Moving from Principles to Rights

Rio 2012 and Ensuring Access to Information, Public Participation, and Access to Justice for Everyone

July 2011

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ARTICLE 19 and The Access Initiative

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Synopsis

The rights of access to information, public participation, and access to justice are essential to sustainable development. The 1992 Rio Declaration provided for these rights in Principle 10 and Agenda 21 moved them into reality in many countries. Now renewed commitment is needed for the full implementation of the rights in all countries. The Rio 2012 Summit provides an opportunity for governments to transform Principle 10 from aspirational goals into actionable rights. Governments and civil society should use the opportunity to commit together in adopting, implementing, and exercising these rights in support of sustainable development. The 2012 Summit's focus on the theme of improving institutional frameworks should galvanize nations to improve their national environmental governance, develop international instruments giving legal force to Principle 10, and implement these principles into international bodies' decision-making processes. This paper reflects insights from the research, on the ground experiences, and core beliefs of over 250 non-governmental organisations (NGOs) working in 50 countries within The Access Initiative Network together with ARTICLE 19 - a human rights organisation that promotes freedom of expression and freedom of information all over the world.

Principle 10 of the 1992 Rio Declaration

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 held by public authorities concerning the environment, 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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1 Introduction

In the 1992 Rio Declaration on Environment and Development, the international community recognised that sustainable development depends upon good governance.[2] Principle 10 of the Declaration sets out the fundamental elements for good environmental governance in three "access rights": access to information, public participation, and access to justice. These are based on the experience that governmental decision-making failing to include these essential tenets of access will produce outcomes more likely to be environmentally damaging, developmentally unsustainable, and socially unjust.[3]

Access rights facilitate more transparent, inclusive, and accountable decision-making in matters affecting the environment and development. Access to information empowers and motivates people to participate in an informed and meaningful manner. Participatory decision-making enhances the ability of governments to respond to public concerns and demands, to build consensus, and to improve acceptance of and compliance with environmental decisions because citizens feel ownership over these decisions. Access to justice facilitates the public's ability to enforce their right to participate, to be informed, and to hold regulators and polluters accountable for environmental harm.

The access rights in the Rio Declaration have been widely recognised across the world. However, there is much work remaining to ensure that these rights are truly available to empower societies. Commitments made by governments to the principles of good governance under the Rio Declaration, Agenda 21, and the Johannesburg Plan of Implementation[4] need to be strengthened, monitored, and reported upon. Governments that have not already done so must establish legal rights to access to information, public participation**,** and justice**.** Finally, all governments must demonstrate their support for protection of these rights. Once access rights are established, governments and civil society need to focus on developing the capacity to operationalize these rights and make them meaningful for the communities they are intended to support.[5]

The Access Initiative (TAI) aims to bridge the gap between international commitment to P10 and national-level implementation of the policies and systems that support these access rights. Over the 10 years since its formation, partner NGOs have carried out evidence-based indicator assessments of their governments' implementations of Principle 10. ARTICLE 19 has worked on supporting the development and implementation of laws guaranteeing and implementing rights to freedom of expression for over 20 years in over one hundred countries around the world. TAI and ARTICLE 19's work supports the belief that sustainable development cannot succeed when citizens are sidelined and decisions are made in secret behind closed doors.

We believe that the outcome of the Rio 2012 Summit must include an affirmation of these fundamental access rights and that substantial efforts must be made to establish them and make them enforceable in all countries. At a minimum national governments must commit to the full implementation of access rights into national law, ensure intergovernmental organisations and institutions incorporate these rights into their own regulation and practices, and develop international and regional mechanisms to ensure support across regions for tracking and monitoring of implementation. We believe that new international instruments are necessary to ensure that these access rights are truly available to everyone.

2 The Rio 2012 Process and Principle 10

The United Nations Conference on Sustainable Development, the Rio 2012 Summit, follows up on the 1992 Earth Summit. Its stated purpose is to "secure renewed political commitment for sustainable development, assessing the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges." Within that context, there are two

[2] In addition to Principle 10 above, the Rio Declaration Principle 11 asserts that States should "enact effective environmental legislation." Principle 15 speaks about the precautionary principle. Principle 17 states that "[e]nvironmental impact assessment[s] are a national instrument" and should "be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." Principles 20 and 22 recognise that women and indigenous people play a vital role in environmental management and that their participation is essential to achieve sustainable development. Report of the United Nations Conference on Environment And Development, A/CONF.151/26 (Vol. I). http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

[3] Foti J. et al, *Voice and Choice: Opening the Door to Environmental Democracy*, World Resources Institute, (2008). http://www.accessinitiative.org/resource/voice-and-choice-opening-door-environmental-democracy.

[4] Johannesburg *Plan of Implementation of the World Summit on Sustainable Development*, August 26-September 4, 1992. http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

[5] Foti J. et al, *Voice and Choice,* ibid.

specific themes emphasised: (1) A green economy in the context of sustainable development and poverty eradication; and (2) The institutional framework for sustainable development.

Overall, these themes have been discussed in isolation from each other and there has been insufficient discussion on what reforms are needed to achieve these objectives, who needs to be involved in decision-making, and how the objectives will be achieved. Both agenda items need to be discussed in light of the principles of transparency, public participation**,** and accountability. A fruitful approach would be for the two themes to be considered together in conjunction with the larger objective of securing political commitments for sustainable development that could have a greater impact at the Summit.

As UN Secretary General Ban Ki-moon notes, the goals represented by these themes are interdependent, as "improved institutions are crucial to favourable social outcomes of green economy policies."[6] He calls upon governments to do more to "build on progress made to promote transparency and accountability through access to information and stakeholder involvement in decision-making."[7] Without these basic changes the current economic paradigm will prevail, supported by institutions and interest groups that have benefited from restricting citizen access.

