

OTHER INTERNATIONAL DEVELOPMENTS

Environmental Rights in Multilateral Treaties Adopted between 1991 and 2001*

by Dinah Shelton **

Introduction

Principle 1 of the *Stockholm Declaration* established a foundation for linking human rights and environmental protection, declaring that man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being. It also announced the responsibility of each person to protect and improve the environment for present and future generations. Almost twenty years later, in resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts towards ensuring a better and healthier environment.

In contrast to the earlier documents, the 1992 UN Conference of Rio de Janeiro on Environment and Development (UNCED) formulated the link between human rights and environmental protection largely in procedural terms. Principle 10 of the *Rio Declaration on Environment and Development* proclaims as follows:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Rights to information, participation and remedies in respect to environmental conditions thus formed the focus of the Rio Declaration. In addition to Principle 10, the Declaration includes provisions on the participation of different components of the population: women (Principle 20), youth (Principle 21), and indigenous peoples and local communities (Principle 22). Public participation also is emphasized in Agenda 21. The Preamble to Chapter 23 states:

One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to informa-

tion relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.

Chapter 23 proclaims that individuals, groups and organizations should have access to information relevant to the environment and development, held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection matters.¹ Agenda 21 also calls on governments and legislators to establish judicial and administrative procedures for legal redress and remedy for actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organizations with a recognized legal interest. Section III of Chapter 23 identifies major groups whose participation is needed: women, youth, indigenous and local populations, non-governmental organizations, local authorities, workers, business and industry, scientists and farmers. Agenda 21 also calls for public participation in environmental impact assessment procedures and in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work. It also encourages governments to create policies that facilitate a direct exchange of information between the government and the public in environmental issues, suggesting the EIA (environmental impact assessment) process as a potential mechanism for participation.

In the decade since preparations began for the Rio Conference, global and regional treaties adopted in the fields of human rights and environmental protection have included provisions specific to the rights contained in Principle 10. The language used by different instruments is far from being homogeneous. Sometimes public participation is used in a broad sense to designate the recommended openness of authorities towards individuals and groups of individuals, and includes the right to information rather than separately guaranteeing it. Some treaties also contain substantive rights to a particular environmental quality while others, such as the Lugano Convention, focus on remedies for environmental harm. Generally, global and regional environmental treaties since 1991 contain at least some reference to public information, access or remedies, although this practice is not usually followed in cases with watercourse agreements. Such agreements tend to focus on interstate management and utilization of freshwater bodies without reference to public information and participation. See, e.g., the *Agreement on the Coop-*

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eration for the Sustainable Development of the Mekong River Basin (Chiang Rai, 5 April 1995), the *Protocol on Shared Watercourse Systems in the Southern African Development Community Region* (28 August 1995), the *Convention on the International Commission for the Protection of the Order* (Wrocław, 11 April 1996), and the *UN Convention on the Law of the Non-Navigational Uses of International Watercourses* (New York, 21 May 1997) (the last does contain a requirement of non-discrimination in respect to any remedies that are provided). The exceptions in this regard are the regional *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Helsinki, 17 March 1992), as discussed below, and the *Convention on Cooperation for the Protection and Sustainable Use of the Danube River* (Sofia, 29 June 1994).

Human rights treaties of the past decade are fewer in number than the total of environmental agreements adopted during the same period, and most of those that have been concluded have been at the regional level. In general, global treaties have not included specific reference to the environment or to environmental rights. In contrast, even prior to the Rio Conference, regional instruments contained provisions on environmental rights. Although they predate the conference they are included below, as are the relevant provisions of the global *Convention on the Rights of the Child* and *ILO Convention No. 169*.

The following sections refer to the relevant provisions in multilateral treaties adopted since preparations for the Rio Conference began in 1991, with a few human rights provisions cited from earlier agreements.

