Public Participation in MEAs Compliance: A Proposal to Rio +20 to Improve the Institutional Framework for Sustainable Development

The Instituto Internacional de Derecho y Medio Ambiente (IIDMA) and Justice & Environment (J&E) submits this proposal to introduce in the Zero Draft “The Future We Want” a call to Parties of MEAs to take the necessary steps to include public participation in MEAs compliance procedures when members of the international community fail to implement their international commitments. This proposal consists on replicating the instrument available to the public under the Compliance Committee of the 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) which may bring communications to that Committee concerning a Party’s compliance with the Convention. This is a concrete measure that, using the words of the Zero Draft text, will serve to “strengthen international environmental governance within the context of the institutional framework for sustainable development”.

This proposal is framed within the theme on institutional framework for sustainable development of Río +20.

Supporting organizations

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1 The UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements adopted by the UNEP Governing Council in 2002 defines implementation as referring “to, inter alia, all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments, if any”.

2 It brings together 56 countries located in the European Union, non-EU Western and Eastern Europe, South-East Europe and Commonwealth of Independent States (CIS) and North America.

3 Paragraph 50 of the Zero Draft.

4 During the March 2012 informals it was proposed to add a paragraph, the 44 ter, identifying among the functions of the IFSD the implementation of sustainable development.
Introduction

We, present generations are facing unprecedented environmental challenges. The actions of past and present generations have not only effects in our times but those effects will be also affecting future generations which have no option to participate in the decisions to be taken at the Rio +20 United Nations Conference on Sustainable Development. As UN Secretary General pointed out in 2005:

57. We fundamentally depend on natural systems and resources for our existence and development. Our efforts to defeat poverty and pursue sustainable development will be in vain if environmental degradation and natural resource depletion continue unabated.

Good governance and the rule of law are part of the equation to attain sustainable development. Having an international well developed environmental legal framework alone does not guarantee sustainable development as evidences of the current state of the Earth show. We are still very far from *inter e intra* generational justice. For this reason it is imperative to emphasise on the implementation of and compliance with Multilateral Environmental Agreements (MEAs).

Ensuring compliance by members of the international community with their international environmental obligations is vital to achieve sustainable development. Non-compliance limits the effectiveness of legal commitments, undermines the international legal process, and can lead to conflict and instability in the international order. Non-compliance can include a failure to give effect to substantives norms, or to fulfil procedural requirements, or to fulfil an institutional obligation. Non-compliance raises three distinct but related issues relating to implementation, enforcement, and conflict resolution.

Public participation, implementation and compliance in the Zero Draft

The Preamble of the Zero Draft “The Future We Want” affirms the commitment of heads of State and Governments “to work for a prosperous, secure and sustainable future for our people and our planet”. However, as it has been shown in the last 40th

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5 Director of IIDMA, Lawyer, LL.M Environmental Law, London University ’93; LL.M International Legal Studies, New York University ’96. Member of the IUCN Commission on Environmental Law.
8 The mentioned UNEP Guidelines defines compliance as “the fulfilment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement”
10 Ibid.
years since the UN Conference on Human Development, the work of heads of State and governments alone is not sufficient in the quest for sustainable development\textsuperscript{11}. This led to the introduction of Principle 10 in the Rio Declaration, whose principles are reaffirmed in the Zero Draft\textsuperscript{12}. At least, the March proposals for redrafting that affirmation mention the representatives of civil society as well as other representatives of the people of the world. The Zero Draft recognizes gaps in implementation making a call to fill that gap through the commitment of heads of State and Governments to “improving governance and capacity at all levels - global, regional, national and local-…”\textsuperscript{13}. It also recognizes “that States must work together cooperatively and join with all stakeholders to address the common sustainable development challenges we face”\textsuperscript{14} and “that strong governance at local, national, regional and global levels is critical for advancing sustainable development”\textsuperscript{15}. It is important to recall that one of the key points of governance is institutional reform, which is necessary in order to return some functions to society and to turn democracy to a participatory one\textsuperscript{16}. Openness, transparency and participation, essential principles to achieve good governance, improve the damaged credibility of public institutions.

To attain sustainable development engaging the public not only in decision-making\textsuperscript{17} but also in implementation is a prerequisite. As said, a failure in implementation is a case of non-compliance. Leaving the public to participate only in decision-making at international level does not “strengthen international environmental governance within the context of the institutional framework for sustainable development”\textsuperscript{18}. If the commitment of heads of State and Government to sustainable development is real, they must show it in the Rio +20 outcomes. For this reason their agreement “(…)to take steps at various levels to give further effect to Rio Principle 10 at the global, regional and national level, as appropriate”\textsuperscript{19} should include the introduction of participatory mechanism at the international level to improve compliance with MEAs. This would be a way to introduce accountability mechanisms.

\textsuperscript{11} Paragraph 13 of the Zero Draft states: “We nevertheless observe that, despite efforts by Governments and non-State actors in all countries, sustainable development remains a distant goal and there remain major barriers and systemic gaps in the implementation of internationally agreed commitments”.

\textsuperscript{12} Pre Paragraph 7: “(…)The Rio Principles shall continue to guide the international community and serve as the basis for cooperation, coherence and implementation of agreed commitments”.

\textsuperscript{13} Paragraph 22. Some of the proposals for redrafting this paragraph include a commitment to “improve accountability at all levels” to “promote the objectives of sustainable development” and “participatory decision making” to “fill the implementation gap”.

