

# ENVIRONMENT AND DEVELOPMENT

## Typology of instruments of public environmental international law

Marcos A. Orellana



UNITED NATIONS

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ECLAC

This document was prepared by Marcos A. Orellana for the Sustainable Development and Human Settlements Division of the Economic Commission for Latin America and the Caribbean (ECLAC). The work was reviewed and supervised by Valeria Torres, Economic Affairs Officer, and Carlos de Miguel, Chief of the Policies for Sustainable Development Unit of the Sustainable Development and Human Settlements Division. The comments received from David Barrio, Associate Political Affairs Officer of the Sustainable Development and Human Settlement Division, are much appreciated.

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## Summary

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At the second meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, which was held in Guadalajara, Mexico, on 16 and 17 April 2013, a decision was made to form working groups to advance towards the creation of a regional instrument. Thus, a working group on access rights and the regional instrument was formed for the purpose of gaining more in-depth knowledge on access rights in order to make a proposal on the nature and scope of the application of a regional instrument. At its first meeting, the working group determined that a study describing the different types of international instruments would be useful in helping it achieve its objective.

This report explores the different types of instruments that are used in public international law, with an emphasis on the instruments that are relevant to Principle 10. The report has three chapters, which are as follows. The first chapter analyses the term “international instrument” and discusses the distinction between binding and non-binding legal instruments, illustrated with examples. The second chapter describes the function of implementation and compliance mechanisms in an international instrument, providing examples of these mechanisms. The third chapter presents the multilateral and regional instruments relevant to access rights.

The terms of reference for this study emphasize that it is intended as a descriptive, not an evaluative, tool. Accordingly, the report does not assess the value of the various types of instruments or the various types of compliance and implementation mechanisms.



# I. Typology of instruments of public international law

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## A. Definition of the term “International Instrument”

The term “international instrument” is not defined in international law. The Oxford English Dictionary defines “instrument” as “a thing used in pursuing an aim or policy; a means”. International law uses the term “instrument” generically, as a broad category that includes binding international agreements as well as non-binding documents, also known as “soft law”.

The generic nature of the concept does not mean that the term is open-ended. In practice, an “international instrument” refers to a document produced by an international body concerning international law. Based on this understanding, four different sources of international instruments can be identified:

- A multilateral conference of States: This usually concludes with one or more international instruments, e.g. a declaration. In this first case, the emphasis is on the States that meet to prepare the instrument.
- An intergovernmental body (including its organs): In general, its work is set forth in international instruments, e.g. a resolution. In this second case, the emphasis is on the intergovernmental body that produces the instrument.
- Committees of independent experts: There are international mechanisms that are not composed of States which normally derive from a treaty and do not necessarily enjoy international legal status but nevertheless play an important role in applying and enforcing international law. For example, the International Covenant on Civil and Political Rights established the Human Rights Committee to monitor its implementation.<sup>1</sup> The Committee consists of experts who, among other tasks, issue “General Comments”, which are authorized interpretations of the obligations provided for in the treaty. In this third case, the emphasis is on the international mechanism that produces the instrument.

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<sup>1</sup> The International Covenant on Civil and Political Rights entered into force on 23 March 1976.



- International non-governmental organizations: An example of this is the International Law Association, which drafts instruments on specific matters of international law. In this fourth and final case, the emphasis is on the international non-governmental organization that drafts the instrument.

For the purposes of this presentation, a broad definition of the term instrument will be used, encompassing binding agreements and soft law instruments alike.

## **B. Distinction between a binding agreement and soft law**

Especially in the last four decades, the category of soft law has emerged in academic doctrine as an analytical tool for explaining the process by which international law is created. This phenomenon has been studied in particular in the context of international environmental law, a new field of public international law rooted in tenets that were established in Stockholm in 1972 at the United Nations Conference on the Human Environment. The doctrinal debate on soft law has raised several questions, including: Does soft law exist? And if so, what is its legal value? This section discusses what distinguishes a binding agreement from soft law.

Public international law, as classically conceived, recognizes the Statute of the International Court of Justice as laying out the authorized sources of international law. Article 38 of the Statute identifies, *inter alia*, international conventions, whether general or particular, as a source of international law that the Court must apply when deciding disputes submitted to it. In other words, classic international law makes a clear distinction between a binding instrument and a non-binding instrument.

Public international law ascribes legal importance to instruments based on type: treaty vs. non-binding instrument. According to this dichotomy, on the one hand, there are international treaties that establish international obligations (hard law), and on the other hand, there are non-binding legal instruments that do not establish such obligations (soft law).

This distinction between binding and non-binding agreements, however, does not mean treaties alone are relevant to the operation of international public law. The characteristics of non-binding legal instruments, or soft law, and some of their functions, are described below.

## **C. Non-binding legal instruments**

### **1. Characteristics**

The defining characteristic of a non-binding legal instrument is that it does not, in and by itself, establish international legal obligations. However, this does not mean that a non-binding instrument is without legal relevance for international law. A resolution that adopts an international declaration is a non-binding instrument, but the principles contained in that declaration can play an important, or even a decisive, role in the conduct of States. For example, Principle 21 of the Declaration of the United Nations Conference on the Human Environment, on the obligation to refrain from causing damage to the environment of other States or of areas beyond the limits of national jurisdiction, has influenced the conduct of States to such an extent that the International Court of Justice has recognized the obligation expressed in the principle as part of the corpus of international environmental law.<sup>2</sup>

Non-binding instruments fulfil various functions and have helped strengthen the operation of international law. On occasion, soft law contributes to the development of international law, which is known as a gradual or incremental approach.<sup>3</sup> According to this approach, a non-binding instrument that establishes basic principles is followed by a treaty that establishes specific obligations giving expression to those principles. At times, treaties may reflect the content declared in previous soft law instruments

<sup>2</sup> Among others, the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, para. 29, International Court of Justice, 8 July 1996.

<sup>3</sup> GODÍNEZ, 2011, p. 310.

and grant it a legally binding status (e.g. the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997).

Soft law, however, is not simply a new name for the process by which international law is developed.<sup>4</sup> In other situations, soft law helps identify standards related to State conduct. For example, concerning the obligation of States to cooperate with respect to shared natural resources, the standards established by soft law create the framework for due diligence. Similarly, in the adjudication of disputes, instruments of soft law have helped to specify the normative content and scope of the provisions of a treaty.<sup>5</sup> Moreover, soft law instruments may guide and support the implementation of concrete measures at the national level. For example, the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) of the United Nations Environment Programme, discussed in detail below, assist States in adopting measures that give expression to the access rights covered in Principle 10 of the Rio Declaration.

From this vantage point, soft law is an analytical category that views international law not as a static collection of sources but rather as an ongoing dynamic dialogue designed to shape the behaviour of the various actors. This understanding elucidates the most important characteristics and functions of non-binding instruments, which are as follows:

- Declarations of principles that reflect a shared political and strategic vision;
- Programmatic guidelines or directives for planning and implementing activities;
- Interpretations of the standards contained in international treaties; and
- Guiding principles that serve to clarify international obligations.

