

4th Ministerial Conference "Environment for Europe", Århus, Denmark, 23-25 June, 1998



## Implementing the Principles of the Public Participation Convention in International Organizations

Background Document for NGO Session, 3-6 pm, 24 June, 1998

Prepared by  
Claudia Saladin & Brennan Van Dyke  
Center for International Environmental Law,  
USA



June 1998

Implementing the Principles of  
the Public Participation Convention in  
International Organizations  
Prepared by  
Claudia Saladin & Brennan Van Dyke  
Center for International Environmental Law, USA  
June 1998

This publication has been prepared within the project "Environment for Europe - Environmental NGOs' preparatory process for the pan-European Environment Ministers Conference Århus/Denmark, June 1998" and financially supported by Danish Ministry of Environment and Energy.

## Table of Contents

<u>I. INTRODUCTION</u>	2
<u>II. THE PRINCIPLES OF THE DRAFT CONVENTION</u>	3
A. PRINCIPLE OF ACCESS TO INFORMATION	3
B. PRINCIPLE OF ACCESS TO DECISION-MAKING	5
C. PRINCIPLE OF ACCESS TO JUSTICE	5
<u>III. UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL</u>	7
A. ACCESS TO INFORMATION	8
B. ACCESS TO DECISION-MAKING	10
C. ACCESS TO JUSTICE	12
<u>IV. EUROPEAN UNION</u>	13
A. ACCESS TO INFORMATION	15
B. ACCESS TO DECISION-MAKING	18
C. ACCESS TO JUSTICE	18
<u>V. WORLD TRADE ORGANIZATION</u>	20
A. ACCESS TO INFORMATION	21
B. ACCESS TO DECISION-MAKING	23
C. ACCESS TO JUSTICE	25
<u>VI. EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT</u>	27
A. ACCESS TO INFORMATION	28
B. ACCESS TO DECISION-MAKING	31
C. ACCESS TO JUSTICE	32
<u>VII. THREE PILLARS REVISITED: THE FOUR INSTITUTIONS COMPARED</u>	34
A. ACCESS TO INFORMATION	34
B. ACCESS TO DECISION-MAKING	35
C. ACCESS TO JUSTICE	35
<u>VIII. POST SCRIPT: IMPLEMENTING THE CONVENTION</u>	36

## Table of Boxes

<i>Box 1: Principle of Access to Information</i>	4
<i>Box 2: Principle of Access to Decision-Making</i>	5
<i>Box 3: Principle of Access to Justice</i>	7
<i>Box 4: Implementing the Principles in ECOSOC</i>	13
<i>Box 5: Implementing the Principles in the European Union</i>	20
<i>Box 6: Implementing the Principles in the WTO</i>	27
<i>Box 7: Implementing the Principle in the EBRD</i>	33
<i>Box 8: Implementing the Principles of the Convention Internationally</i>	36
<i>Box 9: Implementing the Convention: the Role of Civil Society</i>	37

## I. Introduction

This study will explore how the draft Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter "draft Convention") can be used to open up new possibilities for public participation in international decision-making. The purpose of this study is not to provide a detailed analysis or critique of the draft Convention. The purpose is solely to distill the principles of the draft Convention whose application *must be* promoted by the Parties in international organizations and decision-making processes relating to the environment. This study will examine the extent to which public participation opportunities exist in some of the international fora in which UNECE Member States participate. The study will both identify ways in which international institutions already promote the principles of public participation embodied in the draft Convention and ways in which the future Parties to the Convention can further promote these principles in the international institutions in which they participate.

The importance of public participation in environmental decision-making has achieved international recognition. The draft Convention grows out of a variety of international and regional processes to bring greater transparency and accountability to environmental decision-making, including the 1992 United Nations Conference on Environment and Development (UNCED). UNCED recognized the many benefits of public participation to government, regulated communities, individuals, groups, and society as a whole and stressed public participation as one of fundamental means for moving governments toward sustainable development. The Rio Declaration and Agenda 21 endorsed the principle of public participation at the national and international levels.<sup>1</sup> Although the broad goal of public participation was widely endorsed, the precise content of the notion of "public participation" had not been developed. The UNECE, through the "Environment for Europe" process, sought to define and give content to the idea of "public participation." As a result, in 1995 the Environment Ministers of the UNECE countries endorsed the Sofia Guidelines on Public Participation and Access to Information in Environmental Decision-Making. The Guidelines gave more concrete expression to the Rio Declaration and Agenda 21 within the European con-

text. They also set in motion a process to negotiate an instrument elaborating on the principles of the Guidelines that would create binding legal obligations on the Parties to incorporate the principles of transparent, accountable, and democratic governance into their environmental decision-making processes.

The draft Convention is addressed to its Parties and creates obligations that they are to implement domestically. The majority of the provisions are not addressed to international organizations (other than possibly the European Union, see below). Rather, they are addressed to the public authorities of national governments. If adopted, however, the draft Convention would require each Party to "promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment."<sup>2</sup> International organizations increasingly have the power to undermine policy choices that are the product of domestic decision-making processes that are typically far more transparent and open than those of the international institution. Consequently, implementation of the principles of the draft Convention in international institutions is increasingly important.

### Structure of this Study

The goal of this study is to identify fora in which the future Parties to the draft Convention will be able to promote the principles of the draft Convention, as well as to identify the means by which international fora already implement those principles. This information can be used to demand progressive implementation of Parties' obligations and the Convention's principles in the international context. The information in this study will also identify areas where certain international institutions need to better implement the principles of the draft Convention. The Convention provides a useful reference point – a floor – for governments in promoting greater transparency and civil society in seeking it.

The study will analyze in depth four institutions that are important policy and decision-making fora and whose decisions have important environmental impacts. They are all also institutions in which UNECE Member States (and therefore potential future Parties of the draft

<sup>1</sup> Rio Declaration, principle 10 states that "[e]nvironmental 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 . . . 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 provided." UN Doc. A/Conf.151/26 (vol. I). Agenda 21, article 27(9) states that "[t]he United Nations system, including international finance and development agencies, and all intergovernmental organizations and forums should, in consultation with non-governmental organizations, take measures to: . . . enhance existing or, where they do not exist, establish mechanisms and procedures within each agency to draw on the expertise and views of non-governmental organizations in policy and programme design, implementation and evaluation; [and] . . . [p]rovide access for non-governmental organizations to accurate and timely data and information to promote the effectiveness of their programmes and activities and their roles in support of sustainable development." *Id.* (vol. 3).

<sup>2</sup> Draft Convention, UN Doc. ECE/CEP/43 (21 April 1998), art. 3.7 [hereinafter Draft Convention].

Convention) play a significant role. They are:

- United Nations Economic and Social Council
- European Union
- World Trade Organization
- European Bank for Reconstruction and Development

The study will evaluate these institutions in light of the three principles of the draft Convention – access to information, access to decision-making, and access to justice – and will judge each regime according to how well it integrates the fundamental elements of these principles. The study does not purport to be a critique of the draft Convention, but rather an analysis of the institution using the draft Convention as a ruler.<sup>3</sup> Part II introduces the principles embodied in the draft Convention. Parts III, IV, V and VI evaluate the practices in each of the four institutions in light of the draft Convention. At the end of these sections is a Box, recommending how the institutions and their members can better implement the principles of the Convention in that particular institution. Part VII of this study will look thematically across the four institutions and the draft Convention from the perspective of the three principles, and draw conclusions about how these principles might be promoted in these and other international organizations.

This study identifies how these institutions can better implement the principles of the draft Convention. To this end, the study will draw on additional examples of progressive policies in other international fora that promote the goals of the draft Convention, such as the UNDP Public Information Disclosure Policy and the World Bank Inspection Panel. This approach will provide Parties with the information they need to advocate better implementation of the principle of the draft Convention in the above institutions and elsewhere. It will also provide citizens with the information they need to demand more progressive implementation of Parties' obligations in international organizations and monitor such implementation.

## II. The Principles of the Draft Convention

As discussed above, the draft Convention grows out of an international process to define the concept of public participation in the context of sustainable deve-

lopment. The three principles of the draft Convention, broadly stated, are that the public should have access to environmental information, with limited, explicit exceptions (the principle of access to information); that the public should have a right to participate in the environmental decision-making process and have that participation taken into account in the decision-making process (the principle of access to decision-making); and that the public should ultimately have access to an independent and impartial review process, capable of binding public authorities, to allege their rights have been infringed (the principle of access to justice). The draft Convention is the first time that States have agreed on the minimum content of these principles and established their minimum procedural elements in a single, legally binding international agreement. Although the obligations are addressed primarily to national level governments, an analysis of the text of the draft Convention reveals certain minimum elements of its principles. The draft Convention obliges its Parties to promote these principles in international institutions. These principles are discussed below and their minimum elements outlined. They are then used as the template for comparing the practices of the four institutions.<sup>4</sup>

### A. Principle of Access to Information

The principle of access to information includes the right of citizens to obtain environmental information from public authorities, subject to certain limited and explicit restrictions, without having to show an interest in the information. The draft Convention lays out timeframes for responding to requests. It also stipulates that refusals to provide information should be in writing and should state the reasons for the refusal. The draft Convention creates a presumption in favor of information disclosure. Public authorities can only deny a request for information on the basis of a list of specific grounds for refusal. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure. The minimum elements of the principle of access to information and the grounds for refusal, as contained in the draft Convention, are summarized in Box 1: Principle of Access to Information, below.

Some of the grounds for refusal are more limited than others. For example, a public authority has an unqualified right to deny a request for information where

<sup>3</sup> The draft Convention in many respects represents the "lowest common denominator" of the principles of access to information, access to decision making, and access to justice and can be criticized on many points. A detailed analysis or critique of the draft Convention, however, is beyond the scope of this study.

<sup>4</sup> For the purposes of this study, the international organizations and their subsidiary bodies are equivalent to "public authorities" as that term is used in the Convention. The draft Convention defines a public authority as "(a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraph (a) or (b) above; (d) The institutions of an regional economic integration organizations referred to in article 17 which is a Party to this Convention. This definition does not include bodies or institutions acting a judicial or legislative capacity." Draft Convention, *supra* note 2, at art. 2.2.

the public authority does not hold the requested information.<sup>5</sup> In addition, a public authority may refuse to disclose of information that would impair the ability of a person to receive a fair trial, or would adversely affect national defense or public security. In such cases, the only requirement imposed on public authorities is to interpret the restriction narrowly and to balance the interest to be protected against the public's interest in disclosure.<sup>6</sup>

Some grounds for refusal are qualified, however. Thus a public authority may only deny an information request that would adversely affect the confidentiality of commercial and industrial information "where such confidentiality is protected by law in order to protect a legitimate economic interest."<sup>7</sup> Where the grounds for denying a request for information is that disclosure would adversely affect the confidentiality of the proceedings of public authorities, "such confidentiality [must be] provided for under national law."<sup>8</sup> Finally, a request for

information may be refused if the material is in the course of completion or concerns internal communications of public authorities, "where such an exemption is provided for in national law or customary practice."<sup>9</sup> These qualifications demonstrate that these interests of public authorities are not absolute and should be strictly limited by domestic law. The goal is to ensure that the grounds for denial of information are clearly established in national law, and that the grounds for withholding information are not subverted into the means of providing a blanket refusal. Although these access to information provisions are addressed to public authorities at the national level, the concept embodied in these provisions can be implemented at the international level. The information disclosure policies of international institutions should establish a presumption of disclosure with limited, clearly defined exceptions, referring to domestic legislation where appropriate.

Box 1: Principle of Access to Information

Principle of Access to Information  
*Minimum Elements of the Principle*

- Information is accessible, unless it falls within one of the grounds for refusal.
- No showing of interest is required.
- Information should be provided in the form requested.
- Responses to requests should be made within 1 month.
- Denials of requests for information shall be in writing, state the grounds for refusal, and be made generally within 1 to 2 months.
- Grounds for refusal are to be narrowly construed, balancing the interest to be protected against the public interest.
- Public authorities should redact confidential portions out of documents and disclose non-confidential portions, where this can be done without prejudicing the confidential information.
- Actual copies of documents will be provided when requested.
- Reasonable charges may be made for supplying information, subject to an established schedule.
- Public authorities must collect and disseminate environmental information.
- The public must be informed of their opportunities to participate in decision-making processes.

*Grounds for Refusal of a Request for Information*

- The public authority does not have the information.
- The request is manifestly unreasonable or overly general.
- The request concerns materials being completed.
- Disclosure would adversely affect:
  - Confidentiality of the proceedings of public authorities,
  - Internal relations, national defense, public security,
  - Confidentiality of commercial or industrial information,
  - Intellectual property rights,
  - Confidentiality of personal data,
  - The interests of a third party that has supplied the information, without that party being legally obliged to do so.

An important element of the right of access to information, is the duty of public authorities to inform the public of their participation rights. It is not enough for these participation rights to exist; the public authority must make an affirmative effort to inform the public of those rights. For example, the draft Convention requires that, when denying requests for information, public authorities inform the requestor of the availability of a review mechanism under the access to justice provisions. The draft Convention also

<sup>5</sup> *Id.* art. 4.3(a).

<sup>6</sup> *Id.* arts. 4.4(c) & 4.4(b).

<sup>7</sup> *Id.* art. 4.4(d).

<sup>8</sup> *Id.* art. 4.4(a).

<sup>9</sup> *Id.* art. 4.3(c).

requires, in the access to decision-making provisions, that the public authority inform the public of a decision to be made and their ability to participate in it. Access to information also entails informing the public of the opportunities and procedures for review of the decision of a public authority.

A final, essential element of the principle of access to information is that public authorities regularly and systematically collect information on the state of the environment and disseminate it to the public.

### *B. Principle of Access to Decision-Making*

Meaningful and effective participation requires that the public know both that a decision is being made and that they have a right to participate in the making of that decision. The minimum procedural elements of the principle of access to decision-making are designed to ensure that the public is able to participate in environmental decision-making in a meaningful and effective way. Notice of the pending decision-making process should come early enough in the process for the public to review relevant documents and prepare their input. Notice must also be made in a way reasonably calculated to reach the public in general, but more importantly that portion of the public most directly interested in and affected by the decision to be made.<sup>10</sup>

The process must also allow adequate time for the decision-makers to process the public input and incorporate it into their decision-making process. For the public to be willing or interested in participating they must be certain that their views will be taken into account in the decision-making process. Providing that final decisions be in writing and state the reasons for the decision ensures both that the decision-makers do adequately consider public input and that the public feels their input has been treated seriously. Failure to take public input into consideration is a basis for challenging the outcome of the decision-making process (see also the discussion of the principle of access to justice, below).

Environmental decision-making occurs at different levels and the draft Convention lays out slightly different procedures for the different levels of decision-making. At the most general level, environmental decision-making involves the adoption of policies, programs and plans relating to the environment.<sup>11</sup> At the most specific level are decisions on particular activities, such as permitting.<sup>12</sup> Between the adoption of policies, and specific decisions, are the adoption of executive regulations and other generally applicable, legally binding normative instruments.<sup>13</sup>

Certain common principles underlie the different procedures. These are summarized in Box 2 below and constitute the minimum procedural elements of the principle of access to decision-making, as defined in the draft Convention. These elements are designed to ensure that the public is able to participate in environmental decision-making in a meaningful and effective way.

#### Box 2: Principle of Access to Decision-Making

##### Principle of Access to Decision-Making *Minimum Elements of the Principle*

- Notice that a decision will be made.
- Notice in sufficient time to inform the public and for the public to prepare and participate in the decision-making process.
- Notice in an effective manner (calculated to reach the concerned public).
- Notice describing the opportunities and procedures for public participation.
- Sufficient timeframes for decision-making to allow effective public participation.
- Opportunities for the public to submit comments, information and analyses.
- Written decisions stating the reason behind them.
- Consideration of public input in the final decision.

### *C. Principle of Access to Justice*

No legal right is effective unless it is enforceable. In order to adequately ensure that the law is respected, including the principles of access to information and access to decision-making, members of the public must have access to a court or other independent and impartial body, established by law. The procedures of such a court or body must be fair and equitable and not pro-

<sup>10</sup> The draft Convention defines "the public concerned" as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making. . . ." *Id.* art. 2.5.

<sup>11</sup> Adoption of policies and programs is addressed by article 7 of the draft Convention.

<sup>12</sup> Decisions on specific activities are dealt with in article 6 of the draft Convention. The Convention sets out in Annex I those activities which must be subject to the requirements laid out in article 6, while leaving it to the discretion of the Parties whether to apply article 6 to decisions on other activities that may significantly impact the environment.

<sup>13</sup> Executive regulations are addressed in article 8 of the draft Convention.

hibitively expensive. In order for any review process to be meaningful, it must offer effective remedies, including injunctive relief. The review body must have the ability to create a binding obligation on a public authority and must issue a decision in writing that is publicly accessible.<sup>14</sup> The public must also be informed of the access to such review procedures and have adequate information to be able to avail themselves of the right of access.<sup>15</sup> These minimum elements of the principle of access to justice, as defined in the draft Convention, are summarized in the Box 3 below.

In order for the right of access to justice to be truly effective, the rules on standing – the criteria a potential plaintiff must meet in order to be allowed to sue to enforce a particular right – should be sufficient to allow any member of the public having an interest in a matter or being affected or potentially affected by a matter to have standing. Ideally an international instrument purporting to implement the right of access to justice would ensure that overly restrictive standing requirements do not vitiate the right of access to justice. Unfortunately the draft Convention only partially realizes this element of the right of access to justice in its principles, as discussed more fully below.

