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Globalizing Environmental Democracy: A Call for International Action

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The rising call for a Global Convention on Principle 10

The United Nations Conference on Sustainable Development is returning to Rio de Janeiro in 2012, with *institutional framework for sustainable development and green economy in the context of sustainable development and poverty eradication* as the main themes. As part of the preparations for Rio+20, the UN Department of Economic and Social Affairs (UNDESA) called for submissions by 1 November 2011 through a web portal they established.²

An analysis of the submissions carried out by The Access Initiative (TAI)³ showed that there were over 140 submissions (including submissions by several states, intergovernmental organizations and civil society organizations) calling for better implementation of Principle 10 of the Rio Declaration⁴ and greater transparency, participation, and accountability in

Principle 10 – Rio Declaration (1992)

“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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2 <<http://www.uncsd2012.org/rio20/index.php?menu=115>> at 26 January 2012.

3 The Access Initiative (TAI) is a network of over 250 civil society organizations operating in 50 countries dedicated to promoting transparency, citizen engagement and accountability in decision-making relating to the environment. <www.accessinitiative.org> at 26 January 2012.

4 Principle 10 states that environmental issues are best handled with access to information, participation of all relevant stakeholders and access to remedies and relief. See the text box for the Principle 10 of the Rio Declaration (1992).

matters affecting sustainable development.⁵ Clearly, there is a growing sense of urgency and a chorus of national governments, intergovernmental bodies and civil society groups calling for the strengthening of Principle 10 worldwide.

Among the 100 state submissions received were those from Brazil,⁶ Chile⁷ and Jamaica⁸ that made specific proposals for international conventions on access to information, public participation and access to justice in sustainable development decision-making. Several international organizations including the UN Economic Commission for Europe (UNECE), the UN Economic Commission for Latin America and the Caribbean (UNECLAC) and the United Nations Environment Programme (UNEP) have joined these calls for a global or regional convention(s). As a result of these calls for strengthening the implementation of Principle 10 of the Rio Declaration, the “zero draft” of the negotiating text for adoption at Rio+20 that was published in January 2012 contained a number of references to access to information, public participation and accountability in sustainable development decision-making. In the subsequent informal negotiations on the zero draft in January and March 2012 in New York, all governments appeared to be agreed that Principle 10 plays a central role in sustainable development which should be open, inclusive and accountable. The European Union in particular has suggested consideration of “legally binding frameworks at the most appropriate level” for implementing Principle 10. This language has now found its way into the latest draft presented by the Co-Chairs of the Rio+20 negotiation.

These calls for a convention or legally binding framework on Principle 10 of the Rio Declaration provide the context for this paper. In it we seek to (a) provide reasons why a convention offers a good option for making future progress in implementing Principle 10, (b) suggest what the contents of such a convention might be and (c) conclude with what Rio+20 can do to further such a convention. For those who would like more information on Principle 10 and the details of the various calls for a convention, we have provided an annex.

Why Principle 10 conventions are a good option

International agreements, especially legally binding ones, can play an important role in promoting and strengthening rights to information, participation and justice in environmental matters at the national and local levels. They can catalyse and drive the development of national legislation and practice, bringing about positive changes that would not otherwise have occurred. While legally binding agreements can be more difficult to negotiate than non-binding ones and take more time to enter into force, they tend to command more respect and are in general more effective than non-binding instruments. While the primary reason for a State to become a party to an international agreement is in order for it to join with other parties in implementing the agreement, being a party to such an agreement may improve a country's prospects of attracting funding (whether directed to the government or to other actors) for the purpose of building capacity to meet the obligations under the agreement.

5 <<http://www.accessinitiative.org/blog/2012/01/citizen-voices-sustainable-development-putting-principle-10-heart-rio20>> at 26 January 2012.

6 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=227&menu=20>> at 26 January 2012.

7 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=549&menu=20>> at 26 January 2012.

8 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=566&menu=20>> at 26 January 2012.



In this section, we explore three broad options for strengthening the international legal framework in this area, namely 1) development of a global convention, 2) development of regional conventions, drawing as appropriate from the experience gained through the development of the Aarhus Convention, and 3) accession to the Aarhus Convention by States from outside the United Nations Economic Commission for Europe (UNECE) region.

The focus here on international agreements is not meant to downplay the value of unilateral or bilateral initiatives, but rather relates to the potential for a significant collective outcome from the Rio+20 conference relating to the former topic.

i A global convention

Ever since the Aarhus Convention was adopted, the idea of a global convention on environmental access rights has been discussed, at least in the background. As far back as 1999, the former Executive Director of UNEP, Klaus Töpfer, attempted to get support for the idea in the UNEP Governing Council but was not successful. It took until 2010 for the Governing Council to take a really significant step forward in this area with the adoption of the Principle 10 Guidelines in Bali.⁹ Could the Bali Guidelines pave the way for a global convention in the same way that the 1995 Sofia Guidelines were the precursor of the Aarhus Convention?

There would undoubtedly be considerable opportunities and benefits in launching negotiations on a global convention. These include the following:

- One of the most compelling arguments for a global convention is that it responds to the principle that the rights that are at stake – rights to information, to participation and to justice – should be enjoyed universally, and that measures for their protection should not be limited to just one region or another. Anything less than a global approach increases the risk of certain regions being left behind – as is currently the case.
- A global convention would contribute to establishing a level playing field for business by establishing universal minimum standards for transparency, participation and accountability.
- A global convention could build on the Bali Guidelines¹⁰ and draw on the experience under the Aarhus Convention as well as other national systems. There is a wealth of knowledge and practice to build on, with the possibility to learn from successes as well as from failures and shortcomings.
- As compared to the option of countries acceding to the Aarhus Convention (discussed further below), there could be full involvement of all countries, at governmental and non-governmental levels, in developing and shaping the text of the instrument from the start.
- The process of negotiating a new instrument can have value in its own right, which is to some extent independent of the quality of the end product. Simply starting such a negotiation brings the issue up the political agenda; officials begin to think and talk about access issues and to enter into a dialogue with civil society representatives in a way that would not otherwise happen, resulting in a major educational and awareness-raising exercise; civil society organizations improve their networking on the issues and refine their positions; donor organizations increase their funding for related activities.
- A global convention could have a particular role in developing or furthering methodologies for public participation in environmental decision-making where there are transboundary impacts or impacts across global regions.