2.1 The Green Economy

There has been an extensive debate on creating a definition for a "green economy" and determining its scope. There is some agreement that at the national level, greening the economy will include improving fiscal policy reform, reducing environmentally harmful subsidies, employing new market-based instruments, and targeting public investments to "green" key sectors. There has been almost no discussion on the role of citizens and on access rights as an important facet of creating this new economic model.

We should no longer ignore the role citizens must play in determining the success or failure of a global green economy. Ensuring that policies dressed as green meet their intended aims of economic and environmental sustainability and social equity requires broad based public participation and support from empowered civil society actors, well-informed and engaged voters, consumers, stakeholders, and shareholders. Disseminating information about what specifically a green economy entails for society is essential to motivating social actors' involvement in the decision-making process of policies intended for developing and protecting sustainability. Governments must establish infrastructure for access to this type of information and ensure public participation. The media must act as a neutral messenger.

Without a fundamental shift in the power of interest groups, greening the economy will remain a game of catch up as innovation and industry move ahead without regard to the social and environmental costs.

2.2 Reforming Institutions at the International and National Levels

Meanwhile, discussions on the sustainable development governance theme have focused on International Environmental Governance (IEG). The Nairobi-Helsinki Outcome Document proposes a reform agenda for institutions, the UN Environmental Programme (UNEP), the UN Commission on Sustainable Development (UNCSD), and the Economic and Social Council.[8] A second tier of concerns addresses the fragmentation of Multilateral Environmental Agreements (MEAs), funding mechanisms, and Secretariats.

The current deliberations before the UNCSD have failed to deliver a visionary approach to the creation of a new international environmental governance system that includes mechanisms for accountability.

Within the IEG discussions there has been insufficient emphasis on the need to make these international institutions and governments themselves more transparent and accountable to the citizens they are intended to serve. Currently, there are limited and inadequate mechanisms for access to information held by UN bodies, especially relating to trade.[9] There has been more significant progress with the World Bank and International Financial Institutions (IFI's).[10]

At the same time, there has been little effort toward reviewing and reforming national institutions. While international institutions have critical roles in

[6] Preparatory Committee for the United Nations Conference on Sustainable Development, Second session, Item 2 of the provisional agenda, p. 25, 7-8 March 2011, http://www.uncsd2012.org/files/prepcom/SG-report-on-objective-and-themes-of-the-UNCSD.pdf

[7] Ibid, p. 5.

[8] Consultative Group of Ministers or High-level Representatives, Nairobi-Helsinki Outcome, 23 November 2010. http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/NairobiHelsinkifinaloutcomeedited.pdf.

[9] See e.g. Roberts, Alasdair S., *A Partial Revolution: The Diplomatic Ethos and Transparency in Intergovernmental Organizations*, Public Administration Review, Vol. 64, No. 4, pp. 408-422, July-August 2004. Available at SSRN: http://ssrn.com/abstract=1307710.

[10] See http://www.ifitransparency.org/index.shtml.

formulating and coordinating policy on international environmental governance, their reform will have little impact on those national level institutions where citizens are still struggling to participate in decisions affecting their environment.

The Nairobi-Helsinki Outcome Document, for example, does not make any mention of compliance mechanisms to ensure implementation and monitoring of Multilateral Environmental Agreements and environment obligations by citizens. This is a glaring omission**.** Without mechanisms to ensure a means of government accountability, governments will continue to fail to fulfill their obligations under international environmental law. Some possible mechanisms which may be put forward for consideration include:

- *Peer review* - The OECD Group on Environmental Performance (GEP) has developed a process to conduct reviews of the environmental performance of OECD member countries with respect to both domestic policy objectives and international commitments.[11] It has been in place since 1992.
- *Independent evaluation and complaint mechanisms* - The North American Commission for Environmental Cooperation takes a multi-pronged approach to promoting environmental enforcement and compliance. Central to the agreement is a commitment by the parties to effective enforcement of their respective environmental laws, reinforced by two formal procedures: (1) A procedure for citizen submissions asserting ineffective enforcement by a party, to which the secretariat may respond by requesting a response from the party and developing a factual record; and (2) A procedure for claims by a party that another party exhibits a persistent pattern of failure to effectively enforce its environmental law.
- *Dispute resolution processes* - Under the Kyoto Protocol, states are considering a procedure that would allow private investors a right to appeal decisions by the Clean Development Mechanism that go against their interest while under the World Bank Inspection Panel affected citizens can trigger inspections of alleged failures of the Bank to follow its own policies. Finally, under the WTO dispute settlement process, and under several bilateral investment agreements, civil society organisations have been allowed to submit amicus curiae briefs to influence the outcome of decisions.

In his background paper for Ministerial consultations at the 26th session of the Global Ministerial Environmental Forum,[12] the Executive Director of UNEP noted that to deal with the accountability challenge, it would be necessary to make review a key function of the Global Ministerial Environment Forum, to implement independent third-party reviews and performance monitoring, to create incentives for performance and early action, and to establish a global version of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The IEG discussions clearly need to move away from the current negotiations and refocus in areas that can engender greater transparency and accountability, acknowledging achievements and compliance with international commitments but also acknowledging where capacity and political will have been lacking.

3 Progress to Date on Principle 10 and What is Missing?

The 1992 Rio Declaration was signed by 178 States. There has been notable progress both internationally and nationally since its adoption. However, many gaps remain.

3.1 International Progress

In the area of access rights, the 1992 Rio Declaration has seen mixed success on the global level. Unlike many other areas in the Declaration, no global legal instrument – such as a treaty or convention - on access rights in the environment has been developed. It is only recently, mostly in the context of the Rio 2012 process, that this has even been discussed.[13]

UN bodies have also been slow in addressing the issue. In 2010, after nearly 20 years, the UNEP Governing Council finally adopted guidelines ("the Bali Guidelines") on how governments should develop national laws in relation to Principle 10.[14] The

[11] See "OECD Environmental Performance Reviews - A Practical Introduction", 1997. http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(97)35&docLanguage=En.