The draft Convention requires three types of access to justice: enforceability of access to information provisions, enforceability of the decision-making provisions, and enforceability of substantive environmental law. The draft Convention is unequivocal in providing the right to challenge denials of access to information.<sup>16</sup> It is equally unequivocal in the right to challenge the substantive and procedural legality of decisions on specific activities, listed in annex I to the draft Convention.<sup>17</sup> With respect to challenging such decisions, the Convention lays out a fairly liberal criteria for standing – determining who will have access to the review procedure. Members of the public must either have an interest or allege impairment of a right and any standing criteria in national law must be interpreted consistently with the objective of giving the public wide access to justice.<sup>18</sup> Moreover, NGOs, properly established in accordance with national law, are deemed to have a sufficient interest and rights capable of being impaired.<sup>19</sup>

The ability of members of the public to challenge acts or omissions of private parties or public authorities

that contravene national environmental law is potentially more limited, however.<sup>20</sup> In this case the members of the public have to meet the criteria laid down in national law. Narrowly drawn standing criteria could dilute access to justice in these matters, as nothing in the draft Convention requires parties to liberalize their standing requirements with respect to these types of cases. Thus, while the provisions on challenging the substantive and procedural legality of decisions on specific activities lay out minimum standing requirements, the provisions with respect to challenging violations of general environmental law do not establish a low standing threshold. Liberal standing criteria do not yet fall within the minimum elements of access to justice, *as defined in the draft Convention*. Nothing in the draft Convention, however, prevents Parties from adopting more generous standing criteria in their national laws. Similarly, nothing in the draft Convention prohibits international organization from widening their standing criteria. Certainly Parties to the Convention that choose to fully embrace the right of access to justice, ought to promote such broad notions of standing in international organizations in which they participate, although the draft Convention does not require it.

The provisions on access to information in the draft Convention include a right to review by an independent body when a request for information is denied. Review by an independent body ensures that public authorities exercise their discretion in interpreting the restrictions on access to information, and that such discretion is not exercised arbitrarily or in a way that vitiates the right of the public to access to information. Such review ensures that, in weighing the interest to be protected by non-disclosure against the interest of the public in disclosure, appropriate weight is given to both interests. It also ensures that limitations on the right of access truly are interpreted as restrictively as possible, as required by the principle of access to information.<sup>21</sup>

The provisions of the draft Convention on access to decision-making impose numerous procedural obligations on public authorities to ensure meaningful and effective public participation. Access to an independent review body when public authorities fail to properly implement these procedural requirements is crucial. If public authorities disregard such procedural requirements, then the substantive outcomes of those decision-

<sup>14</sup> Draft Convention, art. 9.4.

<sup>15</sup> *Id.* art. 9.5.

<sup>16</sup> *Id.* art. 9.1.

<sup>17</sup> Challenging the procedural and substantive legality of adoption of policies, plans and programmes, or of administrative regulations and other legally binding normative acts is limited by the provisions of national law. *Id.* art. 9.2.

<sup>18</sup> *Id.* art. 9.2 (a) & (b).

<sup>19</sup> *Id.* art. 9.2, referring to art. 2.5.

<sup>20</sup> *Id.* art. 9.3.

<sup>21</sup> *Id.* art. 9.1.

making processes are illegitimate and must be vacated. Without such a remedy these procedural safeguards on the public's right to participate are meaningless. Thus the principle of access to justice embodied in the draft Convention includes the ability to enforce the principles of access to information and decision-making.<sup>22</sup>

Finally, the principle of access to justice includes the right to challenge violations of environmental law by either private parties or public authorities, including, presumably, all national laws implementing the draft Convention.<sup>23</sup> Unfortunately, as discussed above, the draft Convention allows parties to subvert this component of the right with potentially restrictive standing criteria. This component of access to justice is, therefore, more limited than the other two.

### Box 3: Principle of Access to Justice

#### Principle of Access to Justice

##### *Types of Action*

- To seek review of a denial of a request for information.
- To challenge the substantive and procedural legality of a specific environmental decision, act or omission by a public authority.
- To enforce a substantive environmental law (to challenge the substance of a decision).

##### *Minimum Elements of the Principle*

- Access to independent and impartial review body.
- Decision of the review body is binding on the public authority.
- Final decisions should be in writing & publicly accessible.
- Process is timely & inexpensive.
- Procedures are established in law (i.e. written down in a formal manner).
- Adequate remedies, including injunctive relief, are available.

### III. United Nations Economic and Social Council

The United Nations system is divided into six main organs: the International Court of Justice, the General Assembly, the Economic and Social Council (ECOSOC),

the Trusteeship Council, the Security Council, and the Secretariat. ECOSOC was created in 1945 to promote economic and social justice, as a way to minimize international disputes.<sup>24</sup> Within ECOSOC's scope of activity are the promotion of "higher standards of living, full employment, and conditions of economic progress and development, solutions of international economic, social, health and related problems, and international cultural and educational cooperation, and universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>25</sup>

ECOSOC operates under the authority and guidance of the General Assembly to coordinate and monitor all UN operations in the field of economic and social work, including environment. ECOSOC has the authority to initiate and conduct "studies and reports with respect to economic, social, cultural, educational, health, and related matters."<sup>26</sup> In addition, ECOSOC may draft conventions regarding matters within its competence for submission to the General Assembly and may convene international conferences.

In carrying out its duties, ECOSOC works closely with the Specialized Agencies and other Programmes and Organs of the United Nations, including, in the environmental field, the United Nations Environment Program (UNEP), the World Health Organization (WHO), and the International Maritime Organization (IMO). In addition, ECOSOC works to coordinate and include relevant NGOs in its activities. "A significant portion of the Council's energy is spent supervising, coordinating, and functioning as an inter-agency liaison."<sup>27</sup>

In order to facilitate the execution of its wide-ranging tasks, ECOSOC has created a number of regional and functional commissions, as well as various sub-commissions and working groups. The five regional commissions are located in Europe (UNECE), Asia and the Pacific, Latin America, Africa, and West Asia. There are numerous functional commissions including: the Statistical Commission, the Commission for Sustainable Development (CSD), and the Commission on Human Rights. The Plenary Session of ECOSOC is used by members to review, on an annual

<sup>22</sup> *Id.* art. 9.2. The draft Convention provides only a limited right of access to justice for certain kinds of environmental decisions, namely those related to adoption of plans programmes and policies and the preparation of executive regulations and generally applicable, legally binding normative instruments. The right is contingent on the existence of national laws that create an enforcement mechanism accessible to individuals. *Id.*

<sup>23</sup> *Id.* art. 9.3.

<sup>24</sup> ECOSOC's mandate and goals are stated in the UN Charter, chapters IX and X, articles 55-72. Some excerpts drawn from: INGRID BUSSON, BACKGROUND GUIDE FOR THE ECONOMIC AND SOCIAL COUNCIL PLENARY, NATIONAL COLLEGIATE CONFERENCE ASSOCIATION (NCCA) 4-5 (1996).

<sup>25</sup> NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, UNITED NATIONS HANDBOOK 1997 at 77 (1997) [hereinafter UN HANDBOOK].

<sup>26</sup> *Id.*

<sup>27</sup> KURT HERMINGHAUSEN, BACKGROUND GUIDE FOR THE ECONOMIC AND SOCIAL COUNCIL PLENARY (NCCA) 2 (1994).

basis, the work of ECOSOC and its Commissions. The Commission on Human Rights for example, having completed its annual working operations, sends a report to ECOSOC assessing the year's work and proposing future operations. The report is then reviewed and adopted by ECOSOC in its plenary session.

Under article 71 of the UN Charter, the document that created the United Nations, ECOSOC may make arrangements for consultations with NGOs concerned with matters relating to ECOSOC's area of competence. Following adoption of the UN Charter, ECOSOC established procedures for such consultative relations.<sup>28</sup> These procedures were modified in the ensuing years, most recently in July 1996, when ECOSOC adopted the updated *Arrangements for Consultation with Non-Governmental Organizations* (hereinafter "Consultative Arrangements").<sup>29</sup> The Consultative Arrangements form the main legal basis for NGO involvement with ECOSOC. They are also significant, because they are expected to provide the model for participation of NGOs in all areas of the work of the UN.<sup>30</sup> Although the ECOSOC Consultative Arrangements are the main procedures for NGO participation in the UN, other UN bodies, conferences and conventions are free to adopt their own rules.

The latest decision to review the Consultative Arrangements grew out of a recognition that arrangements for NGO consultation had to be changed to reflect the changing role of NGOs. The former (1968) Consultative Arrangements had reflected a presumption that NGOs were useful partners to the United Nations in disseminating information about UN programs and in assisting in the implementation of UN-established priorities, particularly development, but not in developing policies and legal instruments. In a report prepared for the Open-Ended Working Group on the Review of Arrangements for Consultations with Non-Governmental Organizations (hereinafter "NGO Working Group"), the UN Secretary General concluded by identifying issues to be addressed in the review process, including:

whether too much emphasis has been placed on looking upon NGOs as disseminators of information about the United Nations and its activities and too little emphasis on NGOs as (i) organizations of civil society that want to strengthen their links to global governance and (ii) generators and reservoirs of substantive expertise and practical experience that are necessary to the formulation of international legal instruments, policies and programmes, and to their implementation nationally and globally.<sup>31</sup>

The process of rewriting the 1968 Consultative Arrangements indicated that the revised Consultative Arrangements should take into account the broader view of NGO consultations.<sup>32</sup>

The revisions reflect experience gained at UNCED. The process for accrediting NGOs to the UNCED process was much more flexible and open than the then-existing ECOSOC rules. UNCED also brought to international consciousness the realization that NGOs were not only useful as disseminators of information but as positive contributors to the policy process. The follow-on process to UNCED – the Commission on Sustainable Development – continued these more flexible and inclusive accreditation rules and provided a useful model to the NGO Working Group. Nevertheless, although the new Consultative Arrangements are an improvement, they do not adequately reflect the broad potential role of NGO consultations. The consideration of the revisions were much farther ranging than the ultimate product of those deliberations.

#### A. Access to Information

The documents prepared by the NGO Working Group as they reviewed the 1968 arrangements, make much of the contribution and role NGOs can make to the international policy-making process, but there is little discussion of access to information.<sup>33</sup> This may stem in part from the emphasis on NGOs as disseminators of information rather than reservoirs of policy expertise.

<sup>28</sup> Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 252-253, 266-67 (1997).

<sup>29</sup> Arrangements for Consultation with Non-Governmental Organizations, ECOSOC Res. 1996/31 [hereinafter Consultative Arrangements].

<sup>30</sup> In the same session that ECOSOC adopted the revised Consultative Arrangements, ECOSOC also adopted a resolution recommending that the General Assembly examine the question of participation of NGOs in all areas of the work of the UN, in light of the experience gained through the ECOSOC Consultative Arrangements. UN Doc. E/1996/L.24.

<sup>31</sup> General Review of Arrangements for Consultations with Non-Governmental Organizations, Report of the Secretary-General, UN Doc. E/AC.70/1994/5, at para. 109(a) (26 May 1994).

<sup>32</sup> See, e.g., Antonio Donini, *The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs*, in NGOs, THE UN AND GLOBAL GOVERNANCE (1996); Working with Non-Governmental Organizations: operational activities for development of the United Nations system with non-governmental organizations and Governments at the grass-roots and national levels, UN Doc. No. A49/122-E/1994/44 (13 April 1994) (discussing the importance of NGOs to development) [hereinafter Working with Non-Governmental Organizations]; General Review of Arrangements for Consultations with Non-Governmental Organizations, Report of the Secretary-General, UN Doc. E/AC.70/1994/5 (26 May 1994).

<sup>33</sup> See, e.g., General Review of Arrangements for Consultations with Non-Governmental Organizations, UN Doc. No. E/AC.70/1994/5 (26 May 1994); Working with Non-Governmental Organizations, *supra* note 32.

Even in the process of revising the Consultative Arrangements, the UN has focused little formal attention on access to and timely dissemination of information. As acknowledged in the draft Convention, timely access to appropriate information – particularly policy documents – is a necessary prerequisite to meaningful and effective participation. Neither ECOSOC, nor the UN system in general have information disclosure procedures, aside from policies for distribution of final documents and publications, discussed below. Only the United Nations Development Programme (UNDP) has a written information disclosure policy.<sup>34</sup>

*Dissemination of UN Information.* Although there is no information disclosure policy there is some policy with regard to distribution of UN documents and publications. UN Documents designated as “General Distribution Documents” are essentially final documents. They are publicly available through a series of UN depositary libraries that are required to make their UN collections available to the public. Currently 364 UN depositary libraries exist in 141 countries. Documents designated as “Limited Distribution Documents” are not distributed through the depositary system. In addition, a large selection of UN documents are available through the World Wide Web.<sup>35</sup>

In 1978 the General Assembly created the Committee on Information.<sup>36</sup> The Committee’s mandate is to review and report to the Assembly “on the policies and activities of the public information services of the UN system, with particular reference to those in the economic and social sphere.”<sup>37</sup> In this regard, the Committee’s work directly impacts the work of the Department of Public Information (DPI). The DPI, created in 1946, operates as an office of the United Nations Secretariat. The Department’s mandate is to promote the informed understanding of the operations and purposes of the United Nations around the world.<sup>38</sup>

Since 1946, the DPI has had formal working relationships with NGOs. That year, the General Assembly instructed the DPI to “actively assist and encourage national information services, educational institutions and other governmental and non-governmental organizations

of all kinds interested in spreading information about the United Nations. For this and other purposes, it should operate a fully equipped reference service, brief or supply lecturers, and make available its publications, documentary films, film strips, posters, and other exhibits for use by these agencies or organizations.”<sup>39</sup>

*Information Distribution in the Consultative Arrangements.* The Consultative Arrangements also make some provisions for document distribution and access to information. Under paragraph 67, the Secretary-General has the authority to offer NGOs in consultative status ECOSOC documents that the Secretary-General deems appropriate, access to UN press documentation services, use of UN libraries, and appropriate arrangements for obtaining documents at public meetings of the General Assembly.

*The UNDP Information Policy.* One of the main policy areas where the UN has acknowledged that NGOs have an important global policy role to play is development.<sup>40</sup> Thus not surprisingly, the United Nations Development Programme (UNDP) was the first UN agency to adopt an official public information disclosure policy. Interestingly, the adoption of this policy itself resulted from the pressure and initiative from NGOs, and in fact NGOs played a significant role in drafting the document.

The UNDP Public Information Disclosure Policy (“UNDP Information Policy”) provides a contrast to the general UN situation with regard to information disclosure, and should serve as a model for a UN-wide public information disclosure policy. The UNDP Information Policy was designed to ensure that information on UNDP operational activities was publicly available “in the absence of a compelling reason for confidentiality.”<sup>41</sup> The UNDP Information Policy, like the draft Convention, creates a presumption in favor of disclosure, subject to specific exemptions.<sup>42</sup> The UNDP Information Policy identifies a standard package of documents that tracks programming and projects that it makes available to the public.<sup>43</sup> The description of the standard package is not exclusive and documents not listed are still subject to the presumption in favor of disclosure.<sup>44</sup> The policy

<sup>34</sup> UNDP Public Information Disclosure Policy (available via internet at: <http://www.undp.org/undp/disclose/info-new.htm>) [hereinafter UNDP Information Policy].

<sup>35</sup> <http://www.un.org/>.

<sup>36</sup> General Assembly Resolution, res. 33/115C.

<sup>37</sup> UN HANDBOOK, *supra* note 25, at 27.

<sup>38</sup> UNITED NATIONS, A GUIDE TO INFORMATION AT THE UNITED NATIONS. 14 (1995).

<sup>39</sup> UN Doc. A/1/13. For further information on the relationship between DPI and NGOs, see NGOs and the Department of Public Information, <http://www.un.org/moreinfo/ngolink/brochure.htm>.

<sup>40</sup> See, e.g., Working with Non-Governmental Organizations, *supra* note 32.

<sup>41</sup> UNDP Information Policy, *supra* note 34, at para. 1.

<sup>42</sup> *Id.* para. 6.

<sup>43</sup> *Id.* para. 12.

<sup>44</sup> *Id.* para. 6.

lays out specifically when documents concerning programming and country specific activities will become available.<sup>45</sup> It also provides for specific exceptions to the presumption on disclosure.<sup>46</sup> Country-specific documents are available through country offices.<sup>47</sup> Programming information appears to be available only through UNDP Headquarters in New York.<sup>48</sup> Requests must receive a response within 30 business days and a denial of the request shall state the reason, consistent with the draft Convention.<sup>49</sup> The UNDP policy also creates a semi-independent panel to review denials of information requests (this is discussed in more detail in III.C, below).

The UNDP policy has problems as well.<sup>50</sup> For example the Standard Basic Assistance Agreement between UNDP and programme countries, gives programme countries control over disclosure of information relating to UNDP-assisted projects in that country.<sup>51</sup> In addition, the exceptions to disclosure are not precisely defined. The information disclosure policy provides, for example that information that "falls within one of the enumerated exceptions . . . shall be considered confidential,"<sup>52</sup> but then goes on to state however that "if the information that is to be classified as confidential does not fall within one of the exceptions enumerated . . . an explanation of the reason why the information would be considered confidential will be provided."<sup>53</sup>

Finally, implementation of the UNDP Information Policy is still weak. In August 1997 NGOs submitted requests for information, specifically listed as available in the policy,<sup>54</sup> to UNDP headquarters and 15 resident missions in order to test the policy. After 45 working days (the UNDP Information Policy allows 30 working days), only five of 15 resident missions had replied to the requests. Even UNDP Headquarter in New York did not completely answer the request. UNDP provided no written explanation as to why they did not answer the requests, as required by the policy. These difficulties in

actual implementation reflect the fact that, regardless of the progressiveness of a policy, overcoming a culture of secrecy that exists in organizations requires more than simply adopting a policy. Testing and monitoring the implementation of policies by civil society is vital if they are to be meaningful.

Despite its shortcoming, the UNDP's Information Policy provides a reference point for considering how the principle of access to information in the draft Convention can be implemented internationally. The UNDP example should be particularly persuasive to other UN agencies and will provide a useful tool to governments and civil society in promoting greater transparency across the UN system.