⁹ <<http://www.unep.org/DEC/PDF/GuidelinesAccessToJustice2010.pdf>>, at 31 January 2012.

¹⁰ Ibid.



Challenges of a global convention include the following:

- The ‘lowest common denominator’ phenomenon¹¹ could lead to a text which falls below the standard of Aarhus and, hypothetically, the standard which could be achieved in other regional conventions. On the other hand, important lessons have been learned through the first decade of applying Aarhus – lessons which could be used to avoid some of the perceived weaknesses in that Convention.
- Negotiations over a global convention would take some years and consume significant resources. In the current climate, this is likely to be an argument used by some governments to oppose such a convention. On the other hand, the costs are relatively modest when compared to other expenditures in the sphere of sustainable development and when the potential benefits are taken into account. It is rare to hear anyone question whether the costs of the Aarhus Convention negotiations were justified in relation to the benefits of their outcome. Furthermore, in so far as developed countries might be expected to subsidise the costs of negotiating a global treaty and the related capacity building costs, this should rather come from overseas development funds aimed at supporting good governance and democratisation, rather than environment budgets.
- It would be important to ensure that the ground rules for civil society participation in any negotiations on a global treaty (or indeed, any regional treaties) provide for transparency and participation, taking account not only of best practices in global fora but also precedents established under instruments such as the Aarhus Convention. The fact that negotiations are often conducted by regional blocs of nations which prepare their positions behind closed doors would need to be addressed in this context.
- Concern has sometimes been expressed that if a global treaty were to contain lower standards than Aarhus, this might have a negative impact on the implementation and development of the Aarhus Convention. However, there are examples of regional or sub-regional agreements going beyond the minimum standards in the corresponding global agreement.¹² In any case, it would need to be established from the outset that any global convention would be a “floor” not a “ceiling”, and thus would not diminish any stronger rights protected under regional conventions or national laws. Additionally, a global convention could track and consolidate progress on rights in regional contexts and provide leadership in areas such as participation and international processes where regional conventions would be limited.

At this stage, it is difficult to gauge whether there will be sufficient political support for launching negotiations on a global convention on procedural environmental rights. To date, the idea has mainly been promoted by civil society organizations though several governments have expressed support for the idea of a global or regional convention.¹³

11 This is the phenomenon whereby in a consensus-oriented process aimed at setting minimum standards, the least progressive countries have a strong motivation to oppose and effectively veto measures which will oblige them to change their laws, whereas the more progressive countries, which are in any case always free to adopt stronger measures for themselves, have less motivation to hold out for progressive positions.

12 For example see the comparison between the provisions, standards and procedures of the Stockholm Convention on Persistent Organic Pollutants and 1979 Protocol to the UNECE Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, <<http://alturl.com/aiuu7>>, at 10 May 2012. Another example is the varied standards under regional human rights treaties in comparison to the Universal declaration of Human Rights and its Protocols.

13 The vast majority of civil society groups including eight of the major groups (except business) in the Rio+20 negotiation process have supported the call for a global (or regional) convention on Principle 10. Business groups are warming to the idea that they too have considerable common interests in transparency, participation and access to justice with civil society though they remain preoccupied with concerns for the protection of intellectual property, security sensitive information and confidential business information”.



However, the preparatory process is still ongoing. The negotiation of a global convention can only be mandated through a UN-led process such as Rio+20. If so mandated, countries still retain the choice of participating in its negotiation and later in ratifying and joining the convention. No country is obligated to join an international convention even though they may participate in its negotiation. Once negotiated, what is critical is to ensure that a coalition of willing nations should join the global convention and get its operation started.

One of the challenges for those advocating the global convention option arises from the fact that the Aarhus Parties, who from a policy perspective would be expected to be sympathetic to the policy objectives of a global convention, have the least need for such a convention and may feel it as an additional burden which is duplicative of their existing commitments under the Aarhus Convention. Such a tendency was already evident during the discussions over the Principle 10 Guidelines, where the Aarhus Parties were generally supportive of a progressive text but had little reason or justification to push for one. However, it is in the interest of such governments to see the bigger picture in terms of global benefits. The Aarhus Parties could highlight how a Principle 10 Convention could play an important role in strengthening good governance and promoting the rights of citizens in other parts of the world – not through imposing the Aarhus standard as if it were the only valid approach but through sharing in a consensual process more than a decade of experience in applying and implementing the only legally binding international agreement on Principle 10.

Another challenge is to persuade governments from the global south that the idea of a global convention on environmental democracy is not ‘another Northern plot’. It has been convenient for some governments of developing countries to be able to dismiss the Aarhus Convention in this way, even if in reality the principles of environmental democracy are as important in the South as in the North. Developing countries that wish to underpin or develop such principles in their domestic context will have an obvious interest in promoting this approach at the international level, including through lending their support to the development of a global convention. Such countries would need to take a leading role in steering any negotiations on a global convention on environmental democracy.