\textsuperscript{14} Paragraph 23.

\textsuperscript{15} Paragraph 44.


\textsuperscript{17} This is recognized in paragraph 17 of the Zero Draft: “We underscore that a fundamental prerequisite for the achievement of sustainable development is broad public participation in decision-making. Sustainable development requires major groups at all levels to play a meaningful role. It is important to enable all members of civil society to be actively engaged in sustainable development by incorporating their specific knowledge and practical know-how into national and local policy making (…)”. Some proposals for redrafting this paragraph also mention access to information and judicial and administrative proceedings are essential to the promotion of sustainable development in line with Rio Principle 10. In addition, states that “sustainable development requires “governments to ensure the meaningful involvement and active participation of major groups”(…) “to play a meaningful role at all levels”.

\textsuperscript{18} Paragraph 50. In addition, the proposals to add para 44 bis state “ (…)Any reform [and strengthening –G77] of the institutional framework for sustainable development should ensure adequate [monitoring, review and implementation of sustainable development measures (…)as well as follow-up and implementation of sustainable development commitments (…)–G77]”.

\textsuperscript{19} Paragraph 58.
Compliance Mechanisms at MEAs

There are four types of mechanisms related to facilitating compliance under MEAs:

1. **Performance Review Information.** It is the most common one. In relation to their performance, Parties are often required to report on the measures they have taken to implement a particular MEA, usually by submitting annual reports on their relevant laws or policies. Some MEAs provide for a third Party, such as a Secretariat, to monitor or verify the performance and require the Parties to cooperate with such monitoring or verification of their performance.

2. **Multilateral Non-Compliance Procedures.** Most MEAs provide for the development of a formal, multilateral NCP. When developed, this usually comes in the form of an elected committee, called an Implementation Committee or Compliance Committee. A Party's alleged non-compliance may be referred to the Committee for consideration (or it may, itself, refer its own inability to comply) and the Committee then makes a recommendation on the matter to the COP. Usually, the final output is a decision by the COP. The purpose of such procedures is to identify compliance difficulties and to facilitate better compliance in a non-adversarial manner. Multilateral NCPs may be distinguished from traditional dispute resolution procedures, which are usually invoked only once sufficient damage has been done to the legal order for a conflict to arise.

3. **Non-Compliance Response Measures.** Response measures can be classified into two categories: incentives - technical and financial assistance to support improved implementation; and disincentives - penalties such as stricter requirements for performance review information.

4. **Dispute Settlement.** MEA dispute resolution mechanisms are grouped in three clusters of compulsory procedures: negotiation, conciliation and arbitration.

This proposal to incorporate public participation for improving implementation of and compliance with MEAs lies on the second category.

**The Aarhus Convention Compliance Committee**

The Compliance Committee of the Aarhus Convention was established in accordance with Article 15 of the Convention. This Committee is comprised of nine members elected by the Aarhus Convention Meeting of the Parties (MoP). The compliance mechanism may be triggered in four ways:

1. a Party may make a submission about compliance by another Party;

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20 UNEP, *Compliance Mechanism under Selected Multilateral Environmental Agreements*, available at: [http://www.unep.org/DEC/docs/Compliance%20mechanisms%20under%20MEAs.pdf](http://www.unep.org/DEC/docs/Compliance%20mechanisms%20under%20MEAs.pdf)

21 Ibid.

22 Ibid.


2. a Party may make a submission concerning its own compliance;
3. the secretariat may make a referral to the Committee;
4. members of the public may make communications concerning a Party's compliance with the convention.

In addition, the Committee may examine compliance issues on its own initiative and make recommendations; prepare reports on compliance with or implementation of the provisions of the Convention at the request of the Meeting of the Parties; and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention.

This proposal refers to the communications that may be submitted by members of the public. In this sense it is almost unique in international law\(^{25}\). The Committee does not make any distinction between information received by individuals and States\(^{26}\). However, the Committee cannot issue binding decisions, but rather may make recommendations either to the MoP, or, in certain circumstances, directly to individual Parties. The MoP may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. To this end, depending on the particular question before it and considering the cause, degree and frequency of non-compliance, the MoP may decide to take one or more of the following measures:

a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;
b) Make recommendations to the Party concerned;
c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;
d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;
e) Issue declarations of non-compliance;
f) Issue cautions.

The proposal

If progress to achieve sustainable development is the real aim of the Rio+20 Conference, its outcomes must show it. Being the institutional framework for sustainable development one of the two themes of this Conference, a clear commitment for its improvement and strengthening is necessary. This commitment must incorporate the participation of the public to advance in the compliance with MEAs. Thus, we propose to include a new sentence in the ZeroDraft stating:

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\(^{25}\) This was the first international non-compliance procedure opened to the public, after and following this example the UNECE Protocol on Water and Health established it.

\(^{26}\) Paragraph 25 of the annex to decision I/7.
At the global level we call on the governing bodies of MEAs to take the necessary steps to establish, where they are not already in place, participatory compliance mechanisms which allow for a review of any Party’s compliance to be triggered inter alia by communications from the public.  

27 Some proposals on the March 2012 informals includes “We recognize the need to ensure the rule of law, good governance and citizens’ right of access to official information, public participation in decision-making and equal access to justice and – Switzerland, EU [agree to take steps to give further effect to Rio Principle 10 [and 20 – Iceland] at the global, regional and national level (…)] One way to improve the rule of law it is precisely to incorporate participatory compliance mechanisms.