Non-binding or soft law instruments can be prepared by States, international organizations, committees of independent experts or international non-governmental organizations. In practice, the vast majority of non-binding instruments come about as a result of a resolution in which the instrument is approved and attached as an annex.

## 2. Examples of non-binding instruments

There is a wide variety of non-binding instruments. Four examples related to Principle 10 are presented below, illustrating the various types and functions of non-binding instruments.

### a) Rio Declaration on Environment and Development

The Rio Declaration is a non-binding instrument negotiated by the States that participated in the United Nations Conference on Environment and Development,<sup>6</sup> which was organized pursuant to resolution 44/228, adopted by the United Nations General Assembly on 22 December 1989.<sup>7</sup> The Conference also prepared other non-binding instruments, such as Agenda 21, as well as binding instruments, such as the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change.

Although the Rio Declaration is itself a non-binding instrument, its principles are of extreme importance in the development and implementation of environmental policy and law, both nationally and internationally. In addition, some of its principles reflect rules set out in customary international law or standards established in international treaties. Principle 10, for example, envisages rights that are recognized and protected in national constitutions and international treaties.<sup>8</sup>

<sup>4</sup> See Pierre Marie Dupuy, "Soft Law and the International Law of the Environment", *Michigan Journal of International Law*, 1991.

<sup>5</sup> See *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Judgement, Merits, Reparations and Costs, 24 August 2010.

<sup>6</sup> See document A/CONF.151/26 (Vol. I), 12 August 1992.

<sup>7</sup> A/RES/44/228, 1989.

<sup>8</sup> UNEP, 2006, p. 79.

### **b) Bali Guidelines**

In February 2010 in Bali (Indonesia), the Governing Council of the United Nations Environment Programme adopted the Bali Guidelines<sup>9</sup> to steer the preparation of national legislation to protect access rights. This instrument was drafted by a group of experts, with civil society participation.

The Bali Guidelines include 26 guidelines organized under the three pillars of Principle 10: information, participation and justice. They are intended to fill gaps and strengthen national legal frameworks, particularly in the case of developing countries that request support to fulfil their commitments to Principle 10.

The United Nations Environment Programme and the United Nations Institute for Training and Research have taken action to strengthen country-level implementation of the Bali Guidelines, which has included regional workshops, national projects and the preparation of an implementation manual for the Bali Guidelines.

### **c) General comments of the human rights committees**

The committees in charge of overseeing compliance and implementation of their respective human rights treaties have prepared “General Comments” on the interpretation of certain provisions of the treaties they monitor. These instruments clarify the normative content and scope of the rights recognized and protected by the treaties, or of the international obligations with respect to rights, thus helping to promote compliance and implementation of these binding agreements.

For example, the Human Rights Committee has prepared a General Comment on article 19 of the International Covenant on Civil and Political Rights which sets out the right to freedom of opinion and expression.<sup>10</sup> Although the General Comment is a non-binding instrument, it derives from a legally binding instrument and recognizes the right of access to information of public interest and the State’s obligation to provide such information. Accordingly, this instrument strengthens the rights enshrined in the International Covenant, contributes to the progressive development of international human rights law and leads to a better implementation of the Covenant.

### **d) Principles of international law relating to sustainable development**

The International Law Association (ILA) is a civil society organization that contributes to the study, clarification and development of international public and private law. In 2002, it approved the New Delhi Declaration of Principles of International Law Relating to Sustainable Development. Principle 5 focuses on access rights under its three pillars: participation, information and justice. In 2012, the ILA Conference, held in Sofia (Bulgaria), approved the Guiding Statements, number 7 of which reiterated the importance of Principle 10, describing it as “foundational” to sustainable development.

## **D. Binding legal instruments**

### **1. Characteristics**

A binding international agreement contains certain characteristic elements defined in the Vienna Convention on the Law of Treaties (VCLT), including the following: (i) a statement to the effect that it is governed by international law; and (ii) provisions that establish international obligations. In addition, international treaties usually contain a preamble that is relevant to the interpretation of the treaty. In recent times, it has been observed that mechanisms have been established under international treaties, especially those concerning the environment and human rights, to facilitate implementation and enforcement of the treaty. This section presents the structural elements of a binding international agreement; the subsequent section covers implementation and compliance mechanisms.

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<sup>9</sup> Decision SS.XI/5, 2010, part A.

<sup>10</sup> General Comment No. 34, 2011, para. 18.

### a) Definition of an international treaty

An international instrument falls into the category of international treaty if it is governed by international law, regardless of its specific designation. An international treaty is binding insofar as it imposes obligations on the parties to the treaty.

According to article 2(1) (a) of the VCLT, a “treaty” is understood to be an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular name or designation.

Accordingly, the name of the international instrument (pact, convention, agreement or protocol) does not determine whether the instrument is binding. This point regarding designation has been underscored both by the Permanent Court of International Justice<sup>11</sup> and the International Court of Justice.<sup>12</sup> The core element that makes an international agreement a treaty, and thus binding, is the decision of State parties to govern it by international law.

The parties to an international agreement may express their consent to be bound by the treaty according to the method established therein. In general, a State signs a treaty to authenticate the text and express to the other parties its intention to conduct the procedures required under its national legislation to manifest its consent. Once such procedures have been successfully concluded, the State will perform the international act by which it will certify its consent to be bound by the treaty. This international act may be called “ratification”, “acceptance”, “approval” or “accession”, depending on the case, and in any event, this international act will be governed by the terms of the treaty.

### b) International obligations

An international treaty establishes norms of conduct that are binding upon the parties. These norms express a State’s commitment to conduct itself in a certain way, thus setting out international obligations. The general rule established in customary law is *pacta sunt servanda*, codified in article 26 of the VCLT as follows: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

An international treaty establishes obligations only for and between the parties to it. Generally, a treaty cannot impose obligations on third-party States or other international actors without their consent (according to the no benefit-no harm rule *pacta tertiis nec nocent nec prosunt* provided for in article 34 of the VCLT).

Generally, an international treaty does not specifically address all the measures that a State must adopt to comply with the obligations established by the treaty. The State maintains a degree of flexibility to select those measures that are best suited to its particular legal, political and social tradition and culture, with the caveat that a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”, according to article 27 of the VCLT.

Under general international law, if a State fails to comply with its treaty obligations, there are three basic avenues available to address the situation of non-compliance: (i) State responsibility; (ii) remedies and peaceful settlement of disputes; and (iii) termination or suspension under the law of treaties. State responsibility involves a duty to make reparation, which must as far as possible restore the situation that existed prior to the breach. On remedies, Article 33 of the UN Charter provides means for States to peacefully settle their disputes. On the law of treaties, the parties of a multilateral treaty may terminate or suspend its operation as a consequence of a material breach.<sup>13</sup>

In the context of State responsibility, a breach of an international obligation that is attributable to a State gives rise to the international responsibility of that State. The legal consequences of an internationally wrongful act are governed by customary international law, whose content has been

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<sup>11</sup> P.C.I.J., 1931, p. 47.