Treaty Provisions

A. Global environmental treaties

1. An obligation to inform is foreseen by Annex II to the *Protocol on Environmental Protection on the Conservation of Antarctic Fauna and Flora* (Madrid, 1991). According to Article 5, the Parties shall prepare and make available information setting forth and providing lists of Specially Protected Species and relevant protected Areas to all those persons present or intending to enter the Antarctic Treaty area with a view to ensuring that such persons understand and observe the provisions of the Annex.² A parallel provision is inserted in Annex V of the Protocol, on Area Protection and Management, according to which each party shall make available information setting forth, *inter alia*, the location of protected areas and of historic monuments and sites, as well as the management plans, with a view to ensuring that all persons visiting or proposing to visit Antarctica understand and observe the provisions of the Annex.³
2. The *Framework Convention on Climate Change* (4 June 1992),⁴ Article 4(1)(i) obliges Parties to promote public awareness and to "encourage the widest participation in this process including that of non-governmental organizations". Article 6 provides that its parties "shall promote and facilitate at the national and, as appropriate, sub-regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities" provide public access to information and public participation.⁵
3. *Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and the Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage* (London, 27 November 1992) extend the provisions of the 1969 conventions that aim to provide remedies for those who suffer harm from oil pollution damage.
4. The *Convention on Biological Diversity* refers in its preamble to the general lack of information and knowledge regarding biological diversity, and affirms the need for the full participation of women at all levels of policy-making and implementation. Article 13 calls for education to promote and encourage understanding of the importance of conservation of biological diversity. Article 14 provides that each contracting party, as far as possible and as appropriate, shall introduce appropriate environmental impact assessment procedures and where appropriate allow for public participation in such procedures.⁶ The Convention also calls for the participation of indigenous and local peoples in decisions about sharing their knowledge, innovations and practices concerning conservation and sustainable use of biological diversity (Art. 8(j)).
5. *International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa* (Paris, 17 June 1994),⁷ contains numerous provisions on environmental rights, including in the Preamble, Article 10(2)(e), 13(1)(b), 14(2)(19) and 25. The Convention goes furthest among recent treaties in calling for public participation, embedding the issue throughout the agreement. Articles 3(a) and (c) begin by recognizing that there is a need to associate civil society with the actions of the State. The treaty calls for an integrated commitment of all actors: national governments, scientific institutions, local communities and authorities, and non-governmental organizations, as well as international partners, both bilateral and multilateral.⁸
6. The IAEA (International Atomic Energy Agency) *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*⁹ is based to a large extent on the principles contained in the IAEA document "The Principles of Radioactive Waste Management". The Preamble of the treaty recognizes the importance of informing the public on issues regarding the safety of spent fuel and radioactive waste management. This view is reinforced in Articles 6 and 13, on the siting of proposed facilities; they require each State Party to take the appropriate steps to ensure that procedures are established and implemented to make information available to members of the public on the safety of any proposed spent fuel management facility or radioactive waste management facility.
7. The *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*

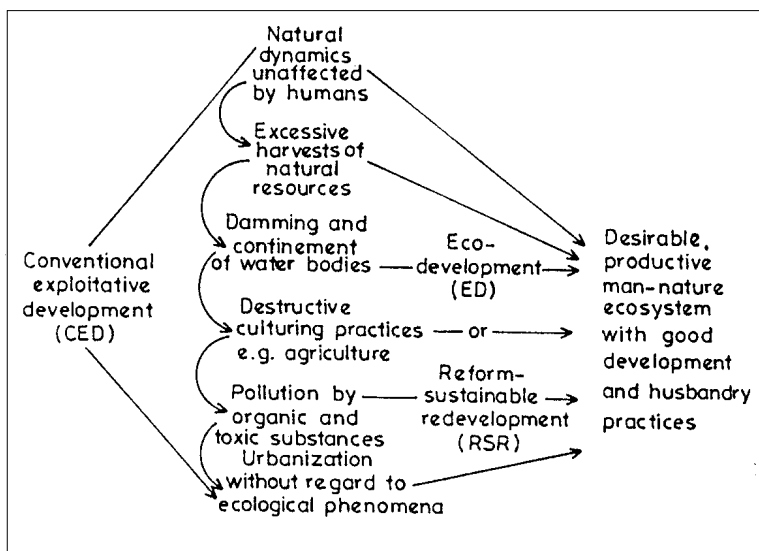
(London, 3 May 1996) is similar to the Convention on Liability for Oil Pollution Damage. It ensures a remedy for those injured by damage, imposes a mandatory insurance requirement, and establishes limits on liability and a compensation fund.

8. Article 32 of the UN *Convention on the Law of the Non-navigational Uses of International Watercourses* (New York, 21 May 1997) concerns freedom from discrimination in respect to remedies. It says that watercourse States shall not discriminate on the basis of nationality or residence or place when the injury occurred, in granting to persons who suffered or are under a serious threat of suffering significant transboundary harm, in accordance with their legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in their territory.
9. On September 12, 1997, a *Joint Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage (21 May 1963) and the Paris Convention on Third Party Liability in the Field of Nuclear Energy (29 July 1960) as amended*, updated the provisions imposing civil liability on owners or operators of nuclear facilities and providing remedies for those injured as a result of nuclear incidents.
10. *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (10 September 1998).¹⁰ Article 15(2) requires each State party to ensure "to the extent practicable" that the public has "appropriate" access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention.
11. *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (Montreal, 29 January 2000),¹¹ Art. 23 concerns public awareness and participation, requiring the Parties to facilitate awareness, education and participation concerning the safe transfer, handling and use of living modified organisms (LMOs) in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. Access to information on imported LMOs should be ensured and the public consulted in the decision-making process regarding such organisms, with the results of such decisions made available to the public. Further, each Party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House created by the Convention.
12. Article 10(1) of the *Convention on Persistent Organic Pollutants* (Stockholm, 22 May 2001)¹² aims at "protecting human health and the environment from persistent organic pollutants". The treaty provides that each party shall, within its capabilities, promote and