Many countries in the global south and north have already put in place access to information, public participation and access to justice provisions in response to Principle 10. Over 100 countries have freedom of information laws. Environmental impact assessment has nearly universal coverage and about 125 countries have public participation provisions in their laws. Principle 10 has been absorbed into domestic laws in dozens of countries through local laws, judicial decisions and administrative actions. Practically, the difference between a standard set at the international level and the national level may not be great for many countries.

ii Regional conventions

The experience with the Aarhus Convention has demonstrated that a regional approach can be practical, workable and politically effective. The idea of developing regional conventions on environmental democracy in regions other than the UNECE region has a number of potentially positive features:

- There could be full involvement of all countries of the region, at governmental and non-governmental levels, in developing and shaping the text of the regional instrument from the start. This would provide the opportunity to take account of regional specificities and create a sense of regional ownership.



- Countries from within a region often share common political, cultural and linguistic ties, which could simplify the negotiations and make it easier to reach consensus.
- Synergies with existing regional processes could be availed of, which would inter alia mitigate the resource implications.

Some of the arguments made above in relation to the option of developing a global convention would apply to regional conventions, notably the opportunity to benefit from the lessons learned with instruments such as the Aarhus Convention, the value of the negotiation process itself, the importance of a participatory process and the issues concerning the time and costs involved.

A disadvantage of pursuing the option of regional conventions is that, as compared with the global convention option, some regions may simply be left behind. At the moment, there is some momentum building behind the idea of a Latin American convention, but in other regions it may take years or even decades before there is a political readiness to take such a regional initiative. On the other hand, if certain regions are in any case unwilling to enter into a global or regional agreement, then the theoretical possibility of a global convention does not provide a reason for other regions not to move forward with their own agreements. Such an assessment could be made if the Rio+20 Conference does not initiate a process towards a global convention.

There is also a risk that the diversity of standards that might exist with an eventual set of parallel regional conventions would create an uneven playing field for business, even though this would be less uneven than if there were no new regional conventions and if each country had its own standards.

The interface between a hypothetical global convention and regional conventions merits some attention. The co-existence of a global convention with regional conventions on the same subject is not new. For example the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPEP) co-exists with a similar regional convention in Latin America. Many regional anti corruption conventions preceded the global convention on the same subject. The global conventions and protocol of human rights co-exist with several regional conventions and protocols on human rights. None of these conventions imply double accountability for a country because global conventions generally contain special provisions dealing with regional conventions and making space for their co-existence and harmony. Likewise, a global convention on Principle 10 can contain special provisions providing for the co-existence and mutual support of regional conventions. For example, a global Principle 10 convention can recognize and support the Aarhus Convention and ensure that remedies under it are first exhausted before remedies under the global convention are triggered. A global convention can have special provisions for future regional conventions that would embrace the universal principles but provide its own and perhaps stronger enforcement mechanisms. Nonetheless, there may be resistance among countries to signing up to multiple agreements and for that reason at a given moment in time, pursuing one option might come at the expense of another.



iii Accession to the Aarhus Convention

The adoption of the Aarhus Convention in 1998 under the auspices of the United Nations Economic Commission for Europe was a significant step forward from Principle 10 - significant both because unlike Principle 10, it was legally binding, and also because it expanded the very general and concise statements of principle in Principle 10 into some quite detailed and specific provisions. The Convention contains the legal possibility for any UN Member State to become a Party.¹⁴ The Parties to the Convention, through decisions and declarations adopted at successive sessions of the Meeting of the Parties¹⁵, have repeatedly signalled their support in principle for countries outside the region to accede to the Convention.

In theory, extending the geographical scope of the Aarhus Convention by encouraging accession by non-UNECE States would appear to be a practical and effective way to strengthen the international legal framework promoting implementation of Principle 10. The Convention is already up and running. It provides a relatively fast track for a country to join with a group of nations that are working in a concerted way to promote procedural environmental rights. While the Convention is by no means a perfect document or blueprint for environmental democracy, it was negotiated in a highly participatory process, with the final text incorporating much of the input from civil society organizations. Thus the resulting text, even fourteen years after its adoption, is sufficiently ambitious to serve as a global benchmark, in the sense that implementation of its provisions would imply meaningful improvements in most of the countries that are not currently party to it.

These and other arguments may persuade some non-UNECE States to accede to the Aarhus Convention, thereby bringing additional benefits to their citizens and strengthening access rights in those countries. However, despite several expressions of interest, to date no State from outside the UNECE region has acceded to the Convention. This may be put down to several factors:

First, the legal possibility of accession does not alter the general perception that the Convention is a European, or at most 'European-plus', creation. This is reinforced by the fact that accession by States from outside the UNECE region is subject to approval by the Meeting of the Parties (MOP). This presents both a symbolic impediment to the Convention becoming a truly global instrument as well as a practical obstacle (e.g. the MOP meets only once every three years, meaning that political momentum in a country interested in acceding may be lost).

Second, States that were not involved in developing the text of any treaty are understandably less motivated to accede to it. Such reluctance may be compounded by the accumulation of soft law around the Convention (e.g. decisions and declarations of the MoP, findings of the Compliance Committee etc) over the past decade.

Third, the existing Aarhus Parties have been preoccupied with addressing implementation of the Convention in their own jurisdictions during the first decade since entry into force and thus have not been particularly proactive in reaching out to non-UNECE States to encourage them to accede.

14 Through article 19, paragraph 3, of the Convention.

15 See the Lucca Declaration, paragraph 32 (UN Doc. ECE/MP.PP/2/Add.1), adopted in 2002; the Almaty Declaration, paragraph 24 (UN Doc. ECE/MP.PP/2005/2/Add.1), adopted in 2005; decision II/9 on accession of non-UNECE member States to the Convention and advancement of the principles of the Convention in other regions and at the global level (UN Doc. ECE/MP.PP/2005/2/Add.13), adopted in 2005; the Riga Declaration, paragraph 23 (UN Doc. ECE/MP.PP/2008/2/Add.1), adopted in 2008; and decision III/8 on the strategic plan for 2009-2014, objective II.4 (UN Doc. ECE/MP.PP/2008/2/Add.16, paragraph 10 (d)), adopted in 2008.



