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Key issues of developing a P10 instrument in the LAC region

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The Access Initiative (TAI)

Introduction

Thank you on behalf of The Access Initiative for this opportunity to present the Key Challenges of developing a Principle 10 instrument in the LAC region. THE ACCESS INITIATIVE is the world's largest civil society network dedicated to ensuring that people have the right and ability to influence decisions that affect their communities and the natural resources they rely on. The Access Initiative now has 21 partners in 19 Latin American and Caribbean countries that are engaged in the LAC P10 process supporting the development of a convention for the region.

Our network has developed and adopted an innovative advocacy strategy and has the convening power to strengthen civil society capacity to lead this process. So far, TAI has informed approximately 500 civil society leaders in 11 countries about this LAC process and its potential through workshops and meetings.

Key challenges for the LAC region

The Latin American and Caribbean (LAC) region has a population of 570 million and 28.8% live in poverty (ECLAC 2012). It is a rich region culturally, biologically and linguistically. It has more than 600 languages and 650 indigenous communities.

Economic growth has had a limited impact on reducing poverty since wealth is concentrated in the hands of a minority, with 50% of wealth being concentrated in the hands of 10% of the population (compared with 30% in the industrialized countries).

There is a well-known view that public participation facilitates democracy and informed debate, legitimizes decisions taken by governments and reduces conflict.¹ Access rights, information, participation and justice are a pivotal element for the promotion and growth of investment and development while at the same time reducing poverty, inequality, and ensuring social peace and sustainable development. In the LAC region, existing conditions related to democracy and governance are jeopardized not only by poverty, but unemployment, the lack of political

¹ 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.

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debate, lack of participation by civil society, indigenous people and women and the fragmentation of society.

There are some key challenges to the Caribbean region which mean that they require particular assistance in meeting minimum standards for access rights. The special circumstances inherent to SIDS, the generally slow and discouraging level and pace of socio-economic advancement and severe resource constraints, do little to encourage the implementation of treaty obligations relating to environmental management. These limitations in addressing access rights are a concern, especially in light of increased international recognition of these rights.

Participation is often restricted to limited formal forums and does not include follow-up mechanisms for society's contributions. In many countries, participation is still dependent on stakeholders proving a pre-existing legal interest to the relevant authorities. Participation in policy making and planning is often solely at the discretion of the government. Other challenges relate to the need to build up the capacities of those who are historically underrepresented in participatory processes, including women and indigenous populations and communities living in poverty. Robust systems on transparency, participatory consultative processes and systems for handling grievances are still needed. In a recent case in El Salvador a community of 100 families have been seeking from authorities information on the water quality of their drinking water. Since February 2013 they are waiting for an answer to their claim to the water authority of the country.

In the last few decades there has also been an unprecedented increase in the scale and pace of infrastructure development in the region which has across the globe is creating large scale natural resource related conflicts. ECLAC has indicated in a recent report (2013) that there are a growing number of socio-environmental conflicts relating to the management and exploitation of natural resources in LAC. There continues to be significant weaknesses in domestic processes to protect people and the environment from harm associated with large scale investments. Sometimes, these problems have led to social unrest – and even deaths – when citizens frustrated with the process take to the streets to protest developments that they believe were not legitimately approved.

In the Caribbean we have seen a marked increase in the number of legal challenges by civil society against development projects in the last decade particularly from Jamaica, Belize, Trinidad, the British Virgin Islands and the Bahamas. Many of these cases concerned the procedure followed for approval of these projects in particular in the area of public participation and access to information.

Although all 15 Caribbean member countries of the United Nations Economic Commission of Latin America and the Caribbean (ECLAC) are signatories to the **1992 Rio Declaration on Environment and Development**, many Caribbean countries have failed to develop or implement legislation that would both give effect to Principle 10 and provide access rights to the public. In some cases laws remain in draft due to issues such as delays in legislative reform.