#### *Adequacy of Access to Information Policy.*

The UN system generally and ECOSOC do not adequately implement the principle of access to information because they fail to formalize an information disclosure policy – including the presumption of disclosure – *in written procedures*, like those of the UNDP. An information disclosure policy is a tool for enabling dialogue between an institution and civil society; it implements the principle of access to information. It is, therefore, different from a public education or outreach policy, like that pursued by DPI, although these also involve dissemination of information to the public. In the latter, the organization determines what information about itself it would like to convey to the public; in a true disclosure policy – one that implements the principle of access to information – the public determines what information it wants to have about the organization.

#### *B. Access to Decision-Making*

The 1996 Consultative Arrangements recognize the expertise of NGOs and their ability to support the work of the UN and seek to establish "just, balanced, effective and genuine involvement of non-governmental

<sup>45</sup> *Id.* paras. 13 (programming) & 14 (country-specific activities).

<sup>46</sup> *Id.* para. 15.

<sup>47</sup> *Id.* para. 16.

<sup>48</sup> *Id.* para. 17.

<sup>49</sup> *Id.* para. 19.

<sup>50</sup> A detailed analysis of this policy and its weaknesses is outside the scope of this study, however.

<sup>51</sup> UNDP Information Policy, *supra* note 34, at para. 2.

<sup>52</sup> *Id.* para. 8.

<sup>53</sup> *Id.*

<sup>54</sup> The request included a request to UNDP Headquarters for Country Strategy Notes, Advisory Notes, Country Cooperation Frameworks, and Programme Performance Reports for fifteen countries. All of these documents are listed in the UNDP Information Policy (paras. 13(a), 13(b), 13(c) & 14(f), respectively) as publicly available. The request also included a request to resident missions in those 15 countries for Programme Support Documents, EOPMS Documents (environmental overview of programme (Project) and management strategy), Project Documents, Technical Documents, and Performance country programme/project reports. These documents are also in the list of available documents in the UNDP Information Policy (paras. 14(a), 14(b), 14(c), 14(d) & 14(e) respectively).

organizations from all regions and areas of the world."<sup>55</sup> A significant change from the older arrangements is that national, regional and subnational NGOs may seek consultative status.<sup>56</sup> Under the old arrangements NGOs were defined as international NGOs; a national NGO was only admitted to consultative status if approved by the NGO's home government.<sup>57</sup> This change reflects a widening of policy debate within the UN and a recognition of a greater role for NGOs in policy formation.

*Participation in ECOSOC.* The Consultative Arrangements establish three categories of consultative relationships: general consultative status, special consultative status, and roster status. The Consultative Arrangements address the rights and privileges of each category with respect to consultations with ECOSOC (part IV), consultations with commissions (part V), and participation in international conferences convened by the UN (part VII).<sup>58</sup> The decision to grant an NGO consultative status is made by ECOSOC upon the recommendation of the Committee on Non-Governmental Organizations.<sup>59</sup>

To qualify for general consultative status, an organization must be concerned with most of the activities of ECOSOC and demonstrate that (1) it has substantive and continued contributions to make to UN objectives; (2) it is closely involved in the economic and social life of the people in the areas it represents; and (3) its Membership is broadly representative of major segments of

society in a large number of countries.<sup>60</sup>

Organizations in general consultative status enjoy the greatest participation rights. In consultations with ECOSOC and the Commissions, these organizations may propose that certain items of special interest be placed on the provisional agenda,<sup>61</sup> designate representatives to sit as observers at public meetings,<sup>62</sup> and submit written statements to ECOSOC on subjects in which they have a special expertise.<sup>63</sup> In addition, organizations in general consultative status are permitted to make oral presentations to ECOSOC whenever an item proposed by the organization is included in the agenda.<sup>64</sup>

Organizations in special consultative status enjoy the same basic substantive rights as those in general consultative status. Unlike general consultative status, however, organizations in special consultative status are concerned with only a few areas of activity covered by ECOSOC.<sup>65</sup> In consultations with ECOSOC and the Commissions, these organizations may designate representatives to sit as observers at public meetings,<sup>66</sup> file written statements on subjects in which they have a special expertise,<sup>67</sup> and may be asked by the Committee on Non-Governmental Organizations to make an oral presentation on a subject within its field of interest.<sup>68</sup>

Organizations in Roster status enjoy the fewest rights. These organizations consist of organizations that the Secretary-General and ECOSOC believe can make

<sup>55</sup> Consultative Arrangements, *supra* note 29, at para. 5. While seeking broad NGO participation, the Consultative Arrangements contain an important caveat. Article 19 provides that "[t]he arrangements should not be such as to overburden the Council or transform it from a body for coordination of policy and action . . . into a general forum for discussion." Additionally, paragraph 18 makes explicitly clear the difference between consultative status and participation without a vote. Under articles 69 and 70 of the UN Charter, only those states that are not members of ECOSOC may participate. Under Article 71, ECOSOC may only arrange for consultation with NGOs. Paragraph 18 notes that this distinction is essential and that arrangements for consultations should not confer the same rights of participation on NGOs as afforded to non-member states of ECOSOC.

<sup>56</sup> *Id.* para 4; Charnovitz, *supra* note 28, at 266-67.

<sup>57</sup> *Id.* at 252-53.

<sup>58</sup> Part VI addresses consultations with *ad hoc* committees of ECOSOC and establishes that consultative relations will follow the procedures established for consultations with Commissions.

<sup>59</sup> ECOSOC created the Committee on Non-Governmental Organizations in 1946 to "examine and report on the consultative relationship which ECOSOC should accord to international NGOs and to recommend what action should be taken on submissions which those organizations may make to it." UN HANDBOOK, *supra* note 25, at 132.

<sup>60</sup> Consultative Arrangements, *supra* note 29, at para. 22.

<sup>61</sup> *Id.* paras. 28 & 34. While only those organizations in general consultative status may propose items for the agenda, organizations in all three categories are entitled to receive copies of the provisional agenda (*Id.* paras. 27 & 33).

<sup>62</sup> *Id.* paras. 29 & 35.

<sup>63</sup> *Id.* paras. 30 & 36. There are three important restrictions to the submission of written statements. First, the submission will only be circulated in full if less than 2000 words (*Id.* paras. 31(d) & 37(d)). Second, they must be submitted in sufficient time to allow consultation with the Secretary-General (*Id.* paras. 31(b) & 37(b)). Third, the organization must give due consideration to comments by the Secretary-General before formally submitting its statement (*Id.* paras. 31(c) & 37(c)).

<sup>64</sup> *Id.* para. 32(b). However, such statements may only be an "introductory statement of an expository nature" (*Id.* para. 32(b)). In consultations with Commissions, however, the language is slightly different. (*Id.* para. 38).

<sup>65</sup> *Id.* para. 23.

<sup>66</sup> *Id.* paras. 29 & 35.

<sup>67</sup> *Id.* paras. 30 & 36. The same basic restrictions apply to organizations in special consultative status as applicable to those in general consultative status with the exception that the statement will only be circulated in full if it is less than 500 words (for consultations with ECOSOC) or 1500 words (for consultations with Commissions) (*Id.* paras. 31(e) & 37(e)).

<sup>68</sup> *Id.* para. 32(a). There is, however, a serious restriction on this privilege. An organization in special consultative status will receive such a request only in the absence of a subsidiary body of ECOSOC with jurisdiction in the area (*Id.* para. 32(a)). For the procedure with ECOSOC's regional and functional Commissions, see *Id.* para. 38.

occasional and useful contributions to the work of the ECOSOC.<sup>69</sup> Organizations on the roster will be available for consultation at the request of ECOSOC and may have representatives present at public meetings. (It should be noted that “public” meetings are not open to the general public.) Unlike organizations in general and special consultative status, there is no express right for roster organizations to submit written statements. Instead, the Secretary-General or ECOSOC may invite these organizations to submit written statements.<sup>70</sup> In addition, there is no express provision allowing organizations on the roster to make oral presentations in consultations with ECOSOC; however, in consultations with Commissions, these organizations may make statements at the request of the Commission.<sup>71</sup>

#### *Participation in International Conferences.*

In addition to the various consultative statuses, the Consultative Arrangements address the issue of NGO participation in international conferences.<sup>72</sup> In order for an organization to participate in any portion of an international conference, the organization must receive accreditation.<sup>73</sup> NGOs in any of the three categories of consultative status that wish to attend a conference will be accredited for participation.<sup>74</sup> An NGO granted accreditation to attend a session of the preparatory committee may attend all future sessions and the conference itself.<sup>75</sup> Although the Resolution points out that due to the “intergovernmental” nature of the conference, active participation by NGOs does not entail a negotiating role,<sup>76</sup> NGOs may submit written statements during the preparatory process<sup>77</sup> and, at the discretion of the chairperson and the body concerned, briefly address the preparatory committee and the conference in plenary meetings.<sup>78</sup> The practice in many accredited international conferences in the past has been to provide NGOs with generous participatory rights as well as to make official documents available. Some of the most liberal of the international conferences, such as the ECE negotiations of the draft Convention and the Habitat Conferences, should be held up as examples of how well liberal policies on access to information and participation in deci-

sion-making work on an international scale.

*Adequacy of Access to Decision-Making Policy.* Generally speaking, ECOSOC implements the principle of access to decision-making. The only deficiency of the ECOSOC accreditation model is that, if poorly implemented, it could be used as a means for screening out civil society participants whose view are unpopular with the institution, rather than as a means of providing better participation opportunities to interested parties. Other international organizations that look to the ECOSOC as a model should keep this caveat in mind.

#### *C. Access to Justice*

Little opportunity for civil society access to justice exists in the UN generally. There is for example, no right of access of civil society to the International Court of Justice (ICJ). Moreover, as the UN provides little if any *right* of access to information, it has no mechanisms to enforce that right.

The UNDP Information Policy, discussed above, therefore sets a welcome precedent by providing for access to justice to enforce the principle of access to information in a UN institution. In addition to providing for information disclosure, it creates a Public Information and Documentation Oversight Panel (“Oversight Panel”). The Oversight Panel’s functions are both to ensure full implementation of the policy and to reconsider denials of requests for information (this is referred to as its “appellate” function).<sup>79</sup> The Oversight Panel is supposed to adopt procedures for exercising its appellate function, but has not yet done so. The Oversight Panel is to be composed of five members, appointed by the UNDP Administrator. Three of the members will be UNDP professional staff and two individuals from the non-profit sector – one from a donor country and one from a programme country. The first Oversight Panel will be selected this year. Obviously, the Oversight Panel is not completely independent since its members include

<sup>69</sup> *Id.* para. 24.

<sup>70</sup> *Id.* paras. 31(f) & 37(f). These statements are subject to the same restrictions as statements submitted by organizations in special consultative status.

<sup>71</sup> *Id.* para. 38(b).

<sup>72</sup> *Id.* part VII.

<sup>73</sup> *Id.* para. 43. Applications for accreditation are submitted to the secretariat of the conference (*Id.* para. 43). Paragraph 44 lays out the application requirements. The application should contain the following information: purpose of the organization; information as to the programs and activities of the organization relevant to the conference; confirmation of the activities of the organization; copies of the organization’s annual reports; a list of the organization’s governing body; a description of the organization’s membership; and a copy of the organization’s by-laws or constitution. The secretariat of the conference will make its recommendation to the preparatory committee (*Id.* para. 47) and the preparatory committee will decide on accreditation (*Id.* para. 48).

<sup>74</sup> *Id.* para. 42.

<sup>75</sup> *Id.* para. 49.

<sup>76</sup> *Id.* para. 50.

<sup>77</sup> *Id.* para. 52.

<sup>78</sup> *Id.* para. 51.

<sup>79</sup> UNDP Information Policy, *supra* note 34, at paras. 20-23.

current UNDP staff. Nonetheless the Oversight Panel can be seen as roughly equivalent to an administrative review procedure in national legal systems.

Thus neither ECOSOC nor the UN generally adequately implements the principle of access to justice. Hopefully, as more countries join the draft Convention, pressure will build within the UN to improve this institutional shortcoming. The UNDP information policy provides an appealing model for institution-wide reform.

#### Box 4: Implementing the Principles in ECOSOC

##### Implementing the Principles in ECOSOC

###### *Access to Information*

- Adopt written information disclosure policies, based on the presumption of disclosure with limited exceptions, consistent with the draft Convention and national and international best practices.
- Continue and expand on the current practice of providing accredited NGOs with liberal access to UN documents and "codifying" this practice in a written procedure.

###### *Access to Decision-Making*

Ensure accreditation procedures do not unduly limit participation.

- Replace the discretion of the chair to limit participation rights with express rules and guidelines to delineate ample participation rights.
- Continue and expand on the current practice of liberally providing accredited NGOs opportunities to actively participate in international meetings and negotiations.

###### *Access to Justice*

- Establish review procedures for denials of requests for information.
- Establish review procedures for denials of rights either to participate in decision-making processes or to receive accreditation.
- Establish a practice of including in environmental conventions provisions allowing citizens to directly enforce violations of the convention's environmental protection rules.

zations discussed in this study. Although for the purposes of this paper the EU is being treated as an international organization, the EU is a supranational, inter-governmental body, to which a measure of sovereignty has been devolved. As a supranational organization, the EU has the most highly developed legal regime of the institutions addressed in this study. Of the four, it is also likely to have the most direct impacts on the lives of the public. Moreover, the EU is in a unique position vis-à-vis the other institutions in this study, in that it has the possibility under article 17 of the draft Convention, as a regional economic integration organization, to become a Party to the Convention directly. If it were to become a

Party, then the definition of "public authority" in article 2.2 would include the institutions of the European Union.<sup>80</sup> The purpose of this study, however, is not to evaluate how the EU should implement the draft Convention as a Party, but rather how Parties can promote the principles of the draft Convention in the EU, whether or not it becomes a Party.

###### *The Founding Treaties of the EU.*

The major legal instruments creating the EU and defining its powers and responsibilities are the Treaties of Rome (1957), The Single European Act (1987), the Treaty of European Union (also known as the Maastricht Treaty, 1992), and the Treaty of Amsterdam (1997), which is in the process of being ratified.

*The Institutions of the EU.*<sup>81</sup> The major institutions of the European Union are the Council, the Commission, the European Parliament, and the Court of Justice. These institutions are described briefly, below.

The Council continues to be the main political force and legislative body in the EU. The Council consists of one representative from each of the Member States

at the ministerial level; the minister varies depending on the matter being discussed. For example, if the issue is environment the Council consists of the environment mi-

#### IV. European Union

The European Union (EU) is in a somewhat unique position in comparison to the other international organi-

<sup>80</sup> Article 2.2(d) provides that "institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention" are public authorities for the purposes of the Convention. (Draft Convention, *supra* note 2, at art. 2.2(d)). The EU has provisions, such as the Codes of Conduct discussed below, that create obligations on the institutions of the EU with respect to access to information. In addition, various legislative acts of the EU create obligations for the Member States to provide information and participation rights to their citizens (for example, the Council Directive on Freedom of Access to Information on the Environment, Directive 90/313/EEC). These obligations of Member States vis-à-vis their citizens are matters of domestic law and thus outside the scope of this study. This study will look at the implementation of the three principles of the Convention by EU institutions, as institutions of an international organization; in other words, the focus of this section will be on the extent to which the EU allows citizen access to information, decision-making and justice in the EU institutions, not in the institutions of the Member States. The Member States are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, The Netherlands, Portugal, the United Kingdom, Sweden, Austria, Finland.

<sup>81</sup> This discussion of the institutions of the EU and how they function is drawn generally from EUROPEAN ENVIRONMENTAL BUREAU, YOUR RIGHTS UNDER EUROPEAN UNION ENVIRONMENTAL LEGISLATION (1994) [hereinafter YOUR RIGHTS], A. LEWIS, EUROPEAN COMMUNITY LAW 3-34 (1997), as well as the European Union Home page on the World Wide Web (<http://europa.eu.int/inst-en.htm>).

nisters from each of the Member States.<sup>82</sup> The Presidency of the Council rotates every six months. Decisions of the Council are made by a qualified majority – where the Member States have different numbers of votes<sup>83</sup> – or unanimity, depending on the legal basis in the Treaty for the measure concerned. Since most Councils (e.g., environment, transport) meet only once or twice per Presidency, much of the day-to-day work of the Council is carried out by the Committee of Permanent Representatives (COREPER), which consists of the Permanent Representatives (the “ambassadors”) of the Member States to the EU or their deputies. Most issues are resolved by COREPER and simply ratified by the Council; only the most politically contentious issues are resolved by the Ministers. The Council receives legislative proposals from the Commission. In some cases the Council must get an opinion from the Economic and Social Committee before a decision can be taken.<sup>84</sup>

The Commission’s main role is to formulate policy, prepare legislative proposals, manage the EU budget, implement EU policies and monitor implementation of EU legislation by the Member States.<sup>85</sup> All EU legislation must begin with a proposal from the Commission. Commissioners are supposed to represent the interests of the EU as a whole, independent of their Member State. Currently the President of the Commission is chosen by the Heads of State or Government meeting as the European Council after consultation with Parliament; when the Treaty of Amsterdam enters into force, nomination of the President will be approved by the Parliament. The other Commissioners are nominated by the 15 Member States in consultation with the incoming president. The full Commission must be approved by Parliament. Parliament can also force the entire Commission to resign by taking a vote of censure.<sup>86</sup> Each Commissioner is responsible for one or more portfolios, each of which is administered by a Directorate General (DG).<sup>87</sup>

The Parliament is the only EU body that meets and debates in public. Votes are also taken in public and on the record. Its debates and resolutions are published in the *Official Journal of the European Community*. The Parliament is elected directly by the citizens of the EU. The number of Members from each country varies; Mem-

bers are seated in political, not national, groups.<sup>88</sup> Despite its name the Parliament does not have the same role as national Parliaments. Parliament is increasingly becoming a legislating partner to the Council, although it remains in certain respects a junior partner. Parliament can propose amendments, although these amendments need not be taken up by the Commission or Council. In the last decade it has been given more powers in certain areas, but the Council of Ministers is still the senior legislative body.