<sup>12</sup> I.C.J., 1962, p. 331.

<sup>13</sup> KISKENNIEMI, 1992, p. 124.

clarified by the United Nations International Law Commission.<sup>14</sup> General international law broadly establishes the consequences and content of the international responsibility of the State, including: the continued duty to perform the obligation breached; the obligation to cease the wrongful act if it is continuing; the non-repetition of the wrongful act and full reparation for the injury caused by the latter. Each of the parties to a treaty has a legal interest in the fulfilment of the obligations of the treaty. Therefore, any party may invoke the international responsibility of the State in the case of an internationally wrongful act.

In the context of the law of treaties, Article 60(2) of the VCLT provides that a material breach of a multilateral treaty by one of the parties entitles the other parties to suspend the operation of the treaty in the relations between themselves and the defaulting state. In other words, a party that fails to comply with its obligations may be denied the benefits that it derives from the treaty. A material breach is defined in this context as the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

This said, a treaty, in terms of *lex specialis*, may modify these general rules of customary law and establish the specific consequences of non-fulfilment of the obligations established under it.<sup>15</sup> For example, the World Trade Organization provides that a member that does not adjust its conduct to the obligations of the agreements covered by the organization may have its trade benefits suspended. In lay terms, this consequence is known as a trade sanction and takes the form of an increase in the customs duties levied on products imported from the infringing country.

### **c) Preamble and interpretation of the treaty**

The preamble of an international treaty sets out the shared vision and objectives that the parties intend to achieve by means of this instrument. It is an integral part of the context of an international treaty, while also presenting the object and purpose of the treaty. Pursuant to article 31(1) of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, the preamble plays an important role in the interpretation of a treaty.

## **2. Examples of binding instruments**

### **a) Multilateral environmental agreements**

Over the past four decades, owing to advances in science and technology, the international community has come to recognize that the environment is the foundation of human society. Based on this understanding, it has developed international instruments to respond to threats to the environment, which has sparked the emergence of international environmental law as a new branch of public international law. International environmental law is an evolving area, marked by a lack of cohesion and a multiplicity of instruments, where binding instruments exist alongside non-binding instruments on a wide variety of issues, including biodiversity, the atmosphere, hazardous waste, cultural heritage and many others.

Multilateral environmental agreements (MEAs) are binding legal agreements that establish international obligations incumbent upon the parties. Some MEAs constitute a framework treaty that establishes the mechanisms that will enable the parties to channel their dialogue; other MEAs constitute protocols that set out specific obligations on certain issues. Several highly qualified public international law experts have noted that certain MEAs establish obligations that are so broad or programmatic in scope that they give the appearance of being nonbinding, soft law instruments. It should be noted, however, that MEAs are international treaties and as such they generate legal consequences.

An example of a MEA that recognizes the importance of access to information is the Stockholm Convention on Persistent Organic Pollutants (POPs). Article 10 of the Convention, on public information, awareness and education, provides, *inter alia*, that each party shall, within its capabilities,

<sup>14</sup> Draft articles on the responsibility of States for internationally wrongful acts, approved by the International Law Commission during its 53<sup>rd</sup> session (A/56/10) and included by the General Assembly of the United Nations in its resolution 56/83 of 12 December 2001.

<sup>15</sup> A/RES/56/83, 2002, article 55.

promote and facilitate communication to the public of all available information on persistent organic pollutants. The Convention also states that information on the health and safety of human beings and the environment shall not be deemed confidential.

A MEA that addresses public participation is the United Nations Framework Convention on Climate Change, concluded at the 1992 Earth Summit. Article 6 of the Convention, on education, training and public awareness, provides that the parties will promote and facilitate, in accordance with national laws and regulations and within their respective capacities, public participation in addressing climate change and its effects and developing adequate responses.

A MEA that establishes access to environmental justice is the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal. Article 17 of the Protocol authorizes any person who has suffered damage resulting from activities covered by the Protocol to bring a claim for compensation before the competent national court. Furthermore, each contracting party shall ensure that its courts possess the necessary competence to entertain such claims for compensation. The provisions on mutual recognition and enforcement of judgments, set forth in article 21 of the Protocol, strengthen the right of access to justice.

#### **b) Human rights treaties**

With the advent of the Charter of the United Nations and the Universal Declaration of Human Rights, the international community came to recognize its interest in the way in which individuals are treated within States. What happens in terms of human rights within the State was no longer regarded solely as a matter of a country's internal jurisdiction but rather as a matter of interest to the international community. In the wake of this change of paradigm, the very concept of State sovereignty has been redefined, with the legitimacy of the State becoming contingent on the effective enjoyment of rights.

Nevertheless, the Universal Declaration of Human Rights was considered insufficient for the implementation of internal measures to guarantee these rights. Thus, as a first global step, two universal human rights treaties were concluded on civil and political rights and economic, social and cultural rights. These two legally binding instruments obliged States to respect and guarantee the rights recognized in them. Over time, other international human rights treaties have been developed, all of which also have committees of experts to monitor enforcement and compliance. And in some regions, such as Latin America and the Caribbean, human rights treaties have been adopted, and courts have been established to hear cases of human rights violations.

The International Covenant on Civil and Political Rights, for example, recognizes rights that are directly related to the pillars of Principle 10. Article 19, on the right to freedom of expression, for example, has been interpreted by the Human Rights Committee as also protecting the right of access to information of public interest that is held by the State. Article 2 of the Covenant recognizes the obligation of the State to provide effective recourse in the case of rights violations, before the competent judicial authority, and to enforce the decision issued by that authority.

The American Convention on Human Rights also recognizes access rights. Article 13 of the Convention has been interpreted by the Inter-American Court of Human Rights as protecting freedom of expression and the right of access to information. The Court has also developed standards on public participation in the context of development and investment projects, particularly on indigenous lands and territories. The Convention also recognizes the right to an effective remedy granted in accordance with due process in the case of violations of the rights and freedoms protected by it.

#### **c) Aarhus Convention**

Concluded under the auspices of the United Nations Economic Commission for Europe, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in

Environmental Matters (1998 Aarhus Convention) remains the only legally binding multilateral treaty on access rights.<sup>16</sup> At present, 46 States and the European Union are parties to the Convention.

The Aarhus Convention takes a rights-based approach to environmental protection grounded in the conviction, as expressed in the preamble, that “adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself”. Article 1, on the objective of the Convention, reaffirms that each party shall guarantee access rights “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”. The Aarhus Convention prohibits discrimination based on nationality, citizenship or domicile in the exercise of access rights and likewise, stipulates that persons shall not be penalized, persecuted or harassed for exercising those rights.

The Aarhus Convention reflects principles, obligations, standards and a structure designed to guarantee access rights. It establishes regulatory minimums and allows each party to adopt higher standards, i.e., it sets a floor, not a ceiling. The Convention builds on existing access rights and obligates the parties to ensure that they are enforced. In addition, it establishes specific standards that facilitate the implementation of access rights. The Aarhus Convention is similar in structure to the pillars of Principle 10: (i) access to information; (ii) public participation in decision-making; and (iii) access to justice in environmental matters. While the Convention’s main focus is on implementing Principle 10 at the national level, it also requires Parties to promote its principles in international forums dealing with matters relating to the environment.

