



**United Nations
Environment
Programme**



Distr.
GENERAL

UNEP/INF2000/WP/4
11 September 2000

ORIGINAL: ENGLISH

INFOTERRA 2000 – Global Conference on Access to Environmental Information
Dublin, Ireland
11-15 September 2000
(Item 5 of the agenda)

COMPARATIVE POLICY AND PRACTICE OF ACCESS TO ENVIRONMENTAL INFORMATION

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1. Protecting the environment and promoting sustainable development are largely cooperative processes, requiring government, citizens, non-governmental organisations (NGOs), businesses, and other sectors of society to work together. Civil society is one of a nation's greatest resources in formulating, implementing, and enforcing environmental laws, regulations, policies, and projects. To contribute to sustainable development, citizens need to know the state of the environment and public health, the activities that could affect them, and opportunities for them to contribute.

2. This paper highlights the policies that underlie access to environmental information. It then examines how international conventions and institutions, as well as nations around the world, have developed policy and legal frameworks for ensuring access to environmental information. Finally, it outlines steps for further advancing access to environmental information in the context of specific international or national legal structures.

How can access to environmental information promote sustainable development?

3. Broad access to environmental information benefits governments and civil society alike. Fundamentally, access to information allows citizens to know about possible environmental threats. This information is essential for citizens in deciding whether it is necessary to take action, and if they need to act what sort of action is most appropriate. The process also educates the business community about the environmental and social impacts of their operations, allowing them to plan and develop their projects appropriately.

4. Access to information also assists the government. It improves the credibility, effectiveness, and accountability of governmental decision-making processes by encouraging transparent decisions. Citizens

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frequently know their local environment more intimately than the government does. By allowing public review of the basis for governmental proposals and decisions, errors or inadequacies in the information can be corrected. This improves and expands the knowledge base for decisions, and results in better implementation of environmental goals. Such a process can identify and address problems at an early stage, saving time, energy, and scarce financial resources in the long run. For example, it can highlight possible inefficiencies in site selection, production methods, raw material use, or energy consumption, which project proponents or the government can then correct. Further, public access to and review of information can supplement scarce government resources for developing laws, as well as for monitoring, inspection, and enforcement, by identifying environmental threats or violations of applicable laws.

What is “access to environmental information”?

5. Because so many sectors affect the environment – everything from finance to transportation to timber – it is customary to talk broadly of “access to information,” rather than specifically access to environmental information. Another term is “right to know,” which the UNEP Governing Council utilized in its Decision 20/5. [Additionally, under Decision 20/4, the Governing Council requested UNEP to examine models, policies, and guidelines governing access to information in different countries; and Decision 20/6 also refers to access to information.] While right to know generally entails “active” collection and dissemination of environmental information such as emission of contaminants into the environment (and is often limited to more strictly environmental information), in its broad sense, access to information includes both passive dissemination and active dissemination.

6. While there are many ways to provide access to information, there are generally recognized minimum requirements for “passive” and “active” dissemination of information. First, in order to fulfil the purpose of enabling the public to learn about environmental threats and to decide how best to respond, access should be broadly granted to a wide range of information. This principle ensures that citizens have a right to obtain government-held information about:

- the current state of the environment and human health;
- factors affecting or potentially affecting the environment (such as sources of pollution, including environmental impact assessments, permit conditions, and environmental monitoring data);
- proposed projects that could affect the environment and the data underlying the proposed decisions; and
- laws, policies, and international agreements potentially affecting the environment.

7. These are the basic information elements of a “passive” access to information regime, under which a national or sub-national (e.g., state and municipal) law obligates government authorities to release information that is requested of it.

8. For example, in the United States, access to information is generally governed by the Freedom of Information Act (FOIA). FOIA – and similar laws in U.S. states and other nations – creates a presumption that the government must disclose any information in its possession to citizens upon their request, unless the information is specifically exempted. Typical exemptions address trade secrets, confidential business information, and law enforcement investigations and records, but these exemptions are meant to be construed narrowly so that they do not defeat the law’s purposes of transparency and access. The information must be provided promptly, and a modest fee to cover administrative expenses is typical (but may be waived if it is in the public interest). Access to these forms of information is often guaranteed to individuals and institutions that request the information (see discussion of national laws, below).

