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**The Right To Participate In Decisions
That Affect The Environment**

Neil A.F. Popović*

I. Introduction

Virtually every non-natural event that affects the environment involves governmental decision-making at some level. Every time the government issues or denies a permit or license for a private development project or commences or declines to commence a project of its own, the governmental process affects the environment. How the government makes decisions can have a profound impact on the environment and on the people (and other creatures) who inhabit it. Sometimes the impact is immediate and direct, as when the government regulates the disposal of a toxic chemical; and sometimes the impact is postponed or latent, as when the government approves the siting of a nuclear power plant.

When a government makes decisions — systemic or epi-

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sodic — it may or may not consider the views of the public. Most political systems purport to make some provision for public participation, but the scope and effect of that participation vary considerably.¹ Public participation encompasses a broad spectrum of institutions, including suffrage, participation in local government, appearance and testimony at legislative and administrative proceedings and membership in citizen/government panels. Many of the foundational human rights instruments incorporate the right to political participation as well as some of its corollaries, such as freedom of expression and freedom of information. With the growth and increasing prominence of environmental awareness and protection has come an increasing recognition of the importance of public participation in governmental decisions that bear on the environment.²

This paper aims to explore the status and contours of the right to political participation in environmental decision-making and to determine (preliminarily) the requisites of effective participation. The paper will first address international and regional instruments that treat political participation as a human right and as an environment-related right. Next, the paper will examine some elements of participation — including education, access to information, voice, impact, implementation and enforcement — in an effort to cull the essential elements of effective participation. Finally, the paper will address special considerations that come into play in the context of trans-boundary environmental issues.

II. The Right To Participate

A. In General

Analysis of the essential composition of the right to political participation requires a prior understanding, or judgment, as to why political participation matters: does it matter for its

1. Henry J. Steiner, *Political Participation as a Human Right*, 1 HUM. RTS. Y.B. 77 (1988).

2. *E.g.*, POPULAR PARTICIPATION IN DECISION MAKING FOR DEVELOPMENT at 65, U.N. Doc. ST/ESA/31, U.N. Sales No. E.75.IV.10 (1975).

own sake (the elemental model), or as a means to protect the environment or other cherished values (the instrumental model)?³ The answer to that question frames the debate over the optimal configuration of the right to political participation, because maximizing participation does not necessarily maximize environmental protection. Different renditions of the right to participate inevitably reflect the different priorities inherent in the elemental and instrumental models, and evaluation of the status and appeal of various attempts to describe the right to participation should acknowledge the making of such value judgments.

This paper addresses political participation as a mechanism for enhancing environmental protection. The paper thus proceeds from the premise that political participation matters because of what it permits in the context of environmental decision-making.

A 1980 Advisory Committee on Intergovernmental Relations survey of American public participation objectives identified eight participation functions: (1) Give information to citizens; (2) Get information from and about citizens; (3) Improve public decisions and programs; (4) Enhance acceptance of public decisions and build consensus; (5) Supplement public agency work; (6) Change political power patterns and power allocations; (7) Protect individual and minority group rights and interests; and (8) Delay or avoid making difficult public decisions.⁴ These functions come within the scope of a broad norm of public participation, a norm that few states openly disregard.

The Universal Declaration of Human Rights provides, in Article 21, that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives."⁵ The International Covenant on Civil and Political Rights proclaims: "[e]very citizen shall have the right

3. Steiner, *supra* note 1, at 100.

4. J. William Futrell, *Public Participation in Soviet Environmental Policy*, 5 PACE ENVTL. L. REV. 487, 497-98 (1987) (citing ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM 30, 61-97 (1979)).

5. G.A. Res. 217A, U.N. GAOR, 3d Sess., at 139, U.N. Doc. A/810 (1948).

and the opportunity . . . without unreasonable restrictions: [¶](a) To take part in the conduct of public affairs, directly or through freely chosen representatives.”⁶ Governments of diverse political and ideological leanings espouse the norm of political participation, but they interpret and apply the norm in widely differing ways.⁷ Underlying any theory of participation, the proposed participants must enjoy the “expressive” rights of freedom of speech, press, assembly and association.⁸ Article 19 of the Universal Declaration of Human Rights expresses this baseline for political participation as follows: “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁹ The rights described in Article 19 make up the core prerequisites to political participation. Beyond that, however, the lines become less clear as to which component rights are essential to political participation and which are extras. This paper aims to identify the essentials.

B. Participation Regarding the Environment

Narrowing the issue to political participation related to the environment provides a focal point for selecting the compulsory elements of effective participation.¹⁰ Although the basic human rights instruments (which do not focus specifically on the environment) sweep broadly enough to touch environmental issues, they are supplemented and complemented by

6. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 55, U.N. Doc. A/6316 (1966); see also International Labour Conference, Convention 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 28 I.L.M. 1382 (1989) (obligating Convention parties to “establish means by which these [indigenous] peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them”).

7. See Steiner, *supra* note 1, at 78.

8. *Id.* at 88.