Lastly, the basic structure of the Aarhus Convention has enabled the parties to address new issues related to the observance of access rights. For example, in 2003 the parties adopted a protocol to the Convention on pollutant release and transfer registers (discussed in further detail later in this document). The structure of the Convention has also enabled parties to further elaborate its provisions through soft law instruments. For example, in 2005 the parties adopted the Almaty Guidelines to assist them with the obligation to promote the principles of the Convention in international forums.

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<sup>16</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, p. 447. See also, Economic Commission for Europe, *The Aarhus Convention: an implementation guide*, second edition 2013.

## II. Typology of implementation and compliance mechanisms

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The experience of the past two decades with the operation of international instruments on sustainable development has underscored the importance of creating implementation and compliance mechanisms that contribute to the effectiveness of the instruments. Recent international treaties are not limited to simply establishing international obligations; they also set out a variety of institutional mechanisms that enable the parties to channel their cooperation efforts to achieve the objectives of the instrument. By contrast, soft law instruments, given their objectives (described above), generally do not establish implementation and compliance mechanisms. Therefore, this section will largely focus on the typology of implementation and compliance mechanisms in binding agreements.

Implementation and compliance mechanisms allow the parties to strengthen their capacities, both to fulfil their obligations and to monitor and verify the degree of compliance with the instrument. A compliance mechanism that determines whether or not a party is in non-compliance will necessarily involve a legal interpretation of the obligation at issue.<sup>17</sup> Accordingly, a compliance mechanism may clarify the normative content of an obligation, and in so doing the mechanism may facilitate compliance by other parties as well. Implementation and compliance mechanisms thus contribute decisively to the effectiveness of the instrument.

There are several different legal strategies for promoting compliance with international instruments: coercive measures such as sanctions or loss of privileges; transparency methods such as monitoring, reports and civil society participation; and positive incentives such as technical and financial assistance, access to technology and training.<sup>18</sup> These strategies are generally integrated in a system of compliance that helps maintain a dynamic balance between the divergent interests at play in the legal system established by the instrument, so that the instrument will continue to be viable in a changing international context.<sup>19</sup>

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<sup>17</sup> WERKSMAN, 1998, p. 53.

<sup>18</sup> JACOBSON and WEISS, 1998.

<sup>19</sup> CHAYES and CHAYES, 1991.



There is a synergistic relationship between compliance and implementation, which has been recognized in the design of certain implementation and compliance mechanisms, as illustrated below. Effective implementation of an instrument depends on compliance with the obligations contained therein. At the same time, compliance with the obligations depends on the capacity of the States to fulfil them, which underscores the importance of mechanisms for strengthening implementation of the instrument.

In general, the terms “implementation” and “compliance” have been used in specific contexts, so using them in a more general context creates terminological ambiguity, with the result that they are often used synonymously. They do, however, have different shades of meaning, as discussed below.

## A. Implementation mechanisms

In general, the term “implementation” means putting into practice or applying the provisions of an instrument. In order for an instrument to be implemented, an abstract rule must be translated into concrete action taken by governmental or non-governmental entities to achieve the objectives of the instrument. Translating rules into action emphasizes, in turn, concrete mechanisms and measures that help strengthen institutional, scientific and technical capacities, as well as the regulatory frameworks needed for application of the instrument and to ensure that it will be effective.

For example, to support implementation and application, mechanisms such as the following have been employed:

- **Conference of the Parties**, in which the parties meet to examine the state of the implementation of the treaty. The Conference of the Parties analyses the situation or issues addressed by the treaty, as well as the degree of progress towards the fulfillment of its objectives.
- **Specialized secretariat**, which supports the Conference of the Parties, provides information to the parties and coordinates with other multilateral entities. A specialized secretariat facilitates the functioning of the various organic parts of the instrument.
- **Working groups** or technical or scientific panels that explore specific and specialized issues and report to the parties. Working groups prepare specialized reports on specific issues to support decision-making by the parties on those issues.
- **Clearinghouse of information** relevant to implementation of the treaty. For example, the parties can exchange information on good practices, lessons learned and scientific, technical and legal experience, in order to determine which strategies and tools have been effective and provide mutual assistance in applying the instrument.<sup>20</sup>
- **Financial mechanism** to cover the incremental costs associated with implementation of the instrument and support the execution of projects designed to strengthen implementation. A financial mechanism is key for supporting the incremental costs involved in putting measures in place to build capacities.<sup>21</sup>

These implementation mechanisms enable the parties to channel their cooperation to achieve the objectives of the instrument. An instrument may incorporate all or some of these implementation mechanisms, based on its design and objectives. Built into these mechanisms is the recognition that the effectiveness of international law, particularly as it concerns environmental matters and rights, depends not only on the coordination of international obligations but also and especially on material cooperation between the parties. These implementation mechanisms underscore the fact that technical assistance and capacity-building are indispensable for the effective operation of international instruments on sustainable development.

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<sup>20</sup> See article 20 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.

<sup>21</sup> See article 10 of the Montreal Protocol on Substances that Deplete the Ozone Layer.

## B. Compliance mechanisms

In general, the term “compliance” refers to the conformity of State conduct with its international obligations. Clearly, non-compliance with the obligations established in an international treaty undermines the effectiveness of the instrument. Non-compliance with a treaty also violates the rights of the other contracting parties, and in the case of certain treaties, the rights of citizens. Therefore, several international instruments use institutional, regulatory and programmatic mechanisms to facilitate compliance.

In order to analyse the typology of compliance mechanisms, a distinction must be made between four types of mechanisms: (i) supervision mechanisms; (ii) dispute resolution mechanisms; (iii) quasi-judicial mechanisms; and (iv) facilitation mechanisms. As discussed below, the design of these mechanisms relates to the type of instrument and the nature of the issues it addresses.

In the operation of compliance mechanisms, a compliance committee typically plays a prominent role as a specialized entity reporting to the Conference of the Parties. This institutional design emphasizes the collective supervision that tends to characterize the application of agreements reflecting common interests in environmental protection.<sup>22</sup>

### 1. Supervision mechanisms

Supervision mechanisms emphasize procedures for reporting on the application of the instrument. Examples of these mechanisms are as follows:

- **Periodic reports** submitted by the States giving account on the application of the instrument. For example, the Convention on the Rights of the Child establishes the obligation to deliver regular reports (every five years) on the implementation status of children’s rights to the Committee on the Rights of the Child, including the right to health and its environmental determinants such as the risk of pollution. The Committee on the Rights of the Child created under the Convention examines these reports and following a dialogue with the State, prepares “concluding observations”, which include recommendations for improving implementation of, and compliance with, the treaty.
- **Inspection or monitoring**, which provides information on the matter addressed by the instrument. For example, the safeguards systems implemented by the International Atomic Energy Agency to ensure the peaceful use of atomic energy and prevent the proliferation of nuclear weapons calls for a comprehensive evaluation of the atomic situation of the State. States are under the obligation to declare nuclear material and facilities, information which is monitored and verified by the agency, including through on-site inspections.
- **Periodic evaluation or review** of the conduct or performance of the State, by a multilateral entity. For example, the United Nations Human Rights Council conducts a Universal Periodic Review (UPR) in which the human rights situation of a country is examined by other states on the basis of three reports represented by: (i) the State under examination; (ii) the United Nations system; and (iii) other relevant stakeholders such as the National Human Rights Institutions and civil society organizations. After an interactive dialogue, other States make recommendations on all human rights issues to the country under review –including on environmental matters– and a final report is adopted by the Human Rights Council. Similarly, the Organisation for Economic Cooperation and Development (OECD) conducts periodic evaluations of the environmental performance of its members, identifying good practices and formulating recommendations to improve environmental policies and programmes. These evaluations are also presented as part of a dialogue between peers.
- **Visits, inquiries or investigations** to obtain information intended to elucidate certain areas that affect compliance with the instrument or determine possible infringements thereof. For

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<sup>22</sup> BIRNIE and BOYLE, 1992, p. 186.

example, the Convention Concerning the Protection of the World Cultural and Natural Heritage of the United Nations Educational, Scientific and Cultural Organization (UNESCO) established the World Heritage Committee to monitor the conservation status of threatened heritage assets. This review foresees the possibility of missions by experts. In addition, the Special Rapporteurs mandated by the Human Rights Council may conduct visits to countries upon the acceptance of the latter.

- **Individual complaints** filed before independent experts and/or committees, such as the United Nations human rights mechanisms. There are two types of mechanisms that may –individually or simultaneously– take action in case of a human rights violation occurs: (i) Human Rights Treaty Bodies (e.g. Human Rights Committee and Committee on Economic, Social and Cultural Rights); and (ii) Special Procedures of the United Nations Human Rights Council such as the Special Rapporteurs (e.g. the Special Rapporteur on the right to food). Both the treaty bodies and the special procedures may examine alleged violations of environmentally-related human rights (e.g. water and sanitation) or rights which may be negatively affected by environmental degradation (e.g. right to life, security or health). Whereas the treaty bodies follow a more formal procedure that results in decisions of quasi-judicial nature, Special Rapporteurs make information requests to public authorities and recommendations by means of urgent appeals or allegation letters.

These supervision mechanisms, based on transparency methods, promote compliance with the instrument by applying subtle forms of pressure. For example, the parties to the instrument may establish a dialogue on the status of compliance, or civil society organizations may file communications regarding situations that affect compliance with the instrument. In turn, these supervision mechanisms, in order to be useful and effective, must have specialized institutional support. For example, a committee of experts may examine the reports filed by the States and convene public hearings as a forum for dialogue with the States, and a specialized secretariat may serve as a liaison with the States.

## 2. Dispute settlement mechanisms

Dispute settlement mechanisms enable the parties to an instrument to resolve differences that may arise in the interpretation or application of the instrument. There are political mechanisms for settling disputes, such as good offices, conciliation and mediation, as well as legal mechanisms, such as arbitration and adjudication set out in article 33 of the United Nations Charter. The selection of a mechanism may be left up to the parties, or they may have established their consent to submit to the jurisdiction of a court or arbitration panel in the respective instrument.

Dispute settlement generally involves an allegation of non-compliance with an international obligation and is thus contentious in nature, placing the parties in adversarial positions. The legal consequences of non-compliance are governed by the customary rules of international responsibility, such as full restitution or compensation for damages, or by special rules on liability established by the parties, e.g., trade sanctions (suspension of preferences) .

### a) Trade sanctions

Violation of the obligations established in the environment chapter of the United States-Peru Trade Promotion Agreement, including those concerning access to justice in environmental matters and citizen participation, can lead to the imposition of trade sanctions (suspension of tariff preferences).<sup>23</sup> The same approach is taken in the United States-Colombia Trade Promotion Agreement.

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<sup>23</sup> United States-Peru Trade Promotion Agreement (PTPA), 2006 (entered into force in 2009), chapters 18 and 21.

## b) Fines

A different approach is taken in the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR). The environment chapter of that agreement establishes several obligations relating to Principle 10, including on citizen participation and access to environmental justice. However, the dispute settlement procedure under CAFTA-DR may only be used with respect to the obligation of a party to effectively enforce its environmental laws.<sup>24</sup> Moreover, CAFTA-DR does not provide for trade sanctions; rather, fines (monetary contribution) can be assessed that are deposited into a fund to be used on environmental initiatives, such as enhancing enforcement of environmental laws.<sup>25</sup>

## 3. Quasi-jurisdictional mechanisms

Quasi-jurisdictional mechanisms have been developed especially for environmental matters, occupying a function between conciliation and traditional dispute settlement.<sup>26</sup> The development of these mechanisms can be explained in regard to the environment as an area in which non-compliance can be due more to lack of technical or financial capacity than to lack of intention to comply or a divergent interpretation of a provision, particularly in developing countries.<sup>27</sup> In addition, a non-compliance mechanism might work to offset the difficulties in invoking traditional third party settlement procedures, in connection with the limits of state responsibility in the environmental arena.<sup>28</sup> These mechanisms examine situations involving non-compliance or structural obstacles to systemic non-compliance, for the purpose of identifying measures that would support compliance with the instrument.

These quasi-jurisdictional mechanisms are similar to the facilitation mechanisms discussed below. What distinguishes the former from the latter is that quasi-jurisdictional mechanisms provide for the possibility of quasi-coercive measures that carry legal consequences. The compliance mechanism established by the Parties to the Kyoto Protocol illustrates this difference, inasmuch as it comprises both facilitation and compliance control. The control component of the mechanism can determine, for example, that a party no longer meets the eligibility criteria for participating in the Protocol's flexibility mechanisms, such as the clean development mechanism. Another example of a quasi-jurisdictional mechanism can be seen in the Montreal Protocol, where in the case of non-compliance, a party may lose the privileges granted under the instrument, such as access to assistance funds.

## 4. Facilitation mechanisms

Facilitation mechanisms take a non-confrontational approach, enabling the parties to identify situations of non-compliance and measures that would facilitate compliance. Facilitation mechanisms are characterized by their cooperative approach. Unlike the methods for settling disputes, facilitation mechanisms do not seek to assign international responsibility. And unlike quasi-jurisdictional mechanisms, facilitation mechanisms do not impose coercive measures. Instead, the procedure seeks to pinpoint the causes of a situation of non-compliance in order to make recommendations for an amicable and constructive solution. Accordingly, any other State party, the secretariat or in certain cases, civil society organizations may initiate the procedure to prevent and correct cases of non-compliance.