Parliament’s participation in the EU law-making process is governed by three procedures: *the consultation procedure, the co-decision procedure (189B) and the cooperation procedure (189C)*.<sup>89</sup> In environmental matters the Parliament has various positions, depending on the specific character of the matter. In most cases, when the matter is raised in order to maintain the single market, the cooperation procedure is relevant. Once the Treaty of Amsterdam is ratified, the Parliament will be a co-legislator for most environmental decision-making. The *consultation procedures* requires an opinion from Parliament before a legislative proposal from the Commission can be adopted by the Council. In the case of *co-decision*, Parliament can prevent the Council from adopting a measure, but has no power to compel the Council to adopt a position the Council does not wish to adopt. In the case of the *cooperation procedure*, if the Parliament rejects the Council’s proposal, the Council must adopt the measure unanimously; Parliament cannot, however, veto the measure under the cooperative procedure.<sup>90</sup>

The Parliament has also appointed an Ombudsman to investigate allegations of maladministration brought by EU citizens or residents of EU Member States. The Ombudsman is elected by the Parliament for five year terms; the first Ombudsman was elected in 1995. Maladministration means that an institution has either failed to do something it should have done, done something in the wrong way, or done something it ought not to have done, including refusing access to information. The Ombudsman can also carry out studies on its own initiative.<sup>91</sup> For example, in 1996 the Ombudsman be-

<sup>82</sup> The Council is usually known as the Council of Ministers. When the Council is comprised of the Heads of State or Government of each of the Member States, it is referred to as the European Council.

<sup>83</sup> When the Council decides an issue by qualified majority, each Member State has the following number of votes: Germany, France, Italy and the United Kingdom – 10 each; Spain – 8; Belgium, Greece, the Netherlands and Portugal – 5 each; Austria and Sweden – 4 each; Ireland, Denmark and Finland – 3 each; and Luxembourg 2.

<sup>84</sup> <http://europa.eu.int/inst/en/cl.htm#function>.

<sup>85</sup> <http://europa.eu.int/inst/en/com.htm#democratic>.

<sup>86</sup> This has never yet happened.

<sup>87</sup> There are 26 DGs; environment is DGXI.

<sup>88</sup> Parliament currently consists of 626 members elected every five years. The distribution of seats among the Member States is as follows: Germany – 99; France, Italy and the United Kingdom – 87 each; Spain – 64; the Netherlands – 31; Belgium, Greece and Portugal – 25 each; Sweden – 22; Austria – 21; Denmark and Finland – 16 each; Ireland – 15; and Luxembourg – 6.

<sup>89</sup> Public participation does not vary between the procedures.

<sup>90</sup> <http://europa.eu.int/inst/en/ep.htm#intro>.

<sup>91</sup> <http://ww.euro-ombudsman.eu.int/media/en/default.htm>.

gan on its own initiative, a study into public access to documents in the EU.

The European Court of Justice and the Court of First Instance are the judicial branch of the EU. The Court of Justice has jurisdiction to hear disputes to which Member States, EU Institutions and individuals may be parties. There are fifteen judges and nine advocates general.<sup>92</sup> The Court of First Instance was established in 1989 to relieve the increasing case load of the Court of Justice and to allow the Court of Justice to concentrate on the uniform interpretation of EU law. The Court of First Instance also has 15 judges, but no advocates general. Judges to both courts are appointed by common accord of the Member States for renewable terms of six years. Both the Court of Justice and Court of First Instance can sit in plenary or in chambers of three or five judges. They sit in plenary when a Member State or an EU Institution party to the proceeding requests it.<sup>93</sup> The Court of First Instance has jurisdiction to deal with all actions brought by individuals and companies against decisions of the EU institutions and agencies. Cases decided in the Court of First Instance can be appealed to the Court of Justice on questions of law.<sup>94</sup> The Court of Justice also hears direct actions brought by either EU institutions or a Member State, and preliminary rulings, which may be requested by courts or tribunals in Member States when they need a decision on a question of EU law in order to render a judgment. In some circumstances, the Court of Justice can hear cases brought by natural or legal persons. In environmental cases (as discussed in Section C, below), access to the Courts is so limited as to be virtually non-existent.

*The Democracy Deficit.* Perhaps the most significant issue the EU has failed to deal with in the 41 years of its existence is the role of individuals in the EU and their fundamental rights and liberties (including those enshrined in the principles of the draft Convention) vis-à-vis its institutions. All the Member States are democracies providing their citizens with fundamental rights. As the jurisdiction of the EU has expanded, however, the Member States have ceded more legislative authority to the EU institutions. Unfortunately, as the power and influence of the EU institutions has expanded, their trans-

parency and accountability has not kept pace.

#### A. Access to Information

Greater demands for transparency and access to information within EU institutions gathered momentum in the 1980s, leading to the adoption of Declaration 17 in the Final Act of the Treaty of European Union, which called on the Commission to submit a study to the Council on measures to improve public access to information in the EU.<sup>95</sup> The results of this survey were communicated to the Council, the Parliament and the Economic and Social Committee in May 1993.<sup>96</sup> This process culminated in the adoption of a joint Code of Conduct concerning public access to Council and Commission documents in December 1993.<sup>97</sup> The failure of the Code of Conduct to elevate the principle of access to information to the status of a fundamental right within the EU, discussed below, led the Member States in turn to include a provision on access to documents in the Treaty of Amsterdam, signed in 1997, which is in the process of being ratified.

*The Code of Conduct.* The Code of Conduct lays out the common principles governing access to Council and Commission documents.<sup>98</sup> The idea was that each institution would adopt specific regulations implementing the principles in the Code of Conduct. The Council did so immediately, in *Council Decision 93/731 on Public Access to Council Documents*, which basically restates the Code of Conduct.<sup>99</sup> The Commission responded by adopting the Code of Conduct as an annex to Decision 94/90.<sup>100</sup> Thus, the Code of Conduct contains the basic principles that govern access to both Commission and Council information. Other EU institutions, such as the Parliament, the Economic and Social Committee, the Committee of the Regions and the European Environment Agency have adopted information access provisions as well, often following pressure from the Ombudsman.<sup>101</sup>

The Code of Conduct lays out the general principle that the public is to have the widest possible access to information held by the Commission and Council, subject to certain, broadly phrased exceptions. Applica-

<sup>92</sup> The role of advocates general is to deliver an independent opinion in open court on the arguments submitted during the hearing of the case and on the interpretation of the relevant rules. The advocate general recommends a decision for adoption by the Court. The advocate general's opinion is not binding on the Court, but is considered extremely persuasive and is often followed.

<sup>93</sup> Judgments are available in all 11 official languages.

<sup>94</sup> <http://europa.eu.int/inst/en/cj.htm>.

<sup>95</sup> Declaration No. 17, Final Act of the Treaty of European Union (Rome, Dec. 15, 1990).

<sup>96</sup> Public Access to the Institutions' Documents, 1993 *Official Journal C*-156/5.

<sup>97</sup> 93/730/EC, 1993 *Official Journal L* 340 (Dec. 31, 1993)[hereinafter Code of Conduct]. It should be noted that both the Council and Commission have each reviewed their rules and made minor amendments.

<sup>98</sup> *Id.*

<sup>99</sup> 93/731/EC, 1993 *Official Journal L* 340 (December 20, 1993).

<sup>100</sup> 94/90/EC, 1994 *Official Journal L* 46 (Feb. 8, 1994).

<sup>101</sup> *Special Report from the European Ombudsman to the European Parliament following the own-initiative inquiry into public access to documents* (616/PUBAC/F/IJH), 1998 *Official Journal C* 44/9. (Feb. 10, 1998).

tions are to be in writing and to specify the information requested. Documents held by either institution from external sources must be requested from the source individual or institution. The Code specifies that the institution (either the Council or the Commission) will respond within one month either approving or rejecting the request.

*Exceptions to Disclosure.* The Code of Conduct provides for the following exceptions:

The institutions *will* refuse access to documents when disclosure *could* undermine:

- The protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
- The protection of the individual and of privacy
- The protection of the Community's financial interests
- The protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information. They *may* also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.<sup>102</sup>

Based on the wording of the exceptions, the Court of Justice and the Court of First Instance have drawn a distinction between the first group of exceptions and the second, labeling the exceptions "mandatory" and "discretionary" respectively. The mandatory group of exceptions are introduced by the words "the institutions *will* refuse access." The idea is that mandatory exceptions protect the interests of third parties or the general public "where disclosure of particular documents by the institution concerned would risk causing harm to persons who could legitimately refuse access to the documents if held in their own possession."<sup>103</sup> The "discretionary" exception is introduced by the words the institutions "*may* refuse access." In this case, only the confidentiality of the internal deliberations of the institution are at stake.<sup>104</sup>

The discretionary exception is subject to a balancing test. The balancing test requirement was esta-

lished in *Carvel and Guardian Newspapers v. Council*. In this case the Court of First Instance annulled a refusal by the Council to disclose preparatory reports, minutes, attendance and voting records of the Council because the Council failed to exercise its discretion properly,<sup>105</sup> as required by Decision 93/731. The Court stated:

the Council must, when exercising its discretion under article 4(2) [of decision 93/731], genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations.<sup>106</sup>

The Council and the Commission are also required to state the reasons for decisions to reject a request for documents under either the mandatory or discretionary exception. This requirement is imposed by article 190 of the EC Treaty, which requires that "regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."<sup>107</sup> In *WWF v. Commission*, the Court of First Instance held that the Commission had to state reasons why particular documents were withheld and not to make flatly stated denials.<sup>108</sup> However, the WWF case only obliged the Commission to state a reason for its refusal pursuant to article 190 EC. The mandatory exception contained in the Code of Conduct has thus been interpreted quite broadly and the obligations imposed on the Commission primarily procedural: "Therefore the individual's potential for success on the basis of a substantive right to access contained in the legislation is extremely limited indeed and procedural errors on the part of the institution involved may be the only real chance of success."<sup>109</sup>

*The Legal Nature of the Code of Conduct.* The Council and Commission have taken the view that the Code of Conduct and the related Council and Commission decisions implementing them are matters of internal organization adopted pursuant to their ability to establish rules of procedure,<sup>110</sup> and not legal obligations.<sup>111</sup> The Netherlands and the European Parliament challenged this assertion in *Netherlands v. Council*. They argued, unsuccessfully, that access to information was a

<sup>102</sup> Code of Conduct, *supra* note 97 (emphasis added).

<sup>103</sup> Michael O'Neill, *In Search of a Real Right of Access to E.C.-held Documentation*, PUBLIC LAW 446 at 450 n.23 (1997).

<sup>104</sup> *Id.*

<sup>105</sup> *John Carvel and Guardian Newspaper Ltd. v. Council*, Case T-194/94 (Court of First Instance, 1995), para. 78.

<sup>106</sup> *Id.* para. 65.

<sup>107</sup> See, e.g., *WWF UK (World Wide Fund for Nature) v. Commission*, Case T-105/95 (Court of First Instance, 1997)[hereinafter *WWF v. Commission*]; *Interporc Im- und Export GmbH v. Commission*, Case T-124/96 (Court of First Instance, 1998); *Gerard van der Wal v. Commission*, Case T-83/96 (Court of First Instance, 1998).

<sup>108</sup> *WWF v. Commission*, *supra* note 107, at para. 77.

<sup>109</sup> O'Neill, *supra* note 103, at 452.

<sup>110</sup> Treaty Establishing the European Community (Rome Mar. 25, 1957), art. 151(3) (Council) & art. 162 (Commission)[hereinafter EC Treaty].

<sup>111</sup> *Kingdom of the Netherlands v. Council*, Case C-58/94 (Court of Justice, 1996).

fundamental right and an essential requirement of democracy; they challenged the notion that the Council could adopt the access to documents provisions simply as a matter of internal procedure.<sup>112</sup> The Court of Justice agreed with the Council's position, that as a matter of EU law there was not yet a fundamental right of access to information:

So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such request by virtue of their power of internal organisation, which authorize them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.

The fact that Decision 93/731 has legal effects vis-à-vis third parties cannot call into question its categorization as a measure of internal organisation.<sup>113</sup>

In *WWF v. Commission*, the Commission argued that because the Code of Conduct was a set of internal procedures, voluntarily adopted, it neither created a legal obligation for the Commission, nor conferred rights on third parties. The Court of First Instance rejected this argument, noting that the decision was capable of conferring rights on third parties, although it was a voluntarily assumed obligation.<sup>114</sup> The decision made abundantly clear, however, that within the EU the fundamental democratic principle of access to information was a mere administrative guideline, unilaterally conceded by the very institutions to which access was being sought.<sup>115</sup> To address this evident deficiency, the Member States in June 1997 adopted in the Treaty of Amsterdam a Treaty provision on access to documents.

*The Treaty of Amsterdam.* The Treaty of Amsterdam, once ratified, will amend the Treaty Establishing the European Community to add the following article:<sup>116</sup>

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in article 189b within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

This provision addresses the failure in the Code of Conduct to elevate the principle of access to justice to the status of a fundamental right. This article elevates the right of access to documents to Treaty stature in paragraph 1, but leaves it to the institutions to adopt internal working procedures in paragraph 3. Once ratified this article will force the EU to adopt actual legislation in the field, under paragraph 2. Moreover, the legislation will have to be adopted with the participation of Parliament, pursuant to the co-decision procedure. Thus, the general principles and any limits will be adopted with the maximum participation of the Parliament allowable under the EU legal system. As the most democratic EU institution and a consistent supporter of transparency within the EU, the fact that the Parliament is to be involved as an equal partner in crafting the general principles of and any limits to access to information in the EU is significant.

*Applying the Draft Convention's Access to Information Policy.* The Treaty of Amsterdam's article on access to information facilitates implementation of the draft Convention's principle of access to information by creating a solid legal basis for the right of public access to information within the EU. The EU should learn from its experience with the Code of Conduct (and related decisions) and from the draft Convention to develop principles and procedures that better implement the principle of access to information within the EU. In crafting the new principles, the Council and Parliament should seek advice and input from civil society. Careful attention should be paid to narrowly crafting the exceptions to the presumption of disclosure to ensure that they are not vulnerable to the discretion of the very organizations whose transparency is being sought. Those EU Member States that ratify the draft Convention, should advocate, consistent with their obligations under article 3.7 of the draft Convention, that its minimum elements provide the floor on which to build the new principles, even if the EU itself chooses not to become a Party.

<sup>112</sup> *Id.* paras. 18 & 31.

<sup>113</sup> *Id.* paras. 37 & 38.

<sup>114</sup> *WWF v. Commission*, *supra* note 107, para. 55.

<sup>115</sup> O'Neill, *supra* note 103, at 452-53.

<sup>116</sup> The Treaty of Amsterdam will renumber the articles of both the Treaty of European Union and the Treaty establishing the European Communities. The article cited is article 191a under the old numbering and article 255 under the new numbering. References in this paper to articles in either treaty is to the pre-Treaty of Amsterdam numbering.

## B. Access to Decision-Making

*Transparency of EU Decision-Making Institutions.* The EU institutions, particularly the Council and Commission, are not transparent. Of the EU institutions involved in the legislative process, only the European Parliament holds its meetings and debates in public and publishes its votes. The Council, the main legislative body of the EU, carries out its deliberations primarily behind closed doors. In response to criticism regarding its secrecy, the Council began the practice of debating specific topics at certain Council meetings in public a few times per Presidency. Holding a few public debates a year, while the real business of legislating in the Council is still carried out behind closed doors, does little to address the public's concern about the Council's secrecy, nor does it constitute true open debate and decision-making. The Council remains, therefore, a completely opaque institution. The Council's Rules of Procedure have limited provisions for holding public meetings and for making minutes of meetings available to the public.<sup>117</sup> The deliberations of the Council are considered confidential. Recently, the Council has begun the practice of making information about votes on legislative matters public. Meetings of the Commission are also held behind closed doors and the discussions are confidential.<sup>118</sup>

*Public Input into Decision-Making.* True public participation in EU decision-making is non-existent. Public input takes place on an informal and *ad hoc* basis. In the Council, the main legislative body of the EU, the public has no opportunity for input. The Parliament and Commission occasionally organize expert hearings, but are under no obligation to do so. The Commission also offers an opportunity for public comment through Green and White Papers. Green Papers are generally issued in advance of legislative initiative on an issue and are meant to be consultative documents to solicit public comment. White Papers are further elaborations on a topic and the public can also comment on these.

The Commission may establish consultative groups to assist in its work. One such informal consultative group is the Consultative Forum on the Environment and Sustainable Development.<sup>119</sup> The members are supposed to include a balanced representation of industry, business, local and regional authorities, professional associations, trade unions and environmental protection and consumer organizations, but representa-

tion is weighted toward the business sector, which has 7-12 seats, compared with 4-7 seats for representatives from environmental protection and consumer organizations.<sup>120</sup> The Forum may be consulted by the Commission on policy issues related to environment and sustainable development.<sup>121</sup>

The Economic and Social Committee is an advisory body consisting of representatives of economic and social groups, particularly labor and business. It issues opinions on matters referred to it by the Commission and the Council. Consultation is required in some subject areas, such as the environment. The Committee can also issue opinions on its own initiative. Environmental groups, however, are not represented in the membership of the Committee. Even were these structural weaknesses to be remedied, the Committee would still be an inadequate substitute for direct public access to decision-making.

*Applying the Draft Convention's Access to Decision-Making Policy.* Opportunities for civil society participation in the environmental decision-making processes of EU institutions fail to meet the standards set out by the draft Convention. The gravest fault with civil society access to decision-making processes in the EU is that it is solely at the discretion of the EU institutions. While advisory committees, like the Forum, can be a way for civil society to have input into institutional policy debates, they operate only at the discretion of the institution and cannot substitute for a right of participation. In addition, the ability of the Commission (or other institutions) to determine which groups and interests will or will not have input into the decision-making process is problematic. It allows the EU institutions to "screen" the input they receive from civil society, when the purpose of having civil society input into the decision-making process is to get the broadest possible spectrum of input.