9. G.A. Res. 217A(III), *supra* note 5, at art. 19.

10. Participation in environmental decision-making, though an example of political participation in general, does not necessarily reflect the prerequisites of effective participation in other contexts.

many international legal instruments that specifically address the right to political participation in the context of the environment. For example, the World Charter for Nature, approved as a resolution of the United Nations General Assembly, recommends: "[a]ll persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."¹¹

The International Union for the Conservation of Nature and Natural Resources (IUCN) Draft Covenant on Environmental Conservation and Sustainable Use of Natural Resources provides: "[s]tates shall provide for and promote widespread participation by individuals and non-governmental organizations in all aspects of conserving the environment. In particular, States shall:

. . . (b) afford the opportunity to participate, individually, or with others, in the decision-making process."¹²

Participants in the 1992 United Nations Conference on Environment and Development in Rio de Janeiro agreed on a Declaration on Environment and Development ("Rio Declaration"). It addresses political participation as follows:

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

11. G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 18, U.N. Doc. A/37/51 (1982) (referencing principle 23).

12. U.N. Doc. A/CONF.151/PC/WG.III/4, at 10 (1991) (quoting art. 10) [hereinafter IUCN Draft Covenant].

be provided.¹³

Although the foregoing instruments do not purport to create enforceable obligations in the legal sense,¹⁴ they do provide valuable insight into the elements of an operational right to participation and they do reflect a degree of international consensus. Moreover, instruments like the Rio Declaration provide examples for regional instruments that increase the specificity and in some cases create binding obligations on states regarding public participation in the environmental decision-making process.

Several regional organizations have adopted instruments that address political participation in the environmental sphere. For example, the Arab Ministerial Conference on Environment and Development issued an Arab Declaration on Environment and Development and Future Perspectives ("Arab Declaration") that affirms "the right of individuals and non-governmental organizations to acquire information about environmental issues relevant to them, to have access to data and to participate in the formulation and implementation of decisions that may affect their environment."¹⁵ The Arab Declaration also provides:

It is important that due attention be paid to popular participation by:

- (a) Associating individuals, local organizations and non-governmental organizations in following up the implementation of projects for protection of

13. U.N. Doc. A/CONF.151/PC/WG.III/L.33/Rev. 1, principle 10 (1992) [hereinafter Rio Declaration]. Principle 10 was adopted by the participating states at the U.N. Conference on Environment and Development, 3-14 June 1992, Rio de Janeiro. See also WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 330 (1986).

14. The right to participate in environmental decisions is probably not (yet) a legal right capable of judicial enforcement, as there seems to be little, if any, evidence that any state that would suffer by application of such a norm has nonetheless acknowledged the norm's existence or legal character. See generally Alfred P. Rubin, *Are Human Rights Legal?*, 21 ISRAEL Y.B. ON HUM. RTS. 45 (1991).

15. *Letter of the Conference on Environment and Development*, 46th Sess., Agenda Items 34, 77(e)-(h), 78 & 79, at 4, U.N. Doc. A/46/632 (1991) [hereinafter Arab Declaration].

the environment and integrated development and providing the necessary support;

- (b) Affirming the role of the Arab woman in environmental protection so as to ensure sound environmental education for future generations.¹⁶

In 1990, the United Nations Economic Commission for Europe adopted a Draft ECE Charter on Environmental Rights and Obligations, which sets forth twenty-four principles that relate to public participation in decisions that affect the environment.¹⁷ The Draft ECE Charter addresses environmental information, education and training by framing rights to: adequate information relevant to the environment, including information on products and activities which could or do significantly affect the environment and on environmental protection measures; adequate information about potential sources of accidents, including contingency planning, and the right to be informed immediately when an emergency occurs; access to administrative or judicial review when the requested information is not provided in a timely manner; adequate environmental education and training; and reports prepared by competent authorities on the state of the environment at local, provincial and national levels, including the extent to which public activities have had a significant effect on the environment.¹⁸

With respect to decision-making per se, the Draft Charter requires the following components: the right of everyone to participate in the decision-making process for activities that do or could have a significant impact on the environment; environmental impact assessment tied to decision-making authority; the right to receive the information necessary to participate in a timely and effective manner in the decision-making process; and the right to be informed without delay of

16. *Id.* at 9.

17. Draft ECE Charter on Environmental Rights and Obligations, *adopted at the Experts Meeting*, U.N. Economic Commission for Europe, Oslo, Norway, 29-31 Oct. 1990 [hereinafter Draft ECE Charter].

18. *Id.*, principles 4-9.

the reasons for the decision taken.¹⁹

On the issues of legal protection and compensation, the Draft Charter outlines the following concepts: the right of access to and due process in environment-related administrative and judicial proceedings; the right to seek immediate State or judicial action to reduce or stop an environmentally destructive activity; the right to seek reimbursement for expenditures used to prevent or repair damage to the environment; the right to seek a return to the environmental status quo ante; and the right to seek compensation for damage to health, livelihood or the environment.²⁰

Finally, with respect to trans-boundary impacts, the Draft Charter provides for equal access to administrative and judicial proceedings for affected nonresidents, and for public responsibility to take environmental effects into account without discrimination as to whether the effects would occur inside or outside the area under the national jurisdiction of the state concerned.²¹

The Organization of American States' 1991 Inter-American Program of Action for Environmental Protection recommends:

Promotion of a greater environmental awareness as a dimension and omnipresent function of education, from an interdisciplinary standpoint, in the member states of the Inter-american system.

. . . .

Promotion of the coordinated participation of non-governmental organizations and other sectors of society in

19. *Id.*, principles 10-13.