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In practice, many Caribbean countries are governed by guidelines or practice rather than through binding legislative procedures. Only 7 ECLAC Caribbean member countries (Antigua and Barbuda, Belize, Dominican Republic, Guyana, Jamaica, St. Vincent and the Grenadines and Trinidad and Tobago) have enacted a national law on access to information and none of the countries have a law dealing specifically with access to environmental information.

Nonetheless over the past few decades, the countries of the region have made great achievements in access to information, participation in decision-making and access to justice on environmental matters. 14 countries have specific legislation on access to public information and 8 others are engaged in adopting or creating such legislation. Another positive trend in the region is the creation of pollutant release and transfer registers (PRTRs), in some cases as a result of commitments assumed under free trade agreements. Most countries in the region have incorporated provisions on citizen participation into environmental legislation or into thematic or sectoral laws and have created a variety of citizen participation councils. Most also have some degree of citizen participation in environmental impact assessments. In Chile the new EIA regulation establishes that the information of any project under evaluation should be delivered to the affected communities appropriate to their economic, social and cultural characteristics. There are specialised environmental courts in a number of countries including Chile, Brazil and Trinidad and Tobago

Legislation enacted in several of the region's countries has offered a broader range of procedural remedies, and burgeoning jurisprudence is paving the way towards a more functional form of environmental law.

Why should Europe care about access rights in LAC?

The European Union has supported an important number of initiatives during the last decade in different areas of the LAC region such as urban development, social cohesion, education, justice, information technology and climate change mitigation. Today the LAC region is a hub for foreign investments with European being the largest investor in the region during the period 2000-2009.

Members of the EU have also been strong supports of improving access rights. For example, the UK government supported the expansion of the Access Initiative to 15 countries in the region providing funding for an assessment of the level of implementation of access rights and built capacities in local civil society organizations. Also the European Union supported projects in Chile during the years 2005-2008 to train communities and vulnerable groups on access rights and specifically how to take advantage of the FOIA.

The **EU-CELAC ACTION PLAN 2013-2015** dated January 27th, 2013 indicates several actions and expected results in environmental matters. One of the expected result is "Improved knowledge on problems and consequences of climate change including vulnerability and risk assessment, biodiversity loss and environment issues in its widest meaning, and integration of these issues

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into sustainable development and climate adaptation strategies and other adaptation activities”.

In 2008 a new trade partnership was established known as the **CARIFORUM-EU Economic Partnership Agreement (EPA)** which was signed by fifteen Caribbean countries and the EU. In 2011 trade between the two regions amounted to over 8 billion euros. The Caribbean region provides agricultural exports, minerals, petroleum gas and oil to the EU and imports from the EU include ships, cars, equipment and alcohol among other things. The EU has over the years provided significant aid to the Caribbean and as it relates to trade, the EU has indicated its intention to provide regional support to the Caribbean at approximately 147 million euros during the period between 2012 to 2015.

There are many benefits to the EU for supporting the LAC region on access rights. Such an initiative could:

- Strengthen the **political ties** with the LAC region and Europe
- Support **regional integration** and harmonization of laws and practices in the region which will make the LAC countries more competitive and attractive for foreign investors
- Help the region address its **specific vulnerabilities**, including increasing its ability to protect its natural assets and reduce internal conflicts.

Why a regional instrument on Principle 10?

There have been several international and regional instruments that promote the adoption of requirements for public participation in environmental decision-making in the LAC region.. Other than the 1992 Rio Declaration, notable international and regional instruments include:

- 1) The **2001 Inter-American Strategy for Public Participation in Sustainable Development Decision-making** (Inter-American Strategy) by Organisation of American States (OAS) called for the modification of national legal frameworks to promote public participation in environmental decisions. The Strategy also focuses on information and communication, funding for public participation, institutional procedures and structures, education and training and opportunities and mechanisms for public participation; and
- 2) The **2010 UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters** (the Bali Guidelines) which outlines seven guidelines for a legal framework on public participation.

