

# “Application of International Best Practice Related to SDG16: the UNEP Bali Guidelines on Rio Principle 10”

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# Our Common Future (1987)

Report of the World Commission on Environment and Development (Brundtland Report)

- *The Concept of Sustainable Development*
- “The law alone cannot enforce the common interest. It principally needs community knowledge and support, which entails greater public participation in the decisions that affect the environment.”

# Stockholm to Rio

- Principle 1 of Stockholm Declaration (1972) spoke of a right to a decent environment and the duty to protect the environment
- Principle 10 of the Rio Declaration (1992) showed the way for individuals and groups to reach the goal of a healthy environment is to participate in decisionmaking
- Principle 10 set framework for 3 pillars of access to information, public participation in decision-making, and access to justice, in environmental matters

# Principle 10 of the Rio Declaration on Environment and Development (1992)

- *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.*

# 7 Precepts of Environmental Rule of Law (Benjamin and Fulton)

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

# Framework for Environmental Governance: Global

- **Global Conferences** (Stockholm, Rio, Jo'burg, Rio+20, trade/development conferences)
- **2015 SDGs** – Sustainable Development Agenda for 2030
- **Paris Agreement**
- **Sendai Framework** on DRR

# 1998 Aarhus Convention

“Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters”

- Entered into force 2001
- Major impact on EU environmental *acquis communautaire*



Kofi Annan, former Secretary-General of the United Nations

In 2000, for the launch of the implementation guide to the Aarhus Convention, Annan called the Aarhus Convention an *"ambitious venture in the area of environmental democracy ..."*



## Why « environmental democracy »?

### Pragmatic (environmental) motivation:

- Environmental sustainability needs involvement of all actors
- More participation leads to better decision-making: criticism strengthens quality of proposals
- More participation leads to better implementation of decisions: greater ownership, involvement

### Idealistic (democratic) motivation:

- an issue of democratic rights: the right to have a say in issues affecting one's life
- representative democracy vs. participatory democracy
- an ongoing relationship between government and civil society

# SDGs (2015)





## Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

### TARGETS

16.1 significantly reduce all forms of violence and related death rates everywhere

16.2 end abuse, exploitation, trafficking and all forms of violence and torture against children

16.3 promote the rule of law at the national and international levels, and ensure equal access to justice for all

16.4 by 2030 significantly reduce illicit financial and arms flows, strengthen recovery and return of stolen assets, and combat all forms of organized crime

16.5 substantially reduce corruption and bribery in all its forms

16.6 develop effective, accountable and transparent institutions at all levels

16.7 ensure responsive, inclusive, participatory and representative decision-making at all levels

16.8 broaden and strengthen the participation of developing countries in the institutions of global governance

16.9 by 2030 provide legal identity for all including birth registration

16.10 ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

16.a strengthen relevant national institutions, including through international cooperation, for building capacities at all levels, in particular in developing countries, for preventing violence and combating terrorism and crime

16.b promote and enforce non-discriminatory laws and policies for sustainable development

# What are the UNEP Bali Guidelines?

“Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”

- Adopted at Global Ministerial Environment Forum, Special Session of UNEP Governing Council in Bali, Indonesia (2010)
- Voluntary and request-driven
- Aimed at filling gaps in national legislation

# Impact of the Bali Guidelines

- Support to and use in LAC Initiative
- Call for regional work on basis of Bali Guidelines in several African sub-regions:
  - First African Colloquium on EROL
- UNITAR revision of its “National Profile to Assess National Capacities and Initiate Action to Strengthen Environmental Democracy”
- Standard for international benchmarking (EDI)

# The Guidelines Themselves

- **Guideline 1:** Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to guideline 3), without having to prove a legal or other interest.

...