20. *Id.*, principles 14-18.

21. *Id.*, principles 19-20; see also *Citizens' Code of Conduct for the Protection of the Environment*, U.N. Economic and Social Commission for Asia and the Pacific, Annex, Agenda Item 2 ¶ 4, U.N. Doc. IHE/MSCE/3 (1990) (paper prepared for NGO/Media Symposium on Communication for Environment) ("It is imperative that all persons make full use of available information on the state of the environment and take responsibility for obtaining adequate knowledge of their rights and duties for environment protection. They should take active part in the formulation and implementation of decisions likely to affect their environment."). *Id.*

the regional effort to improve the environment and quality of life in the region.²²

The provisions referenced above are but a sampling of the existing documentation about public participation in environmental decision-making. The existing instruments on the subject cover environmental education and training, access to information, participation in formal decision-making procedures and legal or administrative means to challenge decisions already made. The next section of this paper attempts to explore the individual elements that together comprise political participation in the environmental context.

III. Designing/Defining An Effective Environmental Right To Participation

Recognition of a right to participate does not in and of itself ensure *effective* participation. To the contrary, it begs the question of what effective participation means and what it requires. Building on the elements set forth above, effective participation requires, at a minimum (1) education about the environment and things that might affect it; (2) access to information (including the fact that information exists and is available); (3) a voice in decision-making; (4) transparency of decisional processes (by formal consideration of public input and explanation of how that input affected the decision at issue); (5) post-project analysis and monitoring, as well as access to pertinent information; (6) enforcement structures; and (7) recourse to independent tribunals for redress.²³ For each of these elements, the public also needs protection against retaliation — by the government or by the non-governmental proponents of the activity.

The listed elements provide a foundation for discussion of what it takes to make participation a practical fact. For exam-

22. General Assembly of the Org. of American States (O.A.S.), ¶¶ (g), (u), AG/RES.1114 (XXI-0/91) (June 8, 1991).

23. This list draws on, among others, the Draft ECE Charter, *supra* note 17, and Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 117 (1991).

ple, in order to really empower the public, a right of access to information requires more than a simple transmission of data. The information must be usable to foster participation. In addition, elements of the right to participation require procedural mechanisms in order for the public's participatory efforts to have a meaningful role in the environmental decision-making process. The elements discussed below should establish a sufficiently firm network of elements to support an effective system of public action in environmental decision-making.

A. Education

Environmental education is the cornerstone of effective participation in environmental decision-making, because it furnishes the public with knowledge and information about the environment's importance and its vulnerability to degradation. Education can equip the public to analyze and understand the proposals, options, alternatives and explanations put before it with respect to a given environmental effect. Environmental education includes formal school curricula, media coverage of environmentally significant events and information, and government/official dissemination of pertinent information.

Several regional and international instruments specifically address the role of education in environmental decision-making. For example, the Council of Europe's Final Declaration of the Pan-European Parliamentary Conference on the Protection of East-West Environment invites governments "[t]o include in school curricula a course on the environment and ecology, with special emphasis on practical training and the introduction of specific behavioural activities."²⁴ Along similar lines, the Draft American Declaration on the Environment recites a duty to provide for the inclusion of preservation and conservation of the environment in educational

24. Council of Europe, *Pan-European Parliamentary Conference on the Protection of East-West Environment — Final Declaration* --, 23-26 Oct. 1990, reprinted in 21 ENVTL. POL'Y & L. 37 (1991).

programs.²⁵

The League of Arab States' Arab Declaration on Environment and Future Perspectives includes a provision for "[i]ntroducing the environmental dimension into educational syllabuses and curricula at all levels and stages."²⁶ These and other proclamations on the right to environmental education and training evidence both the need to increase and enhance understanding of environmental issues,²⁷ and the crucial importance of environmental education and training as prerequisites to other forms of political participation.

Aside from formal school education, effective participation in environmental decision-making also requires education at a more general, dispersed level for members of the public who are not enrolled in school. Here, the popular or mass media can play an important role.²⁸ Media presentation of environmental news and information can reach a broad audience and can provide continuing environmental education for persons outside of formal educational institutions.²⁹ The media can engage in independent investigation and reporting, facilitate public communication and discussion and disseminate information supplied by the government.³⁰

The educational aspect of public participation in environmental decision-making serves a consciousness-raising func-

25. *Draft American Declaration on the Environment*, Inter-American Judicial Comm., ¶ I(2), O.A.S. Doc. CJI/RES.II-2/89 [hereinafter *Draft American Declaration on the Environment*].

26. Arab Declaration, *supra* note 15, at 9.

27. See, e.g., AG/RES.1114, *supra* note 22; Draft ECE Charter, *supra* note 17, principle 7.

28. See, e.g., AG/RES.1114, *supra* note 22, para. (l) (encouraging media "to support regional and national efforts to create environmental awareness and better educate and inform people on the need to protect the environment. . .").

In terms of the right to participation, it is doubtful whether domestic free press provisions would allow an obligation on the part of private media to feature environmental news. See, e.g., U.S. CONST. amend. I. An important factor would be that the public have free access to an uncensored media.

29. See P.F. Teniere-Buchot, *The Role of the Public in Water Management Decisions in France*, 16 NAT. RESOURCES J. 159, 160-62 (1976) (discussing "passive participation," i.e., public use of mass media to obtain information about the environment).

