



Comments on the Economic Commission for Latin America and the Caribbean (ECLAC) paper on the matters to be considered for the application of the Regional Instrument on P10.

June 27th, 2014.

On May 13, 2014 ECLAC submitted the draft “**Matters to be considered in the regional instrument for the full application of principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean**” for consideration by Governments and the public. This draft was discussed at the fifth meeting of the Working Group on the Content and Nature of the Regional Instrument.

During this meeting, July 7th was established as the deadline for sending written comments to the Working Groups Coordinators, the Governments of Brazil and Costa Rica on the draft. TAI appreciates ECLAC’s draft and considers it to be a good starting point for the discussion on the contents of a LAC Principle 10 Regional Instrument.

This document reflects the Access Initiative comments on the draft. It has two sections: the first section presents general comments and the second one contains specific comments on ECLACs draft.

SECTION I: GENERAL COMMENTS

Environmental democracy begins by extending rights to the public. In addition to common civil and political rights and freedoms, the public needs a bundle rights we term ‘access rights’ to effectively participate in environmental decision-making. Environmental activists and concerned individuals rely on this collection of rights to influence environmental decision-making, curb environmental destruction and promote sustainable development. The exercise of access rights in a democracy allows social dialogue which in turn helps prevent environmental conflicts.

Environmental rights include the substantive right to a clean and healthy environment along with the procedural rights of access to information, public participation and access to justice in environmental terms. Access to government held information endows members of society with the requisite knowledge to effectively participate in environmental decision-making. The right to participate extends a platform for the public to voice their concerns, for governments to respond, and for a broad-based consensus to be built around important environmental decisions. The right to seek judicial remedy confers power to citizens to defend individual and collective rights as well as enforce environmental laws and government responsibilities.

In light of these general observations, it is important to recognize that certain minimum content should be reflected in the LAC regional instrument on access rights. In addition the rights based approach needs to be reflected in all the documents related to this process. As such, it should be reflected in the beginning of the ECLAC's document, as a basic principle underpinning the regional instrument and in each of its sections. It is also critical that the ECLAC's document provide some guidance on how to define the scope of each of the sections on information, participation and justice so that there is a legitimate, clear, and precise document that can be utilized to move forward in the development of the regional instrument. Without interpretation of the various terms used in the regional instrument States will not be able to agree to the scope of the instrument or provide detailed feedback on its relevance to national practice. It is therefore imperative that the regional instrument contains for example a definition of environmental information¹. Finally it is essential that ECLAC's document provides for the necessary protection of persons and organizations exercising

¹ For reference, the Aarhus Convention establish that environmental information is any information in written, visual, aural, electronic or any other material form. This should include: (i) the state, quality, quantity, sustainability of environmental elements and their interaction: air, atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including GMOs and techniques extraction of hydrocarbons; (ii) factors such as pollutants, energy, noise and radiation, and activities, pollution caused directly or indirectly by humans and trash; (iii) administrative measures, environmental agreements, policies, legislation, plans, programs and projects affecting or likely to affect the elements of the environment, on the analysis of cost-benefit and other economic analyzes and assumptions used in decision-making on environmental matters; (iv) environmental management: budgeting, strategic maintenance issues in the environmental sectors, programs and financial mechanisms plans national, regional and local action to ensure environmental sustainability. Furthermore, such information should include all contracts, memoranda of understanding, bids, offers and progress reports on projects; (v) strategic and impact assessments, agreements with other States, among others, (vi) the state of human health, safety and living conditions and (vii) the status of cultural sites and built structures insofar as they are or they can be altered by the state of elements of the environment or, through these elements, by the factors, activities or measures of human beings.

rights of access included in the instrument particularly environmental defenders. Without this provision access rights cannot be utilized and the effectiveness of the regional instrument would be undermined.

SECTION II. SPECIFIC COMMENTS TO BE CONSIDERED IN EVERY RIGHT

This section includes specific comments, according to the order and structure of the document prepared by ECLAC.

1. Access to environmental information.

The right of the public to access environmental information is a pivotal right that allows the public to exercise rights to participate and access justice. Information must be widely available in forms that are ***accessible and understandable, as well as provided in a timely manner and without barriers such as language and cost.*** The Access to environmental information section is divided into Active Transparency and Passive Transparency. Some issues which are not specifically mentioned in the ECLAC's document are as follows:

Passive Transparency:

A clear reference that the right to environmental information is a fundamental human right and should be applied broadly to information held by public bodies and private bodies, including information which is recorded in any format or medium.

The instrument must make mention of the importance of costs. It should be specified that environmental information must be provided for free or at reasonable costs.

The instrument must include a provision on who can make a request for information that is a natural person or a corporation, domestic or foreign, or anonymous person. Additionally, any person has the right to request information without having to justify the reasons or interests why the information is requested.

