



## 3. Civic Engagement

### 3.1 Introduction

Environmental rule of law requires a whole-of-society approach. While substantial emphasis is naturally placed on strengthening governmental institutions at the national, regional, and local levels, civil society<sup>1</sup> also plays an essential role.

The effective engagement of civil society results in more informed decision making by government, more responsible environmental actions by companies, more assistance in environmental management by the public, and more effective environmental law. When civil society has effective access to environmental information and meaningful opportunities to participate, it is better equipped to hold violators to account and

ensure compliance with environmental protections and thus to support development of environmental rule of law. It can also help to monitor environmental management and ensure that ministries and other governmental authorities undertake actions required by law and that are in the public interest. Involving vulnerable and marginalized populations that are often excluded from decision making and yet are most affected by environmental and natural resource decisions is a challenging but integral aspect of civic engagement. Including the public in decisions about the environment and natural resources is a cornerstone of good governance that has the benefit of building trust of local communities in government, which increases both social cohesion and environmental rule of law.

Civic engagement is a dynamic process in which information is shared between government and the public as part of inclusive, consultative, and accountable decision making. Meaningful participation of civil society in environmental decision making provides a

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<sup>1</sup> This Report takes a broad view of civil society that encompasses a wide range of actors and interests that are distinct from the government and private sector. In practice, civil society tends to be diverse and heterogeneous, with varying (often competing) interests, experiences, and capacities.



range of environmental, economic, and social benefits to government agencies, business, civil society, and the broader public. For example, a review of 239 cases of public participation in environmental decision making in the United States found that decisions were substantively improved in a significant majority of cases (68 percent).<sup>2</sup> Participation was found to add new information to analyses; lead to new and innovative solutions; reframe issues (and potential solutions) from a more holistic and integrated point of view; and result in more cost-effective solutions. The analysis suggested that the process of participation—rather than its context or the nature of the issues at hand—is largely responsible for success. It also found that intensive and deliberative processes are more likely to be successful.

The fundamental role of civic engagement in environmental decision making was formally recognized in Principle 10 of the 1992 Rio Declaration on Environment and Development.<sup>3</sup> Rio Principle 10 articulated the **three pillars of civic engagement in environmental decision making: (1) broad access to information concerning the environment that is held by public authorities; (2) realistic and meaningful opportunities to participate in decision-making processes related to the environment; and (3) effective access to judicial and administrative proceedings** to provide redress and remedy to uphold both the access rights themselves and other environmental protections that are guaranteed under law.<sup>4</sup>

These three pillars are not only practical mechanisms for implementing civic engagement, but access to these procedural guarantees has increasingly been acknowledged by the international community as the necessary basis for ensuring protection of both the emerging right to a clean and healthy environment and other substantive rights.<sup>5</sup> As procedural rights, the elements of civic engagement do not guarantee a specific environmental or social outcome, but rather help to ensure that decisions and actions impacting the environment adequately and equitably represent the various interests of citizens and stakeholders. In doing so, they contribute to the recognition of environmental deprivations of existing rights, and the increased transparency and accountability in decision making, building a stronger basis for environmental rule of law to produce more effective and equitable environmental outcomes.

Over the years since the 1992 Rio Summit, these procedural obligations have been elaborated in international and regional treaties and nonbinding agreements, in



2 Beierle and Cayford 2002.

3 The Rio Principle 10 pillars are commonly referred to as “access rights,” “public participation,” and “stakeholder participation,” or as the components of “environmental democracy.” In this Report, we use the term “civic engagement” to emphasize the participatory approaches to strengthen environmental rule of law.

4 UNGA 1992.

5 UNGA 2018.

international jurisprudence, through the development and implementation of a wealth of national legal and regulatory frameworks, and in voluntary international standards. As a result, the basic principles and key elements of these procedural rights have been elaborated, and the lessons learned in countries around the world demonstrate the fundamental role meaningful engagement of civil society plays in building environmental rule of law. Experience in implementing these various elements also provides insights into the challenges of effective civic engagement, particularly in the face of emerging threats such as climate variability and change, as well as other environmental challenges such as biodiversity loss and pollution among others. Many of these challenges are common across countries and regions, offering opportunities for sharing lessons for innovative solutions across jurisdictions, which are explored in this chapter.

This chapter focuses on the rights to information and participation in decision making. Access to justice is covered separately in the Justice Chapter, in order to fully cover all aspects of judicial remedies and enforcement as related to environmental rule of law. It is important to recognize that these three pillars of civic engagement—information, participation, and justice—act in a synergistic and mutually reinforcing manner to support increased inclusivity, transparency, and accountability in environmental rule of law, as shown in Figure 3.1. Access to information allows for more informed and effective civic engagement in the creation, implementation, and enforcement of environmental laws. Participation improves the information available to decision and law makers and among stakeholders and also provides a means for resolving disputes before they escalate. Access to justice ensures that governments and other decision-making

bodies respect the procedural rights of access to information and participation, the substantive environmental interests of the various affected parties guaranteed by law, and the public's role in ensuring robust enforcement of environmental laws. Together, the three pillars are a critical part of environmental rule of law.

**Figure 3.1: Three Pillars of Civic Engagement**



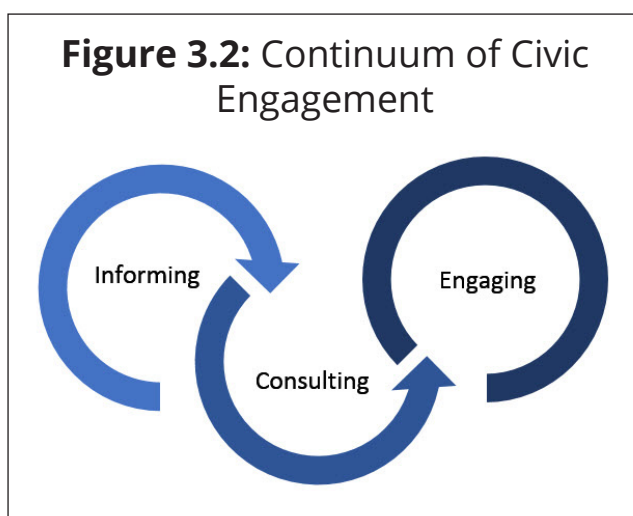
For example, if a forestry concession is to be awarded by the government, it is critical that the public be informed that a concession is being considered as soon as practicable. The government can provide information about potential concession areas and potential environmental and social impacts. With this information, the public can participate in the design and award of the concession, provide information the government and concessionaire may not have, and can monitor the concession once awarded. With access to justice, the public can ensure that

its rights are respected, that the government follows the legally mandated processes in managing the concession and its revenues, and help oversee and ensure long-term enforcement of the terms of the concession.

This chapter explores the legal and practical tools for civic engagement that support environmental rule of law. After reviewing the various types of civic engagement, its benefits, and challenges to its implementation, the chapter discusses ways that States are providing access to environmental information and enhancing public participation in environmental decision making.

### 3.1.1 Continuum of Civic Engagement

Civic engagement exists as a continuum of practices that can be separated into three major types, as shown in Figure 3.2: informing civil society, consulting with civil society, and actively engaging civil society.



At one end of the continuum is **informing civil society**—or providing clear and unbiased information that clarifies the environmental issues at hand, how a decision-making process or proposed law or regulation might impact the environment, any alternatives to proposed decisions or actions, and potential solutions to any conflicts that might arise. This is essentially a one-way flow of information from the government, often through hired consultants, to civil society; and it is not engagement in its true sense. However, access to information is the basis for and a prerequisite to more interactive forms of stakeholder engagement. It enables civil society to understand the nature of issues and to decide whether their involvement in shaping those issues is necessary. The process of informing civil society thus improves the quality of more participatory forms of engagement by ensuring that all involved are reasonably informed. As Case Study 3.1 shows, providing information on the state of the environment helps citizens understand the quality of their environment, gauge environmental priorities, assess the performance of environmental laws and agencies, and determine how to improve environmental compliance and enforcement. There are many ways to provide the public with environmental information, including websites with up-to-date information on the state of the environment and sources of pollution; information repositories; hotlines; briefings; and use of the press and media to communicate with the public.<sup>6</sup>

Further along the continuum is **consulting with civil society**. Consultation not only provides civil society with information, but also seeks feedback on proposed and ongoing activities. This may include opportunities to provide written comments on proposed projects that are undertaking environmental impact assessment or to review proposed

6 Henninger et al. 2002, 61-64.

### Case Study 3.1: New Zealand's Environmental Reporting Act

New Zealand's Environmental Reporting Act 2015 calls for the government to publish a synthesis report every three years that describes the state of New Zealand's environment, pressures that the environment faces, and impacts that the state of the environment is having on ecological, economic, social, and public health.<sup>a</sup> The Ministry of Environment and the Statistics Office are to collaborate in producing the report. The Act also requires these offices to produce a domain report every six months that examines one of five domains (air; atmosphere and climate; fresh water; land; and marine) so that each domain is examined every three years.

The first synthesis report was released in 2015,<sup>b</sup> and the government also maintains a website that presents indicators and trends across the five environmental domains as well as about biodiversity.<sup>c</sup>

- a. Environmental Reporting Act 2015 (New Zealand), sec. 8, available at <http://www.legislation.govt.nz/act/public/2015/0087/latest/whole.html#DLM5941112>.
- b. <http://www.mfe.govt.nz/publications/environmental-reporting/environment-aotearoa-2015>.
- c. [http://www.stats.govt.nz/browse\\_for\\_stats/environment/environmental-reporting-series/environmental-indicators/home.aspx](http://www.stats.govt.nz/browse_for_stats/environment/environmental-reporting-series/environmental-indicators/home.aspx).

environmental permits for facilities. As such, consultation can help to ensure that government staff follow the required steps and standards; this is especially important when government capacity is limited or there may be concerns about agency capture.<sup>7</sup> Consultation may also involve surveys or interviews to determine public views on proposed environmental laws or public hearings to gather oral comments. Surveys and hearings can be particularly useful in determining systemic performance, and in identifying areas that require reform or other measures to ensure environmental rule of law. In essence, consultation is two-way communication in which the opinions and values of interested and affected parties in particular, and civil society in general, are asked for and duly considered, even if they are not necessarily incorporated into a final decision, project design, or law. Case Study

3.2 gives an example of Quebec's consultation process.

The most substantial form of civic engagement—both in terms of impact and cost—is **active engagement**. Beyond presenting civil society with options and seeking their feedback, active engagement involves people much earlier and continues throughout the process. People may be asked to help identify environmental compliance and enforcement issues or to assist in monitoring and enforcement. This may involve formal or informal discussions with stakeholder groups. At this highest level of participation, stakeholders become active in making, implementing, monitoring, and enforcing environmental decisions. Case Study 3.3 below discusses Mongolia's use of councils to actively engage stakeholders in sustainable development.

7 Bruch 2002.



### Case Study 3.2: Consulting the Public on Hydraulic Fracturing

In 1978, the Canadian province of Quebec passed the Environmental Quality Act, establishing the Bureau d'audiences publiques sur l'environnement (Bureau of Public Hearings on the Environment). The Bureau's core mission is to consult citizens on the environmental, social, and economic impact of proposed policies in order to advise Quebec's environmental ministry. Since 1990, the Bureau has held public hearings on a wide variety of topics, including on the question of shale gas exploitation.