facilitate provision to the public of all available information on persistent organic pollutants and ensure that the public has access to public information and that the information is kept up to date (Art.10(1)(b) and (2)). Educational and public awareness programmes are to be developed especially for women, children and the least educated. Parties are to make accessible to the public on a timely and regular basis the results of their research, development and monitoring activities pertaining to persistent organic pollutants (Art. 11). Parties that exchange information pursuant to the Convention shall protect any confidential information, but information on health and safety of humans and the environment shall not be regarded as confidential (Art. 9(5)).

B. Regional environmental treaties

1. The *Espoo Convention on Environmental Impact Assessment in a Transboundary Context*,¹³ adopted on 25 February 1991 during preparations for the Rio Con-



The meaning of major policy options for sustainable development, eco-development and/or reform sustainable redevelopment (after Regier, 1991).

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ference, guarantees non-discriminatory public participation in environmental impact procedures within the scope of the Convention. Article 2(6) provides that "[t]he Party of origin shall provide an opportunity to the public in areas likely to be affected to participate in relevant impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin." The Convention makes public participation obligatory without regard to pre-existing State legislation:

The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with, possibilities for making comments or objections on the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the party of origin (Article 3 para. 8).

The *Convention* requires States parties to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities in any area likely to be affected by transboundary environmental harm. In a final decision on the proposed activities, the State must take due account of the environmental impact assessment, including the opinions of the individuals in the affected area.

2. *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes* (Geneva, 18 November 1991),¹⁴ Article 2(3)(a)(4).
3. The treaty system established by the *Convention concerning the Protection of the Alps* adopted in Salzburg on 7 November 1991¹⁵ and complemented by nine Protocols, contains broad guarantees of public information. While the main treaty expresses the duty of the Contracting Parties to ensure that the public is regularly kept informed in an appropriate manner about the results of research, monitoring and action taken, subject to compliance with national laws on confidentiality (Art. 4(4) and (5)), eight out of the nine Protocols provide that the States Parties favour training and information of the public concerning the objectives, the measures and the implementation of the agreed rules.¹⁶
4. The *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Helsinki, 17 March 1992)¹⁷ provides considerable detail about procedures of information and is virtually unique among watercourse agreements in doing so. It declares that information on the conditions of transboundary waters, measures taken or planned, to prevent, control and reduce transboundary environmental impact, and the effectiveness of those measures, shall be made available to the public at all reasonable times for inspection free of charge. Members of the public are to be provided with reasonable facilities for obtaining from the Riparian Parties, on payment of reasonable charges, copies of such information (Art. 16).
5. Another regional instrument drafted under the auspices of the United Nations Economic Commission for Europe (UNECE) and adopted in the months prior to Rio, the *Convention on Transboundary Effects of Industrial Accidents* (Helsinki, 17 March 1992),¹⁸ was the first international treaty to contain the three procedural environmental rights: information, participation and access to remedies (Art. 9). The Convention requires its Parties to ensure that adequate information is given to the public in all areas capable of being affected by an industrial accident arising out of a hazardous activity. Annex VIII specifies the information to be transmitted, which should take into account the environmental analysis and evaluation listed in Annex V. The public in areas capable of being affected by the proposed activity should be given the opportunity to participate in relevant procedures, with the aim of making known their views and concerns on prevention and preparedness measures. Equivalent opportunity to participate must be given to the public of the State of origin and the public of the potentially affected State. The States Parties shall also, in accordance with their legal systems and, if desired, on a reciprocal basis, provide natural and legal persons who are being or are capable of being adversely affected by the transboundary effects of an industrial accident with access to, and participation in, relevant administrative and judicial proceedings, including the possibilities of starting a legal action and appealing a decision affecting their rights, again equivalent to those available to persons within their own jurisdiction. On public participation, see Article 9.
6. *Convention for the Protection of the Marine Environment of the Baltic Sea* (Helsinki, 9 April 1992),¹⁹ Article 17. The Convention also provides for the protection of information "related to intellectual property including industrial and commercial secrecy". It adds that if a State nevertheless decides to supply such protected information to another State, the latter shall respect the confidentiality of the information received and the conditions under which it is supplied, and shall use that information only for the purposes for which it was supplied (Art. 18).
7. *Convention on the Protection of the Black Sea against Pollution* (Bucharest, 21 April 1992)²⁰ contains a rare provision on remedies. Its article 16 specifies that each Contracting Party shall adopt rules and regulations on the liability for damage caused by natural or juridical persons and shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief for damage caused by pollution of the marine environment of the Black Sea (Art. XVI).
8. *Convention for the Conservation of the Biodiversity and the Protection of Wilderness Areas in Central America* (Managua, 5 June 1992). Article 6 calls for stimulating knowledge about biological diversity in the region, while Article 7 calls for recognition and support for the knowledge, practices and technological innovations developed by native groups in the region which contribute to the sustainable use and conservation of biological resources. Article 13(f) calls upon each State Party to promote public awareness of the necessity of conserving, using sustainably and developing the biological resources of the area. In Article 35 the States Parties recognize the importance of public participation in actions to conserve biodiversity and agree to promote the development of educational materials to be distributed by the media as well as being included in public and private educational institutions.
9. *Convention for the Protection of the Marine Environment of the North-East Atlantic* (Paris, 22 September 1992).²¹ Article 9 requires the contracting parties to ensure that their competent authorities are required to make available relevant information to any natural or legal person, in response to any reasonable request, without the person having to prove an interest, without unreasonable charges and within two months of the request. The protection of the confidentiality of

