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IMPLEMENTING PRINCIPLE 10 AND THE BALI GUIDELINES IN AFRICA

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PRINCIPLE 10 AND BALI GUIDELINES IN AFRICA

1. Introduction and Background

This paper on the Rio Principle 10 and the Guidelines on the Development of National Legislation, Access to Information and Access to Justice in Environmental Matters (hereafter referred to as the Bali Guidelines) describes the importance of the Principle 10 and the Bali Guidelines in the context of Africa, as well as the progress made in its implementation and existing gaps.

1.1. Introduction: Africa's challenges and the importance of Principle 10 and Bali guidelines in addressing them.

Sustainable development is now widely accepted as a global objective and has been amply recognized in international and national legal instruments. Sustainable development revolves around the concept of integrating socioeconomic development and environmental considerations. For this to happen, public participation in decision-making over natural resources management is required. The public can only participate effectively if they have access to all the necessary information, and fair, effective and comprehensive justice systems. The ability of countries to attain sustainable development is therefore greatly dependent on implementation of Rio Principle 10 and the Bali Guidelines.

Principle 10 was adopted in 1992 as a part of the Rio Declaration, states that:

"Environmental issues are best handled with 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."

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While many countries of the world face significant challenges in attaining sustainable development, the a majority of African countries are more vulnerable to these challenges due to unique characteristics, such as: centralized political systems, poverty and inequality, fragile democratic institutions, renewed interest in Africa's extractive resources and cultural practices that negate the rights of minorities.¹The importance of Principle 10 and the Bali Guidelines for Africa is discussed below in the context of each of these characteristics.

About the Bali Guidelines

In February 2010, 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' (Bali Guidelines). This was a significant milestone in the field of environmental law and application of Principle 10. The Guidelines are voluntary, and are meant to demonstrate willingness by Governments to more thoroughly engage the public at all levels to protect and manage the environment and related resources. They also underline recognition of the need to fill gaps in legal norms and practices so as to encourage broad access to information, public participation and access to justice in environmental matters within the framework of national legislation and processes.

2. Challenges for African Countries

2.1. Centralized political systems

Despite considerable widening of the democratic sphere in Africa, governance systems are still largely centralized. These tend to give rise to a monopoly of power and authority, with less accountability to the people. The assertion by Wunsch and Dele² that nearly every African country has developed a centralized approach to political order and economic development remains largely true. This approach breeds a ruler-ruled relationship which allows little or no unsupervised, independent participation by ordinary people. In such circumstances, leadership tends to be prone to errors of judgment and policy, including administrative bureaucracies and inefficiencies, and misappropriation or misallocation of public resources. The authors further point out that "there is a vast reservoir of energy and potential untapped at Africa's grass roots", which has been left out of the development process due to the over-centralization of the state. While significant progress is being made towards decentralization in many African states,³ effective implementation of Rio Principle 10 and the Bali Guidelines provide a solid foundation for addressing the attendant challenges highlighted above.

2.2. Poverty and inequality

Poverty and inequality seem to be the other common denominator of many African countries, particularly in sub-Saharan Africa. According to UNDP's 1996 Human Development Report,⁴ the African states that gained their independence in the 1960s and 1970s experienced steady economic growth and striking improvements in social welfare provisions for the people.

Poverty in the African context not only refers to a lack of income and consumption, but also includes shortfalls in critical areas such as health, education, nutrition, security and

- 1 While these challenges are almost common to all African countries, different countries in Africa experience them with relative intensities
- 2 James S. Wunsch and Dele Olowu (Eds), (1990). *The Failure of the Centralized State: Institutions and Self-Governance in Africa*. Boulder, Colo.: Westview Press.
- 3 Many African countries have started transferring power, resources and responsibilities to their subnational governments, although the pace of transformation is uneven across countries. However, a few countries, such as Ethiopia, South Africa and Uganda, are proceeding towards this goal at a rapid pace. A number of others, e.g. Kenya, have just started the process and are presently creating new units and/or transferring responsibilities and revenues to them. A large group has only adopted legal texts that engage the central government to proceed towards a more decentralized system, while in a few countries decentralization is still at the stage of the announcement of the policy. See, Giorgio Brosio (2000). *Decentralization in Africa* <https://www.imf.org/external/pubs/ft/seminar/2000/fiscal/brosio.pdf>
- 4 UNDP (1996) Human Development Report 1996. UNDP, New York.



empowerment. Vulnerability constitutes a further dimension. Without effective coping mechanisms, excessive exposure to shocks – such as drought and sudden price swings – creates further environmental degradation and the risk of future poverty. All of these dimensions interact with and reinforce one another, and success will only be achieved with adequate access to information, public participation and justice. This makes the implementation of the Rio Principle 10 and the Bali guidelines very relevant and necessary.