30. See W.R. Derrick Sewell & Timothy O'Riordan, *The Culture of Participation in Environmental Decisionmaking*, 16 NAT. RESOURCES J. 1, 15-16 (1976).

tion through formal inclusion of environmental issues in educational curricula and public education by way of the media. Environmental education can sensitize the public to environmental issues. Effective environmental education lets people know they can participate in the environmental decision-making process and it teaches them how to do so effectively. Thus, a meaningful right to participate in environmental decision-making requires education.

B. Access to Information

Political participation depends heavily on ready access to relevant information. Freedom of information — the ability to obtain information in the possession of the government in response to a specific request — enables the public to examine the data (raw and interpreted) that the government considers in connection with environmental decisions.³¹ Without such information, public participation in environmental decision-making would seldom advance beyond shots in the dark.

Many international instruments, in varying degrees of solemnity and enforceability, treat the right to obtain information about the environment as an important component of public participation in preserving the planet. For example, the IUCN Commission on Environmental Law Working Group's Draft Covenant on Environmental Conservation and Sustainable Use of Natural Resources directs states to "provide for adequate publicly available information relevant to the environment."³²

The 1972 United Nations Educational, Scientific and Cultural Organization Convention Concerning the Protection of the World Cultural and Natural Heritage ("UNESCO Convention") includes a pledge by member states to "undertake to keep the public broadly informed of the dangers threatening this [natural] heritage"³³ The UNESCO Convention

31. See generally CHRISTOPHER M. JOHNSON, *DEFINING THE CONTENT OF THE RIGHT TO INFORMATION* (Sierra Club Legal Defense Fund 1992). Mr. Johnson's paper addresses the right to obtain information in the possession of the government.

32. IUCN Draft Covenant, *supra* note 12, art. 10(a).

33. Nov. 16, 1972, art. 27(2), 27 U.S.T. 37, 11 I.L.M. 1358.

addresses both the passive obligations of the government (i.e., to respond to requests for information) and the active obligations (i.e., to place information into the stream of public consumption). The cited instruments represent only a sprinkling of the diverse regional and international offerings on the subject of freedom of information.³⁴

In order for such environmental information to facilitate political participation, the information must be accurate, affordable, accessible, timely, comprehensible³⁵ and available across state boundaries. At the same time, however, the government should be permitted to withhold carefully circumscribed types of information in order to protect individual privacy, recognized trade secrets and particularly sensitive national security information. Such restrictions must be narrowly defined though, in order to limit their application to cases where the injury caused by disclosure clearly outweighs the benefits. In all cases of unproduced information, the requesting party must have an opportunity to seek independent review of the government's decision not to produce.

Information requesters should have to make a limited showing of interest and of the relevance of the information sought, in order to discourage and control frivolous requests. However, the requesting party should get the benefit of the doubt, and be provided a fair opportunity to demonstrate how the information he or she seeks bears on the environment. It cannot be left to the agency that withholds information to determine whether the information relates to the environment, particularly where the requesting party has to guess what type

34. See, e.g., Antarctic Protocol on Environmental Protection, Oct. 4, 1991, art. 6(1)(c), 30 I.L.M. 1455 (duty to provide environmental risk information on request); Rio Declaration, *supra* note 13, principle 10 ("each individual shall have appropriate access to information concerning the environment . . ."); Council Directive 90/313 on the Freedom of Access to Information on the Environment, 1990 O.J. (L 158/56) 33 (proposing public right of free access to environmental information); Arab Declaration, *supra* note 15, ¶ 4 (affirming right to acquire information about environmental issues).

35. See Nay Htun, *The EIA Process in Asia and the Pacific Region*, in ENVIRONMENTAL IMPACT AND ASSESSMENT 225, 236 (P. Wathern ed. 1988) [hereinafter Wathern] (to be meaningful, information must be presented in non-technical form in native language).

of information the government possesses in the first place.

When the government furnishes information, it must do so in a reasonable fashion so as not to frustrate the purpose of the request. The government should not construe information requests too narrowly (so as to exclude pertinent information), or too liberally (so as to bury pertinent information).

In order to effectively support political participation, freedom of environmental information has to be "user friendly." To accomplish this, the government must furnish a mechanism by which members of the public can request government-held information that relates to the environment. The mechanism must not interpose financial or administrative obstacles that would frustrate the public's ability to obtain environmental information. Finally, the government must supply information in comprehensible form, regardless of whether the requesting party seeks raw or interpreted data.

C. The Right to Know

The government's reactive duty to produce information complements its proactive duty to disseminate information. The latter duty finds its expression in provisions for a "right to know." Principle 5 of the ECE Draft Charter on Environmental Rights and Obligations exemplifies the principle: "[e]veryone has the right to receive adequate information about potential sources of accidents, including contingency planning, and to be informed immediately when an emergency occurs."³⁶ The United States Emergency Planning and Community Right-to-Know Act and corresponding state right-to-know laws take a similar approach.³⁷

Right-to-know provisions perform an indispensable educational role by letting people know what is happening in and to their environment, paving the way for the public to participate in related decision-making. At the international level, trans-boundary right-to-know provisions can relieve the tension between environmental effects that know no frontiers and

36. Draft ECE Charter, *supra* note 17, principle 5.

37. EPCRA §§ 301-330, 42 U.S.C. §§ 11001-11050 (1986); *see generally* SUSAN G. HADDEN, A CITIZEN'S RIGHT TO KNOW (1989).

traditional notions of sovereignty that impede cross-border warnings about environmental hazards. The duty to inform should inure to the benefit of all affected persons, irrespective of the political determination of their state of residence.