the proceedings of public authorities, international relations, of commercial and industrial information including intellectual property, and of personal data and/or files is also foreseen (Art. 9(3)).

10. *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* (Lugano, 26 June 1993).²² The primary focus of the Convention is on providing access to remedies for environmental harm. Broad standing is provided to environmental organizations to seek the prohibition of an unlawful activity that poses a grave threat of damage to the environment and to seek orders against operators in order to prevent or mitigate damage. Actions for compensation for harm suffered must be brought within three years from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator, and in no case more than thirty years from the date of the incident which caused the damage. Jurisdiction exists where the damage was suffered; where the dangerous activity was conducted and where the defendant has his habitual residence. Chapter III, comprising Articles 13 to 16, concerns access to information. Public authorities are to provide access to information to any person upon request and without the person having to prove an interest. Certain exceptions are provided, and there is a time limit of two months for reply. Any person who considers that his request for information has been unreasonably refused or ignored or has been inadequately answered by a public authority is entitled to seek a judicial or administrative review of the decision, in accordance with the relevant legal system. Parties may impose a reasonable cost for supplying the information (Art. 14). Articles 15 and 16 extend rights to information to "bodies with public responsibilities for the environment and under the control of a public authority" and, under specified conditions, to operators of activities dangerous to the environment. In respect to the latter, a person suffering damage may, at any time, request the court to order an operator to provide specific information in so far as this is necessary to establish the existence of a claim for compensation under the Convention (Art. 16).
11. *North-American Agreement on Environmental Cooperation* (NAAEC) (Washington, D.C., September 13, 1993)²³ Art. 2(1)(a), 14. Also known as the NAFTA side agreement, the treaty contains institutional arrangements for public participation. It creates a permanent trilateral body, the Commission for Environmental Cooperation (CEC), composed of a Council, a Secretariat and a Joint Public Advisory Committee (Article 8). The Joint Public Advisory Committee includes fifteen members from the public, five from each member country, and advises the Council as well as provides technical, scientific, or other information to the secretariat. The Committee also may advise on the annual programme and budget as well as reports that are issued. It meets annually, along with the regular meetings of the Council. NAAEC is also the first environmental agreement to establish a procedure which allows individuals, environmental organizations and business entities to complain about a State's failure to enforce its environmental law, including those deriving from international obligations.
12. *Convention on Cooperation and Sustainable Use of the Danube River* (Sofia, 29 June 1994).²⁴ Article 14 requires the Contracting Parties to ensure that their competent authorities are required to make available information concerning the state or the quality of riverine environment in the Danube Basin to any natural or legal person, with payment of reasonable charges, in response to any reasonable request, without that person having to prove an interest, as soon as possible. The information may be given in written, visual, oral or data-based form. Any refusal to provide the information requested, based upon specified reasons, must be given in writing.
13. *Energy Charter Treaty* (Lisbon, 17 December 1994), Art. 19(1)(i) and 20, EMuT, 994:93. Article 19(1)(f) calls on parties to promote public awareness of the environmental impacts of energy systems, of the scope for the prevention or abatement of their adverse environmental impacts, and of the costs associated with various prevention or abatement measures; while paragraph "i" calls for promoting the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of environmental impacts of environmentally significant energy investment projects. Article 20 requires parties to publish promptly all laws, regulations, judicial decisions and administrative rulings of agreements in force between Contracting Parties which affect other matters covered by this Treaty. The publication must take place in such a manner as to enable Contracting Parties and Investors to become acquainted with them. Contracting Parties are not required to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any Investor.
14. *Amendments to the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution* (Barcelona, 10 June 1995),²⁵ Art. 15, 16 and 17. Article 15 concerns public information and participation. It requires the Contracting Parties to ensure that their competent authorities give the public appropriate access to information on the environmental state in the field of application of the Convention and the Protocols, on activities or measures adversely affecting or likely to affect it and on activities carried out or measures taken in accordance with the Convention and the Protocols. The Contracting Parties shall also ensure that the opportunity is given to the public to participate in decision-making processes relevant to the field of application of the Convention and the Protocols, as appropriate. The Contracting Parties may refuse, in accordance with their legal systems and applicable international regulations, to provide access to such information on the grounds of confidentiality, public security or investigation proceedings, stating the reasons for such a refusal. Article 16, on liability and