In the mid-2000s, geologists discovered substantial hydrocarbon reserves in the shale deposits of Quebec's Saint Lawrence Lowlands. In 2010, the Environment Ministry of Quebec asked the Bureau to hold a public consultation on the potential impacts of continuing to allow the use of hydrofracturing, the only economical technique for accessing the Province's shale gas reserves. One year later, the Bureau reported that it was unable to fully complete its consultation because "for certain fundamental [scientific] questions, the answers are either incomplete or nonexistent." In response, the Quebec government imposed a moratorium on drilling in June 2011. The continuance of the ban was contingent on the undertaking of an environmental impact study, which informed the Bureau's second series of public consultations in 2013.

Quebec citizens expressed concern in the Bureau's consultation over the dangers of hydrofracturing and, largely on the basis of the Bureau's 2014 final report,<sup>a</sup> the Quebec Government decided to permanently ban the practice, effectively stopping the exploitation of shale gas in the Province.

a. BAPE 2014.

#### 3.1.2 Evolution of Civic Engagement

Civic engagement has been guaranteed and otherwise promoted through numerous treaties, statutes, regulations, and voluntary standards. These instruments view civic engagement both as essential to good environmental governance and to good governance. Ironically, as norms and opportunities for civic engagement have increased, some States have introduced new restrictions on the activities of civil society.

The 1998 Aarhus Convention<sup>8</sup> is the leading binding international treaty requiring States to adopt specific measures to ensure civic engagement. In 1998, the countries of the United Nations Economic Commission for Europe adopted the Aarhus Convention. There are 47 Parties to the Convention, which remains open to accession by any state.<sup>9</sup> The Convention focuses on the twin protections of environmental and human rights, explicitly linking sustainable development with effective

8 The full name of the convention is the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.

9 <https://www.unece.org/env/pp/ratification.html>.

### Case Study 3.3: Convening Stakeholders to Plan for Development in Mongolia

The Asia Foundation in Mongolia supported creation of Local Multi-Stakeholder Councils. The Councils are intended to ensure a balanced ecosystem, responsible resource use, and channel the benefits of resource use toward sustainable development. With representatives from mining companies, local governments, and communities throughout Mongolia, the Councils give the public the opportunity to participate in monitoring mines, determine if there are any problems with the mines, and create consensus-based multi-stakeholder environmental plans for local resource development. Efforts to achieve the latter have generally been successful, with 28 Councils having been established as of 2018.<sup>a</sup>

a. Blessing and Daitch 2018.

civic engagement and environmental rule of law. Under the Convention, as a minimum standard, Parties must develop legal frameworks that require: the collection and dissemination of environmental information to the public; the provision of meaningful opportunities for participation in decisions on activities, programs, plans, and policies, as well as in the preparation of laws, rules, and legally binding norms related to the environment; and the creation of specific mechanisms to enable the public to enforce

access rights and environmental laws more broadly.<sup>10</sup>

Other regional processes are underway to develop tailored legal instruments to operationalize the pillars of Principle 10.<sup>11</sup> For example, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean was adopted in March 2018.<sup>12</sup> The Organization of American States and the African Union have developed model laws on access to information.<sup>13</sup> Following consultation with governments and civil society organizations, UN Environment developed the Bali Guidelines to assist States in effectively implementing their commitments to Principle 10 within the frameworks of their national legislation and processes.<sup>14</sup> The 1991 Espoo Convention and its 2003 Protocol on Strategic Environmental Assessment contain significant provisions on

10 UNECE 2014, 19. In October 2002, through Decision I/7, the first Meeting of the Parties (MOP) established a Compliance Committee to review compliance by Parties with the Convention. To trigger the compliance mechanism, a Party may make a submission about compliance by another Party; a Party may make a submission concerning its own compliance; the Convention secretariat may make a referral to the Committee; or members of the public may make communications concerning a Party's compliance with the Convention. UNECE Decision I/7, paras. 15, 17, 18, October 2002, available at <https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

While other multilateral environmental agreements have not historically allowed communications from civil society and the public in general, a growing number have recognized that communications from the public can be a valuable channel of information about parties' non-compliance.

11 See Bruch 2002.

12 <https://www.cepal.org/en/regional-agreement-on-access-to-information-public-participation-and-justice-in-environmental-matters-in-latin-america-and-the-caribbean>.

13 OAS n.d.; African Commission on Human and Peoples' Rights 2012.

14 UNEP 2010, pt. A; see also UNEP 2015.

### Figure 3.3: Benefits of Civic Engagement

**Better informed decisions**   **Avoidance of conflicts**  
*Increased civil society capacity*   **Public support for government actions**  
**Public empowerment**   **Increased monitoring and enforcement**  
**Trust between stakeholders**   *Effectiveness of laws*

civic engagement in domestic, transboundary, and strategic environmental assessments.<sup>15</sup> And many international trade agreements, such as the North American Free Trade Agreement, contain environmental side agreements that require public consultation in environmental matters.<sup>16</sup>

Since the 1992 Rio Earth Summit, domestic laws and regulations have significantly expanded civic engagement in environmental matters. At least half of the countries of the world have adopted legislation guaranteeing access to information in general or environmental information in particular.<sup>17</sup> The rapid growth of national legislation globally on environmental impact assessment has included a wide range of associated information sharing, consultation, and engagement activities at both the domestic and international level.

The Environmental Democracy Index highlights both progress and limitations in the adoption and implementation of legally binding rules ensuring access to environmental information, public participation, and access to justice.<sup>18</sup> For example, the Index shows that while 65 of 70 (93 percent) countries assessed have at least some legal provisions for citizens' rights to

environmental information, almost 80 percent of the countries ranked only "fair" or "poor" with respect to laws on public participation.<sup>19</sup>

Thus, civic engagement has blossomed from Rio Principle 10 into a multitude of regional and state provisions that form a strong legal basis for civic engagement in environmental governance, but much remains to be done to fully implement these provisions, especially with respect to more substantial forms of civic engagement.

#### 3.1.3 Benefits of Civic Engagement

When implemented well, civic engagement improves both the quality and the legitimacy of the policy process.<sup>20</sup> Including civil society in decision making broadens the base of knowledge and expertise, and it can also engage the public in monitoring and enforcement activities, leveraging scarce governmental resources (see Figure 3.3). Perhaps as important, having companies, agencies, and the public work together on critical environmental issues builds relationships and weaves a stronger social

15 Wates 2005; UNECE 2014.

16 Bruch 2002.

17 Banisar et al. 2012.

18 See World Resources Institute and The Access Initiative 2015.

19 Ibid.

20 For example, a study that tracked the accuracy of environmental and social impact assessments in five transboundary watercourses found a direct correlation between the level of public involvement in the process and the accuracy of the assessment in predicting environmental and social impacts. Bruch et al. 2007b.



fabric—as well as often resulting in more durable environmental protections.

In addition to improved quality and legitimacy of decision making, civic engagement also provides a means for identifying and resolving potential conflicting interests among various groups before they escalate. For example, communities often use a plot of land for various purposes that may not be apparent to a government agency or concessionaire. By surveying the community and engaging them about land uses early in a concession process, public participation may reduce the incidence and severity of land disputes associated with natural resource extraction concessions.<sup>21</sup> The Munden Project estimates that ***land disputes can delay and drive up the cost of large-scale extraction projects by a factor of almost 30.***<sup>22</sup> Engaging the public, and particularly affected communities, can help to address potential concerns about representation both generally in the country and within communities; this reduces the likelihood that arbitrary decisions will be made or makes it more likely that the representatives that claim to speak for communities are legitimate.<sup>23</sup>

Civic engagement also raises public awareness of the reasons for and contents of environmental policies and laws, thus building the capacity of civil society to participate meaningfully in monitoring the implementation and enforcement of those laws, and enhancing motivations for compliance. In Indonesia, the Program for Pollution Control, Evaluation, and Rating involves publicizing and engaging the public on companies' compliance with pollution discharge standards, leading to a significant increase in compliance with pollution laws.<sup>24</sup>

When civil society and the public are excluded, there is a higher likelihood that the decisions will not adhere to key public concerns and priorities and that trust will be undermined by the opacity of the decision-making process and the appearance (or actual existence) of a hidden agenda. Moreover, a culture of exclusion, avoidance, and noncompliance fundamentally and significantly hampers the realization of environment-related rights. An example of this can be found in the instance of Vietnamese Laska Pure Water Plant's production and sale of "mineral water." This bottled water was distributed nationally within Viet Nam but not sold in cafes in Hai Duong, where people refused to drink it because they knew the water was in fact river water repackaged as "mineral water." The majority of the country, however, did not have the information important to their own health and safety.<sup>25</sup>

### 3.1.4 Civic Engagement Implementation Challenges

The Environmental Democracy Index has found that while there has been substantial progress in enacting laws on civic engagement, challenges remain with implementation and enforcement. For example, data on air and drinking water quality are only publicly available in roughly 50 percent of the countries surveyed, and while all but nine of the countries make at least some of their environmental impact assessments publicly available, only 33 percent do so consistently, as shown in Figure 3.4.

There are three key challenges to practical implementation of civic engagement: implementing regulations, capacity, and political will.

21 Jensen 2011, 20.

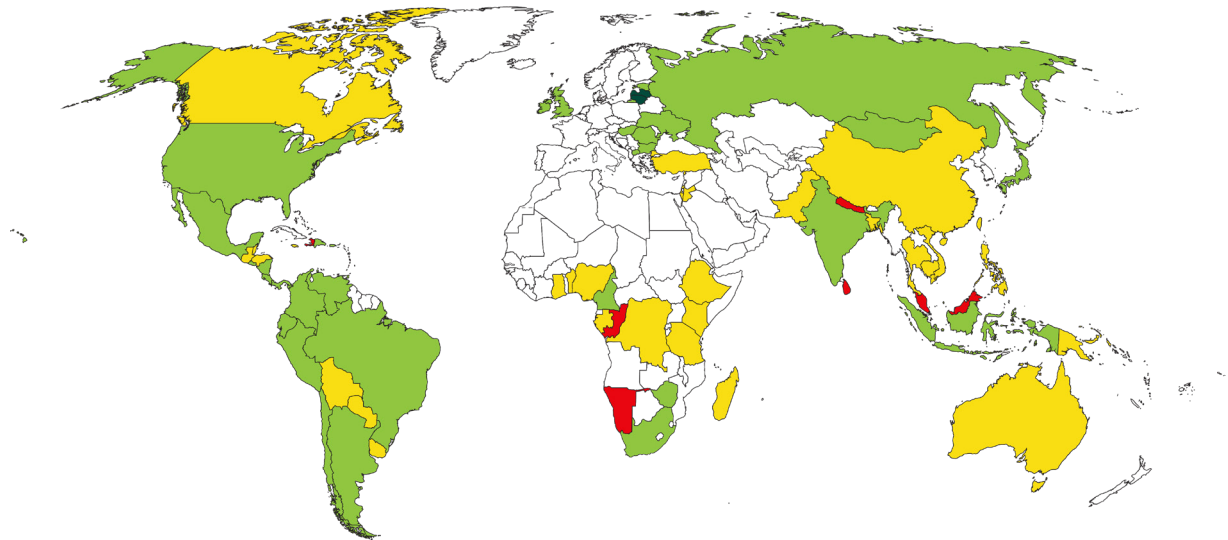
22 Munden Project 2012, 3.