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Having regard to the multitude of these “soft law” or non-binding instruments on access rights little would be accomplished by the adoption of another such instrument for Latin America and the Caribbean.

Regardless of the nature of the regional instrument, the process embarked upon for this Declaration on P10 is the first of its kind in the Caribbean – a process that involves the public throughout all the stages of negotiation and which recognizes citizens as the stakeholders they are. If we are talking about improving access rights then it is only logical that the public should have a say/access in that process.

Since the start of this process in 2012, we have already seen some significant initiatives in the region that have germinated based on the P10 Process including the establishment of a Caribbean Freedom of Information Network. The members of this network include Information Commissioners, Access to Information Officers from various public agencies and members of civil society.

Civil Society has clearly articulated a call for regional standard for access rights.

Why a Regional instrument is needed and any other won't do

There are several advantages to developing an instrument focused on the LAC region:

1. Countries in the Caribbean have regional similarities and specificities: common political systems, legal systems, cultural and language. If we are considering harmonizing standards for access rights in the region then these commonalities provide us with a good foundation for reaching consensus on key and challenging issues in a shorter amount of time. For instance 12 of the 12 ECLAC Caribbean member countries have a common law legal system inherited from the English which will make it easier to harmonize access to justice provisions.
2. By focusing on the regional level without the inclusion of major countries at the international level, we allow the smaller countries like the SIDS of the Caribbean to have a greater involvement in the negotiations to develop the regional instrument.
3. SIDS in the Caribbean face significant resource constraints and often these countries tend to position themselves regionally whether for trade purposes or otherwise in order to ensure strength. A regional instrument has the potential to strengthen existing regional institutions and processes to reduce resource constraints.

TAI main objectives for this regional process are:

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Invest in building a commitment to develop a legally binding convention by Governments and civil society: A regional treaty on access rights, as demonstrated by the Aarhus Convention on access to information, public participation, and access to justice can provide one of the most efficient and effective means of accelerating implementation. A regional convention in Latin America is likely to have a significant impact on the spread of access rights and provide a powerful lever for civil society to push for better environmental and human health safeguards, preventing conflicts and avoiding negative impacts on those most vulnerable. WRI will provide convening support as a Secretariat for civil society to achieve this end.

Strengthen the participation of civil society and provide incentives for Governments to join the process: TAI focuses is on strengthening the capacity of LAC civil society organizations to engage in the regional Principle 10 instrument processes in a meaningful way, both at the national and regional level. We will work closely with our partners to provide incentives to new Governments to participate in this process. To achieve this objective, it is fundamental that civil society (in its broadest context) participates in this process at the country and regional level. We wish to support national level activities to achieve country led buy-in. Civil society in 10 new countries will be supported to engage their governments interests and buy in to the process.

Build a compelling case for the need for minimum standards in the region: TAI is elaborating appropriate key strategic policy papers for Working Groups and Focal Points Meetings to aid the deliberations among governments and the public on the relationship between access rights and environmental conflicts and the need for reform of laws and practice on the implementation of access rights at the country level.

Conduct advocacy at the national and regional level for this convention. We will convene international experts, members of the judiciary and other key figures to provide support and advocacy for the development of a legally binding instrument to raise minimum standards across the LAC region. We will empower activists, and CSOs that cross the spectrum of groups, as well as grass roots organizations that face challenges in the use and management of natural resources and access rights, to engage with this process to get an inclusive process.

TAI target outcomes for the period 2014-2016:

- Assessment on rule of law and provision of access rights in 20 countries in the LAC region
- An increase in the number of civil society groups involved and their awareness of and participation in regional and national level processes to improve access rights.
- Agreement on creation of a legally binding convention by stakeholders in the process.
- Registration and participation of 300 natural and legal persons in the process.
- Building capacity of civil society organizations to participate in a regional negotiation process.