International expositions of the right-to-know include a state to state duty to warn of imminent environmental danger,³⁸ as well as a duty to promulgate regular reports on the state of the environment.³⁹ Some regional and domestic provisions address contingency planning for environmental emergencies as well.⁴⁰ The IUCN Draft Covenant on Environmental Conservation and Sustainable Use of Natural Resources, for example, calls for participating states to:

- (a) collect and disseminate to the public data and information on the environment and the use of natural resources; and
- (b) require that all persons be notified in a timely manner of activities which may significantly affect their environment.⁴¹

The right-to-know provisions have four basic functions: (1) to ensure that people know about hazardous substances that might affect them; (2) to reduce risks from hazardous substances — by (publicity-induced) self-regulation and by government action; (3) to allow the public to participate in decisions about hazards in their communities; and (4) to em-

38. *E.g.*, *Law of the Sea*, U. N. Convention on the Law of the Sea, art. 198, U.N. Doc. A/CONF.62/122 (1982); Vienna Convention on Early Notification in the Case of Nuclear Accident, art. 2(a), Oct. 29, 1986, 25 I.L.M. 1370; Association of South-East Asian Nations Agreement on the Conservation of Nature and Natural Resources, art. 20(d), noted in 15 ENVTL. POL'Y & L. 64 (1985); see generally REPORT OF THE WORLD COMM'N ON ENV'T AND DEV., EXPERTS GROUP ON ENVIRONMENTAL LAW, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT - LEGAL PRINCIPLES AND RECOMMENDATIONS, 117-19 (Dordrecht, the Netherlands 1987).

39. *E.g.*, Council Directive 90/313 on the Freedom of Access to Information on the Environment, art. 7, 1990 O.J. (L 158/56); *Final Declaration*, Pan-European Parliamentary Conference on the Protection of East-West Environment, § C.3, Vienna, Oct. 23-26, 1990, reprinted in 21 ENVTL. POL'Y & L. 37 (1991).

40. *E.g.*, EPCRA § 303, 42 U.S.C. § 11003 (1986) ("Comprehensive Emergency Response Plans").

41. IUCN Draft Covenant, *supra* note 12, art. 14.

power the public by providing it with the data it needs to challenge industry and government.⁴² To accomplish these functions, the right has to guarantee government-initiated dissemination of three types of information: (1) information about the state of the environment; (2) information about potential sources of environmental damage or danger along with contingency planning therefor; and (3) notification/warning of environmental emergencies or other imminent dangers.

Regarding government responses to right-to-know requests, the information has to be accessible, understandable, relevant, accurate and timely if it is to help the public participate in managing the environment.⁴³ Government-supplied information serves its purpose only if it clearly communicates environmental risk and other significant information.⁴⁴ The governmental duty to warn and inform the public places affirmative responsibilities on the government, which consume significant resources. An effective right-to-know therefore requires an adequate commitment of resources, including a sufficient budget.

D. Voice

Educated and equipped with information, the concerned person next needs a forum in which to express his or her concerns — a place to make something happen, to step into the decision-making process, or in some cases a way to get a decision-making process started. Public input in the decisional process includes suffrage, but it goes much farther. The heart of public voice is the right of free expression, supported by the rights of assembly and association. With these foundational rights, the public can speak out and organize collectively to influence the government's environmental decisions. In order for public voice actually to affect the outcome of the environmental decision-making process, the public must have a meaningful role in the process. In other words, the process must force the government, prior to reaching a decision, to

42. HADDEN, *supra* note 37, at 17.

43. *See id.* at 16.

44. *See id.* at 137.

consider the public's input.

Public input can come in many forms, from individual votes to highly structured interest groups orchestrating carefully planned lobbying campaigns. Each type of participant can bring something unique to the process, and each should have the opportunity to do so.

E. Environmental Impact Assessment

In the environmental context, public input characteristically centers on the process of environmental impact assessment ("EIA"). EIA embodies a decision-making structure (formal or informal; sometimes virtually nonexistent) through which environmentally significant projects and activities pass to assess their probable impact on the environment and to explore measures to eliminate or mitigate such impact.

EIA can play a central role in bringing the public into the environmental decision-making loop, and many regional and international instruments that address environmental protection specifically provide for EIA. A typical EIA provision calls for national-level assessment of the environmental impact of proposed activities "likely to have a significant adverse impact on the environment."⁴⁵

The United Nations Environment Programme's (UNEP) Goals and Principles of Environmental Impact Assessment include thirteen principles that describe the fundamentals of environmental impact assessment and public participation therein. The principles provide for comprehensive EIA of any activity likely to significantly affect the environment.⁴⁶ Under

45. Rio Declaration, *supra* note 13, principle 17; see also IUCN Draft Covenant, *supra* note 12, art. 16; *The Assessment of Projects with Significant Impact on the Environment*, Organization of Economic Cooperation and Development, Recommendation C(79)116 (May 8, 1979); *Environmental Assessment of Development Assistance Projects and Programs*, Organization of Economic Cooperation and Development, Recommendation C(85)104 (June 20, 1985); Community Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175/40); Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 802; *Draft American Declaration on the Environment*, *supra* note 25, principle 6; AG/RES.1114, *supra* note 22.