## C. Access to Justice

The EU fails to properly implement the principle of access to justice in environmental matters. While the EU has a developed court system and jurisprudence, the barriers individuals face in seeking access to the Courts on environmental issues are significant. Individuals have some access to the Court of Justice and the Court of First instance where they are directly addressed or individually concerned.<sup>122</sup> However, the interpretation of these standing requirements by the Court

<sup>117</sup> Council Decision 93/662 adopting the Council's Rules of Procedure, 1993 *Official Journal* No. L 304.

<sup>118</sup> Rules of Procedure of the Commission, art. 7, 93/492, 1993 *Official Journal* No. L 230.

<sup>119</sup> Decision 97/150/EC, 1997 *Official Journal* No. L 58; see also <http://europa.eu.int/en/comm/dg11/forum>.

<sup>120</sup> *Id.* art. 3.

<sup>121</sup> *Id.* art. 2.

<sup>122</sup> EC Treaty, *supra* note 110, at art. 173, para. 4.

of Justice has been so narrow as to preclude access to justice on environmental issues (see discussion below). In addition to judicial remedies, individuals can petition the European Parliament and the Ombudsman, or complain to the Commission.<sup>123</sup> These procedures do not, however, substitute for true access justice. While an important component of access to justice, they are an indirect approach, with these other institutions acting as a filter between the civil society and the Courts. A court case may eventually be brought, but it will be brought and controlled by the institutions and not by the individual.

*Challenging Acts of EU Institutions in the Courts.* Article 173 of the EC Treaty provides that an individual may bring an action against a decision by an EU institution on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or any rule relating to its application, or misuse of powers, if the decision in question is addressed to, or of "direct and individual concern" to, the would-be plaintiff. The requirement to show direct and individual concern has proven a substantial barrier to individuals and an impenetrable one to NGOs. The Court of Justice has interpreted this standing requirement narrowly to mean "where . . . the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act."<sup>124</sup>

*Enforcing Access to Information.* Citizens can challenge denials of requests for information by EU institutions. Both Decision 94/90 (access to Commission documents) and 93/731 (access to Councils documents) provide that where a request for documents is denied the applicant may apply to the denying institution for review of the intention to refuse.<sup>125</sup> If the review results in a second denial, individuals have recourse either to the Court, under article 173 of the EC Treaty, or to the Ombudsman under article 138e of the EC Treaty. Individuals have challenged denials of document requests under both Commission Decision 94/90 and Council Decision 93/73 in the Court of First Instance. As noted above, current EU rules give tremendous discretion to the Commission and Council to deny requests for information. It is not clear to what extent this discretion will narrow in the future.

*The Draft Convention's Access to Justice Policy.* The Court's narrow standing doctrine contravenes the principle of access to justice in the draft Convention; individuals should have access to justice to challenge either a denial of a request for environmental information or the substantive or procedural legality of a decision to authorize specific activities (such as the decision to finance construction of power plants). While challenging specific decisions of this nature requires a showing of interest or that a right has been infringed, the draft Convention recognizes that, within the principle of access to justice, NGOs have a special role to play in representing environmental interests, which are often by their nature collective not individual. As noted above, the Court of Justice's interpretation of the standing requirements for individuals are extremely restrictive, and for NGOs they appear even more restrictive.

*Enforcing Access to Decision-Making.* Since there is no legal right of access to decision-making, there is no mechanism for enforcing such a right.

*Petitioning the Parliament and Ombudsman.* Other mechanisms exist for challenging acts of EU institutions. Article 138d of the EC Treaty grants citizens the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter within the Community's fields of activity that directly affects them. The Parliament may investigate the petition and draft a report for submission to the Council or the Commission.

In 1995 the Parliament appointed the first Ombudsman. The Ombudsman investigates allegations of maladministration by EU institutions brought by EU citizens or residents of EU Member States. A personal interest is not required to petition the Ombudsman. The Ombudsman does not deal with matters that are before a court or that have already been settled by a court. The complainant is informed in writing if the Ombudsman cannot begin an inquiry. Complaints are dealt with confidentially if the complainant requests. The Ombudsman makes recommendations to the institution concerned on how to resolve the issues. The institution then has three months to inform the Ombudsman of the measures it intends to take; if the institution does not accept the recommendations, the Ombudsman can make a report to Parliament.<sup>126</sup>

<sup>123</sup> YOUR RIGHTS, *supra* note 81, at 16-17.

<sup>124</sup> *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission of the European Communities* (Case C-321/95P) (2 April 1998), para. 28.

<sup>125</sup> Decision 94/90, *supra* note 100, at art. 2.2; Decision 93/731, *supra* note 99, at art. 7.

<sup>126</sup> EC Treaty, *supra* note 110, at art. 138e; <http://www.euro-ombudsman.eu.int/media/en/default.htm>.

*Complaining to the Commission.* Although citizens have the right to complain to the Commission, the Commission is not required to pursue citizen complaints. Even if it does undertake an investigation, the Commission is not required to commence a judicial proceeding. Moreover, the Commission continues to regard information on the follow-up to a complaint as confidential. Thus an individual or organization that has complained to the Commission can not learn what is being or has been done to pursue the matter. In the event that the Commission pursues a matter, it can take years before a case is brought to court.

regard is thus dependent on the standing rules and other jurisprudence of the Member State.

## V. World Trade Organization

The World Trade Organization (WTO) is the primary political and legal institution promoting global trade. Its rules, articulated in a series of agreements, have greatly liberalized trade between Member States over the past five decades. The WTO came into being on January 1, 1995 as the successor organization to the General Agreement on Tariffs and Trade (GATT), established in 1948. The WTO agreements cover trade in goods, services and intellectual property.

### Box 5: Implementing the Principles in the European Union

#### Implementing the Principles in the European Union

##### *Access to Information*

- Consult extensively with civil society in crafting the general principles and limits governing the right of access to documents, pursuant to the Treaty of Amsterdam.
- Precisely define and limit the exceptions to the presumption of disclosure in the institutions' rules of procedure for access to information.
- Ensure that the draft Convention informs the adoption of these new rules or procedures and provides the minimum floor.

##### *Access to Decision-Making*

- Create legally binding rights for civil society to participate in the decision-making processes of EU institutions, using the draft Convention as a floor.
- Ensure that failure to respect such legally binding rights to participate is grounds for challenging the validity of the decision adopted.

##### *Access to Justice*

- Once a legally-binding right of participation has been created, ensure that this right is enjoyed by all of civil society.
- Reinterpret article 173 of the EC Treaty so that any specific decision, act or omission of an EU institution that harms or may potentially harm the environment be deemed to directly concern individuals and organizations.
- Reinterpret article 173 of the EC Treaty to allow environmental citizens organizations and others to bring cases challenging specific environmental decisions, acts and omissions of EU institutions by recognizing as legitimate parties, individual or organizations that are affected or likely to be affected by the environmental decision, act or omission.

The Ministerial Conference and the General Council are the formal decision-making bodies within the WTO.<sup>127</sup> In addition, however numerous subsidiary bodies frequently address issues of environmental consequence, such as the Committee on Trade and Environment, the Technical Barriers to Trade Committee, the Subsidies Committee, and the Dispute Settlement Body. Participation in every body of the WTO, except for specialized bodies, is open to all Members.<sup>128</sup> Although they are not formal decision-making bodies, the recommendations of even subsidiary bodies often become final decisions of the WTO. Thus, consideration of environmental issues, even in the most subordinate bodies may in practice determine final WTO policy. It is therefore important that opportunities for public participation exist across the WTO structure.

The institutional structure of the WTO includes a sophisticated dispute settlement system, comprised of the Dispute Settlement Body (DSB), dispute settlement panels, and the Appellate Body. The DSB is the operational name of the WTO General Council when it convenes to address dispute settlement issues. It has the sole authority to es-

tablish dispute settlement panels, adopt panel and appellate reports, monitor the implementation of rules and recommendations, and authorize retaliatory measures if recommendations are not implemented.

*Enforcing EU Environmental Law.* Individuals can only sue to enforce the failure of a Member State to enforce EU environmental law in the domestic court system of that Member State. Access to justice in this

<sup>127</sup> Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, December 15, 1993, Multilateral Trade Negotiations Doc. MTN/FA WTO Agreement art. IV, para. 2.

<sup>128</sup> All Members of the WTO are either States or regional economic integration organizations (i.e. the EU).

The significance of the role of the dispute settlement procedure in the WTO has increased from what it was under the GATT. Under the new Dispute Settlement Understanding, a decision will proceed through the system – toward formal adoption and WTO sanctions in the event of non-compliance – unless the losing party convinces all other Members, including the winning party, to oppose the decision.<sup>129</sup> The result is that individual nation states have lost the ability to make independent judgments about the balance they wish to strike in a given situation between free trade and other policy imperatives, such as environmental protection. To the extent that a nation's decision conflicts with the WTO's interpretation of its rules, the trade rules will be enforced through an automatic legal mechanism.<sup>130</sup>

The dispute settlement institutions therefore represent influential fora for the deliberation and ultimate conclusion of policy conflicts between trade and environment. Because of the new, more legalistic nature of the dispute resolution process, the WTO has the power to undermine policy choices – balancing the interests of trade and environment – that are the product of domestic decision-making processes. These domestic decision-making processes are typically far more transparent and open than those of the WTO.

#### A. Access to Information

The eventual public availability of some WTO documents, including final panel decisions, but excluding other documents related to dispute settlement proceedings, is governed by the General Council *Decision on Procedures for the Circulation and Derestriction of WTO Documents*<sup>131</sup> (hereinafter "*Document Procedures*"). Under these procedures, official series WTO documents are now circulated as unrestricted, unless they fall into a category specifically identified as restricted in the Appendix to the *Document Procedures*.<sup>132</sup> Unfortunately, the list of restricted documents includes most of the documents pertaining to pending policy decisions.

Although the new *Document Procedures* represent an important change from prior GATT and WTO practice, the procedures do not facilitate the kind of public participation necessary to protect the interests of the many constituencies affected by the activities of the WTO. On the contrary, the *Document Procedures* reflect a determination by the WTO Membership to permit the public to consider the issues addressed by the WTO only after the fact, and then, often, only if no Member finds even such a belated review offensive for any reason.

*Automatic Document Derestriction.* Restricted documents can become publicly available (derestricted) either automatically or derestricted by Member consideration. Documents subject to automatic derestriction (i.e. automatic release to the public) are listed in the table below. Documents qualifying for automatic derestriction become publicly available (derestricted) upon the occurrence of stipulated triggering

Table 1: Automatic Document Derestriction

Type of Document	Triggering Event
Working documents, other than those specifically identified for scheduled derestriction consideration (see below)	Adoption of the report or the decision pertaining to their subject matter (or considered for derestriction 6 months after their circulation, whichever is earlier)
SECRET/- series documents (i.e. those documents relating to modification or withdrawal of concessions pursuant to article XXVIII of the GATT 1994)	Completion of the article XXVIII process (including such process initiated pursuant to article XXIV:6) through certification of the changes in the schedule in accordance with the Decision by the contracting Parties to the GATT 1947
Reports of the Secretariat and by the government concerned, relating to the Trade Policy Review Mechanism, including the annual report of the Director-General on the overview of developments in the international trading environment	Expiry of the press embargo. A press embargo is imposed, forbidding publication or quotation from these documents until the trade review is conducted; these documents are generally circulated 3-4 weeks before the review and should be derestricted immediately after the review.
Documents relating to working parties on accession	Adoption of the report of the working party. Prior to adoption, such documents are considered for derestriction at the end of the first year following the year in which they were circulated.
Panel reports, circulated in accordance with the provisions of the Dispute Settlement Understanding	Within 10 days of the date of circulation to the Membership

ring events, without any review by the Membership. No Member can prevent derestriction by objecting to it. For the most part, this means documents are only released after the underlying decision is made or a process is complete.

<sup>129</sup> Dispute Settlement Understanding, arts. 16.4 & 17.14 [hereinafter DSU]. Under the old system, losing parties could block adoption of panel reports and simply fail to act in accordance with the unadopted decision.

<sup>130</sup> See G. Richard Shell, *Participation of Nongovernmental Parties in the World Trade Organization: the Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, n. 56 and accompanying text (1996).

<sup>131</sup> Procedures for the Circulation and Derestriction of WTO Documents, WT/L/160/Rev.1 [hereinafter *Document Procedures*]. This discussion of the *Document Procedures* is based on L. Brennan Van Dyke & John Barlow Weiner, *An Introduction to the WTO Decision on Document Restriction* (undated).

<sup>132</sup> *Document Procedures*, *supra* note 131, at para. 1.

*Scheduled Document Derestriction.* Classes of documents subject to scheduled derestriction consideration by the Members are described in the table below. The timing of derestriction of these documents varies considerably depending on the document type and when the document is circulated to the Membership (see chart below). Consideration of derestriction of most documents follow two primary schedules. Some documents become eligible for consideration six months after the date of their circulation. Others become eligible at the end of the six month period (January-June or July-December) in which they are circulated. In general, in the absence of an objection by a Member, derestriction

document on the list of documents considered for derestriction until the entire restricted period for the document has passed. The Membership is then given a full 60 days to consider the derestriction.<sup>133</sup> This practice is not required by the *Document Procedures* and has the practical effect of adding an additional two months to the restricted period of the document.

*Unscheduled Document Derestriction.* In addition, any document (including those subject to automatic derestriction) can be considered for derestriction at any time.<sup>134</sup> This can be done either by consideration of the Membership or by consideration of the WTO bodies.

If a Member requests that a document be considered for derestriction, the Membership then has 60 days to consider whether to derestrict the document.<sup>135</sup> When a WTO body considers whether to derestrict a document, consideration of the derestriction of the document is placed on the agenda and if no Member objects to the derestriction at that meeting, the document becomes derestricted.<sup>136</sup> If a Member objects, the document will not be considered again until the end of the next calendar year.<sup>137</sup> Thus, once a document has been considered for unscheduled derestriction and not derestricted, it will be between one and two years before it is considered for derestriction again.

Table 2: Scheduled Derestriction Consideration

Type of Document	Subject to Scheduled Derestriction Consideration	Subject to Derestriction (absent Member objection)*	Subject to reconsideration (if Member objection)
Balance of payments consultation documents	At the end of the 6 month period in which they are circulated to the Membership.	2 to 8 months after circulation	At the end of the next calendar year
Working documents of the Committees on Market Access and Trade & Development, and the Trade Policy Review Mechanism	At the end of the 6 month period in which they are circulated to the Membership.	2 to 8 months after circulation	At the end of the next calendar year
Any documents designated as restricted by the Member submitting it to the WTO	At the end of the 6 month period in which they are circulated to the Membership.	2 to 8 months after circulation	At the end of the next calendar year
Meeting Minutes and background notes prepared by the Secretariat.	6 months after their date of circulation.	8 to 9 months after circulation	At the end of the next calendar year
Work of accession working parties	One year after circulation	14 to 15 months after circulation	At the end of the next calendar year

\*Members are allowed a full 60 days after a document becomes eligible for derestriction to consider its derestriction. In addition, the list of document subject to derestriction consideration is circulated only once a month and no document is placed onto the list until after the entire restricted period for the document has passed. Therefore, depending on when a document was circulated, this may add nearly a month onto the time period before a document is derestricted.

of a document will occur between two and nine months after circulation of the document to the Membership. Members can, however, object to derestriction indefinitely, for any document not subject to automatic derestriction. The decision stipulates when the Membership must consider derestriction of documents, but does not explicitly state the time period for this consideration. The practice of the Secretariat has been not to include a

the public lies almost entirely within the discretion of the Members. They can designate that any document submitted to the WTO be restricted. In addition, for all those documents that are subject to scheduled derestriction consideration, Members can prevent derestriction of a document indefinitely. Members are not required to state ground for their objections, and there is no "statute of limitations" after which time documents become derestricted.

*Critique of the WTO Document Procedures.* In general, the extent to which documents are available to

<sup>133</sup> This not entirely clear from the text of the decision. The Document Procedures state that members will "normally" receive 60 days notice of the proposed derestriction of a document. *Id.* para. 4.

<sup>134</sup> *Id.* para. 2(b).

<sup>135</sup> *Id.* para. 3.

<sup>136</sup> *Id.* para. 3.

<sup>137</sup> *Id.* para. 5.

The availability of documents is at odds with the principles of the draft Convention in several ways. First, documents do not become available until after decisions have been made. Thus, documents are not made available early enough in the process for the public to be able to know what decisions are being made, and to give the public an opportunity to submit comments or questions. Even automatically derestricted documents do not become available until after their release to the WTO Membership and following review and consideration by subsidiary bodies. Given that decisions taken in subsidiary bodies are likely to be adopted by the WTO, once the body given primary responsibility for an issue has completed its review, it is unlikely that the issue will be seriously reconsidered soon. Any comments or information the public might have would have to overcome the substantial burden of dislodging the already established consensus position of the Membership.

Second, the Members have arbitrary and absolute authority to keep documents from the public indefinitely and for any reason (or none at all). This is at odds with the principles embodied in the draft Convention. The draft Convention provides that denials of requests for information state the reasons for the denial and preferably be in writing. Only in the case of documents considered for unscheduled derestriction by a WTO body is there any sort of record as to the debate that took place, during which the rationale of Member that objects to the derestriction can be challenged and the debate recorded (assuming of course that the minutes of the meeting themselves eventually become derestricted). Where derestriction is done by notice to the Members (i.e. all other forms of scheduled or unscheduled derestriction) neither the opportunity for debate, nor a record of the rationale for denying derestriction exists. Because the WTO *Document Procedures* do not provide any rules or criteria for why documents can remain forever restricted, it fails to meet these basic principles of the draft Convention.

Finally, the definitions of documents that do not circulate as unrestricted in the Annex to the *Document Procedures* are not limited in such a way as to make sure the exclusions are as restrictive as possible. The *Document Procedures* appear, formalistically, to take an approach consistent with the draft Convention – official series WTO documents circulate as unrestricted, unless they fall within one of the categories listed in the Annex. The Annex then proceeds to list virtually all categories of documents. Thus the substance of the *Document Proce-*

*dures* is actually in its Annex: the exclusions list is the WTO's document policy. In comparison, the draft Convention, while having the same structure, provides a *limited* list of exclusions. Exclusions are based primarily on the quality of the information contained in the document, rather than on the category of document that contains it. Moreover, the limits on disclosure are subject to a balancing of the interests to be protected against the public's interest in disclosure.