Taking into account both the advantages of accession to Aarhus and the obstacles, it is likely that some countries, in particular those bordering on the UNECE region, will accede to the Convention in the coming decade. However, it is unlikely that there will be a major influx of Parties from outside the UNECE region unless the current Parties take an explicit decision to globalise the Convention and invest political efforts in realising that goal. This would involve as a minimum removing those elements which differentiate between prospective Parties according to whether they are from within or outside the UNECE region. At present, such a decision does not seem likely, and thus it seems that for the time being, the Aarhus Convention will remain a primarily regional instrument, albeit one with global significance.

What a Principle 10 convention would look like

The Aarhus Convention stands as the only model of a Principle 10 convention. Since it came into effect in 2001, a considerable body of experience and practices have grown around its framework. Learning from the Aarhus Convention experience is therefore valuable in considering what a Principle 10 convention might look like. More than a decade of experience in implementing the Convention has exposed both the strengths and the weaknesses of the text, highlighting not only what has been drafted well but also what could be done better. However, there are also new developments in technology that challenge us to consider other options.

Additionally, a Principle 10 convention in regions other than Europe would involve more developing and Least Developed Countries, though it is worth recalling that the Aarhus Parties include countries with a variety of national legal systems and traditions and widely varied capacities and priorities.

In this section we address several key questions about the content of a Principle 10 convention and discuss a number of options that are open to states to consider. The questions we consider are:

- What might the objective(s) and scope of a new convention be?
- What elements might be included concerning access to information?
- What elements might be included concerning citizen participation in decision-making?
- What elements might be included concerning access to justice?
- What measures will be effective in facilitating implementation of the convention?
- What would the convention's governance structure be?

What might the objective(s) and scope of a new convention be?

As with the Aarhus Convention, the objective of a new convention should be to define basic citizen rights of access to information, participation and access to justice in environmental matters and to establish a framework for member states to improve national laws, policies, institutions and practices to ensure these rights are respected and implemented. This is a rights based approach. But while the concept of environment reflected in the Aarhus Convention fits within a sustainable development framework, a new convention could more explicitly adopt a sustainable development focus.¹⁶

¹⁶ Principle 10 does not stand on its own but is part and parcel of other principles in the Rio Declaration that sets out a vision for sustainable development. In particular Principle 4 states that "(i)n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."



A new convention could also be approached from the angle of developing the necessary operating environment for good sustainable development decision-making. The accessibility and availability of relevant information, the consideration of options and balancing of competing interests and accountability for the soundness and implementation of such decisions, are necessary though not sufficient conditions for achieving sustainable development. The goal of the convention could also be to foster trust between the public sector, private sector and citizens because sustainable development requires strong partnerships between these sectors. Transparency, inclusiveness and accountability lead to the level of trust needed for the success of such partnerships. In this context the convention can serve as a catalyst for ensuring that environmental, social and economic information is available to all stakeholders when developmental decisions are made, that the latest information, crowd sourcing and cloud computing technologies are harnessed for this purpose and that stakeholders have a seat and voice at the table.

However, these basic rights will not function in isolation and other related rights are essential for their fulfilment. For example the freedom of speech is an essential feature of good participatory processes. Access to information is often seen as an essential part of the freedom of speech. Effective participation sometimes requires citizens to come together and organize themselves in collective action. In this context, the freedom of association and assembly are valuable rights as well. Even when these rights are clear in domestic legislation, civil society may not have the capacity to assert them effectively. Capacity building for civil society is another aspect that might be considered important in such a convention. Gender equality is another area in which access rights need special attention. Whether or not the convention would specifically include or address these rights, it would have to be premised on the recognition of these rights as guaranteed in international law (e.g. the Universal Declaration of Human Rights). Additionally, not all aspects of these rights and obligations can be foreseen and written down in the convention, and it would be important to provide for the development of detailed guidelines and rules to clarify and expand the rights and obligations in the convention.

The convention would need to reflect a level of ambition that seeks to ensure meaningful progress in most countries of the world. Rather than seeking complete harmonisation (which would have a negative effect), it should set minimum standards while allowing and indeed encouraging its parties to go further. In other words, it would be a floor and not a ceiling. Where the delivery of certain specific rights depends upon a certain level of technological advancement (e.g. the right of the public to obtain certain information through the internet), the possibility for time-limited opt-out provisions could be considered for countries with less-developed economies. Alternatively, the guarantee of such technology-dependent rights could be achieved through additional instruments such as protocols.

What elements might be included concerning access to information?

Formal information requests made to the government is the predominant mechanism for providing access to information in many countries. This is an important basic right and mechanism that enables citizens and stakeholders to obtain timely and relevant information at a reasonable cost held by the government. Generally thought of as reactive information requests, they also have their drawbacks. For example, reactive requests are not timely or effective in emergencies. Often when citizens do not send the requests to the right agency or when their requests lack clarity or specificity, the actual information can take weeks if not months to reach the citizen. In the context of environmental or health issues, equally important is proactive information



dissemination by the government. Governments need to collect, analyze, disseminate and enable the uptake of information important for the public. For example, air and water quality data in urban areas are important for citizens if made available in easily digestible forms. Weather information is a good example of such proactively released information. Weather information is critical for farmers and fisher folk alike. A new convention would usefully consider including both reactive and proactive information provision within its purview.

The convention could also cover other transparency mechanisms such as the regular and proactive publication of information about government institutional structures, personnel and the designation of information officers. Additionally, the convention should establish minimum procedures for making and responding to information requests, and define what information should be made available, in what forms and when. Online access to certain categories of information should be a right, while recognising the need to cater for those without internet access. The convention could also consider providing for the development of protocols on specific information mechanisms and tools such as Corporate and Government Sustainability Reports and State of the Environment Reports.