compensation, specifies that the Contracting Parties undertake to cooperate in the formulation and adoption of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea area. Finally, Article 17, concerning the institutional arrangements for the system, provides that the United Nations Environment Programme, carrying out the secretariat functions, shall receive, consider and reply to enquiries and information from non-governmental organizations and the public when they relate to subjects of common interest or to activities carried out at the regional level.

15. *Inter-American Convention for the Protection and Conservation of Sea Turtles* (Caracas, 1 December 1996). Article 4 (2)(g) provides that the appropriate and necessary measures that each Party shall take, "in accordance with international law and on the basis of the best available scientific evidence, for the protection, conservation and recovery of sea turtle populations and their habitats" shall include: "the promotion of environmental education and dissemination of information in an effort to encourage the participation of government institutions, non-governmental organizations and the general public of each State, especially those communities that are involved in the protection, conservation and recovery of sea turtle populations and their habitats."

16. *Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean* (Barcelona, 19 June 1995).²⁶ Article 19, on publicity, information, public awareness and education, was added in 1995 to the original 1982 agreement. It provides that the Parties shall give appropriate publicity to the establishment of specially protected areas, their boundaries, applicable regulations, and to the designation of protected species, their habitats and applicable regulations. Further, the Parties shall endeavour to inform the public of the interest and value of specially protected areas and species, and of the scientific knowledge which may be gained from the point of view of nature conservation and other points of view. Such information should have an appropriate place in education programmes. The Parties shall also endeavour to promote the participation of their public and their conservation organizations in measures that are necessary for the protection of the areas and species concerned, including environmental impact assessments.

17. *The Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters* (Aarhus, 25 June 1998), signed by thirty-five States and the European Community, takes a comprehensive approach. The Convention builds on prior texts, especially Principle 1 of the Stockholm Declaration, which it incorporates and strengthens. The Preamble states that "every person has the right to live in an environ-

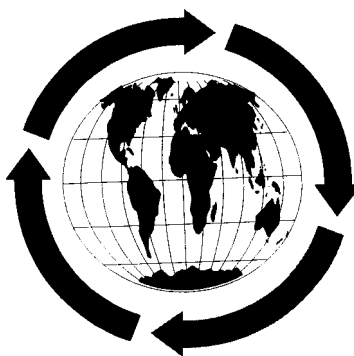
ment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." The following paragraph adds that to be able to assert the right and observe the duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. These provisions are repeated in Article 1 where States Parties agree to guarantee the rights of access to information, public participation and access to justice. The Convention acknowledges its broader implications, expressing a conviction that its implementation will "contribute to strengthening democracy in the region of the UNECE". Although it was open for signature only by States members of the UNECE as well as States having consultative status with it (Art. 17), its Article 19 opens the door to accession by other States under the conditions that they are members of the UN and that the accession is approved by the Meeting of the Parties of the Convention.

The *Aarhus Convention* obliges States Parties to collect and publicly disseminate information, and respond to specific requests (Articles 4-5). Each Party is to prepare and disseminate a national report on the state of the environment at three- to four-year intervals. In addition, it is to disseminate legislative and policy documents, treaties and other international instruments relating to the environment. Each Party must ensure that public authorities, upon request, provide environmental information to a

requesting person without the latter having to state an interest. "Public authorities" means, in addition to government bodies, any natural or legal person having public responsibilities or functions or providing public services. The information has to be made available within one month, or in exceptional cases, up to three months. In addition to providing information on request, each State Party must be proactive, ensuring that public authorities collect and update environmental information relevant to their functions. This re-

quires that each State Party establish mandatory systems to obtain information on proposed and existing activities which could significantly affect the environment. This provision is clearly aimed at the private sector and is supplemented by Article 5(6) which requires States Parties to encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, through eco-labelling, eco-auditing or similar means. States Parties are also to ensure that consumer information on products is made available.

The Aarhus Convention provides numerous exceptions in Article 4(4) to the duty to inform, in the light of other political, economic and legal interests. Thus, the State may refuse to provide information if the information is not in



its possession; the request is manifestly unreasonable or too general; concerns material not completed or internal communications of a public authority; or if the disclosure would adversely affect:

- the confidentiality of public proceedings;
- international relations, national defence or public security;
- criminal investigations or trials;
- commercial and industrial secrets; however, information on emissions relevant to the protection of the environment shall be disclosed;
- intellectual property rights;
- privacy, i.e. personal data;
- the interests of a third party; or
- the environment, such as the breeding sites of rare species.

