

“Participatory mechanisms in the context of the energy transition: Application of Rio Principle 10”

21 June 2017

An Inclusive Energy Transition? Global Low-carbon Strategies
and Their Discontents
University of Cambridge



Stephen Stec

Visiting Associate Professor, Osaka University
Graduate School of Law and Politics

stecs@ceu.edu

- <https://www.facebook.com/CenterforBioDiv/videos/10155020378195460/>



Principle 10 of the Rio Declaration on Environment and Development (1992)

- *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 be*

Our Common Future (1987)

Report of the World Commission on
Environment and Development (Brundtland
Report)

- *The Concept of Sustainable Development*
- “The law alone cannot enforce the common interest. It principally needs community knowledge and support, which entails greater public participation in the decisions that affect the environment.”

Stockholm to Rio

- **Principle 1 of Stockholm Declaration (1972) spoke of a right to a decent environment and the duty to protect the environment**
- **Principle 10 of the Rio Declaration (1992) showed the way for individuals and groups to reach the goal of a healthy environment is to participate in decisionmaking**
- **Principle 10 set framework for 3 pillars of access to information, public participation in decision-making, and access to justice, in environmental matters**



Kofi Annan, former Secretary-General of the United Nations

In 2000, for the launch of the implementation guide to the Aarhus Convention, Annan called the Aarhus Convention an "*ambitious venture in the area of 'environmental democracy' ...*"

Why « environmental democracy »?

Pragmatic (environmental) motivation:

- Environmental sustainability needs involvement of all actors
- More participation leads to better decision-making: criticism strengthens quality of proposals
- More participation leads to better implementation of decisions: greater ownership, involvement

Idealistic (democratic) motivation:

- an issue of democratic rights: the right to have a say in issues affecting one's life
- representative democracy vs. participatory democracy
- an ongoing relationship between government and civil society

7 Precepts of Environmental Rule of Law (Benjamin and Fulton)

- Environmental laws should be clear, even-handed, implementable and enforceable;
- **Environmental information should be shared with the public;**
- **Affected stakeholders should be afforded opportunities to participate in environmental decision-making;**
- **Environmental decision-makers, both public and private, should be accountable for their decisions;**
- Roles and lines of authority for environmental protection should be clear, coordinated, and designed to produce efficient and non-duplicative program delivery;
- **Affected stakeholders should have access to fair and responsive dispute resolution procedures; and**

Big numbers

- **2006**
- **100%**
- **1,500,000,000**
- **20,000,000,000,000**

Conceptualization

- **Resource curse (Auty)**
- **Securitization (Buzen et al.)**
- **Environmental Security framework (Homer-Dixon)**
- **Stockholm Resilience Center**
- **De-securitization (Kasim, 2013; Floyd, 2014)**

Framework for Environmental Governance: Global

- **Global Conferences** (Stockholm, Rio, Jo'burg, Rio+20, trade/development conferences)
- **2015 SDGs** – Sustainable Development Agenda for 2030 (e.g., SDG 16)
- **Paris Agreement**
- **Sendai Framework** on DRR



Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

TARGETS

- | | | |
|--|--|--|
| 16.1 significantly reduce all forms of violence and related death rates everywhere | 16.6 develop effective, accountable and transparent institutions at all levels | 16.a strengthen relevant national institutions, including through international cooperation, for building capacities at all levels, in particular in developing countries, for preventing violence and combating terrorism and crime |
| 16.2 end abuse, exploitation, trafficking and all forms of violence and torture against children | 16.7 ensure responsive, inclusive, participatory and representative decision-making at all levels | |
| 16.3 promote the rule of law at the national and international levels, and ensure equal access to justice for all | 16.8 broaden and strengthen the participation of developing countries in the institutions of global governance | 16.b promote and enforce non-discriminatory laws and policies for sustainable development |
| 16.4 by 2030 significantly reduce illicit financial and arms flows, strengthen recovery and return of stolen assets, and combat all forms of organized crime | 16.9 by 2030 provide legal identity for all including birth registration | |
| 16.5 substantially reduce corruption and bribery in all its forms | 16.10 ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements | |

What are the UNEP Bali Guidelines?

“Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”

- Adopted at Global Ministerial Environment Forum, Special Session of UNEP Governing Council in Bali, Indonesia (2010)

- Voluntary and request-driven

Aimed at filling gaps in national legislation



CENTRAL
EUROPEAN
UNIVERSITY

Impact of the Bali Guidelines

- Support to and use in LAC Initiative
- Call for regional work on basis of Bali Guidelines in several African sub-regions:
 - First African Colloquium on EROL
- UNITAR revision of its “National Profile to Assess National Capacities and Initiate Action to Strengthen Environmental Democracy”
- Standard for international benchmarking (EDI)

The Guidelines Themselves

- **Guideline 1:** Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to guideline 3), without having to prove a legal or other interest.

...

- **Guideline 3:** States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

Guideline 1 – Public authorities to make information available upon request

Implementation guidance:

Any person principle

No interest to be proved

Information vs. documents



CENTRAL
EUROPEAN
UNIVERSITY

Guideline 3 – Limited grounds for refusal to provide information

Implementation guidance:

Must be according to law

Interpreted narrowly

Public interest test

Bali Guidelines on PP

- **Guideline 8:** States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned* should be informed of their opportunities to participate at an early stage in the decision-making process.
- **Guideline 9:** States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.
- *“The public concerned” may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest. [This footnote is in the original Guidelines.]