9. Second, governments and international institutions may commit to actively collecting, synthesizing, and disseminating environmental information. This may take the form of, for example:

- periodic “State of the Environment” reports;

- registries and indexes that track total annual releases of specified pollutants (usually from industrial sources) to the environment, such as pollutant release and transfer registries (PRTRs) in Europe, North America, and Japan, as well as a pilot program in Kenya; and
- an information or rulemaking docket which includes all the information and commentary about a proposed government decision, enabling interested parties to review and respond to arguments and data submitted by others.

10. A number of national and sub-national laws – often in the context of “right-to-know” – impose obligations on governmental and private parties to actively report and disseminate information. For example, the U.S. Occupational Safety and Health Act is a worker right-to-know law that requires companies to notify employees if they have been exposed to toxic substances, to inform employees about the hazards of chemical exposure in the workplace, and to provide access to records about potential hazards. Community right-to-know laws, such as the U.S. Emergency Planning and Community Right-to-Know Act, impose an affirmative duty on the government to collect and widely disseminate information on the use and discharge of pollutants. Government right-to-know laws, such as section 311 of the U.S. Clean Water Act, impose a duty on parties to notify the government immediately of environmental damage that they caused; this information is also made publicly available. Finally, there are product labelling laws requiring warnings for consumer products that create environmental or health risks, property laws that require environmental hazards to be recorded in deeds to land or otherwise be disclosed before real estate can be sold, and laws mandating disclosure in securities sales of a company’s liabilities, which can include potential environmental cleanup costs.

11. The development and implementation of national and sub-national policy and legal frameworks to ensure access to information have provided concrete experiences, which have facilitated the development of international norms and institutions.

How have international bodies implemented access to environmental information?

12. In the international context, the right of access to information has evolved from general declarations to more concrete commitments by governments. As early as 1948, the **Universal Declaration on Human Rights** provided the kernel for a generalised right of access to information (Article 19). Similarly, Article 19(2) of the **1966 International Covenant on Civil and Political Rights** guarantees citizens the “freedom to seek, receive and impart information and ideas of all kinds.” The **1981 African Charter on Human and Peoples’ Rights** guarantees that “Every individual shall have the right to receive information” (Article 9(1)). In fact, many African constitutions have incorporated this provision explicitly or by reference to the Charter. General provisions on access to information may also be found in the **1948 American Declaration of the Rights and Duties of Man** (Article IV), the **1950 European Convention for the Protection of Human Rights and Fundamental Freedoms** (Article 10), and the **1969 American Convention on Human Rights** (Article 13(1)).

13. Increasingly, governments have recognized the important role that access to information plays in environmental protection, incorporating guarantees of access into international environmental instruments. The **1982 World Charter for Nature** requires public disclosure of conservation information “in time to permit effective consultation and participation” (Article 16). The **1992 Rio Declaration** crystallized emerging public participation norms, including access to information, in its Principle 10:

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.

14. Additionally, **Agenda 21** – the “Blueprint for Sustainable Development” that was adopted to implement the principles in the Rio Declaration – relied heavily on civil society playing an active role in developing, implementing, and enforcing environmental laws and policies. Discussion of access to information appears throughout Agenda 21, and particularly in Chapters 12, 19, 27, 36, 37, and 40. The **1992 Convention on Biological Diversity (CBD)** incorporated access to information in Articles 14(1) (on environmental impact assessment) and 17, and the **2000 Biosafety Protocol** to the CBD also relied on access to information (Articles 20, 23(1), and 23(3)). To prevent and mitigate desertification, the **1994 Convention to Combat Desertification** adopted a model that emphasised public participation, and Article 10(2) requires “access by local populations to appropriate information and technology.”