[12] UNEP/GC.26/17/Add.2 Twenty-sixth session of the Governing Council/Global Ministerial Environment Forum, Item 4 (b) of the provisional agenda·Policy issues: emerging policy issues, Nairobi, 21–24 February 2011.

[13] See e.g. The London Declaration for Transparency, the Free Flow of Information and Development, September 2010. http://www.right2info-mdgs.org/declaration/.

[14] UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, 2010. http://www.unep.org/DEC/PDF/GuidelinesAccesstoJustice2010.pdf.

guidelines are intended to assist national governments by "promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes." However, the guidelines are largely unknown and while there are commitments by UNEP and other bodies to provide assistance and training, the efforts appear currently to be on a very small scale.

More successful has been the efforts of the UN Economic Commission for Europe (UNECE). The UNECE has adopted two groundbreaking treaties based on the Declaration. Of primary interest to this paper, the Declaration was the starting point for development of the first legally binding international treaty on access rights - the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, commonly known as the Aarhus Convention. The Convention places ratifying nations under a series of important obligations including collecting information held by private bodies and requiring public bodies to affirmatively make information available to the public, respond to requests, and provide strong rights of appeal. It also established rules for public participation, appeals, and access to justice measures.

The Access Initiative Assessment Toolkit

The Access Initiative (TAI) has developed a comprehensive tracking indicator toolkit on Principle 10. It uses a 148 indicator web-based toolkit to assess the performance of governments on Principle 10 of the Rio Declaration. Working in their respective countries, TAI partners form national coalitions to assess the performance of their governments in providing the public with (a) access to information about government decisions, (b) public participation in decision-making, and (c) access to justice when their rights to information, participation, and a clean environment are violated. TAI currently has CSO partners in 50 countries and assessments for over three dozen countries are available on the web. It is available at *http://www.accessinitiative.org/resource/the-access-initiative-assessment-toolkit*.

The Convention also requires that signatories "promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment." UN Secretary General Kofi Annan described it as "the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations."

As of June 2011, the Aarhus Convention has been ratified by 44 countries from Western Europe to Central Asia and has been incorporated into EU law through a directive.[15] The Compliance Committee has now heard over 50 cases, nearly all filed by the public or civil society organisations.[16] In 2003, a follow-up instrument to the Aarhus Convention, the Kiev Protocol on Pollutant Release and Transfer Registers, was adopted. This Protocol holds corporations accountable for disclosing information on the toxics they release to the environment. It has now been ratified by 26 countries.

In addition to the Aarhus Convention, Principles 17 and 19 of the Rio Declaration also resulted in the creation of the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo EIA Convention).[17] It creates requirements for state parties to assess the environmental impact of major projects early on and to notify other countries when the project will have a transborder effect. It has been signed by 45 countries and ratified by thirty.

To date, no other regions have moved forward on developing binding legal instruments similar to the Aarhus and Espoo Conventions. As we discuss later in the paper, there is an opportunity for them to do so.

3.2 National Progress

There have also been substantial changes in legal frameworks at the national level since 1992, particularly in areas of access to information and environmental impact assessments. A substantial number of countries have adopted new legal frameworks on access rights, especially relating to access to information.

However, the adoption of laws has not been uniform. Few African countries have adopted legal frameworks and significant gaps remain in the Asia Pacific region and in Latin America and the Caribbean.

Implementation has been difficult. Profound institutional and societal transformations are necessary to achieve a level of openness in which governments and civil society share a commitment to environmental democracy. Even countries that have made progress in adopting and implementing Principle 10 are often limited by internal structural and political

[15] http://www.unece.org/env/pp/.

[16] http://www.unece.org/press/pr2010/10env_p19e.htm.

[17] http://www.unece.org/env/eia/.

fights. In many countries, efforts have been led by the Ministries of Environment and other agencies dealing with environmental conservation. Simultaneously, in other areas of decision-making that impact the environment, secretive and closed door routines continue to remain the norm. For example, access to information and public participation decision-making in Ministries relating to macroeconomic policies or energy planning is minimal.[18] Rio 2012's broader sustainable development framing and its emphasis on the green economy present an opportunity for governments to commit to a synchronization of policymaking with opening up a wider range of processes to public scrutiny.

There is considerable evidence that many governments now recognise the need for addressing good governance in achieving sustainable development and fulfilling the Rio commitments. The UN Development Programme, for example, found that the vast majority of 119 countries recently identified capacity development in governance related issues as their top priority for sustainable development improvements.[19] There is a real need for Rio 2012 to be the impetus for addressing these challenges.