The issues document should specify that all public authorities should be subject to the law on access to environmental information, including the judiciary, legislature

and executive. This should also include natural or legal persons performing public administrative functions or providing public services or using public money;

The document does not mention that the reasons for confidentiality of information must be clear, exceptional and specifically provided by law subject to a public interest test.

The document does not explain that public bodies must justify the rejection of a request for information with reasons and in case of denials of requests for access to information, access mechanisms for review of the denial must be through an independent body which natural or legal persons.

Active Transparency: The document does not recognize that public bodies should disclose information about their functions regularly and proactively, in an accessible and understandable way including information relating to environmental public health information, environmental laws and policies as well as all other relevant sectorial areas including but not limited to biodiversity, protected areas, forestry, coastal and marine resources, mining, and environmental quality.

The issues document should recognise that States should create systems that require the generation of information on the establishment of standards, assessments and other environmental impact; permits, monitoring and enforcement of activities that have a significant environmental impact. There should also be a unique section on consumer information about products that can have an impact on the environment or health and the duty of proactive disclosure.

There is no explicit reference in the issues document to open data in the context of environmental information. This needs to be included.

This section on access to information should also make reference to issues of accessibility and dissemination of information

- (i) the information must be accessible, understandable and disseminated by culturally appropriate mechanisms,
- (ii) the information must be accurate and complete.

Monitoring information has a crucial impact on the public's daily lives –some reference should be made to the type of information which should be a priority

including that the authorities should collect and regularly update information about: air quality and drinking water in cities, water quality, climate information, rainfall and humidity in rural areas, and information on forest ecosystems, deforestation rates and impacts on biodiversity. Additionally, those information systems should cover environmental performance and compliance with the operators of all activities that may potentially affect the environment and collect and update that information and the flow of information on new and developing activities that impact the environment.

In particular regard to the section on specific groups or groups on situation of vulnerability, the document needs to be elaborated to include (i) removing barriers that currently exist for local and vulnerable communities such as technical language, the cost of information and means of access. (ii) Ensure that information about threats, impacts, decisions and opportunities to influence environmental decisions are communicated through channels culturally, economically and spatially appropriate and used by groups on situation of vulnerability.

In relation to private information (such as information for consumers, voluntary reporting of environmental compliance, emissions, or substances discharged to the environment) the ECLAC's document has to make clear that information to be release proactively must serve as the basis of discussion of corporate accountability.

2. Participation of the public

P10 of the Rio Declaration has set the basis for a relative consensus that public participation facilitates democracy and informed debate, legitimizes decisions taken by governments and reduces conflict.²

The regional instrument on Principle 10 for Latin America and the Caribbean should require States to ensure that their national frameworks give effect to meaningful participation. Exercising access rights means ensuring that there are clear procedures for public participation and that these processes are inclusive, transparent and enforceable.

² B. Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resources Development' in D. Zillman, A. Lucas and G. Pring (eds.), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (OUP, Oxford 2002); See also J. Foti (Eds.), *Voice and Choice: Opening the Door to Environmental Democracy*, World Resources Institute, 2008.

Mechanisms and tools for public participation: This section should specify that the mechanisms and tools for public participation should ensure **openness** and **inclusivity**.

Facilitation of public participation (such as timely notification, deadlines, guidelines):

This section should state the requirement for early notification of opportunities for public participation and that there should be an opportunity for the public to express their views on the decision to be taken in a timely period.

Additionally, the section should also include a statement that the costs to the public to participate should be kept low.

Access to relevant information: This section should be elaborated to include the statement that States should provide timely, clear, objective and understandable information to the public.

Decision taken (such as notification, explanation and dissemination): This section should include a statement that the views of the public are considered and taken into account, that a response is provided to public comments and that reasons are given for the decision taken.

Special consideration to specific or vulnerable groups

Specific conditions for vulnerable groups need to be mentioned in more detail. States should be required to

- (i) Identify which are the communities in situation of vulnerability (if any) when organizing a public participation process.
- (ii) Learn about the best formats and channels to inform them. (consider appropriate language and level of literacy)
- (iii) Reduce costs (if any) for their participation, like transportation costs and childcare.
- (iv) Build capacity and raise awareness through meetings and other means to better explain the participation process and the topic of the consultation.
- (v) Ensure that public officials consider vulnerable communities characteristics in their interaction and keep them accountable to communities concerns about the issue.

- (vi) For large and complex topics or projects the State should hire a specialist that will assist communities through the process in understanding the topic or project and making comments and participating in hearings.

There should be a statement on Education and Training: States should be required to educate and raise public awareness of public participation requirements.

3. Access to justice

The right to seek judicial remedy empowers citizens to defend individual and collective rights as well as to enforce environmental laws and government responsibilities.