*Duty to Collect and Disseminate Environmental Information.* Neither the WTO nor any of its Member States collect or disseminate even rudimentary information on the environmental impacts of WTO trade rules or activities. Nor is it the WTO practice to assess potential environmental impacts prior to undertaking negotiations of new international trade disciplines that may have profound environmental implications. This failure to take affirmative responsibility to "possess and update environmental information which is relevant to [its]function," also contravenes the principles of the draft Convention.<sup>138</sup> At the very least, the WTO should conduct regular assessments of the environmental impacts of trade rules and international trade flows.

#### B. Access to Decision-Making

*WTO Guidelines for NGO Participation.* The WTO provides virtually no formal role for public participation. The Marrakesh Agreement, establishing the WTO, provides that "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."<sup>139</sup> In July 1996, the General Council adopted the *Guidelines for Arrangements on Relations with Non-Governmental Organizations*<sup>140</sup> (hereinafter "*Guidelines*"). These do little, however, to improve the situation of NGOs in the WTO. The *Guidelines* themselves are less than a full page long and bestow no right of participation on NGOs.

The *Guidelines* essentially establish the Secretariat as a wall between NGOs and the rest of the WTO, including the Membership.<sup>141</sup> Thus the *Guidelines* provide that the Secretariat "should play a more active role in its direct contacts with NGOs."<sup>142</sup> The Secretariat is to organize *ad hoc* symposia and informal arrangements for receiving NGO information, thus, making the Secretariat the only liaison point for NGOs. Unfortunately, the Secretariat has no decision-making authority within

<sup>138</sup> See, Draft Convention, *supra* note 2, at art. 5.1(a).

<sup>139</sup> Marrakesh Agreement article V:2.

<sup>140</sup> Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162 [hereinafter NGO Guidelines].

<sup>141</sup> The following discussion of the NGO Guidelines is drawn from Sally Bullen & Brennan Van Dyke, *In Search of Sound Environment and Trade Policy: A Critique of Public Participation in the WTO* (1996).

<sup>142</sup> NGO Guidelines, *supra* note 140, at para. 4.

the WTO. The "walling off" of NGOs is further effected by the provision in the *Guidelines* that in any meetings between NGOs and chairpersons of WTO Councils or Committees, they act in their personal capacity.

The *Guidelines* are couched in discretionary language.<sup>143</sup> The WTO is to organize symposia on an *ad hoc* basis, rather than at regular intervals. The arrangements for receiving information from NGOs are to be informal, rather than to have regular, formalized procedures for submission and consideration of NGO information, as the use of the word "guidelines" in the decision title would imply. In short the ability of NGOs to participate, limited as it is, is at the sole discretion of the WTO. What the *Guidelines* contemplate is less a right of NGOs to participate in the policy formation process, than a right of NGOs to listen when the WTO wishes to tell them something and to provide the WTO with general information if the WTO wishes to solicit it.

The *Guidelines* promote the national level as the appropriate place for cooperation and consultation with NGOs on trade policy.<sup>144</sup> The national level is of course extremely important for NGO participation in trade policy-making. This does not, however, absolve the WTO of responsibility to provide for open and transparent decision-making processes. As noted above, the public cannot participate effectively, even at a national level, because access to the relevant documents is extremely limited. Since documents do not become publicly available until after decisions have been made NGOs do not have time to prepare comments, suggestions or ideas. This is just as much a handicap to participation if NGOs are trying to participate in the formation of national level or international policy.

*Policy-Making in the Dispute Settlement Process.* An important aspect of the WTO decision-making process is the role played in that process by the DSB (dispute settlement body). Although the Ministerial Conference and the Governing Council are the formal decision-making bodies, often the political process of resolving conflicts between trade priorities and other policy priorities, such as environment, within these bo-

dies breaks down. When the political process fails to resolve these conflicts, political issues often find their way into the dispute settlement arena. Particularly in defining the relationship between trade and environment, the dispute settlement process has played an important policy-making and priority-setting role.

The consideration of environmental issues in the dispute settlement process is significant because decisions are influential both in the specific case, and on a broader policy level. Although not technically binding on future cases, panel and Appellate Body decisions represent an influential source of WTO interpretation, which influences future practice under the regime. WTO panel and Appellate Body decisions are particularly significant in terms of their policy impact because they will almost certainly be adopted, and enforcement mechanisms are built into the automatic time table of the WTO regime.<sup>145</sup>

The dispute settlement mechanism, both under the WTO and the GATT, has frequently involved environmental matters. The Tuna/Dolphin controversies are the most well-known GATT panel decisions involving issues of environmental policy.<sup>146</sup> These disputes questioned the GATT-legality of provisions in the Marine Mammal Protection Act of the United States that operated to ban tuna imports from countries that did not require their tuna fleets to practice "dolphin safe" tuna fishing methods. In deciding those disputes a single GATT panel, made up of three unaccountable trade experts operating in secret, shaped general policy on issues such as: (1) the legitimacy of regulating for environmental purposes the way products are harvested;<sup>147</sup> (2) the availability of alternative methods of environmental regulations;<sup>148</sup> and (3) the extent to which environmental regulation should reach beyond national boundaries.<sup>149</sup> These issues illustrate that by inquiring into the trade legality of environmental measures, the GATT/WTO dispute settlement mechanisms directly address environmental policy. Moreover, the logic of the tuna/dolphin dispute has influenced all future consideration of these issues.

<sup>143</sup> *Id.* ("The interaction with NGOs should be developed through various means such as *inter alia* the organization on an *ad hoc* basis of symposia on specific WTO-related issues, informal arrangements to receive information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO").

<sup>144</sup> *Id.* at para. 6 ([T]here is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making").

<sup>145</sup> For example, within 60 days after the circulation of a panel report to the members, the report shall be adopted at a DSB meeting unless a party objects. DSU, *supra* note 129, at art. 16.4.

<sup>146</sup> United States - Restrictions on Imports of Tuna, GATT Doc. DS21/R (Sept. 3, 1991) (unadopted) [hereinafter Dolphin I Report]; United States - Restrictions on Imports of Tuna, GATT Doc. DS29/R (June 16, 1994) (unadopted) [hereinafter Dolphin II Report].

<sup>147</sup> Dolphin I panel, *supra* note 146, at paras. 5.11 and 5.14.

<sup>148</sup> *Id.* at para. 5.28.

<sup>149</sup> *Id.* at para. 5.26; Dolphin II Report, *supra* note 146, at para. 5.15.

The Tuna/Dolphin disputes are not isolated examples of the environmental policy overlap in the GATT/WTO. The EU has challenged three US tax laws related to fuel efficiency.<sup>150</sup> The first WTO panel decision and WTO Appellate Body decision reviewed the legality of provisions within the United States' Clean Air Act regarding reformulated gasoline.<sup>151</sup> In these controversies, the WTO dispute settlement mechanisms considered such issues as whether environmental protection measures were sufficiently related to conservation goals, and the similarity or likeness of products that have different effects on the environment. More recently, the WTO dispute settlement panel found that the United States law that prohibited shrimp imports from countries not requiring shrimpers to equip their nets with metal grills that prevent endangered sea turtles and other large marine animals from drowning, was an illegitimate barrier to trade. This decision reinforced the policies established in the Tuna/Dolphin decisions.

In effect, although the decisions of dispute settlement panels have no formal legal authority to bind future panels or establish generally applicable WTO policy, the dispute settlement process has become a *de facto* policy-making arena. Therefore access to the dispute settlement process is not only important in implementing the principle of access to justice in the WTO (discussed below), but also in implementing the principle of access to decision-making.

This secondary role is especially problematic, as the dispute settlement forum is not a legitimate one for the establishment of generally applicable policy. In the formal decision-making bodies of the WTO, national interests are represented by officials from the WTO Member States. The dispute settlement panels, however, are staffed by trade experts, who do not have the political legitimacy to resolve fundamental policy issues, or overturn domestic policy choices. Nor do they have sufficient expertise in environmental matter to balance impartially the relative interests of trade and environment values.

*Creating Greater NGO Access at the WTO.* If the WTO is concerned that allowing public access to its decision-making processes would "open the flood gates" and lead to paralysis of the organization, one way around this problem would be to introduce a system of accreditation similar to the ECOSOC Consultative Arrangements. Participation rights could be given to organizations with a demonstrated interest in the ac-

tivities of the WTO, including the incorporation of non-trade concerns such as environment or labor. Such a change would be an acknowledgment by the WTO of the role NGOs and the public have to play in policy-making. It would also provide a mechanism for constructive dialogue with NGOs on fundamental policy issues. Adoption of a consultation policy will only be effective if the WTO liberalizes document disclosure. The danger of such a policy is that the accreditation process will be used to exclude NGOs that the WTO perceives as hostile to its mission of trade liberalization. To avoid this any accreditation process must be extremely transparent and provide for an independent process to review denials of accreditation.

In sum the WTO's almost complete absence of policy on civil society participation do not comport with the principles of the draft Convention. Parties to the Convention will have to work hard to fulfill their obligation to promote the application of its principles in the WTO.

### C. Access to Justice

Because the WTO system basically concedes no rights to information or participation, there is no mechanism to enforce such right. Although the *Guidelines* provide that the Secretariat shall respond to requests for general information and briefings about the WTO, there is no formal recourse for individuals or NGOs if the Secretariat does not respond to its requests or if civil society feels the Secretariat has responded inadequately.

As discussed above, the dispute settlement process often acts as a *de facto* policy-making forum, and for this reason public access to the dispute settlement process is vital. Even if the political process worked, however, and the dispute settlement process simply resolved individual disputes, the WTO would still hear cases with significant environmental impacts and public access to the process would still be essential to implementing the principles of the draft Convention. The WTO dispute settlement system determines whether a Member's environmental laws violate any of the WTO agreements and how, if a violation is found, it might be remedied.<sup>152</sup> Despite this important role in implementation of domestic environmental law, the dispute settlement process is largely opaque and provides no opportunity for civil society input.

<sup>150</sup> One law taxed fuel inefficient cars, a second - know as the CAFE standard — required a minimum average level of fuel economy among each auto manufacturers' fleet. The third measure was and excise tax on luxury cars. A GATT Panel upheld the taxes on fuel inefficient cars and luxury cars, but ruled the CAFE standard GATT-illegal. United States - Taxes on Automobiles, GATT Doc. DS 31/R (Sept. 29, 1994).

<sup>151</sup> United States - Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/R, Jan. 29, 1996; United States — Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WTO Doc. AB - 1996-1, Apr. 29, 1996.

<sup>152</sup> DSU, *supra* note 129, at app. 1.

*Lack of Transparency in the Dispute Settlement Process.* The opportunities for access to the dispute settlement process are extremely limited. Access to dispute settlement documents is highly restricted,<sup>153</sup> and panel and Appellate Body proceedings are all carried out in complete confidentiality.<sup>154</sup> The *Document Procedures* do not apply to submissions to a dispute settlement panel or interim reports of dispute settlement panels, as these are not within a formal document series.<sup>155</sup> Every written submission to a WTO panel or Appellate Body is automatically restricted, unless the government making the submission elects to make its documents public.<sup>156</sup> Even then, the publication by a government of its own submission must be redacted to ensure that it reveals no information submitted by another government to the panel or Appellate Body.<sup>157</sup> At the request of one party to the dispute, another party will be required to “provide a non-confidential summary of the information contained in its written submissions” for public disclosure.<sup>158</sup> However, such a summary will likely provide so little substance or detail that the ability of the public to pinpoint relevant factual information or to develop sophisticated analyses will be impaired. This has certainly been the case in the past.<sup>159</sup>

Similarly, proceedings of the Appellate Body and deliberations of the WTO panels are, by rule, confidential.<sup>160</sup> Moreover, panel hearings are as a matter of practice closed to the public. Opportunities for the public to submit information or arguments to panels or the Appellate Body is strictly limited and may be provided only at the request of the panel or Appellate Body.<sup>161</sup> Briefs *amicus curiae* have never been accepted by either a panel of the Appellate Body. Such documents, also known as friend of the court briefs, are commonly filed on matters of a broad public interest, by persons or organizations with a strong interest in or views on the subject matter of an action. In the shrimp-turtle dispute mentioned above, two NGOs attempted to submit *amicus curiae* briefs for the consideration of the panel. The panel determined that allowing non-governmental organizations to submit information to the panel would be incompatible with the provision of the Dispute Settlement Understanding,<sup>162</sup> despite the panel’s explicit authority to “seek information from any relevant source.”<sup>163</sup>

*Trade Bias of the Dispute Settlement Process.* Dispute settlement panels may “seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.”<sup>164</sup> Although GATT/WTO panels have regularly consulted experts, this practice has not translated into effective participation opportunities for environmental experts.<sup>165</sup> For example, in the first tuna-dolphin dispute, a group of dolphin conservation experts came to Geneva for the oral arguments but the panel declined to hear them.<sup>166</sup> In the Shrimp-Turtle case, the panel invited experts to speak, but declined to use any of the information they presented in the panel findings. It is trade experts who determine if a particular expertise is necessary, and given their unfamiliarity with environmental issues, they may not fully appreciate the need for such input.

*The Draft Convention’s Access to Justice Policy.* The dispute settlement process in the WTO fails to adequately implement the principle of access to justice in several ways. First, there is no means to enforce a right of access to information or access to decision-making, as these rights do not exist. More importantly, however, the dispute settlement mechanism fails to provide an impartial forum for the resolution of disputes – a fundamental element of the principle of access to justice. Dispute settlement panels are composed of trade experts. If they only had to resolve questions of trade law this would not call their impartiality into question. The dispute settlement body has not, however, limited itself to deciding on issues of trade law, but has opined on issues of the legitimacy of domestic environmental measures. In balancing the relative interests of trade and environment, for example, trade experts are likely to be biased in favor of trade concerns. While dispute settlement panels *may* call on outside experts, they are not required to do so. The decision to call on outside experts is within the sole discretion of the panel, and in fact panels have declined to hear environmental experts in a number of cases. Moreover there is neither a legal requirement, nor a practice, of the panel abstaining from deciding environmental (or other) issues not within its competence or of balancing panels with trade and other legal experts. Finally the dispute settlement system is closed to any public input or oversight.

<sup>153</sup> *Id.* art 18.2.

<sup>154</sup> *Id.* art. 14.1 17.10.

<sup>155</sup> Document Procedures, *supra* note 131, at n. 1.

<sup>156</sup> DSU, *supra* note 129, at art. 18.2.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT’L L.J. 631, 647 (1994).

<sup>160</sup> DSU, *supra* note 129, at art 14.1, art. 17.10.

<sup>161</sup> *Id.* art. 13.

<sup>162</sup> United States - Import Prohibition of Certain Shrimp and Shrimp Products, Final Report, 6 April 1998, WT/DS58/R, para 7.8.

<sup>163</sup> DSU, *supra* note 129, at art. 13.

<sup>164</sup> *Id.* art 13.2.

<sup>165</sup> Patti Goldman, *Resolving the Trade and Environment Debate: In Search of Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1286 (1992).

<sup>166</sup> Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENV’T L. 475, 482 (1993).

## Box 6: Implementing the Principles in the WTO

## Implementing the Principles in the WTO

**Access to Information**

- Make documents available before decisions are made.
- Require Members to state reasons for refusing to derestrict documents.
- Establish some "statute of limitations" after which documents become derestricted, even over Member objection.
- Redraft the *Document Procedures* to more narrowly limit the categories of restricted documents and to require a balancing of the public's interest in disclosure against the interest to be protected by non-disclosure.
- Conduct regular environmental impact assessments of international trade activities.

**Access to Decision-Making**

- Open proceedings of decision-making bodies to the public.
- Establish a genuine right of NGO participation at WTO, for example through an accreditation process.
- Ensure that new procedures for NGO participation or accreditation do not screen out environmental NGOs critical to the WTO.

**Access to Justice**

Make the proceedings of dispute settlement panels transparent.

- Allow the public to submit briefs *amicus curiae*.
- Create a judicial mechanism for reviewing decisions to deny access to documents and public participation rights to civil society, once such rights are established.

## VI. European Bank for Reconstruction and Development

The European Bank for Reconstruction and Development (EBRD) was established in 1991 to provide assistance to the countries of Central and Eastern Europe and the former Soviet Union in their transition to market-oriented economies.<sup>167</sup> The EBRD was the first multilateral development bank (MDB) to include specific language in its charter mandating environmentally sound and sustainable development and support for the principles of multiparty democracy.<sup>168</sup> The EBRD has 60 members, including the European Union, European Investment Bank, virtually all of the countries of the EU and 26 borrowing countries in Central and Eastern Europe and the former Soviet Union.<sup>169</sup>

Each of the members appoints a Governor and an Alternate to the Board of Governors, the governing body of the EBRD. The Board of Governors in turn has delegated powers to a Board of Directors, which consists of 23 members elected by the Governors for 3-year terms. The Board of Directors directs the general operations of the Bank – establishing policies, deciding on projects, and approving the budget. The EBRD engages in both public sector lending (lending to governments) and private sector lending (lending to private companies).<sup>170</sup> As of April 1996 the Bank's capital base was ECU 20 billion.

Despite its charter, the EBRD has generally failed to operationalize meaningfully its sustainable development mandate.<sup>171</sup> The EBRD's most important policies and procedures relevant to the issues raised by the draft Convention are the *Environmental Procedures*, revised in September 1996,<sup>172</sup> and the *Policy on Disclosure of Information* ("Information Policy"),

<sup>167</sup> The EBRD is important as an international institutions in its own right and also as an example of how international financial institutions may relate to the principles in the draft Convention. In addition to the EBRD, Parties to the draft Convention will also be members of the World Bank Group, the International Monetary Fund, the European Investment Bank, and one or more other regional development banks. In addition, most EU member countries also have bilateral export credit or external financing agencies, which are notoriously closed and secretive bodies. These bilateral finance institutions raise many of the same questions discussed with respect to the EBRD. In addition, the bilateral finance institutions may well be "public authorities" within the meaning of the draft Convention, and thus the Convention's principles may apply directly to their operations.