The Convention states that all exceptions are to be read restrictively and the State may provide broader information rights than those contained in the Convention. In addition, where non-exempt information can be separated from that not subject to disclosure, the non-restricted information must be provided. In spite of these interpretive provisions, many environmental groups have expressed concern that the exceptions will result in the withholding of extensive and crucial information. Any refusal to provide information must be in writing and with reasons given for the refusal. Reasonable fees may be charged for supplying information. The government has special disclosure obligations in case of any imminent threat to human health or the environment.

To enhance the effectiveness of the Convention, the States Parties must provide information about information, i.e. the type and scope of information held by public authorities, the basic terms and conditions under which it is made available, and the procedure by which it could be obtained. The Convention also foresees the establishment of publicly-accessible electronic sites that should contain reports on the state of the environment, texts of environmental legislation, environmental plans, programmes and policies, and other information that could facilitate the application of national law.

In the Aarhus Convention, public participation is guaranteed in Articles 6-8, and is required in regard to all decisions on whether to permit or renew permission for industrial, agricultural and construction activities listed in an Annex to the Convention as well as other activities which may have a significant impact on the environment. The public must be informed in detail about the proposed activity early in the decision-making process and must be given time to prepare and participate in the decision-making. During the process, the public must have access to all relevant information on the proposal including the site, description of environmental impacts, measures to prevent and/or reduce the effects, a non-technical summary, an outline of the main alternatives, and any reports or advice given. Public participation can be through writing, hearings or inquiry. All public comments, information, analyses or opinions shall be taken into account by the party in making its decision. All decisions shall be made

public, along with the reasons and considerations on which the decision is based.

In addition to providing for public participation regarding decisions on specific projects, the Convention calls for public participation in the preparation of environmental plans, programmes, policies, laws and regulations. Further, States Parties are to promote environmental education and to recognize and support environmental associations and groups.

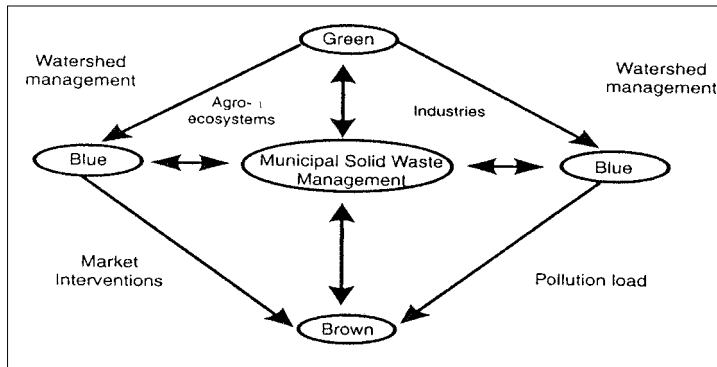
The provisions of Article 9 of the Aarhus Convention mirror many human rights texts in requiring proceedings before an independent and impartial body established by law. Each State Party must provide judicial review for any denial of requested information, and a remedy for any act or omission concerning the permitting of activities and "acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment". Standing to challenge permitting procedures or results is limited to members of the public having a sufficient interest or maintaining impairment of a right; however, the Convention provides that environmental non-governmental organizations "shall be deemed" to have sufficient interest for this purpose. Standing to challenge violations of environmental law is open to the public, including NGOs "where they meet the criteria, if any, laid down in national law" (Article 9 (3)).

The Convention's topic has induced the drafters to take small steps towards the creation of compliance procedures and enhancement of public participation on the international level. Primary review of implementation is conferred on the Meeting of the Parties, at which non-governmental organizations "qualified in the fields to which this Convention relates" may participate as observers if they have made a request and not more than one-third of the parties present at the meeting raise objections (Article 10). This is a common provision in international environmental agreements. The Convention adds, however, a provision on compliance review (Article 15) which mandates the establishment by the Meeting of the Parties of a "non-confrontational, non-judicial and consultative" optional arrangement for compliance review, which "shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention". This tentative language marks the first time a petition procedure has been contemplated in an international environmental agreement. If the compliance procedure is established, it will mark an important step in enhancing the effectiveness of international environmental agreements. At present, nearly all such agreements vest authority over issues of implementation and compliance in the Conference or Meeting of the Parties, a plenary and political body. In some cases small secretariats are created, but they lack broad competence over compliance matters.

18. A *Protocol on Water and Health* to the Helsinki Watercourses Convention, adopted in London on 17 June 1999,²⁷ details in Article 10 the required content of public information. The objective of that Protocol is to promote the protection of human health and well-

being at all appropriate levels, nationally as well as in transboundary and international contexts. See also Art. 5(i).