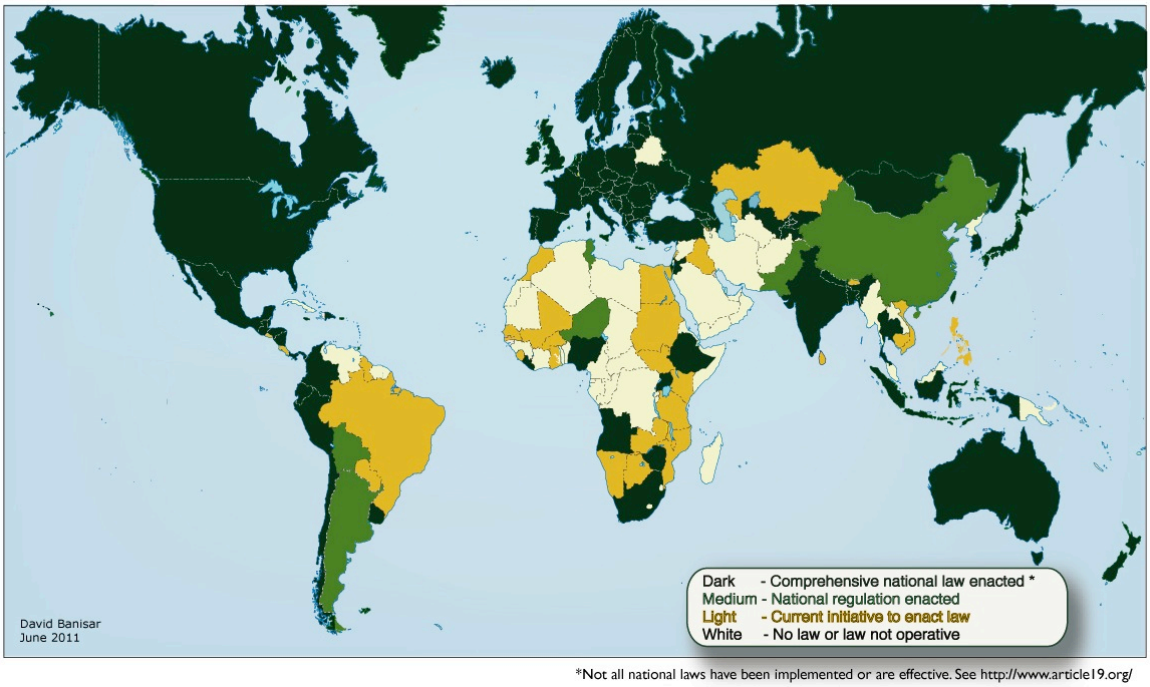
3.2.1 Access to Information

Sustainable development relies upon accurate information on a range of environmental matters, including those related to the green economy and climate change. Disclosure of information is therefore clearly in the public interest and serves to enhance the effectiveness of sustainable development programmes.

Since Rio 1992, there has been a dramatic increase in recognition of the right to access information by nations. Over 90 countries have adopted framework laws or regulations for access to information**,** including in the past few years China, Indonesia, Nigeria, Chile and Mongolia.[20] Over 100 countries have the right to information enshrined in their constitutions. Many others including Brazil have adopted specific environmental information access statutes or provisions in general environmental protection laws. The Rio Declaration and Agenda 21 played an important role in the adoption of these laws.

As the map above shows, there are significant disparities between regions. While most of the nations of Europe, the Americas and a significant portion of Asia have the laws in place, individuals in most Middle Eastern, African, Pacific and Caribbean countries do

National Right to Information Laws, Regulations and Bills 2011



*Not all national laws have been implemented or are effective. See http://www.article19.org/

[18] http://electricitygovernance.wri.org/publications.

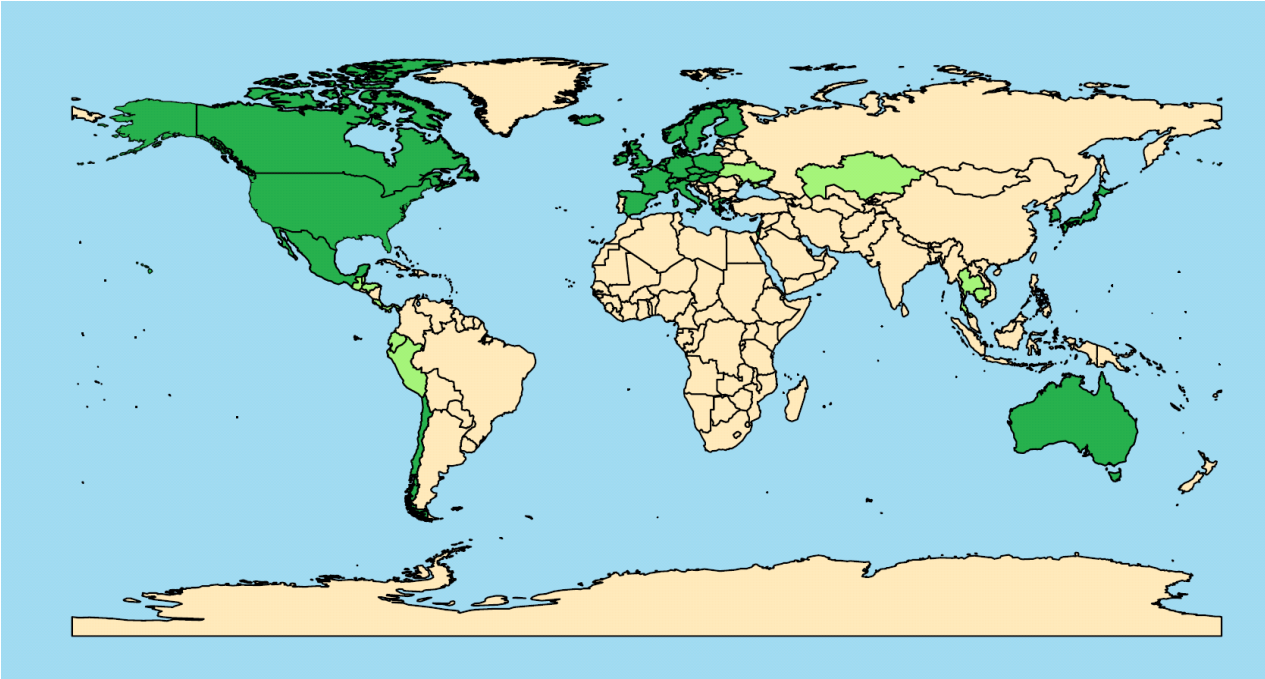
[19] UNDP, UNEP, & GEF, National Capacity Self-Assessments: Results and Lessons Learned for Global Environmental Sustainability, August 2010. http://thegef.org/gef/sites/thegef.org/files/publication/NCSA-SR-web-100913.pdf.

[20] See Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws, July 2006. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707336, ARTICLE 19 web site, http://www.article19.org.

not yet have this right incorporated into national law. Furthermore, practice lags behind laws in the majority of these countries. Causes for this gap vary, including lack of detailed administrative rules and operational policies, inadequate public capacity to use the laws, and insufficient official capacity to implement laws.