### a) Compliance committees in multilateral environmental agreements

A compliance committee is an institutional entity that is created to facilitate the operation of compliance mechanisms. Although its functions vary, a compliance committee typically carries out the procedure and reports its findings and recommendations to the Conference of the Parties. One of the most important roles for a non-compliance mechanism is to help forestall degradation before it occurs by taking a pro-active stand, identifying compliance problems before actual non-compliance takes place.<sup>29</sup> In addition, a compliance mechanism helps parties concentrate on the non-intentional causes of non-compliance, such as lack of resources or capacity. For example, a compliance committee, in order to

<sup>24</sup> CAFTA-DR, chapter 17, articles 17.2.1(a) and 17.10.7.

<sup>25</sup> *Ibid.*, chapter 20, article 20.17.

<sup>26</sup> SANDS, 2012, p. 163.

<sup>27</sup> BORRÀS, 2011, p. 80.

<sup>28</sup> HANDI, 1990, p. 9.

<sup>29</sup> KLABBERS, 2007, p. 1003.

facilitate compliance, could provide advice or assistance, invite further reporting or request a compliance action plan.<sup>30</sup>

The design of these mechanisms varies by instrument, and there is a clear relationship between the mechanism and the objective of the instrument, especially with respect to the measures that the committee or the Conference of the Parties can adopt in cases of non-compliance.

A good number of multilateral environmental agreements have established compliance committees, albeit under different names, including: the Montreal Protocol (1987), the Basel Convention (1989), the Kyoto Protocol (1997), the Cartagena Protocol (2000) and the Minamata Convention on Mercury (2013).

Some compliance committees, such as the one established under the Kyoto Protocol discussed above, explicitly distinguish between quasi-jurisdictional functions and facilitation functions. Other compliance committees, such as the one established under the Montreal Protocol, fulfil both quasi-jurisdictional and facilitation functions without separating them under different institutional divisions.

#### **b) Compliance committee for the Aarhus Convention**

The Aarhus Convention calls for a non-confrontational, non-judicial, consultative mechanism with unique characteristics in international law<sup>31</sup>. The Convention required the parties to adopt a compliance mechanism, on a consensus basis, at their first meeting, which took place in 2002.<sup>32</sup> The compliance committee consists of nine independent experts who are elected by the parties and serve in their personal capacity; civil society is authorized to nominate experts for selection by the parties.<sup>33</sup>

The compliance committee initiates a review of a non-compliance case on the basis of a communication,<sup>34</sup> which may be presented by a party concerning the compliance of another party, by a party concerning its own compliance, by the secretariat of the Convention or by members of the public. The committee makes findings concerning the matters raised in the communications and formulates recommendations.<sup>35</sup> The Meeting of the Parties considers the committee's findings and recommendations and decides on the appropriate measures to ensure full compliance with the Convention. To date, all findings and recommendations have been endorsed by the Meeting of the Parties.

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<sup>30</sup> Id. at pg. 999.

<sup>31</sup> Article 15, Aarhus Convention.

<sup>32</sup> Decision 1/7 on review of compliance.

<sup>33</sup> See Economic Commission for Europe, Guidance Document on the Aarhus Convention Compliance Mechanism, Geneva. (The terminology varies according to whom presents the "communication", including "submission" when brought by a Party, "communication" when brought by a member of the public, and "referral" when brought by the secretariat).

<sup>34</sup> See Svitlana Kravchenko, "The Aarhus Convention and innovations in compliance with multilateral environmental agreements", *Colorado Journal of International Environmental Law and Policy*, Vol. 18, No. 1, 2007.

<sup>35</sup> See European ECO Forum, *Case Law of the Aarhus Convention Compliance Committee 2004-2011*, 2011.

### **III. Multilateral and regional instruments related to access rights**

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At the multilateral and regional levels alike, access rights have been recognized and developed in various instruments. This chapter presents a survey of the status of access rights.

#### **A. Global instruments**

##### **1. Rio Declaration on Environment and Development and Agenda 21**

Given that the Rio Declaration was discussed earlier in the paper, this section will briefly turn to Agenda 21, which contains the work programme for implementing sustainable development. Chapter 23 of Agenda 21 calls for the empowerment of individuals, groups and organizations to participate in environmental impact assessment procedures and in decision-making. In paragraph 23.2, it states that one of the fundamental prerequisites for sustainable development is broad public participation in decision-making. Chapter 23 also seeks to strengthen the nine Major Groups, in terms of the expression of important voices in the sustainability debate: women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers, business and industry, scientists, and farmers.

In 1997, the Rio+5 Forum evaluated progress and strengthened access rights. The Programme for the Further Implementation of Agenda 21, concluded at the Rio+5 meeting, underscored, for example, that each individual should have appropriate access to information concerning the environment that is held by public authorities, as well as the opportunity to participate in decision-making processes. Moreover, governments should establish judicial and administrative procedures to ensure compliance with environmental laws and observance of rights.<sup>36</sup>

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<sup>36</sup> A/RES/S-19/2, 1997, par. 108.

## 2. Johannesburg Plan of Implementation

In 2002, the World Summit on Sustainable Development was held in Johannesburg (South Africa) and produced the Plan of Implementation of the World Summit on Sustainable Development and the Johannesburg Declaration on Sustainable Development. Both instruments reaffirm the pillars of Principle 10.<sup>37</sup> In addition, the Summit endeavored to promote voluntary commitments (type-2 outcomes of the World Summit on Sustainable Development). One of these partnerships or commitments was the Partnership for Principle 10, led by the World Resources Institute in Washington, D.C., with the objective of strengthening implementation of Principle 10.

## 3. The future we want (Rio+20)

In 2012, the United Nations Conference on Sustainable Development (Rio+20) was held in Rio de Janeiro. The preparatory process for the conference included a proposal submission period, during which more than 140 proposals were received on Principle 10, including calls to develop binding instruments on access rights at the global and regional levels.<sup>38</sup> As a result, the so-called “zero draft”, which served as the basis for negotiations, established broad support for Principle 10.

During the regional preparation of Rio+20, the Forum of Ministers of the Environment of Latin America and the Caribbean underscored the importance of Principle 10. The Quito Declaration, produced by the Forum, proclaimed that commitments should be made for the full implementation of the rights of access to information, participation and environmental justice, with the understanding that they are indispensable prerequisites for a citizenry committed to sustainable development.<sup>39</sup>

Rio+20 culminated with the final document “The Future We Want”, which covers a diversity of topics relevant to Principle 10: democratic institutions and the rule of law, environmental information, corporate responsibility, strengthening of the United Nations Environment Programme and regional efforts, including the instrument on Principle 10 in Latin America and the Caribbean.<sup>40</sup>

## B. Human rights instruments

### 1. Universal Human Rights Instruments

The United Nations Human Rights Council has recognized by consensus that “human rights law sets out certain procedural and substantive obligations on States in relation to the enjoyment of a safe, clean, healthy and sustainable environment.”<sup>41</sup> Even though only some human rights instruments explicitly refer to the environment, in recent years human rights mechanisms have increasingly applied human rights standards to environmental issues. The result has been a growing number of legal statements and decisions linking human rights to the environment, including by reference to rights in Principle 10. Moreover, the appointment of an Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment by the United Nations Human Rights Council in 2012 has granted the environment unparalleled importance in the universal human rights system.

