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Globalizing Environmental Democracy: A Call for International Action

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The rising call for a Global Convention on Principle 10

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

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

Principle 10 – Rio Declaration (1992)

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

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

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

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

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

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

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

Why Principle 10 conventions are a good option

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

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

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

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

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



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

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

i A global convention

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

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

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

⁹ <<http://www.unep.org/DEC/PDF/GuidelinesAccessstoJustice2010.pdf>>, at 31 January 2012.

¹⁰ Ibid.



Challenges of a global convention include the following:

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

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

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

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

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



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

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

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

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

ii Regional conventions

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

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



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

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

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

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

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



iii Accession to the Aarhus Convention

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

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

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

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

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

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

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

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



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

What a Principle 10 convention would look like

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

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

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

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

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