What elements might be included concerning citizen participation in decision-making?

Participatory opportunities for citizens, including indigenous peoples, women, the elderly and the poor, to engage in decision-making are critical for sustainable development. Sustainable development decision-making happens at a variety of governmental levels and contexts. For example decision-making can take place at a national, provincial, state, district, county, city or village level. Decision-making can also happen in the context of policy making, project or programme development and execution, rule-making, drafting new laws or revising old ones and in determining privileges, rights and obligations of individual citizens.

Defining when citizen engagement spaces need to be created and establishing basic elements of procedure for such engagements helps organize the business of government. Many legal systems recognize the right of an individual to be heard when the government makes decisions that can adversely affect his or her legal rights. These procedures need to be kept intact and strengthened. However, more often than not, government decisions that affect the public generally or groups of citizens (such as a community, town, a subset of land owners or farmers) may not involve procedures that require notification and hearing of affected parties. These decisions can span national policy-making as well as individual projects. Minimum requirements for citizen engagement in these contexts might include adequate notification of the intent to make the decision, the provision of relevant and timely information about the decision to be made, an opportunity to present views and concerns and procedures that ensure those views are taken into consideration in an accountable manner.

If access to meaningful participation is to become a reality for the world's poor and marginalized groups, special provisions, including affirmative action will be required. These actions could include proactively reimbursing lost opportunity costs for participating in the decision-making process, ensuring accessibility of the venue and selecting the most suitable time for the participation of local affected people. It could also include provisions for enabling the participation of women, indigenous peoples and socially disadvantaged communities.



What elements might be included concerning access to justice?

Access to remedies and relief is the third limb of Principle 10. Often referred to as “access to justice” it includes procedures for reviewing government decisions, standing to invoke proceedings in a court, tribunal or administrative agency, and the regulation of costs and timeliness of proceedings. Access to remedies and relief is a crucial element of ensuring accountability. Providing the right checks and balances within a government structure leads to the minimization of errors, promotion of consistency and rationality and minimization of corruption, misuse and abuse of authority in decision-making and implementation. For remedies and relief regarding sustainable development decision-making to be real to citizens, they need to be timely (i.e. respond to the complaint in a timely fashion by considering the complaint and providing effective relief or remedies, where appropriate).

Access to justice should be available to an affected person as well as to those who act in the public interest simply to enforce or uphold the law. Providing wide legal standing for complainants has been a trend in many legal systems across the world. Courts, tribunals or administrative agencies that are mandated to grant relief and remedies need to be provided with adequate powers, budgets, personnel and status to do so. The cost of proceedings needs to be made affordable to citizens and in appropriate cases, citizens acting in the public interest must have their costs reimbursed. A convention could establish basic minimum standards that countries are bound by but can reach through a time bound, nationally adapted action program in all of these areas.

What impact might the convention have in relation to international fora?

Decisions that affect people’s lives and the environment are increasingly taken at international level. The values of transparency, participation and accountability promoted in Principle 10 are no less relevant at the international level – indeed, the opening sentence of Principle 10 states that environmental issues are best handled with participation of all concerned citizens ‘at the relevant level’, which in many cases is a supranational level.

While there are some formal limitations on the extent to which a global convention can prescribe how international fora conduct their business, a convention could nonetheless oblige or recommend to its contracting parties to promote the convention’s values when engaging in international fora, as has been done under the Aarhus Convention¹⁷ and the associated Almaty Guidelines.¹⁸

What measures will be effective in facilitating implementation of the convention?

The test of any convention lies in the effectiveness of its implementation. Various tools and mechanisms have been developed over time to ensure effective implementation of international treaties, such as capacity building programmes and compliance and reporting mechanisms.

Given that countries are at different levels of implementing Principle 10, a key element for the success of such a convention would have to be robust capacity building programmes. Many countries, especially the least developed countries, lack the capacity to implement Principle 10. Several states do not have the necessary laws in place and the institutional culture, training and equipment needed to deliver access to information and participation in decision-making. The convention could establish a fund to support implementation through capacity building, trainings and knowledge sharing. Access to the fund could be tied to a state’s efforts to comply with the convention.

17 Article 3, paragraph 7.

18 <<http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf>> at 27 April 2012.



Each party to the convention would need to develop a roadmap or national implementation plan of its own together with adequate funding mechanisms to comply with the convention, taking into consideration the circumstances special to that state and prepared with the participation of the public. Furthermore, the convention could require each party to report periodically to the other parties, through the governing body, on the steps taken to implement the convention. Such implementation reports could demonstrate concerted efforts to comply with the convention's obligations in an additive, measurable, and time-bound manner. Following the spirit of Principle 10, they could be drafted with the participation of the public and uploaded to a website where citizens can comment and discuss their accuracy and implications. Such reporting mechanisms provide a valuable means of ensuring that good practices are shared between parties and that the obligations under the convention are not forgotten.

The convention could also establish or provide for the establishment of a mechanism for formal review and assessment of compliance. A variety of compliance mechanisms have been established under international treaties in recent years.¹⁹ In the present case, there are two reasons to consider establishing a participatory compliance mechanism of the kind established under the Aarhus Convention, where members of the public can trigger a review of a party's compliance by an independent compliance review body: first, because in practical terms those who are affected by a violation of the convention's provisions would normally be members of the public rather than another contracting party; and second, because experience has shown it to be an effective means of bringing cases of non-compliance to light (as compared with the more traditional means of submissions by Parties and referrals by the secretariat). Where a regional convention is available, the expectation could be that compliance mechanisms under the regional convention would be first exhausted before resort to a global convention compliance mechanism. However, if the regional convention does not cover an area of rights covered by the global convention, complainants should be able to directly use the global convention mechanism. Given this day and age of information technology, mechanisms for the inter-convention transfer of complaints can easily be developed to minimize the burden on complainants.