- **Guideline 3:** States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

# Guideline 1 – Public authorities to make information available upon request

Implementation guidance:

Any person principle

No interest to be proved

Information vs. documents

# Guideline 3 – Limited grounds for refusal to provide information

Implementation guidance:

Must be according to law

Interpreted narrowly

Public interest test



## As applied under Aarhus Conv., Art. 4

- No need to state interest (4.1)
- In form requested (4.1)
- Time limits (4.2) - 'as soon as possible', max 1 month, plus 1 more month where justifiable
- Optional exceptions (manifestly unreasonable, too general, material in course of completion, internal communications) (4.3)
- Optional exceptions with adverse interest test
  - Proceedings of public authorities
  - International relations, national defence, public security
  - Matters in the course of justice
  - Commercial and industrial confidentiality
  - Intellectual property rights
  - Personal data
  - Voluntary information
  - ▶ Protecting the environment (e.g., habitats of rare species)

## Critical issues under Aarhus Art. 4

- Response to initial request, forwarding to relevant authority (4.5)
- Separation of information (maximum disclosure) (4.6)
- Procedures for refusal to disclose (in writing, with reasons, including information on appeal possibilities, time limits and notice) (4.7)
- Charges not to exceed reasonable amount, publication of schedule of charges (4.8)

# Bali Guidelines on PP

- **Guideline 8:** States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned\* should be informed of their opportunities to participate at an early stage in the decision-making process.
- **Guideline 9:** States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.
- \*“The public concerned” may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest. [This footnote is in the original Guidelines.]

## As applied under Aarhus Conv., Art. 6

### **Projects, specific activities**

- list of types of activity covered (Annex I)
- timely and effective notification
- reasonable timeframes
- free inspection of relevant information by public concerned
- comments in writing or public hearing
- due account to be taken of outcome of public participation
- decision notified and publicly accessible

# Guideline 8 – Early and effective public participation in decision-making

Implementation guidance:

All options open

Phases of decisionmaking (screening, scoping)

Linked to deadlines and preparation time

Nature, complexity and size of project

# Notification – Aarhus Art. 6.2

- Public notice or individually
- Early in decision-making
- Manner:
  - Adequate
  - Timely
  - Effective



# Elements of notification

- Proposed activity
- Nature of possible decisions or draft decision
- Responsible public authority
- Envisaged procedure
  - How to participate
  - Where and which information is available
- Transboundary EIA – if applicable

# Guideline 9 – Authorities proactively seek transparent and consultative public participation

Implementation guidance:

Identifying the public concerned

Notification standards



# Who is responsible for public participation procedure?

- Primary responsibility
  - „competent public authorities”
- Practical arrangements
  - special officers (commissaires enqueteurs)
  - specialised private consultants (sometimes NGOs)
  - local authorities
- Role of applicants (project proponents)

# Guideline 10 – All information relevant to decision-making to be made available

Implementation guidance:

Public concerned

Objective, understandable, timely and effective

Obligation to update

## Aarhus Art.6.6 - making available relevant information



- Free of charge
- As soon as available
- Exemption from general rules on access to information under art.4
- Relation to art 6.2

## Arhus Art 6.6 - content of relevant information

- All information relevant to decision-making
  - Description of site, effects and measures
  - Non-technical summary
  - Outline of main alternatives
  - Reports and advice

# Guideline 11 – Due account of comments received

Implementation guidance:

Transparency and publicity (general and to  
the public concerned)

Reasons upon which decision based

How comments handled

## Due account– Aarhus Art. 6.8

- Due account must be taken of public comments
  - obligation to read and consider seriously
  - but not always to accept all comments
- Any comments vs reasoned comments
- Safeguards

# Publicising the decision

## Aarhus Art. 6.9

- Decision taken must be
  - notified
  - accesible to the public
- together with a statement on:
  - reasons
  - considerations



# Guideline 15 – Access to Review: Information Requests

Implementation guidance:

Any person making a request

Court of law or other independent, impartial body

Handled not in accordance with law



# Guideline 16 – Access to review: public participation

Implementation guidance:

Member of public concerned

Court of law or other independent, impartial body

Substantive or procedural legality

Decisions, acts or omissions

# Guideline 17 – Access to review: public or private actors

Implementation guidance:

Member of public concerned

Court of law or other independent, impartial body

Substantive or procedural legality

Decisions, acts or omissions

Affecting environment or violating legal norms

## Aarhus Conv., Art. 9.3

Obligation to provide opportunities for public to challenge general violations of national law relating to the environment (citizen enforcement)

See 18 Preamble Para.