46. *Environmental Law Goals and Principles*, *Environmental Impact Assessment*, U.N. Environment Programme, principles 1-3, U.N. Doc. UNEP/Z/SER.A/9

the UNEP scheme, an EIA should include descriptions of the proposed activity and the potentially affected environment, alternatives to the proposed activity, assessment of the likely environmental impact of the proposed activity, mitigation measures, uncertainties and gaps in knowledge and an estimation of cross-border effects.⁴⁷

UNEP also calls for impartial examination of EIA information, an opportunity for comment by the public, government agencies and experts, adequate time to consider comments, and on-the-record, written decisions.⁴⁸ UNEP calls for post-decision supervision and for transboundary communication of relevant EIA information as well.⁴⁹

The basic principles of EIA provide a framework for public participation in environmental decision-making by ensuring access to information, opportunity to be heard, transparency in decision-making and mechanisms for implementation and enforcement. The environmental impact report that emerges from EIA should address, at least, the purpose and need for the proposed activity, a description of the activity, a description of the existing environment, descriptions of reasonable alternatives (including doing nothing) and assessment of environmental impacts of the project and of alternatives.⁵⁰ In addition, the EIA process should require formal consideration of the environmental impact report and public comments thereon so that government decision makers cannot ignore issues raised in environmental impact reports or by the public.

Although there is not yet an internationally binding EIA structure, many regional and international instruments do address the subject of EIA. Scores of countries have incorpo-

(1987).

47. *Id.*, principle 4.

48. *Id.*, principles 6-9.

49. *Id.*, principles 10-12.

50. *Application of Environmental Impact Assessment - Highways and Dams*, Economic Comm'n for Europe, U.N. Doc. ECE/ENV/50/SER.B, at ix (1987) [hereinafter *Highways and Dams*]. That is not to say, however, that an EIA of a given project must propose alternative projects, such as a dam on river Y instead of the proposed dam on river X.

rated EIA provisions into national legislation, regulations and/or administrative practice, and more countries are adopting EIA measures all the time.⁵¹

F. Accountable Decision-Making

In the United States of America, the National Environmental Policy Act (and various state law "little NEPA's") requires the government to announce that a particular project is under consideration, to prepare an environmental impact statement about the project, to accept public comments about the proposed project, and to address those comments in its decision on whether and under what circumstances to approve the project.⁵² Public participation can include written comments and/or the opportunity to testify at a public hearing.⁵³ NEPA requires the responsible government agency to take a "hard look" at the record of evidence and arguments before it and to demonstrate "adequate consideration" of public comments in its decision.⁵⁴

On-the-record decision-making,⁵⁵ or transparency, can play an important role in facilitating and monitoring the impact of public participation. For participation actually to affect the quality of the environment, the EIA process must also place substantive limitations on the decision maker's discretion.⁵⁶ This protects against arbitrary disregard of public com-

51. See generally Council on Env'tl. Quality, *International Environmental Impact Assessment Contacts* (1990 & 1991) (listing 53 countries with EIA provisions, and 19 with something in the works); ENVIRONMENTAL IMPACT AND ASSESSMENT (P. Wathern ed. 1988) (summarizing EIA development and implementation worldwide).

52. See generally Christopher A. Sproul, *Public Participation in the Point Conception LNG Controversy: Energy Wasted or Energy Well-Spent?*, 13 *ECOLOGY L.Q.* 73, 84-91 (1986) (discussing United States EIA procedures).

53. See *Highways and Dams*, *supra* note 50, at 8 (discussing Canadian EIS provisions).

54. See Sproul, *supra* note 52, at 93.

55. See, e.g., Alastair R. Lucas, *Legal Foundations for Public Participation in Environmental Decisionmaking*, 16 *NAT. RESOURCES J.* 73, 88 (1976).

56. See generally J. William Futrell, *Environmental Assessment: The Necessary First Step in Successful Environmental Strategies*, 10 *UCLA PAC. BASIN L.J.* 234, 237 (1991) ("environmental degradation may occur even though the NEPA process may be followed to the letter"). *Id.*

ments,⁵⁷ and against capture of the process by real or apparent popular majorities who favor environmentally destructive courses of action.

To avoid environment-blind adherence to public input, the EIA process should require that the government meaningfully consider and respond in writing to public comments, but not that the government necessarily follow the participating public's recommendations. A tyrannical majority can be as harmful to the environment as it can be to the rights of minorities in other contexts. Accordingly, public participation should fit into an environmental scheme that also includes substantive baselines.

G. Implementation and Enforcement

Neither the EIA process nor public participation in general should stop at the point the government approves a project. To the contrary, post-project analysis can provide an invaluable tool for assessing compliance with terms of project approval and for testing the accuracy of presumptions that formed the basis of approval decisions in the first place. Post-project analysis can reveal a number of environment-related project shortcomings. These shortcomings result from proponents' malfeasance, from technical limitations, from faultless errors in prediction, from subsequent changes in the involved environment or from other circumstances.