What would the convention's governance structure be?

As with many other conventions, the main policy making body could be a Conference of the Parties (COP) formed of all the contracting parties that would exercise that function at periodic (e.g. triennial) sessions of the COP. Additional subsidiary bodies such as Task Forces could be created as required to address specific topics such protocols and guideline development, technology development, compliance, implementation fund and capacity building. The participation of civil society in COPs and other subsidiary bodies is critical and must be guaranteed and incorporated into procedural rules.²⁰

The convention would need to be supported by an adequately-resourced secretariat, funded inter alia through a scheme of contributions by the parties. The institutional setting of the secretariat could be decided in the light of the outcome of the ongoing discussions on the international framework for sustainable development and international environmental governance, taking into account the need for synergies with other relevant treaties (e.g. Aarhus) but also the need for the secretariat to be responsive to the needs of the contracting parties and therefore not unduly constrained by any institutional affiliation. The convention can also make provision for regional activities and programmes based on regional needs.

19 One of the most notable innovations has come through the multilateral development banks (e.g. World Bank) and international financial institutions where Inspection panels or other accountability mechanisms can be activated by members of the public.

20 <<http://www.accessinitiative.org/sites/default/files/Public%20Participation%20in%20IEG.pdf>> at 31 January 2012.



Conclusions: What Rio+20 can do for Principle 10

Rio+20 will be a global event. In fact, it will be the largest global event of its kind for at least a decade. **It is thus a rare opportunity for the global community to take decisions with global impact, such as a decision to launch negotiations on a global convention on Principle 10.**

The Rio+20 outcome document could mandate the negotiation of such a convention. Alternatively, it could mandate UNEP to prepare exploratory material for consideration by the new Council on Sustainable Development or the General Assembly or the UNEP Governing Council. Such exploratory material would address the options for moving beyond the 2010 Bali Guidelines with a legal instrument, and their implications.

To prepare for a move towards an enhanced legal framework for Principle 10, the Rio+20 outcome document could also send a clear signal to UNEP to develop a robust implementation and capacity building program around the Principle 10 Bali Guidelines (2010) adopted by the Governing Council.²¹

The options of promoting accession to Aarhus or developing other regional conventions are of less direct relevance in the Rio+20 context in the sense that they do not require, and in fact cannot be initiated by a decision by such a global forum, though they could be given encouragement by the Conference.

21 <<http://www.unep.org/DEC/PDF/GuidelinesAccessToJustice2010.pdf>> at 31 January 2012.



Annex

The call for a Global Convention on Principle 10

As part of the preparations for Rio+20, the UN Department of Economic and Social Affairs (UNDESA) called for submissions by 1 November 2011 through a web portal they established.²² UNDESA received 677 submissions, the vast majority of which came from civil society groups around the world.

An analysis of the submissions carried out by The Access Initiative (TAI) showed that there were over 140 submissions (including submissions by several states, intergovernmental organizations and civil society organizations) calling for better implementation of Principle 10 of the Rio Declaration and greater transparency, participation, and accountability in matters affecting sustainable development. Additionally, many of the statements and submissions emerging from regional preparatory meetings for Rio+20,²³ the Bonn Declaration of Non-Governmental Organizations adopted at a meeting organized by the UN Department of Public Information,²⁴ and the Eye on the Earth Conference Declaration²⁵ also contained strong statements supportive of implementing Principle 10 at all levels. Clearly, there is a growing sense of urgency and a chorus of national governments, intergovernmental bodies and civil society groups calling for the strengthening of Principle 10 worldwide.

Among the 100 state submissions received were those from Brazil, Chile and Jamaica that made specific proposals for international conventions on access to information, public participation and access to justice in sustainable development decision-making. Brazil's was a call for a global convention while Chile and Jamaica proposed a regional convention for Latin America and the Caribbean. The Aarhus Convention²⁶ is the only international convention that currently covers this subject matter and is administered by the UN Economic Commission for Europe (UNECE). In its submissions to Rio+20, the UNECE cites in full the Chisinau Declaration adopted by Parties to the Convention and other stakeholders in which they offer "to share [their] experience with all countries that wish to join the Aarhus family, to replicate its achievements or to be inspired by this most ambitious venture in environmental democracy undertaken under the auspices of the United Nations."²⁷ The UN Economic Commission for Latin America and the Caribbean (UNECLAC) in its submission states "Rio+20 could produce a mandate to negotiate international agreements (at the global or regional level) to promote the enactment of legislation pertaining to Principle 10 of the Rio Declaration and its implementation, to be possibly, but not necessarily, based on the Aarhus Convention."²⁸ The United Nations Environment Programme (UNEP) in its submissions specifically calls for the establishment of "mechanisms for participatory governance (Rio Principle 10)" and suggests "developing regional or sub-regional agreements to give effect to Principle 10 of the Rio Principles."²⁹

22 <<http://www.uncsd2012.org/rio20/index.php?menu=115>> at 26 January 2012.

23 <http://www.uncsd2012.org/rio20/meetings_regional.html> at 26 January 2012

24 <<http://www.un.org/wcm/webdav/site/ngoconference/shared/Documents/Final%20Declaration/Chair%27s%20Text.pdf>> at 26 January 2012

25 <http://www.unep.org/PDF/PressReleases/EoE_Summit_Declaration_EN_final.pdf> at 26 January 2012.

26 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), <<http://www.unece.org/env/pp/welcome.html>> at 26 January 2012.

27 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=486&menu=20>> at 26 January 2012.

28 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=55&menu=20>> at 26 January 2012.

29 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=217&menu=20>> at 26 January 2012.