- conditions may be imposed by Parties
- actio popularis
- acts or omissions of private persons or governmental authorities



# Guideline 18 – Liberal standing provisions

Implementation guidance:

Broad interpretation of rules

Effective access to justice

# Aarhus Conv. Art. 9.2 standing

- Members of the public concerned (art. 2.5)
  - affected or likely to be affected
  - having an interest in environmental decision-making
  - role of NGOs
- Criteria for standing in art. 9.2
  - Sufficient interest
  - Impairment of a right
  - criteria in national law consistent with the objective of giving wide access to justice

# Guideline 19 – Effective procedures for timely review

Implementation guidance:

Fair, open, transparent, equitable

# Remedies

- **Guideline 21:** States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

# Guideline 21 – Prompt, adequate and effective remedies

Implementation guidance:

Injunctive relief

Compensation

Restitution



## Some relevant Aarhus Compliance Committee and CJEU cases

**Compliance mechanism** established pursuant to Art. 15, mandated to consider inter alia communications from the public. Since 2004, more than 100 communications from the public, including civil organizations, triggering compliance review procedures. Committee findings are transmitted to MOP which takes appropriate action; MOPs have reached decisions concerning non-compliance.

**Art. 9.2 standing - CJEU, C-115/09, “Trianel case”** – states have a choice of method to guarantee standing to ENGOs, but in choosing cannot deprive ENGOs of their role under the Convention. Thus, “impairment of a right” cannot depend on conditions impossible to fulfill for most ENGOs and “right” therefore includes rights related to rules of national and EU law having direct effect.

CJEU, C-263/08, Sweden – requirements under national law – 2000 members. Would exclude virtually all Swedish ENGOs, particularly those focused on local matters. Deprived ENGOs of a remedy. Sweden changed its law.

Unclear whether actual participation conveys standing.



Art. 3.8 – retaliation. ACCC/C/2009/36 (Spain). Authorities made statements in press against participation. ACCC/C/2008/27 (UK). Under some circumstances pursuing costs would constitute penalization or harassment.

## Some relevant cases (2)

Art. 9.3 – 2008/32 (EU part 1) – interpretation of EU Treaty is a way that would deny individual or NGO standing to challenge acts or omissions of EU bodies would be contrary to Convention. CJEU had interpreted treaty to limit standing to situations where the acts were particularized to the relevant individuals or organizations (no standing to challenge general acts).

2014/\_ (Germany) – legal provision “serving the environment” too limited.

Not prohibitively expensive – 2008/33 (UK). UK rules on costs follow the event not wrong per se, but in practice may be inadequate. Depends on application of countervailing mechanisms, such as legal assistance, conditional fee agreements, protective cost orders, and judicial discretion. Determined that UK did not give sufficient attention to public interest nature of cases. UK put limits on awards.

CJEU, C-240/09 (Slovakia) – Slovak Brown Bear case. NGO (VLK) challenged derogations to system of protection of brown bear. Court determined this was part of EU law and that Slovak courts should interpret standing so as to allow NGO to challenge actions of authorities that may be contrary to EU law.