<sup>168</sup> Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, art 2(1)(vii) (providing that the bank is to "promote in the full range of its activities environmentally sound and sustainable development"); art. 1 ("the purpose of the [EBRD] shall be to . . . promote private and entrepreneurial initiative in the central and eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics").

<sup>169</sup> EBRD's countries of operation are Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Kazakstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

<sup>170</sup> This summary is based on information on the EBRD's website at <http://www.ebrd.com/intro/contact/g01.htm>.

<sup>171</sup> See, e.g., DONALD M. GOLDBERG, THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT: AN ENVIRONMENTAL PROGRESS REPORT (1995).

<sup>172</sup> EBRD, *Environmental Procedures* (1996), <http://www.ebrd.com/enviro/public/proced0.htm> [hereinafter, *Environmental Procedures*].

adopted in June 1996.<sup>173</sup> Neither sets of rules adequately implement the sustainable development mandate. Even in comparison to other international financial institutions without sustainable development mandates in their charters, including for example the World Bank and International Finance Corporation, the policies and procedures of the EBRD are inadequate.<sup>174</sup>

*The EBRD Project Cycle.* The EBRD's operational cycle has four basic stages: concept clearance, initial review, final review, and board approval. The EBRD's Environmental Appraisal Unit (EAU) is responsible for overseeing the evaluation of environmental impacts and public consultation. EAU oversight begins after concept clearance. Based on the draft Initial Review Memorandum, the EAU prepares an Environmental Screening Memorandum (ESM). The EAU screens projects into categories A, B or C depending on their potential impacts on the Environment, with Category A projects having the most significant environmental impacts and Category C the least.<sup>175</sup> Environmental impact assessments (EIAs) are required for all Category A projects; Category B projects are subject to an environmental analysis; and Category C projects require no assessment of environmental impacts.<sup>176</sup> All categories of projects may be subject to an environmental audit. If an audit is required the operation is screened category "1," if no audit is required it is screened "0."<sup>177</sup>

Following the "initial review," the EAU reviews the project based, *inter alia*, on the findings of the environmental investigation (environmental impact assessment, environmental analysis, and/or environmental audit, depending on how the project was screened). This review is documented in the Environmental Review Memorandum, which is confidential. A summary of the environmental review is incorporated into the Final Review Memorandum.<sup>178</sup>

#### A. Access to Information

The EBRD adopted its *Information Policy* due, at least in part, to pressure from NGOs monitoring the bank. While adoption of this policy did enhance transparency in EBRD operations, the EBRD is still significantly less open with information than other international fi-

ancial institutions, including the World Bank. In particular, the EBRD's *Information Policy* distinguishes between private sector and public sector projects, providing significantly less information and less far in advance for private sector lending operations than for the public sector. This severely handicaps effective public participation in private sector lending, *as nothing in the nature of private-sector lending changes the minimum time periods and information necessary for meaningful and effective public consultation and disclosure in the country of operation.*

*Project Summaries.* Under its *Information Policy*, EBRD will release summaries of public sector projects (called Project Summary Documents (PSDs)) "as soon as possible after the project has passed its Initial Review by the management (typically four-five months before Board consideration)"<sup>179</sup> and PSDs for private sector projects at least 30 days before Board consideration.

In addition to the timing of release of PSDs, the disclosure of *summaries* of projects instead of actual project documents also raises significant concerns. The EBRD's *Information Policy* never defines what exactly must be included in the PSD, but presumably they are analogous to the project summaries used by the World Bank.<sup>180</sup> Releasing summaries does allow for documents to be sanitized and projects to be described in the least controversial language possible.

Even the limited right to access the PSD, as described above, can be restricted further if the EBRD's clients or co-financing institutions can provide "sound reasons" for confidentiality.<sup>181</sup> The *Environmental Procedures* allows the Board, in some cases, to approve category A private sector projects without public release of *any* information, if the Project Sponsor can prove to the satisfaction of the Bank's Operations Committee that "there are commercial confidentiality considerations of an "A" level private sector operation which are so important that details of a prospective operation cannot be made public prior to Board approval."<sup>182</sup> No PSD will be produced if "a project is considered to be confidential in its entirety."<sup>183</sup> It is hard to imagine what legitimate public policy arguments could justify completely "confidential projects" in an institution that is committed to sustain-

<sup>173</sup> EBRD, Policy on Disclosure of Information (1996) [hereinafter "Information Policy"]. This can be downloaded from the EBRD's home page, [www.ebrd.com](http://www.ebrd.com), from the publications list.

<sup>174</sup> This is not to say that the policies and procedures of the World Bank and IFC are ideal and not in need of significant improvement.

<sup>175</sup> Environmental Procedures, *supra* note 172, at Annex 4 (defines the project screening categories in detail).

<sup>176</sup> *Id.* sec. 5.2 & Annex 4.

<sup>177</sup> *Id.* sec. 5.2.

<sup>178</sup> *Id.* sec. 5.6.

<sup>179</sup> Information Policy, *supra* note 173, at 6.

<sup>180</sup> See World Bank description of Project Information Documents (PIDs).

<sup>181</sup> Information Policy, *supra* note 173, at 7.

<sup>182</sup> Environmental Procedures, *supra* note 172, at Annex 1.

<sup>183</sup> Information Policy, *supra* note 173, at 7.

nable development and a custodian of public funds. Neither the World Bank nor the IFC has a similar exception.

Finally, even those PSDs that are made 'available' may not be available to the project-affected people as a practical matter. They are only made available at the EBRD Publications Desk (in London) and on the internet. PSDs are apparently not required to be made available through the EBRD Resident Offices in its countries of operation nor in local languages of the project sites.

*Environmental Investigations.* When the environmental investigations are complete, for category A projects the Project Sponsor must make available the EIA and an Executive Summary in the local language, in accordance with relevant national legislation.<sup>184</sup> It is not clear that all national legislation in the EBRD's countries of operation require such release; Uzbekistan for instance didn't have an EIA law as of February 1998. For private sector operations release of the EIA is to be a minimum of 60 days prior to the date of Board consideration and for public sector operations at least 120 days.<sup>185</sup>

In either case, the EBRD can waive these minimum requirements "where timing is crucial and the EBRD management is satisfied that in all other respects the Bank's Environmental Procedures have been followed."<sup>186</sup> In the event of such waivers being granted, the "legal documentation will not be signed until public consultation has been successfully completed following Board approval."<sup>187</sup> Allowing this information to be kept confidential until *after* the critical decision is made, however, essentially precludes any adequate public consultation. Once the Board has approved a project, the public has little opportunity (or incentive) to achieve any meaningful changes in the project design. By contrast, neither the World Bank nor the IFC's new policies allow bank management such discretion in waiving the minimum requirements.

The EIA and an EIA summary are made available at the EBRD Business Information Center (in London) when released by the project sponsor.<sup>188</sup> The *Information Policy* does not mention making special efforts to reach locally affected peoples, or even of making the EIA accessible through local Resident Offices in the countries of operations.

B level operations require an Environmental Analysis. For public sector projects the environmental analysis is annexed to the PSD; for private sector projects only a *summary* of key findings will be attached to the PSD. B level operations have no other formal notification requirements, other than project sponsors must comply with national legislation.<sup>189</sup> If the Environmental Analysis of a category B project indicates that there have been "significant environmental issues associated with ongoing operations," then the project sponsor must release a statement on remedial measures agreed with the bank to the affected public, prior to first disbursement. C level operations have no environmental information disclosure requirements.

*Post-Decision Information.* Even after Board approval, information remains limited. Thus, for public sector projects the EBRD's *Information Policy* provides that "a shortened version of the Board report *will usually be available* to the public on request."<sup>190</sup> Furthermore, in projects "involving extensive issues of confidentiality, the EBRD may decide not to make any document available."<sup>191</sup> The environmental covenants in the final loan agreement are also not disclosed to the public. These covenants constitute the project sponsor's legal obligations with respect to the environmental impacts of the project, many of which will have evolved from public comments and participation in the EIA process. Disclosing these covenants will encourage project-affected people to participate in the design and environmental review of the project and enable them to monitor compliance with the covenants during the project life. These covenants can be released without disclosing confidential business information, if project sponsors are put on notice that these covenants will be made public and that loan agreements should be drafted accordingly (so that the environmental covenants are separated out from the true confidential business information).

*Exceptions to Disclosure.* Like other international financial institutions, the EBRD's *Information Policy* does state a presumption in favor of disclosure.<sup>192</sup> In principle, all information is public, *except* that information that falls within a specific exception as described in the "limits of information disclosure" section of the *Information Policy*. The exceptions are broadly written and open-ended, so as to potentially undermine the presumption in favor of disclosure.

<sup>184</sup> Environmental Procedures, *supra* note 172, at Annex 1.

<sup>185</sup> Information Policy, *supra* note 173, at 8.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 9.

<sup>188</sup> *Id.* at 8-9.

<sup>189</sup> *Id.* at 9.

<sup>190</sup> *Id.* at 7 (emphasis added).

<sup>191</sup> *Id.* at 7.

<sup>192</sup> *Id.* at 1.

The EBRD's exceptions to information disclosure are reproduced in the chart below, where they are compared to the analogous provisions of the Draft Convention (art 4.4). Some of the exceptions are not proble-

...<sup>193</sup> In other words, categories of documents not already on this extensive list might also be excluded. Perhaps more seriously, the limitations list has a "catch-all" provision that any *other* information can be withheld from the public if the EBRD determines that it is "confidential" or "sensitive."

Table 3: Comparison of Limits on Information Disclosure

EBRD Information Policy <sup>195</sup>	Comparable provisions of draft Convention
Documents intended for internal purposes only	confidentiality of proceedings of a public authority*
Board documents, unless they are intended for public release and Board approval for release is given	Confidentiality of proceedings of a public authority*
Privileged information, such as legal advice and correspondence with external legal advisers	request concerns internal communications of the public authority*
information that might prove a threat to the national security of member governments	international relations, national defense or public security
Information in the EBRD's possession that was not created by the Bank and is identified by its originator as being sensitive and confidential or when the originator has requested that its release be restricted	where the information is submitted by a 3 <sup>rd</sup> party who is not obligated to supply it & the 3 <sup>rd</sup> party does not consent*
Information related to procurement processes, including pre-qualification information submitted by prospective bidders; tenders, proposals or price quotations; or records of deliberative processes	confidentiality of proceedings of a public authority; confidentiality of commercial or industrial information*
Project evaluation reports which are produced for internal use only	confidentiality of proceedings of a public authority*
Financial, business or proprietary information from private organizations or individuals received by EBRD in the analysis or negotiation of loans, unless permission is given by those private organizations or individuals to release this information	confidentiality of commercial or industrial information; intellectual property; where the information is submitted by a 3 <sup>rd</sup> party who is not obligated to supply it & the 3 <sup>rd</sup> party does not consent*
Other information that EBRD management determines to be confidential or sensitive	where the information is submitted by a 3 <sup>rd</sup> party who is not obligated to supply it & the 3 <sup>rd</sup> party does not consent*

\*These grounds for refusal in the draft Convention are strictly and explicitly limited and subject to a balancing test requirement. See section II.A, above. The EBRD *Information Policy* contains no such limitations.

matic, such as national security, but others raise serious questions about the EBRD's obligations to disclose information. See Table 3: Comparison of Limits on Information Disclosure. Moreover, the list of exceptions is introduced by language that indicates it is meant to be an illustrative, rather than an exclusive list: "certain categories of documents are not released. *These include:*

Particularly problematic is the policy of withholding information not originated by EBRD, without the originator's consent. Basically, project sponsors can keep any information they wish from the public. Information originating from third parties can be designated confidential, whether or not they give it voluntarily, and apparently no criteria are placed on the exercise of the privilege. In essence, the provisions on third party information turn the presumption of disclosure on its head. Because third parties can designate information they submit to the EBRD to be confidential for any reason. By contrast, the Draft Convention recognizes the right of a public authority not to disclose *voluntary* information supplied by a third party.<sup>194</sup>

*Practical Aspects of Obtaining Information.* The procedures for actually getting information from the EBRD fail completely to reflect the realities on the ground in project-affected areas. Documents are made available and requests for documents are handled by the EBRD's Business Information Centre in London. In addition, the EBRD makes PSDs available over the World Wide Web. While use of the World Wide Web is an improvement, it is not a substitute for broad, paper copy dissemination in the countries of operation, where internet access is often costly and difficult. Although the EBRD's *Information Policy* states that the Resident Offices are expected to play an increasing role in the dissemination of information, they are not required to do so. Nor have they, as a practical matter, been proactive in reaching out to the public. Finally, there are no time lines for responding to requests for information; no requirement that denial of a request for information be in writing, or

<sup>193</sup> *Id.* at 10 (emphasis added).

<sup>194</sup> Draft Convention, *supra* note 2, at art. 4.4(g).

<sup>195</sup> All text in this column is quoted directly from the Information Policy, *supra* note 173, at 10-11.

that any reason for the denial be stated; and no procedure for seeking review of a denial of a request for information.<sup>196</sup>

Another significant issue is the language in which documents are distributed. The official languages of the EBRD are English, French, German and Russian. Only Russian is a predominant language in any of the EBRD's countries of operation. The *Environmental Procedures* and the *Information Policy* have few provisions for making information available in local languages of the project-affected people (the Executive Summary of the EIA is the only document explicitly required by the *Environmental Procedures* to be in the local language).

*Applying the Draft Convention's Access to Information Policy.* As a result of civil society pressure, EBRD information practice has very recently begun to show small signs of improvement. For example, the EIA for the Sakhalin II project in Russia was widely disseminated to interested civil society groups on computer diskette and free of charge, after project sponsors had initially demanded over US\$1,000 per copy of the document. Nonetheless, the EBRD's *Information Policy* fails to adequately implement the principles of the draft Convention. In general too little information is released too late in the project approval process. In private sector projects in particular, information is not released in adequate time for affected persons to review it prior to the taking of a decision. The EBRD has virtually unlimited authority to waive some or all of the information disclosure requirements. Moreover, the exercise of the waiver is at the sole discretion of the EBRD; no mechanism exists for obtaining independent review of the exercise of this waiver. As a practical matter, information theoretically available through the Business Information Center in London is inaccessible to the project-affected public in the countries of operation. The exceptions to the presumption of disclosure are overly broad; they do not require the EBRD to balance the public's interest in disclosure against the interests to be protected by non-disclosure. Again, interpretation and exercise of the exceptions are within the sole discretion of EBRD. Future parties to the Convention who are also members of the EBRD have a great deal of work to do to bring the EBRD's policy into conformity with the minimum elements of the principle of access to information.

### B. Access to Decision-Making

*Environmental Investigations.* As mentioned above, the EBRD has three types of environmental investigations that it carries out as part of its decision-

making process on whether to approve a project: environmental impact assessments for Category A projects, environmental analyses for Category B projects, and environmental audits for any project requiring one. Category B projects essentially depend exclusively on the requirements in national legislation, if any. Category C projects and the environmental audit procedures require no public consultation or participation.

For Category A projects, the "Project Sponsor *will be requested* to provide the affected public and interested non-governmental organizations (NGOs) with notification about the nature of the operation for which financing is sought from the EBRD. . . . If there has been no previous notification by the Project Sponsor then notification *should* be made no later than four weeks after the operation passes Initial Review."<sup>197</sup> The words in italics indicate the discretionary nature of the notification provision, even for category A projects, which have the most significant environmental impacts. Note, too, that these provisions require only notification, not consultation.

As mentioned above, for category A projects, the EIA is released 60 days before Board consideration for private sector projects and 120 days before Board consideration for public sector projects. This period also includes the time allotted to the EBRD's EAU to consider comments made during public consultation. This effectively means that, for private sector projects, the public has only 30 days to review the EIA and prepare comments. This assumes that they have immediate access to the document. Where an operation is particularly complex and the bank staff needs more than 30 days to evaluate it, the extra time comes out of the period for public comment, rather than the delaying a board decision (as would be appropriate). The EBRD has the authority to entirely waive the public consultation period if it deems necessary.

For the most part, the EBRD's *Environmental Procedures* depend on compliance with the public consultation requirements of national law in the country of operation (as well as with the *Information Policy*, as discussed above). The Procedures only provision for public consultation is a statement that "those potentially affected by a significant new, extended or transformed operation, which has been classified as "A" level, *should* be consulted so that they have the opportunity to express their concerns and views before a financing decision is made."<sup>198</sup> This is a recommendation of consultation rather than a requirement on project sponsors to ensure the public is provided with meaningful opportunities to participate.

<sup>196</sup> In contrast to the UNDP, see UNDP Information Policy; the World Bank; the Inter-American Development Bank and the Asian Development Bank, all of which have inspection panels that can review alleged violations of the respective information policies.

<sup>197</sup> *Environmental Procedures*, *supra* note 172, at Annex 1 (emphasis added).

<sup>198</sup> *Id.* sec. 5.4 (emphasis added).

In short, the EBRD does not actually include any minimum substantive standards for effective public consultation. In contrast, the IFC's new environmental policies specifically require that project-affected people be consulted at least twice for Category A projects: (1) in the scoping period, shortly after environmental screening and before the terms of reference for the environmental impact assessment are finalized and (2) once a draft environmental assessment has been prepared. This explicit requirement, particularly the requirement that the public be consulted during the scoping phase, is widely regarded as the minimum consultation necessary for any environmental assessment process.

*Board Meetings and Other Decisions.* The EBRD's Board of Directors meetings are held in secret, without any public participation. In addition, most EBRD policies have been issued with limited formal opportunity for public comment and review (one exception was the *Environmental Procedures*). In the future, the EBRD should expand its public consultation on all draft policies and procedures. As one model, the IFC recently took the precedent-setting step of submitting all their revised environmental and social policies and procedures to a 45-day public comment period (which was subsequently extended). Routinely submitting all draft policies and procedures for public comment would be a relatively simple way to further the draft Convention's principle of access to decision-making.