As a result of these calls for strengthening the implementation of Principle 10 of the Rio Declaration, the recently published “zero draft” of the negotiating text for adoption at Rio+20 contains a number of references to access to information, public participation and accountability in sustainable development decision-making. Paragraph 58 of the zero draft specifically stated that UN member states “agree to take steps to give further effect to Rio Principle 10 at the global, regional and national level, as appropriate”.³⁰ In the subsequent informal negotiations on the zero draft in January and March 2012 in New York, all governments appear to be agreed that Principle 10 plays a central role in sustainable development which should be open, inclusive and accountable. Some governments have suggested that clause 58 should be deleted, although proposing language in preambular paragraph 17 that agrees to take “appropriate steps” to give further effect to this principle. Others, including the European Union, Switzerland and the US have suggested specific language on Principle 10 to amend paragraph 58 of the existing zero draft. The European Union in particular has suggested consideration of “legally binding frameworks at the most appropriate level” for implementing Principle 10. This language is now found in the Co-Chairs text with the latest proposed revisions.

Principle 10 is at the heart of Good Environmental Governance

Principle 10 of the Rio Declaration on Environment and Development (1992) recognizes that “environmental issues are best handled with participation of all concerned citizens, at the relevant level” and that meaningful participation requires appropriate access to information held by public agencies and the need for governments to proactively make such information widely available to raise public awareness. Principle 10 also emphasizes that accountability mechanisms, including redress and remedies, are essential for ensuring that environmental issues are addressed effectively (see Box on page 1). These principles represent the collective wisdom of the international community.

Emphasising the relevance and importance of Principle 10 in its Rio+20 submissions, UNEP stated:

Systematic arrangements for informed public participation in all levels of decision-making are a necessary part of the institutional framework for sustainable development, and is called for under Principle 10 of the Rio Declaration, Agenda 21, the Johannesburg Plan of Implementation and decisions of the UNEP Governing Council. Such arrangements would allow for shared analysis of issues and challenges, building consensus among stakeholders on objectives and possible approaches and policies to achieve them, effectively supporting implementation of these policies and approaches through contributions from and compliance by stakeholders. Building such consensus and participation is critical to balancing the social, environmental and economic aspects for sustainable development and for moving in a concerted way to achieve the objectives. Generally, many societies have not

30 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=12&nr=324&menu=23>> at 26 January 2012.



invested adequately in creating and managing such arrangements, which are necessary for more participatory governance.³¹

“The rights of access to information, participation in decision-making, and access to redress and remedy form the three basic pillars of Principle 10, which we refer to collectively as “access rights”. Access rights are central to more representative, equitable, and effective environmental decision-making. Access to information empowers and motivates people to participate in a meaningful and informed manner. Access to participation in decision-making enhances the ability of a government to be responsive to public concerns and demands (which of itself improves decision-making), to build consensus, and to improve acceptance of and compliance with environmental decisions. Access to justice allows people to hold government agencies, companies, and individuals accountable. Meaningful participation requires access to the information that forms the basis for decisions, the opportunity to voice opinions, and the ability to influence choice among possible outcomes.”³²

At the heart of good governance are principles of transparency, inclusiveness and accountability. Governmental decision-making that does not stand up to these basic tenets will produce outcomes that are more likely to be environmentally damaging and developmentally unsustainable. This conclusion is fortified by innumerable references to good governance, access to information, access to justice and public participation and accountability throughout Agenda 21³³ and the Johannesburg Plan of Implementation (JPOI).³⁴ Sustainable development cannot happen in secret nor can it happen with citizens becoming onlookers and bystanders. Institutional commitments made for improving good governance through the Rio Declaration, Agenda 21 and the JPOI need to be monitored and reported upon.³⁵

In preparation for the Rio+20 Summit, the UN Secretary General, Ban Ki-moon appointed a 22-member High Level Panel on Global Sustainability, in August 2010 to formulate a new blueprint for sustainable development and low-carbon prosperity. The Panel was co-chaired by Finnish President Tarja Halonen and South African President Jacob Zuma. The Panel’s final report, *“Resilient People, Resilient Planet: A Future Worth Choosing”*, contains 56 recommendations to put sustainable development into practice and to mainstream it into economic policy as quickly as possible.³⁶ The report stated that “good governance [was] at the heart of sustainable development and starts with the basics: democracy, the rule of law, respect for human rights and fundamental freedoms, and equality for women and men, as well as access to information, justice and political participation.”³⁷ It provides the following rationale for why good governance is fundamental to sustainable development:

“The truth is that sustainable development is fundamentally a question of people’s opportunities to influence their future, claim their rights and voice their concerns. Democratic governance and full respect for human rights are key prerequisites for empowering people to make sustainable choices. The peoples of the world will simply not tolerate continued environmental devastation or the persistent inequality which offends deeply held universal principles of social justice. Citizens will no longer accept governments and corporations breaching their compact with them as custodians of a

31 <<http://www.uncsd2012.org/rio20/index.php?page=view&type=510&nr=217&menu=20>> at 26 January 2012.

32 Foti, J. et al Voice and Choice: Opening the Door to Environmental Democracy (World Resources Institute, 2008), <http://pdf.wri.org/voice_and_choice.pdf> at 26 January 2012.

33 <<http://www.un.org/esa/dsd/agenda21/>> at 26 January 2012.

34 <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm> at 26 January 2012.

35 <<http://www.uncsd2012.org/files/responses-major-groups/Questionnaire-Email-submission-Major-groups-Access-Initiative2.pdf>> at 26 January 2012.

36 <<http://www.un.org/gsp/report>> at 31 January 2012.