23 See Section 3.3.4 *infra*.

24 Henniger et al. 2002, 58.

25 *Ibid.*, 47.

**Figure 3.4: The Environmental Democracy Index (2015)**



- Countries designated “Very Good” by the Environmental Democracy Index:  
Latvia, Lithuania
- Countries designated “Good” by the Environmental Democracy Index:  
Argentina, Brazil, Bulgaria, Cameroon, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Estonia, Hungary, India, Indonesia, Ireland, Japan, Macedonia, Mexico, Mongolia, Nicaragua, Panama, Peru, Romania, Russia, South Africa, Trinidad and Tobago, Ukraine, United Kingdom, United States, Venezuela, Zimbabwe
- Countries designated “Fair or Limited” by the Environmental Democracy Index:  
Australia, Bangladesh, Belize, Benin, Bolivia, Cambodia, Canada, China, Democratic Republic of the Congo, Ethiopia, Gabon, Ghana, Guatemala, Honduras, Israel, Jamaica, Jordan, Kenya, Madagascar, Nigeria, Pakistan, Papua New Guinea, Paraguay, Philippines, Tanzania, Thailand, Turkey, Uruguay, Viet Nam
- Countries designated “Poor” by the Environmental Democracy Index:  
Congo, Haiti, Malaysia, Namibia, Nepal, Saint Lucia, Sri Lanka

Source: Environmental Law Institute, adapted from Environmental Democracy Index 2015b.

Notes: The 2015 Environmental Democracy Index is based on assessments of 70 countries conducted in 2014. It tracks progress in enacting national-level laws, regulations, and practices. It does not include comprehensive measurements of implementation of these laws.

While most countries have committed through treaties, constitutions, or laws to advancing the three pillars of civic engagement, many countries have not yet adopted the necessary implementing regulations, procedures, and policies to guide agency officials. Without this specificity, civic engagement can devolve into token

procedures that do not yield meaningful public participation.

Some countries may support transparency or public participation in particular contexts (such as information on the state of the environment), but have yet to extend it to helping to ensure environmental rule of law. As discussed in this chapter, a growing number of countries are utilizing

transparency and public participation to empower the public to know whether there are environmental violations and to act on those violations. This often results in the development of legal requirements that are broadly articulated but narrowly interpreted—limiting the practical scope of engagement.

A second key challenge in engaging the public relates to the capacity of government bodies. Often, agencies have limited staff, and they are not adequately trained in how to engage with members of the public, particularly in supporting environmental compliance and enforcement efforts. It can be difficult for public officials to contact traditionally marginalized or vulnerable segments of society and to communicate effectively with them, to determine who are legitimate representatives of local communities, and to find the appropriate fora and techniques to ensure that stakeholders feel free to voice their opinions and participate actively. This is further complicated in situations where there is a history of mistrust between civil society and government or in which opportunities to participate in the past have been manipulated to the disadvantage of certain groups. Many governments seek to address this by designating dedicated public engagement staff and by building the capacity of government officials to engage in meaningful public participation, such as India's requirement that officials be trained under the 2005 Right to Information Act.<sup>26</sup>

Civil society capacity can also be a challenge. Ongoing efforts to increase the level of participation of civil society have resulted in a certain amount of "participation fatigue," particularly where only a few organizations have the capacity to be involved in environmental decision making. This fatigue is not only felt by organizations, but also by communities that are called to stakeholder

engagement meetings which turn out, over and over again, to be a tick-box exercise so that their views are not actually considered. Additionally, in many developing countries, the low level of capacity in civil society means that the same individuals or organizations are involved repeatedly in projects and programs, sometimes resulting in a perception of (or actual) collusion with government.

The third key challenge in many countries—and perhaps the most important—is the lack of political will and an entrenched culture of centralized decision making. In countries where there is a tradition of centralized decision making, there is reluctance to share power with subnational governmental units or with the public. This leads to a tendency to consider civic engagement to be a process of building stakeholder buy-in or of public relations and strategic communications aimed at bringing civil society into line with the government's point of view, rather than as a potential check on illegal actions. This can be particularly true for government staff used to making what they consider to be complex decisions requiring a high level of technical understanding. The key to building political will is building official awareness of the value of transparency and public participation to ensuring environmental rule of law.

While public participation engages citizens in government decisions, it is not a replacement for government. Public participation helps support and hold accountable public officials and agencies; it does not substitute for government actions investigating and prosecuting environmental violations.<sup>27</sup>

The next section discusses access to information, followed by a discussion of public participation.

26 UNEP 2015, 59.

27 World Bank 2009; Odugbemi and Lee 2011; Ackerman 2005.



## 3.2 Access to Information

Effective and timely access to accurate environmental information is both a cornerstone of civic engagement and a fundamental aspect of environmental rule of law's promotion of transparency and accountability. Broad access to environmental information ensures that civil society is able to understand not only the nature of environmental threats and harms, but also what is required by environmental laws and what their rights are. This knowledge allows citizens to determine when engagement on an environmental issue is necessary and how to respond effectively, including participating in compliance and enforcement actions. Access to information empowers citizens to hold decision makers to account, narrows the space for corruption, and improves environmental governance more broadly.<sup>28</sup>

The right to access environmental information has evolved at both the international and national levels as an outgrowth of the right to seek, receive, or impart information more broadly. It was enshrined in both article 19 of the 1948 Universal Declaration of Human Rights and article 19 of the 1966 International Covenant on Civil and Political Rights.<sup>29</sup> In 2009, the Council of Europe adopted the Convention on Access to Official Documents, which affords explicit protection to the ability to access official documents.<sup>30</sup> International courts have held that governments have to provide information upon request, and even have to provide certain information when it has not been requested.<sup>31</sup> Rights related to accessing information are now recognized to

varying degrees by international and regional human rights regimes around the world.<sup>32</sup> Despite the recognition that these rights may be qualified in certain narrow circumstances, the rights ensuring access to information are broadly recognized as critical components of good governance. There is thus a presumption of transparency.<sup>33</sup>

Access to information can be either passive or active. Passive access to information is the response by government to requests for information from the public or other stakeholders, such as a request for information from government files. In India, Thailand, and Uganda, for example, data on pollution stemming from industrial facilities can only be obtained from the government with a personal contact.<sup>34</sup>

Active access means the government makes available information on its own initiative or pursuant to legal mandates, such as publishing annual reports on pollution emitted from facilities or posting concession contracts on the internet. In the United States such information is mandated to be shared under policy initiatives like the United States

28 Henniger et al. 2002.

29 See also UN Human Rights Council 2011.

30 <https://rm.coe.int/1680084826>.

31 See, e.g., *Judgment by the European Court of Human Rights (second section), Társaság a Szabadságjogokért v. Hungary, Application No. 37374/05, 14 April 2009* Inter-American Court of Human Rights, *Claude Reyes v. Chile*, 19 September 2006.

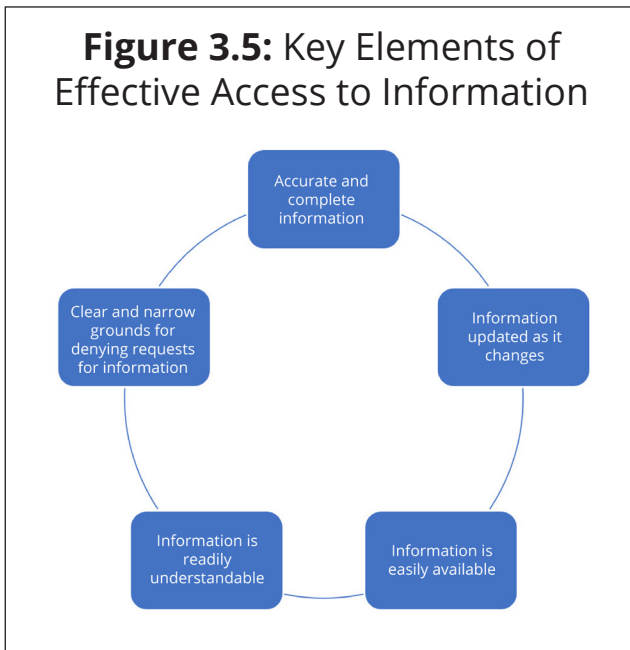
32 International Covenant on Civil and Political Rights (1966), art. 19; African Charter on Human and Peoples' Rights (1963), art. 9; European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art. 10; American Convention on Human Rights (1969), art. 13.

The recognition of a right to information in international human rights law has grown in recent years, and today international human rights bodies such as the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, and the European Committee on Social Rights have recognized the existence of a right to information in certain circumstances. This has often happened in the context of the securing of other rights, including both civil and political rights and economic, social, and cultural rights.

33 World Resources Institute and The Access Initiative 2015.

34 Henniger et al. 2002, 55.

Toxic Release Inventory.<sup>35</sup> States undertake both forms of information sharing, which are discussed in this section.



Key elements of effective access to information are outlined in the Aarhus Convention, Bali Guidelines, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, and State practices and are summarized in Figure 3.5. It is important that information provided be accurate, accessible, and complete and that it includes information on opportunities to participate in government decision making. Without providing complete and accurate information, the project or decision may be reversed in the courts, delaying or negating the project and wasting valuable government resources. For example, the Supreme Court of Jamaica voided a permit issued by the Jamaican Natural Resource Conservation Authority to build a large hotel

35 Ibid.

after it was revealed that the Authority failed to share a marine ecology report and parts of the environmental assessment.<sup>36</sup>

In response to requests for information, authorities should be able to make such information available in an affordable, timely, and effective manner without requiring the person requesting the information to state a legal or other interest. For example, in the Republic of Moldova, the Chişinău Court of Appeals held that the government had to provide information about forestry contracts even if the requester did not provide a justification of interest.<sup>37</sup>

Information provided should be in a language and format that is easy to understand for the people who require it. Translations should be available if the information is needed by indigenous peoples or others. For example, Mexico and Costa Rica both provide assistance to indigenous peoples when language is a barrier to access to information.<sup>38</sup>

If a request for information is to be denied, the applicable law should provide clear grounds for refusing requests for information, such as a national security or personal privacy consideration. But those grounds should be interpreted narrowly.

Considering the ongoing efforts to improve access to information in practice—both to assist environmental rule of law and more broadly—it is critical to track how agencies actually perform. One such effort is the Strengthening the Right to Information for

36 The Northern Jamaica Conservation Association and Others v. The Natural Resources Conservation Authority and Another (2006), Claim No. HCV 3022 of 2005, <http://supremecourt.gov.jm/content/northern-jamaica-conservation-association-et-al-v-natural-resources-conservation-authority>.

37 See, e.g., Co-Seed 2017b, 36.

38 See UNEP 2015, 51.

People and the Environment initiative.<sup>39</sup> The initiative assesses a country's transparency, public participation, and environmental statutes and evaluates what environmental information is and is not available and why. It then works with community members to request information from the government and assesses the government's response. The results are analyzed and used to inform government and the public on ways to increase efficiency and effectiveness of information sharing and to increase capacity of civil society to advocate for environmental information. The initiative has projects ongoing in Indonesia and Mongolia. Efforts like these help reveal where access to information processes are not functioning well in practice, facilitating corrective action. Similar initiatives exist at the national level as well. For example, in South Africa, the Access to Information Network is a network of civil society organizations that cooperate to advance access to information rights for ordinary people in South Africa.<sup>40</sup>

The remainder of this section discusses the legal provisions on access to information and how States provide access to information on environmental conditions; projects and activities affecting the environment; natural resource concessions and revenues; and environmental laws, regulations, and judicial decisions.