Environmental human rights standards related to Principle 10 at the universal level can be classified according to the three access rights of information, participation and justice<sup>42</sup>.

<sup>37</sup> Johannesburg Plan of Implementation, par. 128; Johannesburg Declaration, par. 26.

<sup>38</sup> SILVA and WATES, 2012.

<sup>39</sup> Quito Declaration, par. 14.

<sup>40</sup> A/RES/66/288, 2012, par. 10, 13, 47, 88, 99, 185.

<sup>41</sup> Human Rights Council, Resolution 25/21, A/HRC/25/L.31, (March 24, 2014).

<sup>42</sup> Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, dated 30 December 2013 (A/HRC/25/53)

### a) Right to information

Both the Universal Declaration of Human Rights (art. 19) and the International Covenant on Civil and Political Rights (art. 19) state that the right to freedom of expression includes the freedom “to seek, receive and impart information”. The right to information is also critical to the exercise of other rights, including rights of participation. Access to environmental information and the assessment of environmental impacts that may interfere with the enjoyment of human rights have been deemed fundamental by United Nations human rights mechanisms. For example, General Comment N° 15 of the Committee on Economic, Social and Cultural Rights has determined that individuals should be given full and equal access to information concerning water and the environment.

### b) Right to participation

The right to participation in public affairs is expressly enshrined in article 21 of the Universal Declaration of Human Rights and article 25 of the International Covenant on Civil and Political Rights. The obligation to facilitate public participation in environmental decision-making has been stressed, among others, by the Special Rapporteur on hazardous substances and wastes and the Special Rapporteur on the situation of human rights defenders. Both mandate holders have stated that governments must facilitate the right to participation in environmental decision-making (see A/HRC/7/21 and A/68/262).

Moreover, the Committee on Economic, Social and Cultural Rights has urged States to consult with stakeholders in the course of environmental impact assessments, and has underlined that before any action is taken that interferes with the right to water, the relevant authorities must provide an opportunity for “genuine consultation with those affected.”<sup>43</sup>

The rights of freedom of expression and association are also crucial when it comes to public participation in environmental decision-making. For example, the Special Rapporteur on the situation of human rights defenders has highlighted that those who defend the rights of local communities when they oppose projects that have a direct impact on natural resources, the land or the environment face extraordinary risks (A/68/262) and are the second-largest group of defenders at risk of being killed (A/HRC/4/37).

### c) Right to justice

One of the basic obligations in international human rights law is the provision of an “effective remedy” for violations of the rights established in international standards.<sup>44</sup> Human rights bodies have applied this principle to those violations linked to environmental harm. For example, the Committee on Economic, Social and Cultural Rights has requested that States provide “adequate compensation and/or alternative accommodation and land for cultivation” to indigenous communities and local farmers who had suffered land floods due to large infrastructure projects, and “just compensation and resettlement” of indigenous peoples displaced by forest industries.<sup>45</sup> Special rapporteurs, including those for housing, education, and hazardous substances and wastes, have also underlined the importance of access to remedies within their respective mandates.<sup>46</sup>

## 2. Regional Human Rights Instruments

Case law from the three regional human rights mechanisms in Africa, the Americas and Europe, has developed the links between human rights and the environment. In light of these linkages, access rights have been identified as core components of the procedural dimension of the right to live in a healthy environment and other fundamental rights.

<sup>43</sup> General Comment N° 15, 2002, para. 56.

<sup>44</sup> Articles 2 and 14 of the International Covenant on Civil and Political Rights, among others.

<sup>45</sup> International Covenant on Economic, Social and Cultural Rights report, sect. III.A.3.

<sup>46</sup> Report on special procedures, sect. III.A.3.



### a) Africa and the African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights has heard various cases involving alleged violations of the right to live in a healthy environment, recognized in article 24 of the African Charter on Human and Peoples' Rights. The 1996 Ogoni case, for example, concerned severe environmental degradation and health problems attributed to air, soil and water pollution in the Ogoni lands of Nigeria as a result of oil exploitation.<sup>47</sup> The Commission concluded that observance of the right to live in a healthy environment requires the State to provide genuine opportunities for individuals to be heard and to participate in decisions on development that affect their communities.<sup>48</sup> It indicated that the State should ensure preparation of adequate social and environmental impact studies and should also provide the community with information on risks to health and the environment.<sup>49</sup>

The 2010 Endorois case concerned the displacement of an indigenous community from its ancestral lands following the creation of a protected wildlife area.<sup>50</sup> In this case, the African Commission underscored the fact that the Endorois had not been given accurate information as to the nature and consequences of the project, which was a minimum requirement.<sup>51</sup> It also emphasized that if a development project has significant impacts on the lands of the Endorois, the State has a duty not only to consult, but also to obtain their prior and informed consent, in accordance with their customs and traditions.<sup>52</sup>

### b) Latin America and the Caribbean and the Inter-American human rights system

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have heard several cases involving access rights. In the area of information, the *Claude Reyes v. Chile* case is the leading case in which the Court has recognized that freedom of expression includes the right of access to State-held information of public interest, as well as the duty of the State to disclose it.<sup>53</sup> It should be noted that this case dealt with access to environmental information, in relation to a logging investment project in Patagonia.

In the area of participation and access to effective judicial remedy, *Awás Tingni v. Nicaragua* is the leading case, and it involved a forestry concession that was granted on the Atlantic coast of Nicaragua without consulting the Awás Tingni community.<sup>54</sup> The Court underscored that access to an effective remedy before competent judges is a cornerstone of the rule of law in a democratic society. The Commission developed the obligation to consult in greater detail in the *Maya Communities v. Belize* case, involving timber and oil concessions that were granted without prior consultation.<sup>55</sup> The Commission concluded that the failure to consult with the Maya community on the concessions violated the community's right to collective ownership of lands that they have traditionally used and occupied.<sup>56</sup> And in *Saramaka People v. Suriname*, which concerned forestry and mining concessions on Saramaka tribal lands,<sup>57</sup> the Court developed a framework of safeguards to ensure the survival of the indigenous community, which consisted of three components: adequate consultations, and prior and informed consent in certain cases; equitable distribution of benefits; and independent assessment of social and environmental impacts. These cases show that the inter-American human rights system has recognized

<sup>47</sup> The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights (SERAC v. Nigeria – "Ogoniland"), African Commission on Human and Peoples Rights, Comm. No. 155/96, 2001.

<sup>48</sup> *Ibid.*, par. 53.

<sup>49</sup> *Ibid.*, par. 69.

<sup>50</sup> *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) (on behalf of the Endorois) v. Kenya ("Endorois")*, African Commission on Human and Peoples' Rights, Communication 276/20003, 2010.

<sup>51</sup> *Ibid.*, par. 292.

<sup>52</sup> *Ibid.*, par. 291.

<sup>53</sup> *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (Ser. C) Case No. 151, 19 September 2006.

<sup>54</sup> *Mayagna (Sumo) Awás Tingni Community v. Nicaragua ("Awás Tingni v. Nicaragua")*, Inter-American Court of Human Rights (Ser. C) Case No. 79, 31 August 2001.