A properly functioning justice system must be **accessible** to the public and provide **effective** redress and remedy. For environmental claims, a number of common barriers inhibit the accessibility of courts including

- (i) The weakness of environmental laws;
- (ii) The restrictiveness of legal standing requirements;
- (iii) The overall financial burden of litigation; and lack of alternative forums
- (iv) Legal and extra-legal intimidation.

Some of the most significant factors contributing to the effectiveness of the justice mechanisms of the state are

- (i) The relative independence of judges and lawyers from political pressures;
- (ii) The lengthiness of trials; and
- (iii) The enforceability of judicial rulings.

It is thus critical that the issues to be considered within the regional instrument should go beyond the issues identified in ECLAC's report and include:

- (i) Recognition of the provision of broad legal standing: Available to all natural or legal persons, special mention to environmental and human rights NGOs, to citizen and non-citizens, and without having to demonstrate a legal concern or a proprietary interest in the issue;

- (ii) Provisions to require legal rights to challenge any decision, act or omission by public authorities or private actors that allegedly violate the environmental legal norms;
- (iii) Legal mechanisms to ensure the independence and impartiality of the judicial and administrative bodies (court or other bodies);
- (iv) Reasonable time frames to ensure considering on time the challenged issues;
- (v) Interim or precautionary measures to protect the environment, without delay or preconditions;
- (vi) Provisions to ensure the restoration measures of the environmental damage, including compensation for the victims;
- (vii) Timely serving of environmental sentences and effective enforcement measures;
- (viii) Protection of environmental defenders
- (ix) Provisions to reduce costs in the case of public interest environmental litigation.

4. Capacity building and cooperation.

We consider that any regional instrument P10 instrument should recognize that all countries in the region do not have the same level of development and consequently, do not have the same capabilities. This situation makes it necessary to provide flexible and differentiated commitments according to their respective capabilities. This also relates to the principle of gradualism.

- (i) **Involve the private sector and NGOs:** the instrument should boost cooperation with the private sector and civil society, as information and relevant technologies to achieve the objectives of the instrument are being generated in those sectors.
- (ii) **Support for countries to comply with the instrument:** This support could consider the provision of financial resources; programs to strengthen human capabilities; strengthening of the regulatory framework; among other initiatives and programs.
- (iii) **Technical support:** the instrument should provide that the responsible bodies of the instrument provide technical support to States parties,

especially in the production and exchange of information. It should also promote technical assistance among States and the exchange of information of any kind, useful for the implementation of the Instrument, in other words to cooperate in legal and technical fields.

(iv) **Synergies with other institutions and instruments:** the Instrument should establish provisions relating to the coordination between the efforts of the States Parties and the competent international bodies and organizations as well as between the instrument and other relevant international environmental agreements.

(v) **Education / environmental awareness:** the Instrument should include minimum commitments to provide public awareness on the rights of access by the body in charge of the instrument as well as for the States. It should also include provisions on cooperation among States parties / bodies and other relevant international organizations and agencies or instruments, in order to assist in efforts to generate public awareness on environmental issues.

(vi) **Development of activities for both public and civil servants:** the instrument should provide the development of skills aimed at strengthening the capacity of both public officials as well as general citizens. It is important to promote cooperation with civil society.

(vii) **Funding:** the instrument should contain provisions regarding financial cooperation of States with relevant international agencies or organizations, financial cooperation between States, as well as financial resources managed by the body in charge of the instrument.

We appreciate the opportunity to submit comments to the ECLAC's document concerning the contents of the regional instrument on access rights. The Access Initiative is open to continue to engage in the constructive dialogue that has set the basis in the process opened by the Declaration on the implementation of Principle 10 of the Rio Declaration on Environment and Development, signed by the Conference of the United Nations Conference on Sustainable Development (Rio +20) in Rio de Janeiro in June 2012.

The following TAI³ partner organizations participated in preparing this document:

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Fundación Ambiente y Recursos Naturales, FARN, Argentina

Centro de Incidencia Ambiental, CIAM, Panama

Centro Ecuatoriano de Derecho Ambiental, CEDA, Ecuador

Asociación Ambiente y Sociedad, Colombia

Centro Mexicano de Derecho Ambiental, CEMDA, Mexico

Cultura Ecológica, Mexico

Comunicación y Educación Ambiental, Mexico

Artículo 19, Brazil

GAIA Derecho Ambiental, Uruguay

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Instituto de Abogados para la Protección del Medio Ambiente, Insaproma, Dominican Republic

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³ The Access Initiative is a civil society organizations global network that works for the full implementation of the access rights to information, participation and justice on environmental matters. These access rights are included in the Principle 10 of the Rio Declaration of 1992.