### **3.2.1 National Constitutional and Legal Provisions on Access to Information**

Information held by the government is presumed to be accessible to the public,

subject to reasonable restrictions to protect national security, government deliberation, public health, and individual privacy. Access to information provisions in national constitutions and laws have proliferated across the globe, particularly in the past decade. As shown in Figure 3.6, the right of access to information is protected in the constitutions of 96 countries, and 110 countries have access to information provisions in their national laws or actionable decrees; 43 of these laws have been passed since 2007.<sup>41</sup>

Legal guarantees of access to environmental information appear in many forms.

Rights to environmental information often emanate from a constitutional guarantee to freedom of information or are embedded in national legislation governing access to information more broadly. For example, some States, such as Finland, New Zealand, South Africa, and Mexico, explicitly recognize the constitutional right of access to information.<sup>42</sup> Others, such as India and the Republic of Korea, have recognized constitutional rights that address access to information within constitutional guarantees to the right to life, expression, or the right to a healthy environment.<sup>43</sup> Additionally, some States incorporate a citizen's right of access to information through reference to a global or regional document, such as the African Charter on Human and Peoples' Rights or the Universal Declaration of Human Rights.<sup>44</sup>

The constitutional right to information may not be sufficient to actually effectuate a right. In some countries, certain constitutional rights are not justiciable and therefore a citizen will not be able to enforce the right against the government unless there is implementing

39 <http://www.accessinitiative.org/get-involved/campaigns/strengthening-right-information-people-and-environment>.

40 [http://www.saha.org.za/projects/national\\_paia\\_civil\\_society\\_network.htm](http://www.saha.org.za/projects/national_paia_civil_society_network.htm).

41 Open Society Justice Initiative 2016.

42 UNEP 2006, 54.

43 Ibid.

44 Ibid.; Bruch et al. 2007a.



legislation. In several countries, high courts have ruled that constitutional rights to information are enforceable despite the lack of an implementing law.<sup>45</sup>

Countries that provide a right to environmental information through the constitution may do so through either substantive or procedural rights or both.<sup>46</sup> Substantive rights are rights relating directly to human health or the environment, while procedural rights are rights to procedures, such as access to information, that support substantive rights and environmental rule of law. The realization of a constitutional right to a healthy environment depends on the ability of individuals, communities, civil society organizations, companies, and decision makers to access information about the state of the environment and the impact of human activities. Brazil's constitution, for example, protects the substantive right "to an ecologically balanced environment" and also demands that the government "ensure the effectiveness of this right," including the obligation to demand and make public environmental impact studies, which is a procedural right.<sup>47</sup> Almost three dozen countries have included procedural rights related to the environment in their constitutions since the enactment of the Aarhus Convention.<sup>48</sup> Iceland's constitution provides that "[t]he public authorities shall inform the public on the state of the environment and nature and the impact of construction thereon. The public authorities and others shall provide information on an imminent danger to nature, such as environmental pollution."<sup>49</sup>

A growing number of countries are including specific provisions in environmental framework laws, in resource-specific laws, or even as separate environmental information legislation. For example, Mexico's *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (General Law of Ecological Balance and Environmental Protection) requires the national government to promote public access to information regarding the planning, implementation, evaluation, and monitoring of environmental and natural resource policy.<sup>50</sup>

Even absent explicit constitutional or statutory provisions that define rights to environmental information, courts may still find the right to exist. The Inter-American Court of Human Rights affirmed the fundamental status of the right of access to information in a landmark case by determining that there is a presumption of disclosure and that failure to disclose environmental information must be in accordance with legally stipulated restrictions.<sup>51</sup> In the absence of a national law providing such restrictions, the court demanded disclosure of the information.

### 3.2.2 Access to Information on the State of the Environment

Environmental rule of law requires an informed citizenry that can identify environmental problems and rights, help set environmental priorities, and track environmental progress. The provision of periodic reports on domestic environmental quality, including sectoral information on air quality, water quality, and the status of natural resource management, helps achieve these

45 Right2Info 2012.

46 See the Rights Chapter of this Report for a discussion of substantive and procedural rights.

47 Constitution of Brazil 1988, art. 225; Daly 2012.

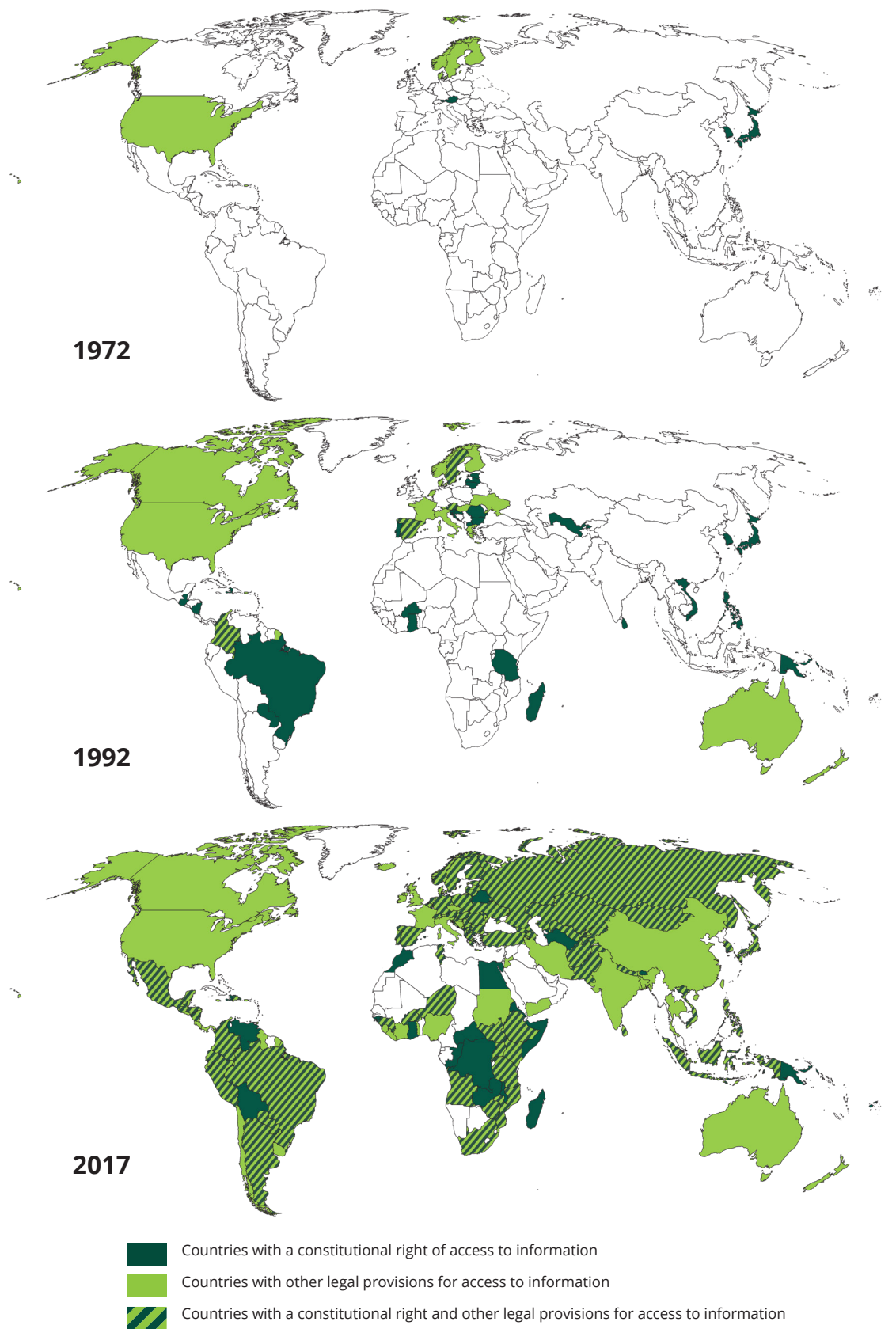
48 May 2013.

49 "A Proposal for a New Constitution for the Republic of Iceland" 2011, art 35. [http://stjornlagarad.is/other\\_files/stjornlagarad/Frumvarp-enska.pdf](http://stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf).

50 La Cámara de Diputados del Congreso de la Unión 1996, secs. 157-159; Environmental Rights Database 2015

51 Claude Reyes et al. v. Chile. Series C No. 151. Inter-American Court of Human Rights. Chile. 2006.

**Figure 3.6:** Countries with Laws Protecting Access to Information (1972, 1992, and 2017)



Year	Countries with a constitutional right of access to information	Countries with other legal provisions for access to information	Countries with a constitutional right and other legal provisions for access to information
1972	Austria, Japan, Malta, Republic of Korea	Denmark, Finland, Norway, Sweden, United States	
1992	Brazil, Bulgaria, Burkina Faso, Cabo Verde, Croatia, Estonia, Ghana, Guatemala, Haiti, Japan, Latvia, Lithuania, Madagascar, Malta, Nicaragua, Papua New Guinea, Paraguay, Philippines, Portugal, Republic of Korea, Romania, Slovakia, Slovenia, Sri Lanka, The former Yugoslav Republic of Macedonia, Uzbekistan, Viet Nam	Australia, Canada, Denmark, Finland, France, Greece, Hungary, Italy, Netherlands, New Zealand, Norway, Ukraine, United States	Austria, Colombia, Spain, Sweden
2017	Belarus, Bhutan, Bolivia, Cabo Verde, Central African Republic, Congo, Costa Rica, Democratic Republic of the Congo, Egypt, Eritrea, Fiji, Ghana, Guinea-Bissau, Haiti, Madagascar, Malawi, Maldives, Morocco, Papua New Guinea, Seychelles, Somalia, Turkmenistan, Venezuela, Zambia	Antigua and Barbuda, Australia, Bangladesh, Belize, Bosnia and Herzegovina, Canada, Chile, China, Côte d'Ivoire, Czech Republic, Denmark, El Salvador, France, Guyana, Iceland, India, Iran, Ireland, Italy, Jamaica, Jordan, Liberia, Liechtenstein, New Zealand, Nigeria, Panama, Saint Vincent and the Grenadines, Sierra Leone, Sudan, Thailand, Togo, Trinidad and Tobago, United Kingdom, United States, Uruguay, Yemen	Afghanistan, Albania, Angola, Argentina, Armenia, Austria, Azerbaijan, Belgium, Brazil, Bulgaria, Burkina Faso, Colombia, Croatia, Dominican Republic, Ecuador, Estonia, Ethiopia, Finland, Georgia, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Indonesia, Japan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lithuania, Malta, Mexico, Mongolia, Montenegro, Mozambique, Nepal, Netherlands, Nicaragua, Niger, Norway, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russia, Rwanda, Serbia, Slovakia, Slovenia, South Africa, South Sudan, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Tanzania, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, Ukraine, Uzbekistan, Viet Nam, Zimbabwe

*Source:* Environmental Law Institute, based on data from the Open Society Justice Initiative's Right2Info database (September 2016), the Centre for Law And Democracy and Access Info Europe's Global Right to Information Rating database (September 2016), and countries' constitutions available from the University of Texas at Austin's Constitute database (September 2013).