15. Regional initiatives have complemented the development of global norms, and continue to be important in clarifying and implementing those norms. For example, the **1998 United Nations Economic Commission for Europe (UN/ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters** (or the “Aarhus Convention”) provides minimum standards for the state parties to adopt in their domestic legislation. The Convention emphasizes enforceable citizens’ rights and obligations of governmental bodies and individuals at the national, sub-national, and local levels, as well as natural and legal persons “performing public administrative functions” and European Union institutions. The Convention includes detailed provisions laying out rights and obligations relating to access to information, public participation, and access to judicial and administrative remedies. The access-to-information provisions of the Convention include most of the provisions described above in the section defining access to environmental information. Signed by 39 European and Central Asian countries and the European Community, the Convention is expected to come into force in early 2001. In the meantime, the UN/ECE is coordinating with other convention secretariats in the region, such as the 1991 Espoo Convention on transboundary environmental impact assessments. In fact, the 1999 (London) Protocol on Water and Health became the first international instrument to expressly incorporate the Aarhus Convention provisions.

16. The **Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development** (or “ISP”) is an independent regional initiative of the Organisation of American States (OAS) to promote environmental governance. While the Aarhus Convention is a binding treaty with concrete obligations, the ISP is a “Strategy.” This Strategy encourages, but does not require, signatories to undertake similar legal and institutional reforms. The ISP consists of two documents: a short, general Policy Framework and detailed Recommendations for Action. The Policy Framework, which OAS member states adopted in April 2000, established the basic elements that member states are encouraged to implement, including recommendations to (1) improve communication mechanisms to share information; and (2) establish legal and regulatory frameworks to ensure public access to information, decision-making, and justice. In contrast, the Recommendations for Action – annexed to the Policy Framework – provides many different, specific actions that the nations can adopt.

17. In both regional initiatives, NGOs have had an unprecedented level of involvement in the conceptualization, drafting, adoption, and implementation. Providing NGOs with drafts of proposed language and information on how they could contribute was essential to this process.

18. Other regional organisations have promoted transparency, access, and accountability in environmental matters among their member states. For example, the **North American Commission for Environmental Cooperation (CEC)** – created as a side agreement to the North American Free Trade Agreement – promotes and develops recommendations for Canada, Mexico, and the United States on environmental issues, including public access to environmental information held by the government and transboundary environmental impact assessment. Additionally, under Article 5.1(d) of the North American Agreement on Environmental Cooperation, member states are committed to publicly releasing environmental non-compliance information. Similar work is currently being undertaken to incorporate access to information into international environmental instruments in East Africa, the Southern African Development Community, and Africa as a whole. Access to information also has been incorporated into conventions that govern the management of international water bodies, such as the North American Great Lakes, the Rhine River, and the Mekong River.

How do different countries guarantee access to environmental information?

19. Countries around the world provide for access to information in various ways through their constitutions, statutes and acts, regulations, and institutional practices. Increasingly, national and local laws provide a detailed framework governing access to information (as described above). Constitutional provisions provide another avenue for ensuring access to information.

20. Although access to information is a relatively new norm, already 21 African countries have constitutional provisions ensuring access to information, with 15 explicitly granting citizens the right of access to information generally or specifically information that the state holds. At least another five countries incorporate access to information through reference to the Universal Declaration of Human Rights or the African Charter on Human and Peoples' Rights, and some countries basically repeat these provisions. Many constitutions provide that national legislation may define the parameters of access to information. These implementing laws need to be "reasonable" so as to preserve the spirit of the right (e.g., Section 32(2) of South Africa's Constitution). Some countries guarantee that citizens will have the constitutional freedom to receive information free from government interference, and it remains unclear to what extent these provisions grant citizens a right to demand state-held information.

21. South Africa has a strong constitutional provision on access to information. Section 32(1) of the 1996 South African Constitution (within its Bill of Rights) guarantees to all "the right of access to any information held by the state; and . . . held by another person and that is required for the exercise or protection of any rights." When read in conjunction with the constitutional right to a healthy environment (Section 24) and right to life (Section 11), this helps to ensure the right to information necessary for environmental advocacy.