“The paths to development are different for different countries, depending upon their histories, cultures and politics, but for the poorest countries the paths are well hidden. Nowhere are the paths to development more obscure than in Africa.”

- Richard J. Barnett⁵

2.3. Fragile democratic institutions

In the late 1980s and early 1990s, Africa experienced a wave of democratic transitions that saw most of the 48 countries in sub-Saharan Africa legalizing opposition parties and holding competitive, multiparty elections. Some Authors (e.g. Rakner and Rocha)⁶ have argued that only a few institutionalized, consolidated democracies have emerged in those African states that launched democratic institutions in the early 1990s. This has given rise to democratic regimes where the freedoms, civil rights/liberties of the people are suppressed, and where elections are mere formalities to legitimize the power of African presidents or head of states.

Replacing these fragile democratic systems with constitutional democracies where the rule of law, tolerance and democratic values are present require citizens to be well informed and actively engaged in the governance process. Moreover, establishing effective judicial systems for providing redress whenever the rights of citizens are violated is of utmost importance. This provides another strong justification for implementing the Rio Principle 10 and the Bali Guidelines in Africa.

2.4. Renewed interest in Africa's extractive resources

As exploitation of mineral and petroleum resources declines in other continents, Africa is seeing renewed interest in resource extraction, with many foreign mining companies falling over themselves to have a piece of the pie. As new African mineral and petroleum resources are exploited, resource-rich African nations are earning rising profits from their natural wealth. However, due to a lack of transparency, accountability and community participation, those living in areas where exploitation of mineral and petroleum resources is taking place have, in general, not benefitted from the exploitation of the natural resources. This paradox of poverty amid plenty has been termed the “resource curse”.

Often, citizens are not able to hold their governments or transnational corporations (TNCs) accountable for this abuse of power because they lack information about their country's revenues and expenditures, and the deals that have been made with those TNCs that are extracting the resources from their territories. Yet, many countries in the continent lack effective justice systems to respond to these changes. Fully implementing Principle 10 and the Bali Guidelines in Africa will therefore greatly contribute to turning the continent's resource wealth into a blessing rather than a curse.

2.5. Cultural practices that negate the rights of vulnerable groups

Many African countries still have cultural practices that negate the rights of vulnerable groups, such as women, youth and minorities. For instance, many countries in Africa lack secure land tenure regimes for indigenous and local communities, often leading to dispossession and involuntary resettlements. When communities are dispossessed of their land, women are often

5 Richard J. Barnett “But What About Africa? On the Global Economy's Lost Continent,” *Harpers' Magazine* Vol. 280, No. 1680 (May 1990): 43. Cited in *The Failure of the Centralized State: Institutions and Self-Governance in Africa*, Edited by James S. Wunsch and Dele Olowu. Boulder, Colo.: Westview Press, 1990, 334 pp. Reviewed by John W. Koehring

6 Lise Rakner, Alina Rocha Menocal and Verena Fritz (2007). *Democratisation's Third Wave and the Challenges of Democratic Deepening: Assessing International Democracy Assistance and Lessons Learned*. ODI Working Paper 1. Available at: <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/241.pdf>



disproportionately affected because of their traditional role in procuring water, fuel or trading goods for their families. Moreover, laws in some African countries still do not allow women and children to own land. Giving women, children and other vulnerable groups a voice through access to the rights to information, public participation and justice will go a long way in addressing this challenge.

3. Progress in the implementation of Principle 10 and Bali Guidelines in Africa, and the role of UNEP

3.1. General status of the implementation of Principle 10 and Bali Guidelines in Africa

Significant progress has been made in the African continent towards the implementation of Principle 10 and the Bali Guidelines. Several African charters and declarations now include provisions that encourage, or even mandate, public access to information, participation and justice.

One of the earliest African initiatives focused on environmental issues is the African Ministerial Conference on the Environment (AMCEN), which was established in 1985. AMCEN aims to assist countries in adopting Agenda 21, and its objectives closely mirror those of the 1992 Earth Summit in Rio de Janeiro. AMCEN has made several notable strides with regard to access to information, public participation and justice. For instance, the eighth and ninth sessions of AMCEN held in Abuja, Nigeria and Kampala, Uganda recognized the importance of these three “access rights”.