## Pear Tree Bottom case (Jamaica)

- Ecologically sensitive coastland slated for protection
- Natural Resource Conservation Authority (NRCA) and National Environment and Planning Agency (NEPA) granted permit to Spanish company to build hotel
- NGOs and residents challenged decision before Supreme Court of Jamaica

# Pear Tree Bottom case (Jamaica)

- Question:
  - Did NRCA properly consult with other agencies?
  - Did public meetings held by NRCA and NEPA meet legitimate expectations of public?
- Jamaica had a general requirement for EIA in law, but had not adopted detailed regulations
- Procedure had been based on NEPA's internal guidelines

# Pear Tree Bottom case (Jamaica)

- Court found in favor of plaintiffs:
  - Agencies failed to meet „common law standard” for consultation because they had withheld part of the information available to it (i.e., marine ecology report and technical addenda to report)
  - Agencies had abused their discretion by knowingly circulating an incomplete EIA, thereby increasing likelihood that public would reach inaccurate conclusions. They deprived public of possibility to make fully informed and intelligent decisions.

## Pear Tree Bottom case (Jamaica)

- Court used the following test, from UK case *R v North and East Devon Health Authority, Ex Parte Coughlan* (2001) Q.B. 213, 258:
  - „To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given ...; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.”

## Pear Tree Bottom case (Jamaica)

- The Court quashed the decision of NRCA and NEPA approving the construction

# Okinawa dugong case (Japan)

- Japan and USA have entered into agreement about relocation of Futenma base to a less inhabited area – the Futenma Replacement Facility (FRF)
- Area includes sensitive habitat of critically endangered dugong, a „national monument” under Japanese law
- Japan responsible for constructing the facility
- USA responsible for design and operation





# Proceedings

- Japan required to conduct EIA under domestic law
  - Proponent obligation (government agency)
  - „taking into account”
- 2008 case in USA – *Okinawa Dugong v. Gates*, 543 F. Supp. 1082 (N.D. Cal. 2008)
  - National Heritage Protection Act (NHPA) applicable and requires assessment

# Proceedings

- US Department of Defense conducted NHPA assessment in 2010 or 2011
  - No notification or public participation
- New challenge by plaintiffs to adequacy of assessment
- [change of judge] – *Okinawa Dugong 2* (2015)
- Case decided on grounds of political question doctrine
  - No political Q as to declaratory judgment
  - Political Q as to injunction request
    - Court could not order US to abrogate a treaty with Japan
  - Without possibility of injunction, declaratory relief would be „meaningless,” therefore no jurisdiction
- Case currently under appeal to 9th Circuit Ct. of Appeals

# Applying Bali/Aarhus to FRF

- Questions re adequacy of Japanese EIA (Bali Guidelines and Aarhus Art. 6 standards)
  - Responsibilities of public authority
  - Notification, Identification of public concerned
  - Quality of information available
  - „Taking into account” results of PP
- Bali Guidelines include no restrictions on grounds of national security etc in PP
- Aarhus Conv., National defense exception under Aarhus Art. 6.1(c)
  - Requires a determination that application of Art. 6 in a case or class of cases would have an adverse effect on national defence purposes
  - If a Party wants to make case-by-case determinations, that has to be provided under national law
  - Use of this exception should be limited in accordance with the Preamble, Objective (Art. 1) and General Provisions (Art. 3).
- If Aarhus applied, Art. 3.7 might have resulted in changes to the US-Japan agreement (through negotiation)

# Political Q doctrine in *Okinawa Dugong 2* under Int'l Law

- Principle of prevention increasingly recognized under international law
  - *Pulp Mills case (Argentina v. Uruguay)* – this rule, however, is couched in rights of states (aggrieved)
- Akin to „Responsibility to Protect” which is controversial even in HR context
  - May be considered an affront to sovereign equality
- Weeramantry opinion in *Gabcikovo-Nagymaros* – continuing EIA obligation, SD as a precept
  - Espoo Convention (on transboundary EIA), Art. 2, paras 9-10 are somewhat contradictory on whether states could eliminate EIA by agreement
  - Q would be shape of US *obligations* under international law with respect to FRF
- P10, EIA, SDGs are mechanisms for cooperation on prevention based on SD concepts

恐れ入ります

THANK YOU!



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