22. In a case that did not go to trial, the Legal Resources Centre (LRC, a South African NGO) sought technical information from the South African Ministry of Environmental Affairs regarding oil refinery processes and releases from a private facility, which the Ministry refused on the grounds that the information was a protected trade secret. When LRC prepared to sue the Ministry under Section 32, the Ministry and refineries produced the requested information before the case could be filed. In *Van Huyssteen v. Minister of Environmental Affairs & Tourism*, a case interpreting a similar right of access to information in Section 23 of South Africa's 1993 Constitution, the court held that trustees to a tract of land adjacent to a lagoon that would be polluted by a proposed steel mill had a right to government-held documents relating to the proposed mill. Although the right of access is not absolute, the court held that access to the documents were necessary for the plaintiffs "in order to exercise their rights."

23. The Indian Supreme Court has held that there is a constitutional right of access to information implicit in the Indian Constitution's guarantees of free speech and expression, and also in the right to life. In the 1982 landmark case of *S.P. Gupta v. President of India*, the Supreme Court concluded that "disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistent with the requirement of public interests, bearing in mind all the time that disclosure also serves an important aspect of public interest." Subsequently, in 1988, the Supreme Court held that access to information (or "right-to-know") was a basic public right and essential to developing public participation and democracy.

24. India is a common-law country, but civil-law countries, particularly in Latin America (as well as Spain and Portugal), have applied a constitutional right of access to information. These countries often have a process of "*habeas data*" which provides a legal mechanism for obtaining access to constitutionally guaranteed information. For example, a Peruvian environmental NGO used *habeas data* to obtain information that the government had previously refused to release because it had been designated "confidential."

25. In 1993, an impoundment for mine tailings ruptured, killing eight workers, destroying natural and cultivated forests, and severely polluting a river. Representing a local community, the Peruvian Society for Environmental Defense (SPDA) requested information from the Ministry of Energy and Mines in order to

determine who was responsible for the disaster. Specifically, SPDA sought technical documents associated with issuing the original concession, as well as a relevant Ministry report. The Ministry refused these requests, claiming the documents were confidential. SPDA filed a habeas data motion with the Supreme Court, which granted the motion and ordered the Ministry to provide the requested documents.

Next Steps

26. Access to information can be advanced in many ways: (1) developing domestic and local laws and institutions; (2) by acceding to an existing international or regional convention (such as the Aarhus Convention); (3) by incorporating access to information into existing conventions (e.g., through protocols or other amendments); (4) by developing regional and subregional declarations and conventions; (5) or by participating in the development of a global convention. In fact, the different approaches can complement one another, and a combination of activities can synergistically advance access to information locally, nationally, regionally, and globally. At the local and national levels, there is the most flexibility to experiment with different mechanisms. Experiences from countries with similar cultural values, legal systems, and states of economic development can provide invaluable persuasive precedent or political capital for adopting similar mechanisms, let alone for negotiating an international instrument. At the same time, supranational declarations can provide legitimacy for domestic initiatives. And sub-regional initiatives can lead to an overarching regional or global initiative.

27. Language can pose special challenges for a government that seeks to provide effective access to environmental information. For example, Ethiopia has over 80 different recognised languages and dialects, and many African nations have more. Even in countries with a single “official” language, rural people frequently have at best a rudimentary grasp of that language. Few governments can afford the resources necessary to translate all the important documents into all relevant languages. There are also technological challenges, as the possibility of establishing publicly accessible electronic databases is not an option, despite their lower maintenance costs. The frequent absence of newspapers and other written media outside the cities and low literacy rates mean that other avenues (such as radio) are necessary for disseminating environmental information.

28. In building social and political support to develop and implement access to information, awareness raising will be necessary at many levels and in many sectors. Citizens need to know about their existing rights and opportunities to access information; and governments need to understand the value of enhanced access and know how they can facilitate access. Through this dialog, civil society and governments in each country and region will be able to determine the most appropriate mechanisms for developing access to information in their particular political, socio-cultural, legal, and economic contexts.