as well as older persons and persons with disabilities. In this regard, we agree to work more closely with Major Groups and other stakeholders and encourage their active participation, as appropriate, in processes that contribute to decision making, planning and implementation of policies and programmes for sustainable development at all levels.

44. We acknowledge the role of civil society and the importance of enabling all members of civil society to be actively engaged in sustainable development. We recognize that improved participation of civil society depends upon, inter alia, strengthening access to information, building civil society capacity as well as an enabling environment. We recognize that information and communication technology (ICT) is facilitating the flow of information between governments and the public. In this regard, it is

essential to work toward improved access to ICT, especially broad-band network and services, and bridge the digital divide, recognizing the contribution of international cooperation in this regard.

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99. We encourage action at regional, national, sub-national, and local levels to promote access to information, public participation, and access to justice in environmental matters, as appropriate.

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In February 2010 a milestone was achieved in the field of environmental law and sustainable development when the Special Session of the UNEP Governing Council, Global Ministerial Environment Forum (GMEF) in Bali, Indonesia, unanimously adopted the 'Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (The "Bali Guidelines"). The Bali Guidelines seek to assist countries in filling possible gaps in their respective relevant national legislation, and where relevant and appropriate in sub-national legal norms and regulations ensuring consistency at all levels to facilitate broad access to information, public participation and access to justice in environmental matters.

This Guide is intended to be a practical tool to help applying the Bali Guidelines. It is made for the use of governments, major groups and stakeholders, legal professionals, implementing authorities and others engaged in the application of Rio Principle 10. The Guide includes a full range of actual examples of implementation of national law and practice to support policymakers, legislators and public authorities in their daily work of applying the Bali Guidelines and realizing the provisions of Principle 10 in practice. It can be used to assist States in undertaking their own gap analysis of national legislation. It takes into account the range of diversity of systems of law throughout the world and aims to fit this diversity.

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