Another positive trend with respect to access to information is the increased adoption of Pollutant Release and Transfer Registers (PRTRs), which require governments to collect information on pollution releases and make that information publicly available through databases. PRTRs have been shown to be one of the most effective means of getting pollutant related information out to the public while simultaneously reducing pollution.[21] There has been a steady increase of countries providing registers and it is estimated that the number of national registers is likely to double over the next 10 years.[22] There are now single registers covering all of North America[23] and Western Europe.[24]

Countries with Pollution Release Transfer Registers



Source: US EPA 2010

Outside of these successes, there are many gaps remaining for access to information. These include:

- Research by ARTICLE 19 and other human rights and environmental organisations across the world demonstrates that populations are still being denied access to essential information about climate change and the environment.[25] Denial of access to information stems largely from the absence of freedom of information legislation and the institutional secrecy of numerous state authorities, coupled with legislation in place preventing access to information, including state secret laws, national security laws, and anti-terrorism legislation.[26]
- Around the world, few laws exist that require the government to proactively release environmental information, including basic information on air quality and drinking water quality. Meaningful access to environmental information requires governments to proactively gather, analyse, and disseminate this information.[27] Where databases exist at the international level, there are no

[21] Stephan, Mark. 2003. Environmental information disclosure programs: They work, but why? *Social Science Quarterly*. (1): 190 – 205.
[22] DeVito, Steve. Personal Communication. USEPA Toxics Release Inventory International Programs Officer. February 2008.
[23] North American Pollutant Release and Transfer Register. http://www.cec.org/Page.asp?PageID=924&SiteNodeID=596.
[24] European Pollutant Release and Transfer Register (E-PRTR). http://prtr.ec.europa.eu/.

[25] ARTICLE 19, *Changing the Climate for Freedom of Expression and Freedom of Information: Human Rights Responses to Climate Change*, December 2009.
[26] ARTICLE 19, *Access to Environmental in China: Evaluation of Local Compliance*, Article 19, December 2010. http://www.article19.org/pdfs/reports/access-to-environmental-information-in-china-evaluation-of-local-compliance.pdf
[27] Foti, *Voice and Choice.* ibid.

requirements that this information is disclosed to the public.[28]

- Many countries performed poorly in providing environmental information during and after emergencies. Most countries fail to release relevant environmental information on emergencies at all. Mandates to produce and disseminate such information are generally weak despite recent international disasters.[29]
- Most countries produced state of the environment reports of generally good quality, but publicity is particularly weak**;** few countries make attempts to publicize the results through the mass media or in a usable format.[30]

3.2.2 Public Participation

Progress on public participation is more complex to assess at the policy, planning, and project levels. In many countries, planning processes are now designed to ensure that the public have procedural rights to intervene and to ensure that public bodies have a duty to take this into account when making their decisions. One key aspect of this area is Environmental Impact Assessments (EIAs), which require the assessing of the environmental and social impact of projects prior to their approval. There has also been a substantial up-take of laws requiring Environmental Impact Assessments in recent years. Over 120 countries have adopted legal provisions on EIAs.[31]

However, in practice, there are many gaps remaining in public participation. These include: [32]

- Public participation has not been fully incorporated at the project level through EIA procedures in many countries. Often there are hurdles to meaningful participation, including insufficient lead time or unavailable project documents even where there are open participatory processes in place. Consultation is often held too late in the project development cycle to make a significant difference in project design or selecting outcomes.
- Framework public participation laws are still new to many governments despite progress in their adoption in a number of countries e.g. Thailand and Indonesia.
- Implementation of EIA processes has also been criticized as weak. Often sequencing of EIA and permitting processes excludes participation in the scoping and screening exercise**,** as well as in the determination of permit conditions. In some countries, copies of EIAs are only provided to citizens at a substantial cost, while restrictions to access based on claims of commercial confidentiality are evident in other countries.
- Conflicts of interest in the public hearing process, the technical nature of EIAs**,** access to non-technical summaries in local languages, and claims of lack of independence of systems to develop and review EIAs are also evident.

At a higher level, Strategic Environmental Assessments (SEAs) are a mechanism for incorporating environmental considerations into policies, plans**,** and programmes. The World Bank describes SEAs as "including mechanisms for evaluating the environmental consequences of policy, planning, or program initiatives in order to ensure that they are appropriately addressed in decision making on par with economic and social considerations".[33] SEA strengths include a general availability of documents relating to proposed policies. There is an EU directive requiring that all EU member states incorporate SEAs into national law.[34] SEAs have also been incorporated within national legislation in a number of countries in Latin America and the Southeast Asia region.[35] Some development assistance from international financial institutions and donor agencies is increasingly tied to the conduct of SEAs. However, to date public participation in SEA processes is still rudimentary and needs improvement.

3.2.3 Access to Justice

The access to justice pillar is arguably one of the most difficult areas in which to see improvement. Increasingly, countries have created or enhanced environmental courts and tribunals with specialized functions.[36] The belief that these institutions enhance access to justice and provide more effective means of resolving environmental disputes has been a primary reason for these interventions. In 2010, there were

[28] See UNEP GEMS program- although information on water quality may be placed on the register by Governments and made accessible to members of the public, this scheme is entirely voluntary http://www.gemswater.org/global_network/index-e.html.

[29] Foti, *Voice and Choice*, ibid; ARTICLE 19, *Information Saves Lives During Humanitarian Crises*, March 2011. http://www.article19.org/pdfs/press/information-saves-lives-during-humanitarian.pdf.

[30] Foti, *Voice and Choice*, Ibid.

[31] John Glasson, Riki Therivel & Andrew Chadwick, *Introduction to environmental impact assessment*, 3rd edition (Routledge, 2005).

[32] Foti, *Voice and Choice*, ibid.

[33] See World Bank, SEAs Overview http://web.worldbank.org/WBSITE/EXTERNAL/WBI/WBIPROGRAMS/ENRLP/0,,contentMDK:20797418~pagePK:64156158~piPK:64152884~theSitePK:460957,00.html.