*The Annual General Meeting.* The EBRD's Annual General Meetings (AGMs) provide an opportunity for accredited non-EBRD parties (including outside bankers, businesses, and civil society) to meet EBRD staff at all levels and learn from and influence one another concerning important EBRD projects, policies and practices. This yearly gathering affords a rare glimpse into the working relationships of the EBRD and its clients. EBRD's May 1998 AGM in Kiev, Ukraine highlighted how far the EBRD has to go to implement the principle of public participation in these events. Problems included the arrest by Ukrainian police of environmentalists for leafleting outside the event (an activity that was permitted for business representatives) and seizure of documents from environmental organizations. Also problematic was the EBRD's initial refusal to accredit many qualified NGOs – particularly NGOs from the EBRD's countries of operation – who wished to attend the event, until concerted pressure was brought to bear by both accredited and unaccredited NGOs.

*Applying the Draft Convention's Access to Decision-Making Policy.* In implementing the principle of access to decision-making, the EBRD also fails

to meet the standard set by the draft Convention. The "requirements" for public consultation, even in Category A projects, are couched in discretionary language. The EBRD establishes no minimum standards for effective public consultation whatsoever. The ability of NGOs to participate in EBRD meetings, theoretically open to them, has been problematic. And accreditation procedures have not always been fairly applied.

### C. Access to Justice

The EBRD has not created any mechanism for the public to seek independent review of compliance with its policies, including the information and environmental policies. The *Information Policy*, for example, provides no review mechanism or appeal process for persons denied information under the policy. Thus, the EBRD completely fails to implement the principle of access to justice as set forth in the draft Convention.

Other MDBs, including the World Bank, the Asian Development Bank, and the Inter-American Development Bank, have adopted inspection mechanisms that do allow for some access to justice for project-affected people. These inspection mechanisms allow citizens to seek an independent review of alleged violation of bank policies and procedures; they thus provide a model for the EBRD to follow in implementing the Draft Convention's access to justice principle.

*The World Bank Inspection Panel.*<sup>199</sup> The World Bank Inspection Panel (the "Panel") was created precisely to bring greater public accountability to World Bank lending. The Panel was created largely in response to pressure brought to bear by civil society at the grass roots and international level after several Bank projects proved to be environmental and social disasters. The Panel is a quasi-independent body designed to evaluate the World Bank's compliance with its own policies and procedures in project planning and implementation. Local people can turn to the Panel when they believe that violations of World Bank policies have harmed them, and their efforts to raise their concerns with Bank staff have been unsatisfactory.

The Panel is composed of three members, nominated by the President of the World Bank and approved by the Board of Executive Directors. The members of the Panel serve for five-year terms. The Chairperson, selected by the Panel members, works full-time and the other two members are called on as needed. The Panel is financed by the World Bank. To increase the independence of Panel staff from the World Bank, Panel members cannot have worked for the World Bank for at

<sup>199</sup> The following description of the World Bank Inspection Panel is based on DANA CLARK & MICHAEL HSU, *A CITIZEN'S GUIDE TO THE WORLD BANK INSPECTION PANEL* (CIEL Publication, November 10, 1997). Greater detail on the Panel procedures and the claims filed since its creation can be found there.

least two years prior to serving on the Panel. They also cannot work again for the World Bank after serving on the Panel. The Panel has its own secretariat. This institutional separation allows the Panel to ensure the confidentiality of important information, such as the identity of anonymous claimants.

Claims brought before the Panel are called Requests for Inspection. Once the Panel receives such a claim, it determines whether the Request meets the eligibility criteria. If a claim is eligible it is registered and the Panel begins its preliminary evaluation. After the preliminary evaluation, the Panel makes a recommendation as to whether or not the claim merits a full investigation. That recommendation must be approved by the Board of Executive Directors before the Panel can proceed with an investigation. If the Board authorizes an investigation, the Panel presents its findings to the Board. Management comes up with a plan to remedy the problems in response. The Board then announces an action plan for resolving any policy violations.

*The IDB and ADB Inspection Mechanisms.* Both the Inter-American Development Bank and the Asian Development Bank have created similar accountability mechanisms. Although these inspection processes are modeled after the World Bank Inspection Panel, they are significantly less independent and effective. Both Mechanisms rely on a "Roster of Experts" rather than having permanent Panel members or staff. If a claim is received, and the banks determine that it should be investigated, they convene a Panel from the roster. Neither mechanism has a procedure for guaranteeing the anonymity of claimants – a crucial feature to prevent retaliation against claimants.

The Inter-American Development Bank and Asian Development Bank mechanisms apply both to private sector and public sector projects in their portfolios. The World Bank Inspection Panel applies to the public sector operations of the World Bank – those loans made by the International Bank for Reconstruction and Development and the International Development Association. The World Bank Group is currently considering expansion of the Inspection Panel mechanism to its private sector ope-

## Box 7: Implementing the Principle in the EBRD

### Implementing the Principles in the EBRD

#### *Access to Information*

- Redraft the Information Policy to more precisely and narrowly define the limits on disclosure, consistent with national and international best practices and the draft Convention.
- Include an explicit requirement in the Information Policy that interpretation of the limits on disclosure will carefully balance the public's interest in disclosure against the interest protected by non-disclosure.
- Eliminate the Information Policy's unnecessary and illegitimate distinction between public-sector and private-sector projects in terms of information disclosure.
- Ensure that information is available in-country to project-affected peoples.
- Provide a trained staff person in each Resident Office to act as the public liaison officer to ensure better implementation of EBRD information access and public consultation procedures.
- Ensure that information is provided in local languages.
- Eliminate the EBRD's power to waive minimum information disclosure requirements.

#### *Access to Decision-Making*

- Release the EIA/environmental analysis for all projects at least 120 days in advance of a Board decision to allow sufficient time for adequate public consultation and input.
- Make requirements for public notification mandatory.
- Establish minimum standards and best practices for effective public consultation.
- Establish a clear requirement to involve the public in the scoping phase of the EIA.
- Submit all EBRD policies and procedures for public comment.

#### *Access to Justice*

Establish an independent inspection panel to ensure the EBRD follows its own policies & procedures.

- Establish a mechanism to review a decision of the EBRD to deny a request for information.

rations as well – the International Finance Corporation and the Multilateral Investment Guarantee Agency. Nothing in the heavily private-sector nature of the EBRD's lending practice would preclude adoption of an inspection panel mechanism.

The adoption of a similar review panel within the EBRD would go a long way toward realizing the EBRD's sustainable development mandate and implementing the principle of access to justice. The need for such an accountability mechanism in the EBRD is particularly acute, as an exhaustive 1995 review of the EBRD's performance in implementing its *Environmental Procedures* concluded that the EBRD did not always meet even the limited aims of its *Environmental Procedures*.<sup>200</sup>

<sup>200</sup> GOLDBERG, *supra* note 171, at 22.

## VII. Three Pillars revisited: the four institutions compared

To the extent that international organizations have implemented the principles of the draft Convention and provided for greater public access, it has often been as a direct result of pressure from civil society, particularly grassroots and international organizations working in concert. The World Bank Inspection Panel, the EBRD Information Policy, the UNDP Information Policy, the World Bank's environmental and social policies, the harmonization of the International Finance Corporation's environmental and social policies with those of the World Bank, and the inclusion of the right of access to information in the Treaty of Amsterdam are all the result of focused action by civil society. Although many of these provisions do not go as far as they should in incorporating civil society into the international policy-making process, they represent movement in the direction of transparency and accessibility in international institutions and decision-making processes. The draft Convention is a valuable tool to continue this momentum and build on these achievements.

### A. Access to Information

The international institutions reviewed in this study do not satisfy the minimum elements of the access to information principle. With respect to the WTO and EBRD, sufficient information is not automatically made available in adequate time for the public to influence the decision-making process or to participate in a meaningful and effective way. Moreover, requirements to collect and publish information, if any, are not sufficiently detailed and not aimed at giving civil society, in particular potentially affected parties, the information necessary to make informed assessments of proposed activities. ECOSOC often complies with these requirements in practice, but has no formal guarantees that such information will be publicly available in a timely fashion. With the Treaty of Amsterdam, the EU has finally elevated the principle of access to information to Treaty stature. The EU will now have opportunity to revisit the general principles and limits on the right of access to information, taking into account the experience with the Code of Conduct, as well as the draft Convention. The EU should do so with full participation of civil society.

While the WTO and EBRD both create a presumption in favor of information disclosure, these provisions are of limited use, as the exceptions to the presumption are so broad. While international organizations have a need to keep certain information confidential, exceptions should be clear, limited to what is absolutely necessary, and narrowly interpreted. The EU information policies to date have also suffered from a failure to nar-

rowly define and interpret the limits on information disclosure. Implementing the Treaty of Amsterdam will provide an opportunity to improve upon these shortcomings. All decisions to withhold information from the public must carefully balance the public's interest in disclosure against the interest to be protected by non-disclosure. The draft Convention accomplishes this, but these international organizations do not.

Information policies must be tailored to the other pillars of the Convention. If decision-making is to be effectively open to public participation, the public must have access to documents at the right time. If there is to be some question of interpretation, construction or balancing, there should be a transparent, deliberate process for doing this, and recourse to an independent (or at least quasi-independent) body for reviewing decisions on access to information.

The WTO and EBRD have failed to tailor their information policies to implement effectively the other pillars of the draft Convention – information is not disclosed in adequate time to allow the public to participate effectively. Again, the good practices of ECOSOC fail to compensate completely for the lack of explicit rules requiring timely information distribution.

How documents are made available is almost as important as when they are made available. The Internet has provided a very cost-effective way of making documents widely available. All the institutions reviewed in this study make use of the Internet to disseminate information to varying degrees. Given the difficulty and expense of internet access in many countries, however, the Internet should not be the only way of broadly disseminating information. Making information available only at an organization's headquarters is also inadequate. Important documents should also be made widely available to the public using existing libraries as depositories of documents (as the UN does), or making documents available through resident representative offices in countries where the organization operates (as the EU does). Where organizations, such as the EBRD, World Bank, or UNDP, have an extensive system of field offices in their countries of operation, there is no excuse for not making relevant policy documents publicly available through reading rooms or public information centers in those offices. Every effort should also be made to make information available in relevant languages. Making documents available in a language other than the language of the affected public is often tantamount to a denial of access to information. The multilateral development banks are the worst example, providing very limited information in local languages. The EU provides the best example, making all documents published in the *Official Journal* available in the eleven languages

of all fifteen of its Member States.<sup>201</sup>

The Convention, when it enters into force, will provide governments and civil society with an additional tool to promote better access to information policies in the international institutions discussed in this study and others. Moreover, international institutions with better access to information policies, such as the UNDP, can be held up as models to refute claims that the principle is appropriate only for domestic policy- and decision-making.

### *B. Access to Decision-Making*

Not one institution highlighted in this study has satisfactorily met the requirements of the access to decision-making principle. Although ECOSOC comes closest to meeting the elements of this principle by establishing consultative relationships with non-governmental organizations, it fails in many regards. Public participation in policy- and other decision-making processes is not yet consistently guaranteed in international fora.

The development of the international level as a major policy-making arena makes implementation of the access to decision-making principle crucial. Fortunately, advances in technology also make it easier. In this modern era of the Internet, for example, policies and procedures of international institutions affecting the public can easily be submitted for public comment. Notices of pending decisions that describe the opportunities and procedures can be posted through an Internet list server that is designed to reach essentially all interested parties. The fact that the IFC recently put their revised environmental and social policies out for public comment, before their submission to the Board, provides an example of this innovative approach. Use of the Internet should not substitute for other information dissemination strategies, discussed above.

The draft Convention requires that Parties not have to show an interest to participate in decision-making processes. ECOSOC accreditation rules nominally violate this element of the principle by regulating the kind of civil society participants granted consultative status. However, the practice seems to be to grant at least minimal consultative status quite liberally. ECOSOC, therefore, provides a good example of how, in practice, international institutions can shape their access to decision-making policies to cope with the potential of being overwhelmed by participants. Civil society should monitor such accreditation processes carefully, however, to ensure that they are used as a tool to promote policy dialogue between the institution and a broad cross-section of civil society, and not used to screen out organizations

that may not agree with the institution. For example, if the WTO were to implement accreditation procedures, those procedures should not be used to exclude environmental, human rights or labor organizations, simply because they advocate a balancing of free trade interests against other policy objectives. In fact one of the main purposes and benefits of public participation, is precisely to provide for such diversity of views. Accreditation is not the only means of providing civil society access to decision-making, however. Direct access to the decision-making process by civil society most fully implements the principle of access to decision-making. Especially in organizations, such as the EU, that have an extensive administrative infrastructure already in place, direct participation by civil society, without any mediating procedures or institutions, should be adopted as the norm for public participation.

As was true for the access to information principle, governments and civil society can use the draft Convention to promote implementation of the access to decision-making principle in international institutions and decision-making processes. Models such as ECOSOC and some of the UN convention negotiations should guide the parties as they work to promote this principle in other international fora. Domestic best practices of the Member States of international organizations are another important source of innovative practices and policies.

### *C. Access to Justice*

For the principles on access to information and decision-making to be secure, civil society must have recourse to an independent body to question determinations to withhold information or to deny a party the right to participate in an environmental decision. Similarly, the implementation of substantive decisions developed through participatory decision-making processes must be subject to public monitoring and oversight, through access to an independent review body. Otherwise, it would be too easy to frustrate the intent of the information and decision-making principles by failing to implement final decisions.

International institutions are increasingly creating accountability mechanisms that begin to fit the definition of access to justice. Independent review processes, such as those found in the UNDP and World Bank Inspection Panel, offer examples of how different international institutions have implemented this principle to some extent. The experience with access to justice in environmental matters in the EU provides a cautionary note, however. Creation of an independent review mechanism, even a court, is insufficient to truly protect the in-

<sup>201</sup> For other documents, however, including DGXI and European Environmental Agency documents, translations are often not provided.

Box 8: Implementing the Principles of the Convention Internationally

Implementing the Principles of the Convention Internationally:  
The Role of Governments and Civil Society

*Generally*

- Become familiar with the minimum elements of the principles of the Convention.
- Develop a list of institutions in which better implementation of the principles of the Convention is required.
- Analyze these institutions with respect to these elements and identify elements each institution fails to meet and the steps that must be taken to correct these failures.
- Brief domestic policy-makers on these deficiencies of the target institutions and on the steps that must be taken to correct these deficiencies.

*Access to Information*

- Advocate for formal, written information disclosure policies – founded on the presumption of disclosure – in all international institutions and decision-making processes.
- Develop standards, based on national and international best practices and the draft Convention, to delineate exceptions to information disclosure presumptions in international institutions; these standards should guide policy-makers as to what constitutes, *inter alia*, “confidential” “business confidential” and “internal deliberations.”
- Develop standards, based on national and international best practices and the draft Convention, to determine appropriate time periods for information availability.
- Develop standards, based on national and international best practices and the draft Convention, to determine what categories of information international institutions must collect and make available to the public.
- Test and monitor the implementation of information policies in international institutions to ensure that they operate as intended; use the experience gained from these activities to push institutions to improve their practices or policies, as appropriate.

*Access to Decision-Making*

- Develop standards, based on national and international best practices and the draft Convention, for time frames for notice and comment periods and for determining what constitutes adequate incorporation of public comments in official decision-making.
- Advocate for disclosure of draft policies and guidelines, particularly those affecting participation of civil society, and the opportunity to comment on those procedures
- Advocate for the implementation of formal consultation procedures for civil society organizations in international organizations.
- Demand that access to decision-making procedures be equitable and inclusive.

*Access to Justice*

- Develop standards, based on national and international best practices, for determining what constitutes independent and impartial review bodies and adequate remedies.
- Advocate for implementation of these practices.

terests of civil society, if the standing requirements are so limited as to completely undermine the right of access to justice. The special value and role of civil society in enforcing environmental provisions should be reinforced through liberal standing requirements in review mechanisms in any international organization. Again, governments and civil society will be able to use the draft Convention to advance the principle of access to justice in environmental matters at the international level.

VIII. Post Script: Implementing the Convention

International institutions have a long way to go in implementing the principles of the draft Convention. One of the international regimes which should be the first to implement the principles of the Convention should be the treaty regime for the Public Participation Convention, once entered into force. If well implemented this Convention will be an invaluable tool to promote transparency and public participation in the countries of the

UNECE region and in international institutions. Interestingly, the compliance review mechanism of the draft Convention itself is very weak, even in comparison to other international regimes. It currently reads:

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention.<sup>202</sup>

The provision requires that the arrangements be both on a consensus basis *and* optional. Thus, a country could break consensus, and then opt out of the arrangements, leaving the countries opting into the arrangements with a weaker compliance review procedure than they might otherwise wish. Thus, if issues of non-compliance arise, the compliance review procedure may prove a poor mechanism for examining and addressing those issues.

Given the weakness of this provision, monitoring of the implementation of and compliance with the Convention, for example through a continuation of the process of close cooperation and consultation with civil society that has characterized the work on the draft Convention to date, will be essential. The Convention process, and particularly the compliance review, should be transparent and accessible to civil society. For example, civil society should have the opportunity to submit comments or reports to the Meetings of the Parties. Such reports might address implementation of the principles of the Convention and compliance problems in their countries and in international institutions. Eventually a procedure for submitting complaints from civil society for failure to implement or comply with the Convention could be instituted.

Box 9: Implementing the Convention: the Role of Governments and Civil Society

Implementing the Convention:  
The Role of Governments and Civil Society

- Establish a civil society review mechanism to monitor implementation of and compliance with the Convention.
- Adopt procedures for the Convention and its follow-on processes that are consistent with the principles and spirit of the Convention.
- Disseminate information on the state of implementation of and compliance with the Convention by the Parties.
- Strengthen the compliance review mechanism.

<sup>202</sup> Draft Convention, *supra* note 2, at art. 15.