The medium-term plan adopted at the Abuja session addressed *inter alia*, environmental information, access to justice, early warning and environmental security. At the end of the ninth session, AMCEN adopted the Kampala Declaration (The Environment for Development) which recognized that 'success in achieving global sustainable development will ultimately depend upon development and implementation of sound and cost-effective national response policies and measures; good environmental governance, effective participation by civil society and collection and exchange of quality data and information on the environment for use by national decision-makers.'

The Kampala session also endorsed a proposal to establish a comprehensive information network to promote access and harmonization of data in the continent and to act as a basis for tracking environmental changes using quantitative indicators focusing on national needs.⁷ Such a network would facilitate the access to information on environmental issues and improve good governance and public participation in decision-making.

The African Union (AU) has advocated that the right of access to information is essential for the promotion of human rights, democracy, transparency and accountability, all of which are at the heart of the shared values of the African Union and form the building blocks of the African Governance Architecture. In 2013, the African Commission on Human and Peoples' Rights⁸ adopted the Model Law for Access to Information for Africa. The Model Law aims at promoting transparency and accountability, as factors contributing to human rights, democracy and development across the continent. It provides a template for all African countries to draft laws addressing the issue of access to information laws. Africa's regional economic blocs have called on African states to apply all possible means to protect the environment and ensure its sustainable utilization.

Many civil society organizations (CSOs) working in the continent are increasingly playing an important role by sustaining pressure on governments and enlightening citizens on the need for countries to implement Principle 10 and the Bali Guidelines. In May 2012, an African CSO Dialogue on preparations towards the Rio+20 Conference, Sustainable Development Goals(SDGs) and post-2015 process was held in Dakar, Senegal. The Dialogue aimed to discuss

⁷ See paragraph 13 of the Declaration.

⁸ The African Commission on Human and Peoples' Rights is an organ of the African Union.



the participation of African CSOs in the process to develop a new global development framework for the post-2015 period. It has also looked at ways to ensure citizens' voices, including those of millions of women, men and youth in Africa, will be adequately incorporated in this process. The African Dialogue brought two important outcome documents: The Dakar Declaration (Strengthening Citizens Voices in the Rio+20 and Post-2015 Processes) and the Advocacy Report.

Article 10 of the Dakar Declaration highlights the importance of accelerating the implementation of Principle 10 and the Bali Guidelines, and calls on African governments to: "... Accelerate the implementation of Principle 10 of Rio Declaration first by implementing the UNEP Guidelines and also by adopting an African Convention on Principle 10 to ensure meaningful improvements in citizens' participation, access to information, transparency and accountability".

While progress has generally been made, progress has not only been slow but also non-uniform in different countries. This may be attributed to the diversity of African countries with regard to political regimes and the other characteristics, as discussed above. As for the regional organizations, despite the fact that they recognized the importance of implementing environmental rights, they have often lacked the resources and, in some circumstances, the requisite goodwill from governments to implement those rights.

Africa's regional economic blocks have also contributed to advancement of environmental principles. The Southern Africa Development Community (SADC), the East African Community (EAC) and the Economic Community of West African States (ECOWAS) have each developed protocols on natural resources. These protocols contain, to varying degrees, environmental governance principles, including the rights enshrined in Principle 10.

3.2. The role of UNEP in the implementation of Principle 10 and Bali Guidelines in Africa

Responding to the generally slow progress, some stakeholders, including international development partners, have taken some actions to address the issue. For instance, UNEP has been fairly consistent in promoting the use of the Bali Guidelines. UNEP, the World Resources Institute (WRI) and the Institute for Training and Research (UNITAR) are cooperating organizations within the Eye on Earth community. One of the projects under the 'Access for All' special initiative involves the promotion of the Bali Guidelines at the global, regional and national level. UNEP, WRI and UNITAR have come together to implement a multi-year, global initiative to promote the application of the Guidelines through a series of regional workshops, national assessments and a guidance material in developing countries.⁹

Under the global initiative, partners focus on the development of substantive guidance, awareness-raising at the regional level and providing technical support for strengthening national legislation; training material development and supporting national capacity development projects to support development of national Principle 10 profiles and national action plans through a multi-sectoral and multi-stakeholder process, including a legal reform component and development of a Guide to the Bali Guidelines.