[34] Directive 2001/42/EC.

[35] These include China, the Philippines, Thailand, and Vietnam.

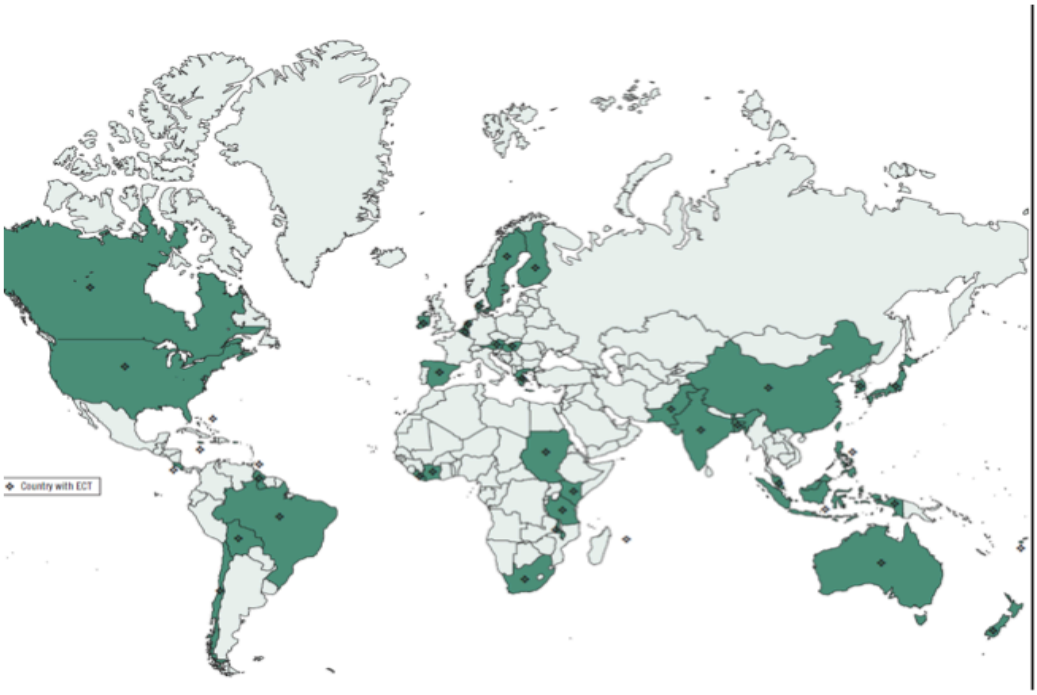
[36] Pring, G. and Pring C., *Greening Justice: Creating and Improving Environmental Courts and Tribunals,* The Access Initiative, 2010. http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20FInal_31399_WRI.pdf.

over 300 environmental courts and tribunals in 41 countries. Recently, India established a Green Tribunal and Malawi created an Environmental Tribunal.

However, there remain many gaps in the road to improving access to justice. Issues of timeliness (time taken to obtain a remedy), intimidation, and costs (litigation, loser pays principles, payment into court and costs to hire attorneys) should be highlighted, including in countries party to the Aarhus Convention.

framework and officials must possess practical skills and financial resources for access across all relevant ministries. Often, only the national ministry of environment has sufficient training in implementing access while other parallel and sectoral ministries and agencies do not.[38] To address the needs of indigenous peoples, vulnerable communities, and the poor, government must be innovative in how it provides and disseminates access to information.[39] These communities in particular continue to be excluded

Countries with Environmental Courts and Tribunals



Source: Access Initiative 2011

The risk of seeking injunctive relief is also significant. There are improvements in many countries relaxing rules for legal standing;[37] however, there are still concerns about legal standing in sectoral legislative processes such as planning. Meanwhile, public interest cases taken by civil society organisations against corporations and governments for causing environmental harm are almost exclusively supported by donors and foundations.

3.3 Capacity Building

Legal mandates are insufficient to ensure the implementation of access rights. Governments need the infrastructure and capacity to *supply* access and the public and civil society organisations must have the ability to *demand* access and participate. Government officials need knowledge of the legal

from decision-making, and specific entitlements are needed to facilitate their participation and achieve inclusiveness.[40]

In addition, a free and independent media plays a key role in increasing awareness of environmental protection and sustainable development to those most likely to be effected by these policies. Article 19 of the Universal Declaration of Human Rights declares everyone has the right to freedom of opinion and expression; this right includes freedom to hold

[37] See e.g. the new Constitution of Kenya.

[38] ARTICLE 19, *Access to Environmental in China: Evaluation of Local Compliance*, Ibid.

[39] *Voice and Choice* also found that framework laws on access to information had made significant progress while framework laws on and practice on public participation and access to justice lagged behind.

[40] Foti, Joseph et al., A *Seat at the Table: Including the Poor in Decisions for Development and Environment*, World Resources Institute (2010). http://www.wri.org/publication/a-seat-at-the-table.

opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers. Information access effects how and what media covers. With legal protections, a free and independent media can monitor and strengthen the transparent and accountable delivery of funds for environmental goals on a diverse range of issues including climate change, protected areas, species endangerment, and protection of coastal resources. An effective, free, and independent media translates complex information into a meaningful, understandable, and actionable format for public consumption. Media facilitates discussion and debate between citizens and officials about sustainable development and green policies. The media has the ability to relay back key messages from affected communities to officials.

Furthermore, media plays a key role in an effective advanced warning system, particularly in relation to the dissemination of warnings, developments, and disaster mitigation. Indeed, in many areas affected by natural or other disasters, the mass media are the only means by which crucial information is quickly and widely disseminated. In order to be able to perform this role, the media must be able to access accurate and timely information from credible sources. Local media outlets, including community radios, newspapers, and even television services, have a central role to play not only in disseminating information from official sources but also in ensuring an effective two-way flow of information underpinning effective participation.