<sup>55</sup> *Maya Indigenous Community of the Toledo District v. Belize ("Maya Communities v. Belize")*, Case 12.053, Inter-American Commission on Human Rights, Report No. 40/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1, 2004.

<sup>56</sup> *Ibid.*, par. 155.

<sup>57</sup> *Saramaka People v. Suriname ("Saramaka")*, Inter-American Court of Human Rights (Ser. C) Case No. 185, 12 August 2008.

access rights as fundamental rights in the normative framework for human rights established by the American Convention on Human Rights.

### **c) Europe and the European Court of Human Rights**

The European Court of Human Rights has also ruled on access rights in cases where human rights intersect with the environment. In the area of access to information, in the 1998 case of *Guerra et al. v. Italy*, involving an accident at a chemical plant that exposed the community to high levels of hazardous substances, the Court concluded that the State's refusal to release information to the public on the risks presented by the substances constituted a violation of article 8 on the right to respect for private life and home.<sup>58</sup> In the 2004 case of *Oneryildiz v. Turkey*, involving a methane gas explosion at a garbage dump that killed nine people, the Court found that the right to life entails the right to be informed of threats that endanger life.<sup>59</sup> In the 2008 case of *Budayeva v. Russian Federation*, concerning the loss of life as a result of a climate event, the Court found that the right to life imposes positive obligations on the State, such as the duty to notify the public of emergencies that constitute a threat to life.<sup>60</sup>

The European Court of Human Rights has addressed the issues of participation and access to justice explicitly in its analysis of the proportionality of a certain measure. It has indicated that the positive obligation to act to protect individual rights is to be balanced against the collective interest of society. In the design of environmental policy, the State has a margin of appreciation. However, this margin is subject to considerations of proportionality, which necessitates respect for procedural guarantees that ensure social dialogue on environmental matters. These guarantees include access to information, public participation and access to justice. Where these guarantees are not respected, there is no balance of proportionality and State responsibility may be engaged for the environmental and human rights interference.<sup>61</sup>

## **C. Regional instruments and processes related to access rights**

### **1. The Aarhus Convention and the Kiev Protocol**

Since the Aarhus Convention was discussed earlier, this section will take a brief look at the Protocol on Pollutant Release and Transfer Registers (Kiev Protocol). In 2003, the parties concluded the Kiev Protocol, the first legally binding international instrument on pollutant release and transfer registers.

The Kiev Protocol recognizes that pollutant release and transfer registers are an important mechanism for increasing corporate responsibility, reducing pollution and promoting sustainable development. Pollutant release and transfer registers are inventories of pollution, mainly from industrial sources. Article 1 of the Protocol sets forth its objective: "to enhance public access to information through the establishment of coherent nationwide pollutant release and transfer registers." Pursuant to the Protocol, Parties must ensure that the listed types of facilities, report their emissions of pollutants to the government authorities, and the government makes this information available to the public.

### **2. Summits of the Americas**

The Summits of the Americas have convened the Heads of State and Government in the framework of the Organization of American States (OAS) to share their perspectives on the challenges facing the region, with a view to finding solutions. Access rights have been affirmed at several Summits, including the ones held at Santa Cruz (1996), and Santiago (1998), which emphasizes the centrality of Principle 10 in the region's shared vision for development.

<sup>58</sup> *Guerra v. Italy*, Appl. No. 14967/89 [1998] ECHR 7, 19 February 1998.

<sup>59</sup> *Oneryildiz v. Turkey*, App. No. 48939/99 [2004] ECHR 657, 30 November 2004.

<sup>60</sup> *Budayeva et al. v. Russian Federation* ("Budayeva"), Appl. No. 15339/02 et al. [2008], 20 March 2008.

<sup>61</sup> A/HRC/19/34, 2011, par. 38.

### 3. Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development

In 2001, the Organization of American States adopted a non-binding regional instrument, the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development, in order to advance public participation in the region.<sup>62</sup> The strategy recommends the creation of a legal framework at the national level to ensure the participation of civil society in decisions on sustainable development. The process that culminated in the strategy marked the first time that experiences were analyzed with public participation in so many countries in the region and that good practices were identified.<sup>63</sup>

### 4. Inter-American Democratic Charter

Also in 2001, the OAS adopted the Inter-American Democratic Charter, which recognizes access to information as a political right that facilitates citizen participation and contributes to transparency in government activities.<sup>64</sup> The Charter establishes the connection between democratic principles and the environment. Specifically, article 15 of the Charter states that the exercise of democracy promotes the preservation and good stewardship of the environment. And article 6 establishes, “it is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy”.

### 5. Model Inter-American Law on Access to Information

In 2010, the OAS approved the Model Inter-American Law on Access to Information. This model law was preceded by the Declaration of Nuevo León of the Special Summit of the Americas, whereby the Heads of State and Government of the Americas committed to “provid[e] the legal and regulatory framework and the structures and conditions required to guarantee the right to access to public information”. A group of experts prepared a draft version of the model law, which was presented to the Committee on Juridical and Political Affairs of the Permanent Council and subsequently to the OAS General Assembly, which approved the instrument. Among other antecedents, the model law incorporates the principles on access to information, approved by the Inter-American Juridical Committee in 2008.<sup>65</sup>

### 6. Community of Latin American and Caribbean States (CELAC)

The First Summit of the Community of Latin American and Caribbean States (CELAC), held in Santiago in 2013, prepared the Declaration of Santiago, which states that the Heads of State and Government of CELAC, “aware of the historical meaning of this First Summit, which groups all Latin American and Caribbean countries into a single regional body, [...] appreciate initiatives for regional implementation of the 10<sup>th</sup> Principle of the 1992 Rio Declaration, regarding the rights of access to information, participation and environmental justice, as a significant contribution to the participation of organized community committed to Sustainable Development”.<sup>66</sup>

Also in January 2013, the Heads of State and Government of CELAC and the European Union (EU), and the Presidents of the European Council and the European Commission, met to discuss the theme “Alliance for Sustainable Development: Promoting Investments of Social and Environmental Quality”. The CELAC-EU meeting acknowledged the importance of implementing Principle 10 of the 1992 Rio Declaration at the Earth Summit and reiterated the importance of advancing initiatives in this matter.<sup>67</sup>

<sup>62</sup> Organization of American States (OAS), *Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development* [online] [http://www.oas.org/dsd/PDF\\_files/ispenglish.pdf](http://www.oas.org/dsd/PDF_files/ispenglish.pdf).

<sup>63</sup> CAILLAUX, et al., 2002.

<sup>64</sup> OAS, Inter-American Democratic Charter, approved at Lima in 2001 [online] [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm); and *Inter-American Democratic Charter: Documents and Interpretations*, 2003 [online] [http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm).

<sup>65</sup> OAS/Ser. Q CJI/RES.147 (LXXIII-O/08), 2008.

<sup>66</sup> Declaration of Santiago, 2013, par. 1 and 60.

<sup>67</sup> Declaration of Santiago, 2013, par. 25.

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