19. The Council of Europe *Convention on the Protection of the Environment through Criminal Law* (Strasbourg, 4 November 1998)²⁸ provides that each Party may “declare that it will, in accordance with domestic law, grant any group, foundation or association which, according to its statutes, aims at the protection of the environment, the right to participate in criminal proceed-



Municipal solid waste management with multiple environmental foci

Courtesy: ETaBM

ings concerning offences established in accordance with th[e] Convention” (Art. 11).

20. The *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* (5 September 2000, 40 ILM 278 (2001)) adopts a participatory approach to fish stock management in the region. Article 21, entitled “transparency”, calls on the Commission created to “promote transparency in its decision-making processes and other activities”. Representatives from inter-governmental and non-governmental organizations concerned with matters relevant to the implementation of the Convention shall be afforded the opportunity to participate in the meetings of the Commission and its subsidiary bodies. Rules of procedure are to detail the modalities of participation and “shall not be unduly restrictive in this respect”. Such organizations are also to be given timely access to pertinent information.

C. Global human rights treaties

1. The *Convention on the Rights of the Child* (New York, 20 November 1989) refers to aspects of environmental protection in respect to the child’s right to health. Article 24 provides that States Parties shall take appropriate measures to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution” (Art. 24(2)(c)). Information and education is to be provided to all segments of society on hygiene and environmental sanitation (Art. 24(2)(e)).
2. *ILO Convention No. 169 concerning Indigenous and*

Tribal Peoples in Independent Countries (Geneva, 27 June 1989) contains numerous references to the lands, resources and environment of indigenous peoples. Article 2 provides that actions respecting indigenous peoples shall be developed with the participation of the peoples concerned. Special measures are to be adopted for safeguarding the environment of such peoples consistent with their freely-expressed wishes (Art. 4). States Parties must consult indigenous peoples (Art. 6) and provide for their participation in formulating

national and regional development plans that may affect them (Art. 7). Environmental impact assessment must be done of planned development activities with the cooperation of the peoples concerned (Art. 7(3)) and “governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit” (Art. 7(4)). Rights to remedies are provided in Article 12. Part II of the Convention addresses land issues, including the rights of the peoples concerned to the natural resources pertaining to their lands. The rights include “the right to participate in the use, management and conservation of these resources” (Art. 15). Article 30 requires governments to make known to the peoples concerned their rights and duties.

D. Regional human rights treaties

1. The *African Charter on Human and Peoples’ Rights*, (Banjul, 26 June 1991) contains several provisions related to environmental rights. Article 21 provides that “all peoples shall freely dispose of their wealth and natural resources” and adds that this right shall be exercised in the exclusive interest of the people”. Article 24, which could be seen to complement or perhaps conflict with Article 21, states that “all peoples shall have the right to a general satisfactory environment favourable to their development”. Article 7 provides that “every individual shall have the right to have his cause heard”.
2. Article 11 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (San Salvador, 17 November 1988),²⁹ is titled: “Right to a healthy environment”. It proclaims:
 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
 2. The States Parties shall promote the protection, preservation and improvement of the environment.
3. The *European Convention on the Exercise of Children’s Rights* (Strasbourg, 25 January 1996)³⁰ aims at ensuring access to information and participation of children in decisions relevant to them, as well as appropriate remedies (Articles 1 and 3).

E. Non-binding instruments

1. The World Health Organization’s *European Charter on the Environment and Health*³¹ states that “every

individual is entitled to information and consultation on the state of the environment.”

2. The States participating in the Helsinki process have confirmed the right of individuals, groups, and organizations to obtain, publish and distribute information on environmental issues.³²
3. The *Bangkok Declaration*, adopted on 16 October 1990,³³ affirms similar rights in Asia and the Pacific.
4. The *Arab Declaration on Environment and Development and Future Perspectives* of September 1991³⁴ speaks of the right of individuals and non-governmental organizations to acquire information about environmental issues relevant to them.
5. *Joint Communiqué and Declaration on the Establishment of the Arctic Council*, Ottawa, 19 September 1996, 35 ILM 1382, in its Preamble and Articles 1(a), 2 and 3(c), provides rights of participation to indigenous communities of the circumpolar region.