For post-project analysis to work, the public must have access to operational data about the approved project. Public access to performance data facilitates public monitoring, which can supplement self-monitoring and government monitoring. This increases the chances of detecting and acting upon failures to comply such things as conditions of approval and other unacceptable environmental effects.⁵⁸

57. See, e.g., Paul Wilkinson, *Public Participation in Environmental Management: A Case Study*, 16 NAT. RESOURCES J. 117, 131 (1976) (providing an example where public comment was not tied to the decision-making authority).

58. See, e.g., Lucas, *supra* note 55, at 91-93; Robert J.A. Goodland, *The World Bank's Environmental Assessment Policy*, HASTINGS C. OF THE LAW (1991) (10th Annual Symposium on "International Environmental Law," not paginated).

H. Independent Review

An effective enforcement scheme also requires access to administrative and judicial redress. If a participant or affected party feels the decision-making process failed to account for his or her concerns or that the ensuing project runs afoul of approval conditions or otherwise harms the environment, he or she should have recourse to remedies such as litigation or administrative review proceedings. Effective independent review would permit challenges to any aspect of the decision-making process, so long as the challenging party does not unreasonably delay his or her challenge. Review should encompass procedural and substantive shortcomings, and must provide meaningful remedies. Finally, the reviewing entity must be independent of the agency being challenged.

IV. General Considerations

A. Scope of Application

Application of each of the participation factors discussed above depends on what kinds of activities implicate the right to participate in the first place. The parameters can be described in terms of environmentally significant types of activities, particularly important or sensitive geographical areas, categories of resources or environmental problems of special concern.⁵⁹ A screening process using a streamlined mini-EIA could aid in the determination of which activities merit the full benefit and burden of public participation. The screening itself must permit public participation in order to avoid official (or other) abuse of the process.

The scope of application issue involves not just the character of a project's environmental impact, but the degree of its impact as well, that is, what level of impact should trigger what level of public participation. In the EIA context, UNEP,

59. *Environmental Law Goals and Principles, Environmental Impact Assessment*, *supra* note 46, at 2 n.*. As an example, Finnish EIA provisions cover effects on water, soil, air, humankind, animals, plants, inanimate objects, aesthetic values, natural and historical cultural values and socioeconomic factors. *Highways and Dams*, *supra* note 50, at 12.

UN/ECE and others use a "significance" standard⁶⁰ so not to commit unnecessary resources to comprehensively assessing activities that have only a *de minimis* effect on the environment. For projects subject to EIA, the assessment itself should elucidate the nature and degree of potential impacts and the size, location, and type of project or activity.⁶¹ For activities not subject to EIA, political participation at some level remains important.

Some national EIA legislation exempts private projects from scrutiny,⁶² but such a distinction has no environmental foundation. Exemptions based on non-environmental policy factors — such as national security exceptions for military projects, or exemptions for private enterprise — call for careful analysis to make sure the stated policy justifies the exemption. In order to maximize environmental protection, public participation must be available irrespective of the identity of the proponent of a particular activity.

In most cases, the government makes the decision whether a particular project comes within the field of application of the EIA or other participatory process. Where the government places a given project outside the process, concerned parties must have recourse to independent review of that determination.

B. Timing

Environmental decision-making generally proceeds through four phases: issue formulation; information gathering; deliberation and decision; and implementation and enforcement.⁶³ If something goes awry at one of those stages of the decision-making process, or at some stage of the project implementation (from planning and scoping through implemen-

60. E.g., *UN/ECE Draft Convention on Environmental Impact Assessment in a Transboundary Context*, reprinted in 20 ENVTL. POL'Y & L. 181 (1990); cf. *Goals and Principles of Environmental Impact Assessment*, *supra* note 46, at 2 n.*; Htun, *supra* note 35, at 234 (suggesting use of flexible significance criteria).

61. See Htun, *supra* note 35, at 232-33.

62. See, e.g., *Environmental Assessment and Review Process Guidelines Order*, para. 6 (1984) (Canada), reprinted in C. Gaz. Part II, Vol. 118, No. 14, at 2-3 (1984).

63. Lucas, *supra* note 55, at 77.

tation and construction/production), concerned parties should have a way to seek independent review.

The earlier in the decision-making process the public gets involved, the more effective its participation can be. Public participation should commence at the scoping stage and remain a factor at the notice and comment, hearing, decision-making, implementation and enforcement phases. At the scoping stage, public participation can force consideration of alternative formulations of the project rather than taking the project as a given and working only on measures aimed at mitigation and amelioration of negative environmental effects.⁶⁴ Early participation also establishes a place at the table for the public (individuals and groups) and thereby facilitates continuing and meaningful participation.⁶⁵ Continued participation throughout the decision-making process increases the likelihood that decision makers will actually consider what the public has to say about the project at issue.

In cases where an environmental problem arises independent of any particular project or proposal then under government consideration, the public should be able to initiate a review process at whatever point environmentally significant issues are discovered.⁶⁶ Absent such a provision, concealed, latent or otherwise previously undiscovered environmental hazards could escape public scrutiny.