*Notes:* This map highlights countries with provisions in laws and constitutions for the right to information; it does not aim to indicate the strength, effectiveness, or application of the aforementioned provisions. On India: The Preamble to India's 1950 Constitution was interpreted as providing for the right to information in a Supreme Court case. India is included as having the constitutional right to access to information in the 2017 map because this case was decided in 2005.



goals. Bali Guideline 5 provides that “States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment.”<sup>52</sup> Moreover, the UN has recognized a human right of access to information, including environmental information.<sup>53</sup> Unfortunately, States have a poor record of actually producing this information: according to the Environmental Democracy Index, only 20 of 70 countries reviewed, or 29 percent, are ranked as “good” or “very good” in producing a regular, comprehensive, and current “State of the Environment” report.<sup>54</sup>

Periodic reporting of environmental conditions is critical to allow government and the public to judge the current status of environmental and human health, the efficacy of the existing legislative framework in addressing environmental priorities, and whether enforcement and compliance efforts need to be improved or the legal framework adjusted. To this end, many States engage the public to develop environmental indicators to report on the status of the environment.

Many States have developed environmental indicators and compile state-of-the-environment reports. While state-of-the-environment reports traditionally have been published documents, some countries are moving to digital reporting of environmental quality by digitizing periodic reports as well as providing environmental data in real time. For example, Tunisia has created the Tunisian Observatory for Environment and Sustainable Development as a dashboard to monitor data on the state of the environment and

sustainable development.<sup>55</sup> Jordan is creating the Jordan Environmental Information System to track the state of the environment in Jordan and “to raise environmental awareness and facilitate decision-making processes.”<sup>56</sup> And the United States has the MyEnvironment website, which gives users a snapshot of environmental indicators in their area.<sup>57</sup>

### 3.2.3 Access to Information on Projects and Activities Affecting the Environment

Myriad national statutes and regional and international treaties require the public to have access to environmental information on projects that affect the environment. In addition, as mentioned above, there is a human right to access to information, including environmental information. Access to such information helps ensure that the public knows about projects that can affect their livelihoods, health, and welfare. After reviewing the information, they can decide whether they want to get involved, and how. Informed public participation is a critical check on projects to ensure that they comply with the necessary standards and procedures. Whether due to lack of capacity, corruption, or other factors, government agencies might not be able to properly determine if a proposed project or activity fully complies with the law. Making information available to civil society organizations, citizens, and other actors can help vet the proposed project or activity.

The most common form of information on the environmental effects of a proposed project is an environmental impact assessment. While public access to assessments has

52 Bali Guideline 5. Aarhus Convention, article 5.4, has a similar requirement.

53 UN 2011.

54 <http://www.environmentaldemocracyindex.org/map#1/5>.

55 <http://www.environnement.gov.tn/index.php?id=127&L=1#.WbhNBNFrw2x>.

56 [http://climateobserver.org/wp-content/uploads/2015/06/EEA\\_Jordan.pdf](http://climateobserver.org/wp-content/uploads/2015/06/EEA_Jordan.pdf).

57 <https://www3.epa.gov/myem/envmap/find.html>.

many benefits,<sup>58</sup> our focus here is on how access supports the environmental rule of law. Since 1970, with the enactment of the U.S. National Environmental Policy Act, over 185 countries have required environmental assessments for projects and activities that may have a significant environmental impact (see Figure 3.15).<sup>59</sup> This has broadened over time to include processes such as transboundary environmental assessment, which examines environmental impact across national boundaries; strategic environmental assessment, which examines environmental impact and implications of policies, plans, and programs; environmental and social impact assessment; and, in certain instances, human rights impact assessments.<sup>60</sup> The International Court of Justice has held that general international law requires States to undertake environmental impact assessments in transboundary situations that might cause environmental harm,<sup>61</sup> and the UN has shown that international human rights law requires that an environmental impact assessment be conducted when a project might cause environmental harm that might interfere with human rights.<sup>62</sup>

As countries have gathered experience with environmental impact assessment, they have realized the importance of making available as soon as practicable:

- the fact that a project has been proposed or is under consideration;

- both the draft and final assessments;
- the information relied upon in the assessments;
- changes to information or proposed decisions during the assessment process; and
- information considered but not relied upon in the assessments.

Making such information about a project available to the public early in the process can help to identify early on whether there are any inconsistencies with required standards or processes, allowing for revision of the project. It can also increase public acceptance and decrease costs of a project, as discussed in Case Study 3.4.

In order to determine if a project complies with the required environmental standards and procedures, it is necessary that information on the project (for example, project documents and the environmental impact assessment) be made public.<sup>63</sup> Increasingly, countries are creating online portals of environmental impact information to facilitate access. Europe now mandates that each Member State set up a central portal or a point of access in order to grant the public access to the relevant information relating to an environmental impact assessment in an easy and efficient way and that information be included as soon as the information can reasonably be provided.<sup>64</sup>

Public scrutiny—and environmental rule of law—is enhanced if civil society and the public are aware of the availability of the information. As a result, most environmental assessment regimes require notification that an environmental assessment is available in the national register of government activities, through publication in local

58 Odparlik and Köppel 2013; Banisar 2012.

59 As of 2017, 123 have stand-alone legal instruments governing environmental impact assessment, and another 64 countries had legal provisions on EIAs included in other legal instruments. *See also* UN Environment 2018; Banisar 2012, 11. Greenland, a semi-autonomous country, also has a legal framework governing environmental impact assessment.

60 *See, e.g.*, Troell et al. 2005; Therivel 2010; Barrow 1997; Harrison 2011.

61 International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, April 20, 2010.

62 UN Human Rights Council 2015.

63 UN Environment 2018.

64 EIA Directive, art. 6(5).

### Case Study 3.4: Public Participation in the Permitting of a Hazardous Waste Storage Facility in Hungary

Dunaferr Ferromark, a company operating a hazardous waste storage facility in Hungary, applied for a permit to establish a permanent facility in Dunaujvaros, where it had previously operated under a provisional license. Pursuant to legislative requirements, the company prepared an environmental performance evaluation, which was adopted by the local environmental authorities and sent to the Mayor's office for public notification. The document shared with the public for 30 days, during which members of the public were invited to comment, and following which a public hearing was held. At the hearing, local citizens, environmental groups, other authorities, and others participated. They raised a number of concerns, including:

- whether the environmental impact assessment procedure had been followed correctly;
- whether the siting of the facility followed local zoning regulations; and
- whether the company had adequately researched impacts on groundwater streams and soil filtration.

Following these concerns, the environmental agency considered the comments and addressed them in its final decision granting the permit.<sup>a</sup>

a. [http://www.unece.org/fileadmin/DAM/env/pp/ecases/HO\\_08.PDF](http://www.unece.org/fileadmin/DAM/env/pp/ecases/HO_08.PDF).

newspapers, or by posting notices on relevant government agency websites.<sup>65</sup> Practices across countries differ, but Estonia's environmental assessment law requires that once a government agency decides that an environmental assessment process will be triggered, the agency must create a summary of the project and the assessment process and give notice to environmental non-governmental organizations.<sup>66</sup>

Reviews of country practices suggest room for improvement in making information on environmental assessments available to the public early in the process and at

low cost.<sup>67</sup> For example, in one study, less than 20 percent of countries reviewed provided public notice of draft environmental assessments and made them available to the public.<sup>68</sup> While only one country charged a fee to view environmental assessment documents, about half charged a fee to obtain copies of the documents.<sup>69</sup>

65 Banisar et al. 2012; UN Environment 2018.

66 CO-SEED 2017a.

67 UNEP 2018.

68 <https://www.elaw.org/elm/eia-access-to-information>.

69 Ibid.



### 3.2.4 Access to Information on Natural Resource Concessions and Revenues

Many countries are blessed with substantial environmental endowments—an abundance of minerals, fertile land, forestry, and other resources. Rather than being a blessing, though, these resources often provide an incentive for economic and political elites to try to capture the resources and their revenues for personal gain. This “resource curse” is well documented, and characterized by non-transparent, non-participatory, and thus non-accountable decision making—and thus may result in rent seeking, corruption, and conflict.<sup>70</sup> With social (or even armed) conflict, there is also an increase in attacks on community advocates and environmental defenders and restrictions on participatory rights.<sup>71</sup>

Efforts to fight the resource curse have focused largely on improving access to information regarding natural resource concessions and the revenues derived from them.<sup>72</sup> Multiple agencies often play a role in reviewing and granting natural resource licensing, and then in monitoring compliance with environmental laws and with the concession agreements. With access to information about the concessions, their operations, government revenue derived from them, benefits to host communities, and management of such revenue, local communities and civil society can help track compliance. And with a more informed and engaged populace, the government and concessionaires have an additional incentive for ensuring that all the relevant rules are adhered to.

Natural resource concessions are often critical economic drivers for regions and countries. Their management involves many environmental laws and regulations relating to natural resource extraction, air pollution, water pollution, local content, community rights and safeguards, worker safety, and other issues. These laws are often managed by different offices within ministries and by diverse ministries, meaning that it can be challenging to coordinate monitoring of concessions to ensure their compliance with law and their overall impact on communities and the environment. Mandating that information on environmental and social factors be collected and made available to the public helps ensure that all ministries and their subdivisions have access to the information that they need, instead of the information remaining within just one office; helps inform the public about conditions and compliance; and empowers civil society to help monitor overall concession performance.

Many concessionaires find that making information publicly available helps operations by increasing public support and building goodwill with local communities.<sup>73</sup> The Extractive Industries Transparency Initiative is a coalition of countries, natural resource extraction companies, and civil society organizations. It has developed a framework for promoting transparency in the mining, oil, and gas sectors, which relies on reporting and auditing payments made by natural resource companies to governments.<sup>74</sup> Countries become Initiative-compliant through a multi-year process during which the Initiative reporting and auditing framework is adopted into law, as noted in Case Study 3.5. As of 2016, at least 29 countries are compliant with the Extractive Industries Transparency Initiative, and 43 countries have published revenues totaling US\$2.4 trillion (see Figure

70 Auty 1993; Ross 2004; Ross 2015.

71 See Chapter 5 (Rights) *infra*.

72 Epremian, Lujala, and Bruch 2016.

73 Rustad, Le Billon, and Rustad 2012.

74 Ernst & Young 2013, 3.

3.7).<sup>75</sup> Some countries have used the Initiative to govern other natural resources, as explained in Case Study 3.5.