Previous UNITAR activities have included a series of pilot projects starting in 2008, including in Africa. Botswana, Democratic Republic of Congo (DRC) and Mali started national profile and action plan projects in 2009, and all three countries organized a national planning workshop the same year. Botswana and Mali prepared their national profiles in the course of 2010 and organized priority setting workshops, bringing together more than 120 participants from both government and non-governmental organizations. According to UNITAR,¹⁰ these pilot projects were characterized by high-level participation; enhanced collaboration between governmental and non-governmental stakeholders; consensus on national priorities in seven African and Central American countries; local level capacity building activities; and development of a

⁹ UNEP and UNITAR (2013). Strengthening Capacities for Participatory Environmental Governance: Country Projects to support Implementation of the Rio Declaration and the UNEP Bali Guidelines. Information Note.

¹⁰ Available at: <http://www.unitar.org/egp/rio-principle-10-projects>.



methodology and guidance document to assist countries in assessing and strengthening national capacities for participatory environmental governance.

Botswana is amongst the three African countries where the pilot project was implemented.¹¹ The exercise was successfully carried out during 2010-2011. Under the project, the Government of Botswana undertook a national exercise to assess national situations and capacities for implementation of Principle 10. The national profile provided an overview and documented strengths and weaknesses of national access to information, public participation in decision-making and access to justice schemes related to environmental matters. A survey was conducted to gauge public opinion on the issues of public access to information, participation in environmental decision-making and access to environmental justices. A UNITAR guidance document informed the development of a survey which was carried out in seven out of ten districts in Botswana.

The project revealed that the Government of Botswana has been implementing Principle 10 by default. The public was accessing information related to environmental issues at a national level through the media (government gazette, daily news, and radio stations), traditional gatherings consultation (kgotla) and environmental impact assessments (EIAs). Based on those results, an action plan has been developed. These activities have for the time being not been budgeted due to limited funds. Nonetheless, Botswana has an Environmental Management Act that deals with access to environmental information. There is also the Environmental Assessment Act of 2011 which superceded the previous Environmental Impact Assessment Act of 2005.

The Guide to the Bali Guidelines was developed within the framework of the UNEP/WRI/UNITAR initiative and implemented with assistance from a global advisory group. A draft guide was available for public comments in the first half of 2015. In which, UNEP called on states and governments, stakeholders, academics and major groups to comment on the draft publication "Putting Rio Principle 10 into Action". The Guide seeks to offer assistance to governments in the implementation of Rio Principle 10 and proposes that case studies and jurisprudence should be collected and compiled from a wide range of national and international practice. The Guide was launched on 6th October 2015 during the Eye on Earth Summit in Abu Dhabi.¹²

4. Challenges facing African Countries in the implementation of Principle 10 and Bali Guidelines

4.1. Legislative and policy weaknesses

As has been highlighted through this document, a number of countries in Africa lack the requisite legislation and detailed administrative rules and operational policies for advancing the realization of the rights enshrined in Principle 10. In such cases, state and/or industry objectives tend to cloud environmental concern and community voices. Consequently, communities face a huge struggle to secure or practice their rights in line with Principle 10. But even in some countries that have enacted freedom of information, public participation and access to justice laws, implementing these laws has progressed very slowly.

4.2. Lack of adequate capacity on the part of governments

The positive examples of Principle 10 and implementation of the Bali Guidelines require a vast amount of work and infrastructure reforms at the level of the state. This requires significant capacity in administrative infrastructure, which many African countries simply do not have, resulting in a number of countries relying on the technical and institutional support provided by development partners such as UNEP.

Achieving the objectives of Principle 10 and the implementation of the Bali Guidelines also requires adequate capacity on the part of legislature, civil society and citizens. Most legislatures

11 The others are the Democratic republic of Congo (DRC) and Mali.

12 The Guide can be downloaded at: <http://www.unep.org/civil-society/Portals/24105/documents/Major%20Groups/Draft%20Implementation%20Guide%20Bali%20Guidelines%2020140812%20for%20commenting.docx>



on the continent are charged with the role of legislation, oversight and representation. Many countries in the continent still do not have the relevant laws to ensure the implementation of the rights enshrined in Principle 10. This is, in part, attributable to a lack of adequate knowledge and understanding of the importance of such laws. Some parliaments have also enacted laws that do not meet the international threshold of the rights outlined in Principle 10. Parliaments therefore also need technical support to enable them not only to fast-track this legislative agenda, but also to draft laws that can effectively advance access to information, public participation and justice.