4 From Principles to Enforceable Rights: How Rio 2012 Could Strengthen Principle 10

There is a compelling need to ensure that Principle 10 is fully implemented in all countries. While UNEP made some progress in 2010 with the adoption of Bali Guidelines on national legislation discussed above,[41] this development is not sufficient by itself. Voluntary implementation of guidelines, coupled with resource and budgetary support, country-by-country, decreases the usefulness and potential impact of these guidelines.

Bolder action at the global level, involving the development of new and revised international instruments to promote Principle 10, is needed. There are a number of approaches at the international level that should be considered including the drafting and adoption of a new legally binding global instrument, adoption of legally binding instruments at the regional level, and new sustained efforts to bring additional parties into the Aarhus Convention. Such proposals are not exclusive but rather complementary and should be considered as part of a package which can be advanced simultaneously.

4.1 Options for international instruments

Possible options for international instruments:

1. A new global convention on Principle 10. The most far-reaching option is the drafting and adoption of a new global legally binding instrument adopting the access rights in Principle 10. This would be based on a commitment by the national leaders at Rio 2012 to adopt such an instrument. This approach would create a global platform to engage worldwide discussion on the subject**,** as has been done for other areas on environment. It could ensure that P10 is uniformly adopted worldwide. However, there are a number of challenges associated with the development of a global legally binding instrument, such as a convention on access rights. The proposal of such an instrument may encounter resistance from some states and there is real risk that such an initiative would lead to the adoption of minimal standards. It would also likely take a considerable time to develop. Finally, there are possible difficulties on how this would affect parties to the Aarhus Convention**.**

2. Promoting regional Principle 10 conventions. A more scaled down approach would focus on the development of new regional legally binding instruments similar to the UNECE Aarhus Convention. A significant positive aspect to this approach is the potential greater involvement of all countries in each region in developing and shaping the text of the regional instrument from the start, rather than the discussion being limited to major countries at the international level. This would provide the opportunity to take account of regional specificities and create a sense of regional ownership. In addition, countries within a region often share common political, cultural and linguistic ties, potentially simplifying the negotiations and making it easier to reach consensus. It would also likely be a quicker process than a global debate. Finally, regional conventions would likely strengthen existing regional institutions and processes

[41] UNEP Governing Council decision GCSS.XI/11: Environmental law (part A), annexed to the proceedings of the special session: http://www.unep.org/gc/GCSS-XI/proceeding_docs.asp.

to reduce resource constraints.[42] However, this approach is not without risks, set out below.

3. Opening up the UNECE Convention to all states. The last option is to encourage accession to the Aarhus Convention by states outside the UNECE region.[43] The treaty is well respected and has a functioning oversight system. It has already been ratified by 44 countries. However, no states outside the UNECE region have acceded to it to date. There are political and practical obstacles to accession including the procedure for accession itself and reticence from many governments towards adopting a treaty viewed as "European-centric."

4.2 Developing a Regional Convention Approach

We believe that the best approach is to begin the process of negotiating regional and sub-regional legally binding instruments on Principle 10 using the UNECE Aarhus Convention as a model. This approach is guided by a pragmatic belief that a new global convention would be too slow to develop and is likely to be substantially watered down in the process. The Aarhus Convention has been recognised as a model that should be considered for other regions. However since its adoption in 1998 no other nation outside the UNECE region has signed it. This suggests it is not likely to significantly expand in terms of accession without substantial incentives, which have not yet been forthcoming.

There are some risks to this approach – some regions may be unlikely to adopt legally binding instruments at the regional level in the foreseeable future. But there remains the possibility for progress toward agreement on their merits, drafting, and adoption at the sub-regional level. Moreover, the development of regional treaties could further strengthen future efforts to create a global instrument in the future as has happened in the field of anti-corruption.

4.2.1 Opportunities in Latin America

We are particularly hopeful that this approach will be successful in the Latin American and Caribbean region as a first mover region, where there is a normative convergence around Principle 10. Some developments include:

- ***Regional Support***. The Declaration of Santa Cruz +10 reaffirmed the commitment of the members of the Organisation of American States (OAS) to Principle 10 and the importance of public participation in sustainable development decision making.[44] The Inter American Court of Human Rights recognises the right of citizens in the region to have access to information and participate in decisions that affect their rights,[45] while the OAS Secretariat recently released a Model Law on Access to Information.[46]

- ***Free trade agreements*** between several North and South American states recognise the importance of environmental assessments and the need to harmonize environmental regulations and standards. The Central American Commission on Environment and Development (CACED) along with the UN Institute for Training and Research developed tools for a national strategy to guarantee access rights in Nicaragua, Honduras, and the Dominican Republic. ECLAC proposed activities in its 2011 programme of work to help states implement Principle 10.

- ***National Developments***. A number of countries in the region have already adopted laws improving access rights including Chile, Jamaica, Peru, and Mexico while Brazil is currently about to adopt one. Jamaica has just undergone an extensive review of its Access to information Law to improve implementation, proactive disclosure, and development of a mandated public interest test. Mexico has one of the most advanced access to information regulatory systems, with one of the most effective oversight and enforcement agencies in the world, and has developed its own pollutant release and transfer register. Some countries have increased their efforts to promote public participation. For example, Chile is in the process of revising environmental impact regulations that will take public participation to the next level – to proactively include the poor and marginalized groups in decision-making by requiring both the project proponent and the government to adapt their strategies of information dissemination and adopt methods of citizen participation that take into account the social, economic, cultural, and geographic

[42] Jeremy Wates, Options for strengthening the international legal framework protecting procedural environmental rights, including a global convention on access rights, 2010.

[43] Article 19, paragraph 3, of the Convention provides that non-UNECE States may only accede 'upon approval by the Meeting of the Parties.'

[44] http://www.oas.org/dsd/Documents/DECLARACTION+10.pdf.

[45] Judgement in Claude Reyes et al. v. Chile, Inter-American Court of Human Rights, 19 September 2006.