Increasingly, countries require disclosure of concession contracts to increase transparency and accountability, and thereby promote environmental rule of law. Without access to the contracts, the public may not know the actual boundaries of the concession or the legal requirements it has to meet. Liberia was a pioneer in making public its natural resource concession contracts; since then, many countries have also made public their contracts. As seen in Figure 3.8, a 2017 review of contract disclosure practices related to oil, gas, and mining of 51 countries found that over half have disclosed some of their contracts.<sup>76</sup> However, 20 of the countries have not published any contracts or licenses or have not passed a contract disclosure law. And 11 countries have failed to make contract disclosures mandatory under national laws. The study authors noted that “[e]ven in countries where contract disclosure is an established practice, it remains challenging for citizens to determine which contracts or licenses apply to active extractive operations. Broken websites and the use of inappropriate file formats hinder access and can make analysis all but impossible.”<sup>77</sup>

This reinforces the finding that the best aspirations, even when enshrined in the law, can be foiled without careful implementation steps. Resources such as [www.resourcecontracts.org](http://www.resourcecontracts.org), a platform upon which countries can post their contracts, may help by providing a technology infrastructure. Sierra Leone, the Philippines, and Tunisia are using such platforms.<sup>78</sup> In addition, experts recommend that documents be posted online in open data file formats instead of image

files, so that they can be more easily searched, and that files include metadata (summary information such as contract title, contracting parties, signing date, and commodity being exploited) thus allowing the documents to be better organized.<sup>79</sup>

The Extractive Industries Transparency Initiative demonstrates that international standards established through like-minded governments, companies, and civil society organizations can provide strong complementary tools to traditional government enforcement mechanisms. The Roundtable on Sustainable Palm Oil, Forest Stewardship Council, the Kimberley Process, and other initiatives are other examples.<sup>80</sup> Such initiatives can help hold companies and countries accountable to both domestic laws and international norms, as discussed in Case Study 3.6.

Thus, over the past decade, many countries have undertaken to make natural resource concessions much more transparent to the public. National laws, contract disclosure, and voluntary initiatives offer many options for countries to pursue.

### **3.2.5 Access to Information on Emission Data, Permits, and Audits**

Access to information is important in ensuring compliance with pollution standards. Making emissions data, permits, and environmental audits available to the public allows government, civil society, business, and the public to track pollution through its lifecycle, call for emissions reductions where appropriate, and to hold those who emit hazardous substances accountable for any damage done. It is particularly important for

75 See <https://eiti.org/>.

76 Hubert and Pitman 2017.

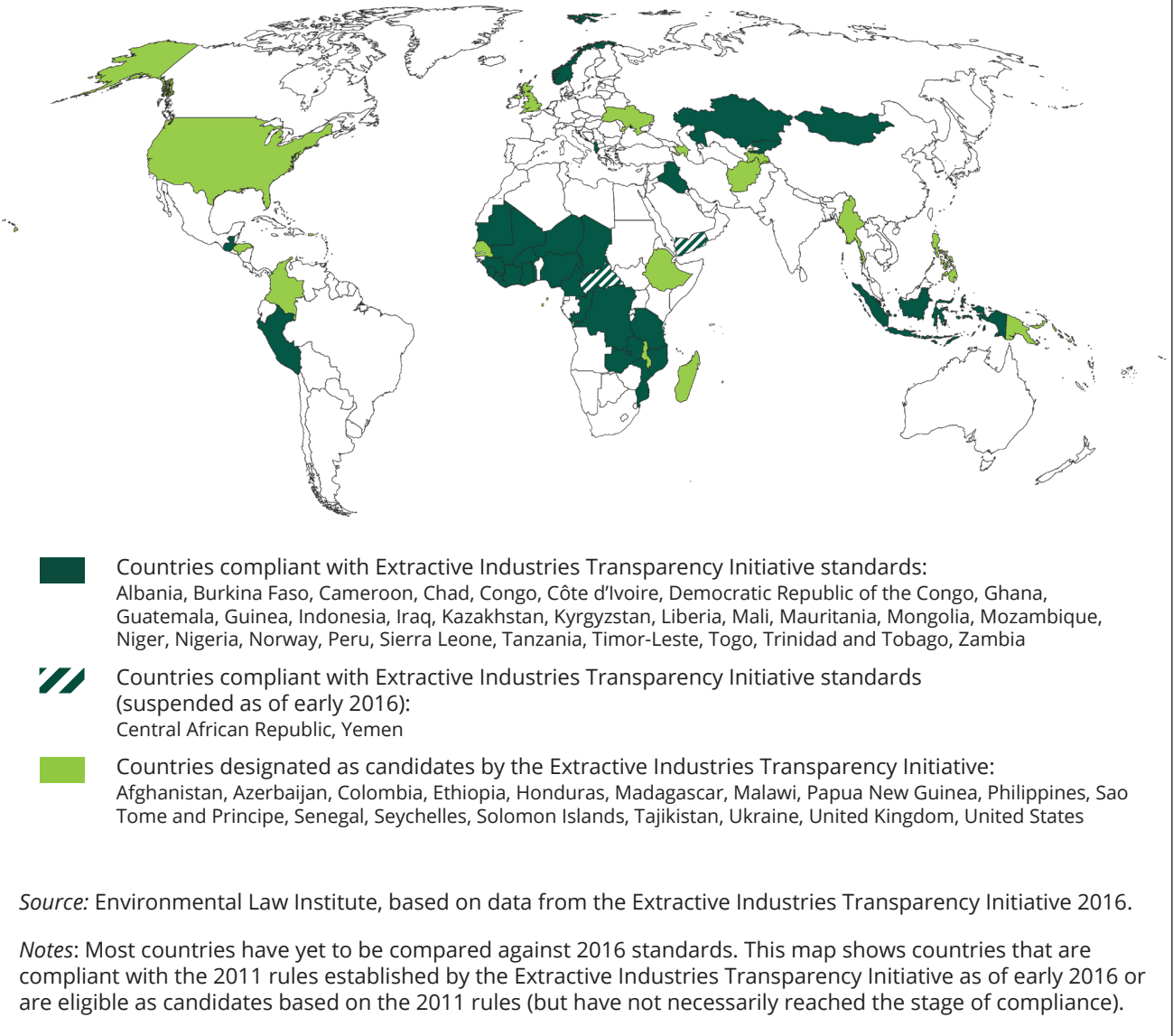
77 Ibid.

78 OGP 2016.

79 Hubert and Pitman 2017.

80 Bruch and Broderick 2017.

**Figure 3.7: Countries Participating in the Extractive Industries Transparency Initiative (2016)**



people living near polluting facilities to ensure that the facilities are complying with the law and their permits. The mandatory reporting of a facility's pollutant emissions is also a highly effective way to encourage voluntary pollution reduction.<sup>81</sup>

While some countries required such information to be made public in the 1970s, the widespread global movement toward transparency of pollution information was born out of a tragedy in the 1980s. After a 1984 release of methyl isocyanate killed thousands and maimed tens of thousands more in Bhopal, India, countries began requiring companies to publicly report information on dangerous chemicals stored

81 UNEP 2015, 47.

### Case Study 3.5: Transparency Initiatives in the Liberian Forest Sector

Forests have played a central role in Liberia's recent history. In the late 1980s, Liberia dissolved into a civil war. While the exploitation of forest resources was not the explicit cause of civil war, it helped prolong it by financing participants in the conflict. As the war proceeded, accountability in the timber industry deteriorated. Records—including for financial transactions between the government and timber contractors—were no longer kept. Forest access roads were built and trees harvested without regard to ecological consequences. The lack of accountability enabled corporations to evade taxes and fees (companies were exporting larger quantities of timber than they were reporting to the government). The government mismanaged and misallocated timber revenues. Liberian timber became a major source of financing for the civil war. As a result, in 2003 the United Nations Security Council issued Regulation 1478, which prohibited UN Member States from importing logs from Liberia.<sup>a</sup>

After a peace agreement was signed in 2003, Liberia sought to restore the rule of law to the forestry sector. The Liberia Forest Initiative was convened to help the Liberian Government establish sustainable use of forest resources and to promote transparency in the forestry sector.<sup>b</sup> In 2006, the Liberian Government adopted the National Forestry Reform Law and a series of implementing regulations. In order to promote transparency and accountability in the forestry sector, the law requires companies that engage in logging to publish their payments to the government and requires the Forestry Development Authority to regularly audit and monitor the forestry contracts, produce an annual enforcement report, and enforce a chain-of-custody system for all timber products.<sup>c</sup>

In 2007, Liberia joined the Extractive Industries Transparency Initiative.<sup>d</sup> Although the Initiative usually focuses on the oil, gas, and mining sectors, Liberia decided to become the first country to incorporate its forestry sector into this process (as well as its rubber sector). Initiative-compliant countries must demonstrate satisfactory levels of information disclosure and provide evidence that there is a functional process to improve transparency, even if the country does not have a fully transparent sector.<sup>e</sup> Liberia has been compliant since 2009.

a. Altman, Nichols, and Woods 2012, 339–344.

b. *Ibid.*, 342.

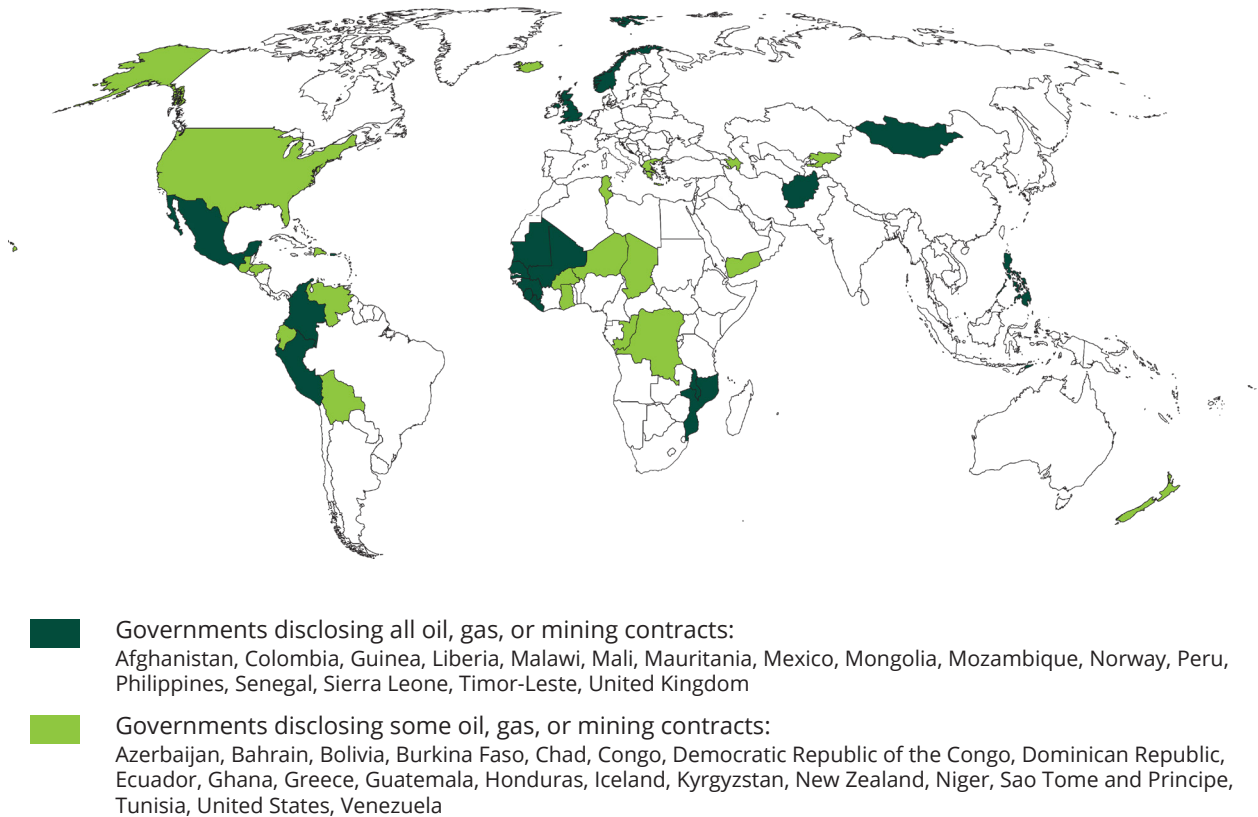
c. National Forestry Reform Law of 2006, secs. 3.4, 5.8, 8.4, 20.11. The chain-of-custody system is an effort to ensure that all timber products originating in Liberia are of legal origin. It employs a labeling system that enables all logs to be traced from its stump to the port of export. Liberia Forest Development Authority Regulation 108-7.

d. Rich and Warner 2012.

e. Extractive Industries Transparency Initiative 2016.