Appendix: Other Legal Instruments

A. European Community texts

In the European Community two general directives address rights of information. First, the duty to provide information in connection with mandatory environmental assessment projects is made explicit in Council *Directive Concerning the Assessment of the Effects of Certain Public and Private Projects on the Environment*.³⁵ Second, on 7 June 1990 the Community adopted a *Directive on Freedom of Access to Information on the Environment*.³⁶ The Directive covers virtually all environmental data, including information held by public authorities that relates to the state of the environment; activities or measures adversely affecting or likely so to affect the environment; and activities or measures designed to protect the environment (Article 2(a)). “Public authorities” is defined to include all administrations with responsibilities relating to the environment (Article 2(b)) but Article 6 extends the Directive’s application to all bodies which have responsibilities for the environment that derive from public authorities. Thus, the Directive applies to any delegated environmental functions, except judicial and legislative bodies acting “in a judicial or legislative capacity.” Access to information is available to any “natural or legal person” without distinction according to nationality and without the necessity to prove an interest (Article 3(1)), thus allowing individuals in another member State or even those from outside the Community to have access to information. The State must respond within two months to any request for information and must give reasons for any refusal to supply the requested information. When the access to information is refused, a judicial or administrative review of the decision must be provided in accordance with the relevant national legal system. The scope of the right of access to information as well as the grounds for refusal should be subject to review by the European Court of Justice in a properly brought case.

On 7 December 2000, the Nice Summit of the European Union adopted the *Charter of Fundamental Rights of the European Union*. Article 37 of the Charter concerns

environmental protection. Unlike many provisions of the Charter, including the right to health, the article is not framed in terms of rights of persons within the European Union or of duties of member States. Instead, it provides that “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

B. Treaty for the establishment of the East African community

Article 111 proclaims that “a clean and healthy environment is a prerequisite for sustainable development.”

Notes:

- ¹ A/CONF. 151/26.
- ² EmuT 991:74 at 38.
- ³ Op. cit. at 59.
- ⁴ 31 I.L.M. 849 (1992).
- ⁵ EmuT 992:35.
- ⁶ EmuT 992:42.
- ⁷ EMuT, 994:76.
- ⁸ See also articles 13(1)(b), 14(2), 19 and 25.
- ⁹ Vienna, 5 September 1997, EmuT 997:67.
- ¹⁰ EMuT, 998:26.
- ¹¹ 39 ILM1027.
- ¹² 40 ILM 532 (2001).
- ¹³ EmuT 991:15.
- ¹⁴ EmuT, 991:84/D.
- ¹⁵ EmuT 991:83.
- ¹⁶ Protocol for the Implementation of the Alpine Convention in the Field of Town and Country Planning and Sustainable Development, Chambery, 20 December 1994, Art. 15, EmuT 991:83/B; Protocol for the Implementation of the Alpine Convention in the Field of Mountain Agriculture, Art. 18, Chambery, 20 December 1994, EmuT 991:83/C; Protocol for the Implementation of the Alpine Convention in the Field of Nature Protection and Landscape Conservation, Art. 21, Chambery, 20 December 1994, EmuT 991:83/D; Protocol for the Implementation of the Alpine Convention in the Field of Soil Protection, Art. 22, Bled, 16 October 1998, EmuT 991:83/F; Protocol for the Implementation of the Alpine Convention in the Field of Energy, Art. 16, Bled, 16 October 1998, EmuT 991:83/G; Protocol for the Implementation of the Alpine Convention in the Field of Tourism, Art. 23, Bled, 16 October 1998, EmuT 991:83/H; Protocol for the Implementation of the Alpine Convention in the Field of Transport, Art. 19, Lausanne, 13 October 2000, EmuT 991:83/I.
- ¹⁷ EmuT 992:20.
- ¹⁸ EmuT 992:22.
- ¹⁹ EMuT 992:28.
- ²⁰ 32 ILM 1101 (1993).
- ²¹ EMuT 1992:71.
- ²² EMuT 993:19.
- ²³ EMuT 993:68.
- ²⁴ EMuT 994:49.
- ²⁵ EMuT 976:13/G.
- ²⁶ EMuT 976:13/F.
- ²⁷ EmuT 992:20/A.
- ²⁸ Council of Europe ETS No. 172.
- ²⁹ OASTS 69.
- ³⁰ 35 ILM 651 (1996).
- ³¹ Adopted on 8 December 1989 by the First Conference of Ministers of the Environment and of Health of the Member States of the European Region of the World Health Organization.
- ³² Conference on Security and Cooperation in Europe, Sofia Meeting on Protection of the Environment (Oct.-Nov. 1989), CSCE/SEM.36, 2 November 1989.
- ³³ Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, A/CONF.151/PC/38. Paragraph 27 affirms “the right of individuals and non-governmental organizations to be informed of environmental problems relevant to them, to have the necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment.”
- ³⁴ Adopted by the Arab Ministerial Conference on Environment and Development in Cairo, A/46/632, cited in UN Doc. E/CN.4/Sub.2/1992/7, 20.
- ³⁵ Council Directive 85/337/EEC of 27 June 1985, O.J. L 175/490.
- ³⁶ Council Directive 90/313/EEC, O.J. 1990 L 158.