Guideline 8 – Early and effective public participation in decision-making

Implementation guidance:

All options open

Phases of decisionmaking (screening, scoping)

Linked to deadlines and preparation time

Nature, complexity and size of project

Elements of notification

- Proposed activity
- Nature of possible decisions or draft decision
- Responsible public authority
- Envisaged procedure
 - How to participate
 - Where and which information is available
- Transboundary EIA – if applicable

Guideline 9 – Authorities proactively seek transparent and consultative public participation

Implementation guidance:

Identifying the public concerned

Notification standards

Who is responsible for public participation procedure?

- Primary responsibility
 - „competent public authorities”
 - Because Aarhus Conv defines public participation as a public function, a private proponent responsible for PP might become a „public authority” under 2.2(c) and would have to respond to info requests under Art. 4 (see CC cases (KZ, LI)).
- Practical arrangements
 - special officers (commissaires enqueteurs)
 - specialised private consultants (sometimes NGOs)
 - local authorities
- Role of applicants (project proponents)

Guideline 10 – All information relevant to decision-making to be made available

Implementation guidance:

Public concerned

Objective, understandable, timely and effective

Obligation to update

Guideline 11 – Due account of comments received

Implementation guidance:

Transparency and publicity (general and to the public concerned)

Reasons upon which decision based

How comments handled

Guideline 15 – Access to Review: Information Requests

Implementation guidance:

Any person making a request

Court of law or other independent, impartial
body

Handled not in accordance with law



CENTRAL
EUROPEAN
UNIVERSITY

Guideline 16 – Access to review: public participation

Implementation guidance:

Member of public concerned

Court of law or other independent, impartial body

Substantive or procedural legality

Decisions, acts or omissions

Guideline 17 – Access to review: public or private actors

Implementation guidance:

Member of public concerned

Court of law or other independent, impartial body

Substantive or procedural legality

Decisions, acts or omissions

Affecting environment or violating legal norms



CENTRAL
EUROPEAN
UNIVERSITY

Guideline 18 – Liberal standing provisions

Implementation guidance:
Broad interpretation of rules
Effective access to justice

Guideline 19 – Effective procedures for timely review

Implementation guidance:
Fair, open, transparent, equitable

Remedies

- **Guideline 21:** States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

Guideline 21 – Prompt, adequate and effective remedies

Implementation guidance:

Injunctive relief

Compensation

Restitution



CENTRAL
EUROPEAN
UNIVERSITY

Okinawa dugong case

- Japan and USA have entered into agreement about relocation of Futenma base to a less inhabited area – the Futenma Replacement Facility (FRF)
- Area includes sensitive habitat of critically endangered dugong, a „national monument” under Japanese law
- Japan responsible for constructing the facility
- USA responsible for



Proceedings

- Japan required to conduct EIA under domestic law
 - Proponent obligation (government agency)
 - „taking into account”
- 2008 case in USA – *Okinawa Dugong v. Gates*, 543 F. Supp. 1082 (N.D. Cal. 2008)
 - National Heritage Protection Act (NHPA) applicable and requires assessment

Proceedings

- US Department of Defense conducted NHPA assessment in 2010 or 2011
 - No notification or public participation
- New challenge by plaintiffs to adequacy of assessment
- [change of judge] – *Okinawa Dugong 2* (2015)
- Case decided on grounds of political question doctrine
 - No political Q as to declaratory judgment
 - Political Q as to injunction request
 - Court could not order US to abrogate a treaty with Japan
 - Without possibility of injunction, declaratory relief would be „meaningless,” therefore no jurisdiction
 - Court is ill-equipped to balance the “serious harm construction of the FRF will likely cause to the dugong (including **possible extinction**) against claimed benefits of the FRF.”

Case currently under appeal to 9th Circuit Ct. of Appeals

Applying Bali/Aarhus to FRF

- Questions re adequacy of Japanese EIA (Bali Guidelines and Aarhus Art. 6 standards)
 - Responsibilities of public authority
 - Notification, Identification of public concerned
 - Quality of information available
 - „Taking into account” results of PP
- Bali Guidelines include no restrictions on grounds of national security etc in PP
- Bali Guideline 21 requires effective remedies so APA/NHPA/NEPA etc would need to provide remedies and a circular argument such as that made in *Dugong 2* would not survive
- Aarhus Conv., National defense exception under Aarhus Art. 6.1(c)
 - Requires a determination that application of Art. 6 in a case or class of cases would have an adverse effect on national defence purposes
 - If a Party wants to make case-by-case determinations, that has to be provided under national law
 - Use of this exception should be limited in accordance with the Preamble, Objective (Art. 1) and General Provisions (Art. 3).
 - There have been no CC cases yet about this paragraph. (does this indicate it's not an issue?)
- If Aarhus applied, Art. 3.7 might have resulted in changes to the US-Japan agreement (through negotiation)

Political Q doctrine in *Okinawa*

Dugong 2 under Int'l Law

- Principle of prevention increasingly recognized under international law
 - *Pulp Mills case (Argentina v. Uruguay)* – this rule, however, is couched in rights of states (aggrieved)
 - Akin to „Responsibility to Protect” which is controversial even in HR context
 - May be considered an affront to sovereign equality
 - Weeramantry opinion in *Gabcikovo-Nagymaros* – continuing EIA obligation, SD as a precept
 - Espoo Convention (on transboundary EIA), Art. 2, paras 9-10 are somewhat contradictory on whether states could eliminate EIA by agreement
 - Q would be shape of US *obligations* under international law with respect to FRF
- P10, EIA, SDGs are mechanisms for cooperation on prevention based on SD concepts

THANK YOU!



Stephen Stec
Visiting Associate Professor, Osaka University
Graduate School of Law and Politics
stecs@ceu.edu