**Figure 3.8: Countries Disclosing Contracts Related to Oil, Gas, and Mining (2016)**



*Source:* Adapted from data in Hubert and Pitman 2017 and Open Contracting Partnership 2016.

onsite, routine emissions of pollutants, accidental releases of substances, and other environmental data about their facilities.<sup>82</sup> This was done through a combination of pollutant release and transfer registers<sup>83</sup> and regular reporting of emissions. Testing and reporting of emissions of specific pollutants to the air, water, and soil allows the government and—through access to information requirements—the public to determine

whether regulated facilities are complying with the law and with their permits.<sup>84</sup>

The information gathered and made public through the pollutant release and transfer registers can shed light on compliance with permits and other requirements, demonstrating the effectiveness, or ineffectiveness, of current pollution control laws.<sup>85</sup> This practice of shining light on the management and release of hazardous substances and pollutants resulted in significant reductions in the use, emissions,

82 UNITAR 2017, 3.

83 For more information on pollutant release and transfer registers, see Sullivan and Gouldson 2007.

84 UNITAR 2017, 3.

85 UNECE 2014, 115.

and releases of such chemicals. In addition to concerns about compliance, facility operators did not want the negative public attention brought about by discussion of such information. Many facility operators also discovered significant cost savings upon implementing pollution reduction efforts.<sup>86</sup>

As shown in Figures 3.9-3.10, maintenance of pollutant release and transfer registers has become standard in over 45 countries worldwide, with several other countries developing registers.<sup>87</sup> China has taken initial steps toward establishing a registry system as well.<sup>88</sup> The UNITAR Chemicals and Waste Management Programme supports national efforts to implement Pollutant Release and Transfer Registers.<sup>89</sup> Regional efforts at harmonizing national registries are also underway using the 2003 Kyiv Protocol (to the Aarhus Convention) on Pollutant Release and Transfer Registers. This Protocol is open to accession by any UN Member State and as of August 2018 has 36 Member States plus the European Union.<sup>90</sup>

It can be difficult for citizens to access permits and audits of facilities in their neighborhoods. Recognizing that such information is particularly important to people whose health and livelihoods may be affected by polluting facilities, a growing number of countries

86 Ibid.

87 UNEP 2015, 47. As of early 2018, 32 countries have national legal instruments specifically providing for pollutant release and transfer registers, 14 countries have such registers but do not have national legal instruments specifically providing for them, and at least 13 countries— Armenia, Belarus, Belize, Bosnia and Herzegovina, Cambodia, Ecuador, Georgia, Guatemala, Montenegro, Peru, Tajikistan, Thailand, and Ukraine—were developing registers.

88 Ibid.

89 <http://prtr.unitar.org/site/home>.

90 <https://www.unece.org/env/pp/prtr.html>. For more information on setting up registers, see <https://www.unece.org/env/pp/prtr.guidancedev.html> and <http://www.oecd.org/chemicalsafety/pollutant-release-transfer-register/>.

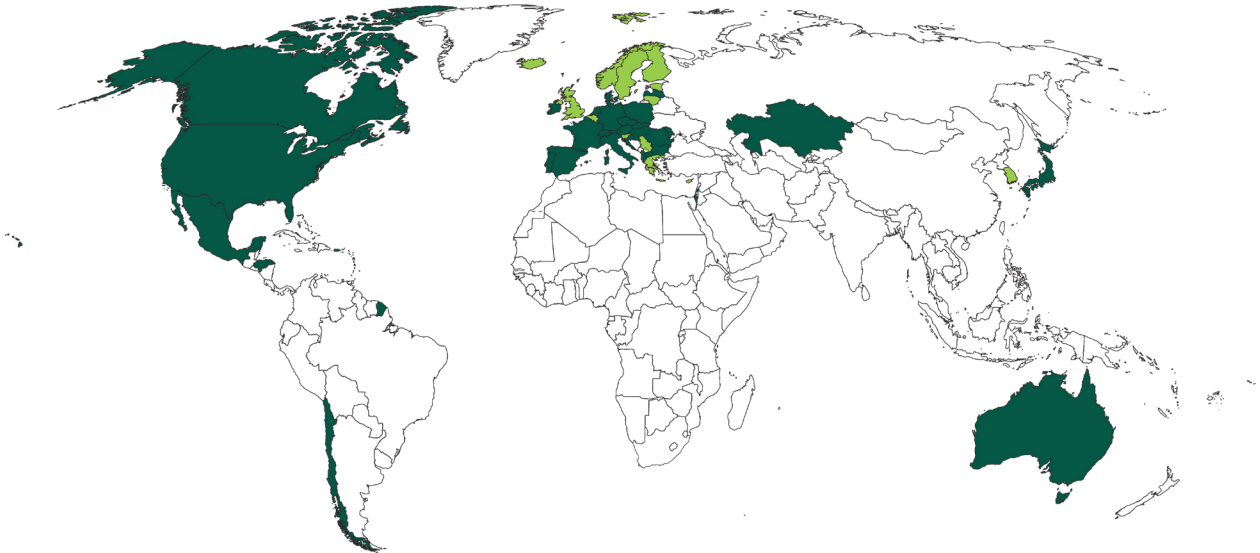
### Case Study 3.6: Mutually Assured Open Government

The Open Government Partnership is a multilateral initiative that secures concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. The Partnership has 75 member countries and a board comprising civil society and government officials. Each country has committed to an action plan, and collectively the member countries have made over 2,500 commitments to expand openness and accountability. These commitments include ambitious undertakings. Indonesia has made an impressive commitment to develop the “One Map Portal,” which will digitize data and information related to forests on a single portal base map for the use of all sectoral ministries dealing with land tenure, land concessions, and land-use licensing.<sup>a</sup> Ghana has committed to building a strong legislative framework to manage oil revenues and to promote the independence of the committee that will monitor the use of such revenues.<sup>b</sup>

- a. Open Government Partnership, Indonesia: One Map Policy.
- b. <https://www.opengovpartnership.org/countries/ghana>.

make available facility permits, government audits of facilities, and any reports on their emissions or compliance status. For example,

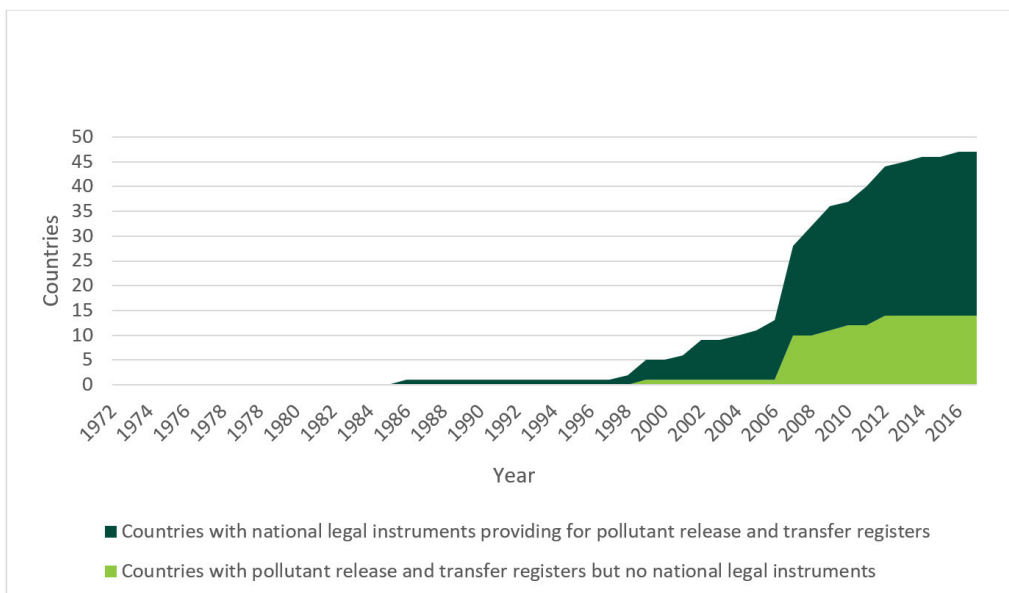
**Figure 3.9: Countries with Pollutant Release and Transfer Registers (2017)**



- Countries with national legal instruments specifically providing for pollutant release and transfer registers:  
 Albania, Australia, Austria, Bulgaria, Canada, Chile, Croatia, Czech Republic, Denmark, France, Germany, Honduras, Hungary, Ireland, Israel, Italy, Japan, Kazakhstan, Latvia, Luxembourg, Malta, Mexico, Netherlands, Poland, Portugal, Republic of Moldova, Romania, Slovakia, Spain, Switzerland, The former Yugoslav Republic of Macedonia, United States
- Countries with pollutant release and transfer registers but no specific national legal instrument:  
 Belgium, Cyprus, Estonia, Finland, Greece, Iceland, Liechtenstein, Lithuania, Norway, Republic of Korea, Serbia, Slovenia, Sweden, United Kingdom

Source: Environmental Law Institute, based on research conducted using UNECE n.d.a, n.d.b; FAOLEX.org; ECOLEX.org; and other databases.

**Figure 3.10: Expansion of Pollutant Release and Transfer Registers (1972-2017)**



the U.S. Environmental Protection Agency has created the Enforcement and Compliance History Online database. This website provides pollution-control compliance and enforcement information for approximately 800,000 registered facilities holding permits from the Agency.<sup>91</sup> The tool provides helpful information to the public as well as others looking to vet a company seeking permission to set up operations in another community (whether in the United States or abroad) to see if it has a record of compliance or a record of serious environmental violations.<sup>92</sup>

### **3.2.6 Access to Information on Laws, Regulations, and Judicial Decisions**

Access to information on environmental laws, regulations, and judicial decisions advances the environmental rule of law in three key ways.

First, the companies and people who are inclined to comply with the law need to know what is required. For example, many dry cleaning facilities use perchloroethane, a toxic solvent that is regulated by many States. In the United States, the U.S. Environmental Protection Agency developed a strategy to improve compliance with the requirements governing the use of perchloroethane.<sup>93</sup> The strategy emphasized outreach to the tens of thousands of small dry cleaning businesses across the country to raise awareness of the requirements and provide information on how they could comply with the law. Recognizing that many dry cleaners did not speak English as their first language, the strategy called for the Agency to translate the outreach materials into Korean, Spanish, and other key languages.