37 Ibid.



sustainable future for all. More generally, international, national and local governance across the world must fully embrace the requirements of a sustainable development future, as must civil society and the private sector. At the same time, local communities, and particularly women, must be encouraged to participate actively and consistently in conceptualizing, planning and executing sustainability policies. Central to this is including young people in society, in politics and in the economy.”³⁸

Principle 10 implementation and gaps

The Access Initiative (TAI) has been collecting lessons at the national, regional and global levels on the establishment and strengthening of access rights for the last 12 years. In 2002, TAI found that governments performed best in providing access to information, less well in facilitating participation and least well in providing access to justice.³⁹ In 2008, TAI research showed that while there has been progress in the formal recognition of access rights (in particular, access to information), significant gaps remain between access laws and policies, and the institutions, practices and capacities necessary to ensure that these laws and policies function.⁴⁰ TAI’s most recent research (2010) speaks to the plight of the poor and indigent and their continued exclusion from decision-making and suggests that the poor need to be given specific entitlements to facilitate their participation and achieve inclusiveness.⁴¹

At the international level, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters (Aarhus Convention) was adopted in 1998, entered into force in 2001 and has been ratified by 45 Parties in Europe and Central Asia.⁴² The Aarhus Convention grants the public rights of access to information, public participation in decision-making and access to justice in national and transboundary environmental matters. This Convention has significantly changed the landscape of access rights. Implementation of the public participation and access to justice pillars still remains weak in some countries. The Aarhus Working Group, Task Forces and Compliance Committee have played a pivotal role in ensuring the continued implementation of access rights and enforcement of the obligations under the Convention.⁴³ Within the European Union, the Convention has inspired legislation on environmental information and environmental impact assessment and access to the courts which have greatly improved environmental protection standards. For example it has resulted in improved standing for Environmental NGOs to bring legal cases in Germany and the protection of legal aid to bring environmental challenges in the UK. As a result of the Aarhus Convention it is now routine for developers of major projects to have to provide detailed information to the public to enable them to understand the environmental impacts of the project and respond to the application. This has been a very significant step towards improved environmental decision-making. The changes it has brought about in other parts of Europe and in Central Asia have been no less significant, with many countries revising their laws and practices in order to align them with the Convention.

38 Ibid.

39 Petkova, E. Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment (World Resources Institute, 2002), <http://pdf.wri.org/closing_the_gap.pdf> at 26 January 2012.

40 Foti, J. et al, above n 32.

41 Foti, J. & De Silva, L. A Seat at the Table; Including the Poor in Decisions for Development and Environment (World Resources Institute, 2010) <http://pdf.wri.org/a_seat_at_the_table.pdf> at 26 January 2012.

42 The Aarhus Convention, above n 26.

43 <<http://www.uncsd2012.org/files/responses-major-groups/Questionnaire-Email-submission-Major-groups-Access-Initiative2.pdf>> at 26 January 2012.



Outside of the UNECE region, the UNEP Governing Council at its 11th special session, held in Bali in February 2010, adopted guidelines for the development of national legislation on access to information, public participation and access to justice.⁴⁴ This is a major milestone for implementing Principle 10 of the 1992 Rio Declaration on Development and Environment. Although these are only voluntary guidelines, this action commits UNEP to continue advancing the implementation of Principle 10 at the national level. These guidelines will also provide a basis for officials and civil society to work together at the national level on access rights and will clarify the minimum legal standards for implementation of Principle 10. The guidelines have been long overdue and an implementation plan is being developed by UNEP.

There are a number of access delivery mechanisms that are currently in use around the world. These mechanisms include Freedom of Information Acts (FOIAs), Environmental Impact Assessments (EIAs), Pollutant Release and Transfer Registers (PRTRs) and access to justice mechanisms such as citizen suits and monitoring and evaluation procedures. These and similar environmental management tools have become the means through which access is provided by governments to citizens. Significant progress has been made at the national level in developing and implementing such access delivery mechanisms. For example there are now nearly 100 countries that have Freedom of Information Acts and many more that have put in place environmental impact assessment processes that include public participation in decision-making.⁴⁵ Nearly 40 countries have PRTRs and a similar number have established environmental tribunals or courts with varying powers to review and assess developmental decisions.⁴⁶

However, despite these advances, progress remains patchy. For example many countries in the Middle East, Africa and Asia still lack sound laws, policies and institutions that establish access rights for their citizens.⁴⁷ In countries where such laws and policies are in place, implementation is often problematic and the content and effectiveness of such laws and policies vary tremendously from country to country.⁴⁸ One consequence is that industries and business sometimes take advantage of weaker implementation and enforcement regimes to violate environmental laws or establish and operate hazardous industries or development projects. Stakeholders such as indigenous peoples, women, children, communities and governments often carry the costs and impacts of such polluting or harmful activities, in effect subsidizing them. Developmental decisions in such situations are sometimes skewed against weaker actors and tend to neglect social and environmental considerations which are essential to achieving sustainable development.⁴⁹ Irresponsible or short-sighted companies may decide to locate their operations in countries that have weaker access laws or to export and sell products that do not meet quality standards in the country of production, in other countries with weaker access laws. It is therefore in the interest of early movers (states) that have strong access laws and policies and good implementation to ensure that such laws and policies are adopted across the globe. While such globalization of access laws and policies will ensure that all enjoy the benefits of Principle 10, it will also level the playing field for business and industry and allow for fairer competition and responsible business practice.⁵⁰

44 <<http://www.unep.org/DEC/PDF/GuidelinesAccesstoJustice2010.pdf>> at 22 March 2012.

45 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1857498&download=yes> at 31 January 2012.

46 <<http://www.article19.org/data/files/medialibrary/2225/Moving-from-Principles-to-Rights-final.pdf>> at 31 January 2012; <<http://www.accessinitiative.org/sites/default/files/Moving%20from%20Principles%20to%20Rights.pdf>> at 31 January 2012.

47 Ibid.

48 Ibid.

49 Foti, J. and de Silva, L, above n 41.

50 Braithwaite, John and Drahos, Peter, *Global Business Regulation* (Oxford University Press, 2001).



Notes





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