[46] http://www.oas.org/dil/access_to_information.htm.

characteristics of the population in question. The draft regulations require the authority to make special efforts to adapt these procedures, taking into account vulnerable and geographically/territorially isolated communities, indigenous communities or those with ethnic minorities, and communities with a low educational level. What is particularly exciting about this new draft regulation is that it is the first time a Latin American country has brought the notion of environmental justice in public participation into standard practice within the framework of a law. Brazil leads the way with innovative strengthening of the justice system to provide relief for environmental harms through public prosecutors and environmental courts.

5 Conclusion and Recommendations

Experience and research have demonstrated that freedom of expression, access rights (including access to information, public participation, and access to justice), transparency, and civic engagement are fundamental to sustainable development and the achievement of the Rio Principles. While there has been significant progress over the past 20 years, billions of people around the world still do not have these rights.

If Rio 2012 is to be successful and bring the world closer to building a green economy and ensuring sustainable development, these fundamental principles must be at the heart of the *Outcome Document* and consecutive commitments by governments to advance Principle 10 at the international, regional, and national levels.
ARTICLE 19 and The Access Initiative have the following specific four recommendations:

<u>Recommendation One:</u> That all states that have not yet done so, codify Principle 10 of the Rio Declaration in national laws, and for all states to make measurable and time bound commitments to improve laws, institutions, and practices for implementing Principle 10.

In particular, states should provide for:-

A legal and regulatory framework:

1. To establish a legal and regulatory framework to protect the right to freedom of expression and the right to freedom of information, including freedom of the media, as well as the right to freedom of association, freedom of assembly, the right of all to access administrative and judicial remedies, and the right to effective political participation. This legal framework should recognise and insist upon the principle of non-discrimination.
2. To enshrine and implement in domestic law the principles of maximum and proactive disclosure on environmental and green economy information.
3. To enshrine the right of the public, communities, and stakeholders to participate in decision-making that affects the environment and natural resources.
4. To ensure that the media, civil society groups, scientists**,** and members of the general public are not hindered in their efforts to gain access to information on development and environmental issues and to report and express their opinions.
5. To protect the right of whistleblowers, especially related to environmental hazards, and take necessary measures to ensure that whistleblowers should benefit from legal protection.
6. To remove all obstacles preventing people living in poverty, vulnerable groups (such as women and minorities) and indigenous peoples from accessing information on development and environmental policies**,** and to take proactive measures to promote their effective participation in the design and execution of development strategies.

<u>Recommendation Two:</u> The Rio 2012 *Outcome Document* should call for new international instruments to provide global and regional standards for, and oversight of, the implementation of Principle 10 into national law. This would include a resolution by all member states mandating UN regional bodies in Asia, Africa and Latin America and the Caribbean, as well as UNEP regional offices and other regional bodies, such as SAARC, SACEP, ECOWAS, ASEAN, OAU, and OAS[47] to take steps to negotiate and conclude legally binding regional or sub-regional conventions modeled on the UNEP Principle 10 Guidelines. The Aarhus Convention Secretariat should intensify its efforts to convince governments in other regions of the world to either adopt the Convention or take it as a model for regional or sub-regional efforts.

<u>Recommendation Three</u>: The Rio 2012 *Outcome Document* should include a commitment by all

[47] South Asian Association for Regional Cooperation (SAARC), South Asia Co-operative Environment Programme (SACEP), Association of Southeast Asian Nations (ASEAN), Organization of African Unity (OAU), and Organization of American States (OAS).

international organisations and agencies working on sustainable development to codify Principle 10 of the Rio Declaration in their rules and procedures, including by proactively disclosing information, providing for the participation of civil society in their decision-making processes, and establishing redress mechanisms for individuals affected by their policies and activities. International financial institutions should adopt comprehensive standards as proposed by the Global Transparency Initiative.

Recommendation Four: The Rio 2012 *Outcome Document* should include specific and time measured information regarding the implementation of the Bali Guidelines recently adopted by the UNEP Governing Council. This programme should identify target countries and specify long term funding sources as well as a timetable for UNEP to provide assistance to developing countries to bring their laws, institutions, and practices in line with the Guidelines. The programme should include capacity building programmes, opportunities for mentoring of public officials, and mechanisms for civil society organisations to share experiences on the development of new legal instruments to create and implement access rights.

6 Additional Resources

The Access Initiative, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2010) http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20FInal_31399_WRI_0.pdf

The Access Initiative, *Seat at the Table: Including the Poor in Decisions for Development and Environment*, (2010*). http://www.accessinitiative.org/resource/a-seat-table*

The Access Initiative Assessment Toolkit, (2006) http://www.accessinitiative.org/resource/the-access-initiative-assessment-toolkit

The Access Initiative*, Voice and Choice: opening the Door to Environmental Democracy*, World Resources Institute, (2008). http://www.accessinitiative.org/resource/voice-and-choice-opening-door-environmental-democracy

The London Declaration for Transparency, the Free Flow of Information and Development, September 2010. http://www.right2info-mdgs.org/declaration/

ARTICLE 19, *Changing the Climate for Freedom of Expression and Freedom of Information* (2009). http://www.article19.org/pdfs/publications/changing-the-climate-for-freedom-of-expression-and-freedom-of-information.pdf

UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, 2010. http://www.unep.org/DEC/PDF/GuidelinesAccesstoJustice2010.pdf

UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. http://www.unece.org/env/pp/

ABOUT THE ACCESS INITIATIVE AND ARTICLE 19

The Access Initiative is the world's largest network of civil society organisations working to ensure that people have the right and ability to influence decisions about the natural resources that sustain their communities (www.accessinitiative.org).

ARTICLE 19, the Global Campaign for Free Expression, is an international human rights organisation focused on protecting and promoting the right to freedom of expression and right to information. ARTICLE 19 is a registered UK charity (No. 32741) with headquarters in London and field offices in Kenya, Senegal, Bangladesh, Mexico and Brazil (www.article19.org).