4.3. Lack of adequate capacity on the part of civil society and citizens

In addition, in some countries CSOs and citizens themselves have not been able to effectively contribute towards the realization of environmental rights. This is attributable to a lack of adequate knowledge, skills and resources. Citizens in many African countries are still unaware of their environmental rights, including the rights of access to information, public participation and justice. Many also barely know how to use information, communication and technology (ICT) tools, such as the internet and computers. Costs have been a significant hurdle to the effective implementation of Principle 10. As an example, access to justice requires that citizens have the opportunity to challenge a state or corporate decision in a court of law. In many African countries it is often expensive for members of the public to bring a case to court, especially in jurisdictions where 'costs follow the event'.¹³ Moreover, the continent lacks sufficient legal experts to represent the public (especially *pro bono* legal representation). Marginalization of some groups in society, such as women and children, in policy and decision-making processes is also a significant hurdle to effective participation of citizens.

4.4. Impunity and lack of institutionalized democracy

Despite the wave towards democratization in the continent, very few African political systems have so far developed into institutionalized, consolidated democracies. In the absence of a functioning democracy, civil rights are suppressed, and are very difficult to enforce, even if they are embedded in law. Such states are often characterized by a highly centralized system, dictatorship and corruption. In situations like this, it is highly unlikely that citizens will be provided access to information or open and independent justice systems. It is also unlikely that citizens will be consulted on issues relating to the environment, let alone hold government to account over planning and industrial decisions. Impunity is still a big hindrance to the effective implementation of environmental rights. There are many cases in Africa where despite existence of freedom of information laws, authorities still fail to proactively release environmental information.

4.5. Institutional weaknesses

There are institutional weaknesses in many countries that have affected the implementation of Principle 10 and the Bali Guidelines. For instance, many of the reforms that would be required to effectively implement Principle 10 rely not just on a thriving democracy, but also on a healthy and independent judiciary. Even states attempting to reform their judiciaries to fully comply with Principle 10 and the Bali guidelines are derailed with the vast amount of work and resources required. Many countries lack adequate, accessible, affordable court facilities. Some countries may also require autonomous entities to oversee the implementation of the laws in place and education of the public on their right of access to information may be required. Moreover, even where specialized institutions exist, many lack special expertise on environmental matters.¹⁴ Other institutional weaknesses include lack of established Alternative Dispute Resolution (ADR) mechanisms.

4.6. Process-related weaknesses

There are a number of process-related hurdles to the implementation of Principle 10 and the Bali Guidelines in Africa. For example, in some countries there are deficiencies in the production

¹³ 'Costs follow the event' is a legal phrase that means the losing party in a court case must not only pay their own legal fees, but those of the defendant too.

¹⁴ For example, the Environment and Land Court in Kenya was long served by judges without any special training in environment and land-related issues.



and dissemination of reliable information. These deficiencies may relate to technical and language complexity of the information; ambiguity in the minimum content of environmental information; delays in the provision of the information; fragmentation of public information and lack of coordination among public entities. Other process-related weaknesses may include deficiencies in the presentation, processing and disclosure of environmental offenses; *locus standi* restrictions, and slow processes in cases of refusal of access to information and participation.

5. Conclusion

This paper has assessed the importance and challenges of implementing Principle 10 and the Bali Guidelines in the African Continent, and highlighted the situation in a few specific countries. In summary, some strides have been made but implementation has been difficult and significant gaps still exist. Profound institutional and societal transformations are necessary to achieve a level of openness in which governments and civil societies share a commitment to environmental democracy. Many countries that have been able to make progress in adopting and implementing Principle 10 are still limited by capacity gaps and institutional and political weaknesses.

At the continental level, efforts have been led by the African Union (AU), regional economic blocs, development partners (e.g. UNEP) and civil society. National level efforts have been made in many countries through constitutional provisions, and legislation aimed at promoting access to information, public participation and justice. Other notable tools that have been employed include EIAs, audit laws and specialized environmental courts and tribunals. Existing gaps that threaten the success of implementing Principle 10 and Bali Guidelines include: (a) the absence of national legislative and policy tools in some countries; (b) inadequate government capacity; (c) inadequate capacity on the part of civil society and citizens; (d) impunity and lack of institutionalized democracy; (e) institutional weaknesses; and (f) weaknesses related to the processes engaged in the implementation of the principles.

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