C. Who Gets to Participate

The right to political participation theoretically permits all affected persons to participate in a given decision. But who is "affected"? Who has standing to participate? Universal standing or completely unrestricted access to the decisional process could overwhelm and cripple the decision-making system, drowning out otherwise significant public input. On the other hand, any standing-based restriction on participation provides a ready measure for the government to exclude per-

64. See generally Htun, *supra* note 35, at 230.

65. Futrell, *supra* note 56, at 236.

66. See Lucas, *supra* note 55, at 81 (noting the need to permit "direct citizen initiation of resource and environmental management decisions").

ceived trouble-makers from the process. A rule of reason approach should, over time, facilitate the establishment of standing guidelines. In any event, the right to participation must provide a mechanism for those who do not meet the standing test to challenge their exclusion.

D. Theory and Practice

Another practical problem arises from the lack of correlation between a given participant's resources (financial, human, intellectual), and the correctness or representativeness of that participant's comments. On the one hand, the grass roots public might be best placed to comment on how a proposed project will affect their lives, while on the other hand, expert scientists might have a better handle on long term environmental effects, and local leaders might have special insight into the long term interests of their communities. Well-funded interest groups might skew the process by presenting their comments in slick packages and by giving the appearance of broader support than they actually have. At the same time, pure majority rule could wreak havoc on the environment and would likely trample the interests (if not "rights") of minorities. Effective public participation in decisions that affect the environment has to operate somewhere between unbridled governmental discretion and unrestrained majority will: namely, formal consideration of public input within a framework of substantive decision-making guidelines that restricts or prohibits environmental degradation.

E. International Factors

1. Differing Priorities: Development

Varying needs for economic development place environmental concerns at widely divergent levels of priority in different countries. In the long term, every country will have to address environmental issues in order to survive and will have to adapt its development strategy to the constraints imposed by sustainability. In the short term though, international variations in wealth and other resources and pressure to develop economically will continue to make it difficult to define an in-

ternationally acceptable right to participate that would place concrete constraints on development. The difficulty stems as much from psychological resistance and closed minds, however, as it does from documented information about the economic price of environmentally responsible development.

At the very least, opening the decision-making process to the public increases the chances that people whose environment is threatened will have the opportunity to make their voices heard. An effective right to political participation must do more than permit obstructions to development. It must incorporate education about the environment, and must recognize the importance of alternatives by encouraging proposals that will serve the interests that underlie the push for development without damaging the environment. It must also address the lack of identity between a given state's perception of its national interest on the one hand, and a supranational formulation of international interest, including international environmental interest, on the other.⁶⁷

2. Cultural/Political Patterns

Much of the literature about public participation in environmental decision-making mentions the need for "culturally appropriate" participation. In the former Soviet Union, the public participated through organized groups that worked with government agencies.⁶⁸ In the United States, individuals can sometimes participate directly by giving testimony at hearings. The right to political participation need not tread upon cultural patterns nor require the dismantling of existing political structures, but the cry for culturally appropriate procedures should not serve as a basis for eliminating or restricting public access to decision-making processes. Forms of access may be tailored or adapted to meet cultural constraints, such as a preference for individual or for group action, but that should not affect the essential character of the access.

67. See Shelton, *supra* note 23, at 120.

68. See Futrell, *supra* note 4, at 488-94.

3. State Sovereignty

Although neither the environment nor its degradation knows state boundaries, international relations continue to depend on the notion that state boundaries define the limits beyond which governments may not extend their rule and beyond which they need not submit to the rule of others. Moreover, countries jealously guard their ability to discriminate between citizens and non-citizens at and within their borders. The idea that a country must permit non-resident non-citizens to participate in environmental decision-making runs counter to a strong historical-political current.⁶⁹

As the transboundary significance of environmentally destructive events becomes clearer, governments can less convincingly claim that their activities are wholly "domestic" and thus immune to international scrutiny. Rather, any government that perpetrates or permits activities that interfere with the environmental sovereignty of others must permit the sovereignty door to swing both ways so those affected by the environmental destruction at issue can avail themselves of the institutions of the source state.

V. Conclusion

Effective environmental protection has many components. One of the most important is public participation in environmental decision-making. Political participation can take many forms, but in any configuration it must incorporate the freedom to develop and exchange ideas and information. Effective public participation in environmental decision-making requires environmental education and training — as part of formal school curricula and for the general public. It also requires ready access to government-controlled information and a structure that makes such information usable for the public. The government must provide environmentally significant information on request and it must disseminate informa-

69. Shelton, *supra* note 23, at 120 ("[i]f environmental rights to information and participation extend to 'all affected persons,' this inevitably will conflict with traditional concepts of state sovereignty . . ."). *Id.*

tion about environmental hazards *sua sponte*.

To fill out a meaningful participation structure, the government must provide a place for public input in the environmental decision-making process. All environmentally significant activities should be subjected to environmental impact assessment in order that public comments and alternative measures are thoroughly considered prior to project approval. Collaterally, this ensures that government decisions are public and on the record. As an additional (and important) check, environmentally significant activities must be amenable to challenge by way of independent review at any and all stages of progress, limited only by generous (to the challengers) standards of interest and significance.

Political participation should apply to all activities that potentially affect the environment, and the participation process should not discriminate among participants or projects based on nationality or form (i.e., public versus private). Furthermore, an effective political participation structure should minimize the practical effects of variations in participant resources by keeping participant expenses to a minimum. An effective participation structure will also account for differing national priorities and values (such as the need to develop), but rarely, if ever, at the expense of the environment.

The foregoing principles can optimize the link between environmental decisions and the people most affected by those decisions. Given adequate education and dispersal of information, the result should be beneficial for the environment.