Second, access to information on the laws and regulations are important for the institutions and people involved in monitoring, enforcing, and adjudicating potential violations. The range of institutions and people needing this information include government agencies, local authorities, nongovernmental organizations, communities, and citizens. Knowing what the law requires facilitates determining if there has been a violation. For example, it is not uncommon to find judges in some countries who lack effective access to or knowledge of their country's environmental laws, which makes it difficult to effectively adjudicate claims of violations, whether those claims are made by the government or others. Thus, a critical component of judicial training is often providing judges with copies of their country's environmental laws and regulations.<sup>94</sup>

Third, information on judicial decisions can both motivate and facilitate compliance. In the environmental context and elsewhere, prosecutors and environmental agencies often advertise successful prosecutions. They provide information to the press, through professional associations, and directly to the regulated community to inform them of the requirements, the penalties for violation, and the government's commitment to upholding the environmental rule of law. This can provide regulated entities with a powerful incentive to comply. Information on judicial decisions also empowers prosecutions. In common law countries, judicial precedent of higher courts can be legally binding. Even where judicial decisions are not binding, they can illustrate arguments that can be successful, especially in cases of first impression. The importance of making judicial decisions widely available in writing is discussed further in Section 5.3.4.

91 USEPA 2015a.

92 UNEP 2006, 396.

93 USEPA 1996.

94 For more information on judicial training, see Case Study 2.6.



The internet has transformed the ability of countries to affordably make public information on their environmental laws, regulations, and judicial decisions. Many countries make their laws available on the internet, which has been a tremendous boon. But even a cursory review of such sites<sup>95</sup> reveals major qualifications to this statement:

- some sites require payment to access full text of statutes;
- some sites only provide access to “major” laws;
- some sites only have laws passed after a relatively recent date, such as 2004; and
- some sites only make available unofficial versions of the laws.

Moreover, the people who most need this information—the most marginalized groups in society and people living in rural, far-flung areas—often do not have functional access to the internet.

Many of the same practices arise in making national environmental regulations available online. Often the official gazette, which shows recent amendments to regulations can be found, but it is not possible to find an up-to-date version of the complete regulation that is in force at that moment. This means that lawyers and non-lawyers alike seeking to understand regulations may not know how to find the current, official version of the regulations that are in force. This problem often bedevils government officials as much as civil society and the public.

Notwithstanding these difficulties, the internet is a powerful platform enabling innovative access to information on environmental laws, regulations, and judicial decisions. In

95 [http://eur-lex.europa.eu/n-lex/related\\_links/related\\_links\\_en](http://eur-lex.europa.eu/n-lex/related_links/related_links_en).

Kenya, the Judiciary administers the Kenya Law site, “where legal information is public knowledge.”<sup>96</sup> Laws, judicial decisions, and the official gazette as well as other resources, although not government regulations, are freely available on the website. In Croatia, the Ministry of Environment and Nature has created a website that includes all laws and regulations within the Ministry’s jurisdiction.<sup>97</sup>

It also is increasingly common for courts, especially high courts, to establish websites where the public can search and access judicial decisions and other relevant information. For example, the Supreme Court of the Philippines website features an online library of judicial decisions and resolutions, recordings of oral arguments, and annual reports.<sup>98</sup>

Several international websites make available national environmental and natural resource statutes. ECOLEX,<sup>99</sup> discussed further in Case Study 2.7, provides an excellent collection of environmentally related treaties, laws, and judicial decisions; and FAOLEX<sup>100</sup> provides a vast collection of treaties, laws, and decisions relating to renewable natural resources.

In sum, States have made tremendous strides in recognizing the need to both respond to requests for environmental information and to actively make environmental information available to citizens. Many are making innovative use of the internet to widely publicize the state of the environment, publish important environmental information, share natural resource concession data, and make available foundational laws, regulations, and judicial decisions. But it is also clear that performance in response to requests for information and in keeping information up-to-

96 <http://kenyalaw.org/kl/>.

97 <http://www.mzopu.hr>.

98 <http://sc.judiciary.gov.ph/>.

99 <https://www.ecolex.org/>.

100 <http://www.fao.org/faolex/en/>.

date and easily accessible is uneven across the globe and even across agencies within a state.

### 3.3 Public Participation

Public participation is important both as a means to ensure environmental rule of law and as a context for environmental rule of law.<sup>101</sup> Public participation in inspection, monitoring, and enforcement of environmental law helps to ensure that the laws are complied with and enforced. Given the many governance benefits of public participation—public participation incorporates local knowledge into environmental decisions, builds public support for projects, and helps to hold actors accountable to their decisions and actions—many countries establish procedural requirements in their environmental laws that require government agencies to inform, consult with, seek feedback from, and meaningfully consider feedback from citizens.<sup>102</sup> Many global and regional instruments enshrine the right to participate in decision making, both generally and in the environmental context.<sup>103</sup> As such, environmental rule of law requires public

<sup>101</sup> Adomokai and Sheate 2004.

<sup>102</sup> In addition to domestic legislation, international environmental law and international human rights law contain several provisions promoting or requiring participation in government and governmental processes. These include, for example, the right to take part in public affairs, the right to vote, and the right to free elections. Article 25 of the International Covenant on Civil and Political Rights supports both participatory and representative models of democracy in so far as it protects the right to take part in the conduct of public affairs, directly or through freely chosen representatives.

<sup>103</sup> See Universal Declaration of Human Rights, arts. 21, 19, 20; International Covenant on Civil and Political Rights, arts. 19, 25; Aarhus Convention, arts. 6-8; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, art. 7.

**Figure 3.11: Key Elements of Effective Public Participation**



participation both as a practical matter and as a legal matter.

Providing access to information is a necessary first step in civic engagement, but it has limited meaning unless people can act on that information by participating in processes to craft laws and regulations, review permits, assess environmental impact, monitor compliance, and help enforce environmental laws. This section discusses public participation as a means of enhancing environmental rule of law.

Drawing on decades of study and experience, scholars and practitioners have identified several elements of effective public participation, which are explained below and summarized in Figure 3.11. In addition, private standards, such as the Global Reporting Initiative,<sup>104</sup> provide indicators on conducting meaningful stakeholder engagement.<sup>105</sup>

<sup>104</sup> <http://www.globalreporting.org>.

<sup>105</sup> See IFC 2007, 91.

Notice of the decision being made or the project being considered needs to be given early in the process. By involving the public early in the process, they can bring to light possible prior instances of non-compliance, more effective approaches that will better ensure compliance, and otherwise help to reduce the likelihood of future violations. Engaging the public later in the process reduces the opportunity to change the project design. If the public is invited to participate only after the potential alternatives have been considered and narrowed, then the public is being notified, as opposed to engaged.

It is important that the proponents of the decision or project actively inform the public about its rights to participate and explain the avenues available to participate. Active outreach can take many forms. For example, when New Zealand undertook to construct a new section of State Highway 2, it utilized 14 different techniques to reach out to potentially affected citizens, including letters and phone calls to affected property owners, meetings with local citizens and citizen groups as well as indigenous Maori people, an informal open house, distribution of information kits, newsletters, press releases, and a display at the local library.<sup>106</sup>

It may be necessary to build the capacity of civil society and local communities to participate meaningfully in the process. Local organizations may lack the technical expertise or resources to engage on highly complex projects involving key scientific or engineering questions. As a result, companies, government agencies, and nongovernmental organizations have built capacity of local people to participate. For example, the Waterkeeper Alliance builds capacity of local citizens to organize, monitor illegal pollution

of rivers and lakes, and take action when violations are found.<sup>107</sup>

Public participation must reflect the particular institutional, social, and political context of the project or decision. In this context, it is important to both be respectful of cultural norms and to be inclusive of vulnerable and traditionally underrepresented groups such as women, indigenous peoples, and youth. As discussed in Chapter 5, this is both a good practice (from a good governance perspective) and often a legal requirement, as indigenous communities have a right to free, prior, and informed consent.

It is important that public contributions are documented and accounted for in the final decision and that those outcomes are communicated back to the public. This helps to ensure that the process was deliberative and informed; it also provides a record in case the final decision is challenged. In this vein, some countries require agencies to compile formal “response to comments” documents where the agency provides a response to public comments in order to show the comment was heard and answered in a reasonable fashion. For example, Estonia’s 2005 Environmental Impact Assessment and Environmental Management System Act requires developers to contact commenters individually with responses to questions and explanations on how their comments were incorporated into the planning process.<sup>108</sup> Unfortunately, this is one area in which many countries fail to meet best practices. According to the Environmental Democracy Index, only 19 of 70 countries examined, or 27 percent, rank good or very good in that their laws require agencies to consider public comments.<sup>109</sup> [It should be noted that the

<sup>107</sup> See <https://waterkeeper.org/>.

<sup>108</sup> Estonia Environmental Impact Assessment and Environmental Management System Act, sec. 17.

<sup>109</sup> <http://www.environmentaldemocracyindex.org/map#2/11/1624/Law>.

<sup>106</sup> CO-SEED 2017b, 14.

Index focuses on the contents of the law; the Index includes only modest measures assessing actual practice.]

Finally, provision of training and resources to those charged with implementing public participation mechanisms is key to effective civic engagement. Often sectoral authorities are expected to abide by public participation requirements without adequate knowledge and skills to know what they are supposed to do and how to do it. For example, after India mandated training of officials in its public information laws, a World Bank study found that 60 percent of public information officers had not received any training.<sup>110</sup>

If government staff are not skilled in implementing public information requirements, there is a good chance that public participation procedures will fail to meet minimum legal requirements, much less reflect the elements of effective participation. This undermines the quality and legal adequacy of government efforts to include the public, and can result in nullification of government actions and wasted resources. For example, in 1993, the Constitutional Court of Slovenia nullified the long-term development plan for the region of Koper for failure to follow public participation procedures.<sup>111</sup> A 1992 amendment allowed construction of a quarry near the village of Premančan. National law required the municipal government of Koper to publicly display the text, a brief explanation of various components of the plan, and associated graphics at the seat of municipal assembly, in affected local communities, and at interested labor organizations.<sup>112</sup> Instead, the

municipality displayed the text of the plan without any graphics and only in the hall of the Koper municipal assembly, resulting in the plan's nullification.

This section reviews legal provisions and practices for public participation generally; in developing laws, regulations, and plans; in conducting environmental assessments and awarding permits and concessions; in community-based natural resource management; and in monitoring and enforcement.

### **3.3.1 National Constitutional and Legal Provisions on Public Participation**

Increasingly, the right to public participation is guaranteed by national constitutions and laws. As with the right of access to information, these guarantees come in many forms: explicit and implied constitutional rights; national statutes governing public administration; rights provided in environmental and other sectoral legislation; and other forms, such as regional treaties and court interpretations of constitutions and statutes. As Figures 3.12-3.13 show, as of late 2017, 131 countries have constitutional provisions on public participation, 107 countries provide for public participation in their environmental laws, and 46 countries provide for public participation in laws governing public administration—for a total of 161 countries with legal provisions broadly guaranteeing and otherwise governing public participation in environmental matters.

Some constitutions provide a right to public participation as a procedural right to freedom of association and public participation in decision making.<sup>113</sup> These guarantees may apply generally, or they may focus on public

110 World Bank 2012.

111 Mirkovic and Klemenc 1995.

112 Article 37 of the Law on Urban Planning and Other Spatial Interventions (Zakona o urejanju naselij in drugih posegov v proctor); Official Gazette SRS, no. 18/84, 37/85, and 39/86; and Official Gazette RS no. 26/90, 18/93, and 47/93.

113 Bruch 2002, 26.



participation in the environmental context. The Treaty on European Union, for example, guarantees that “[e]very citizen shall have the right to participate in the democratic life of the Union.”<sup>114</sup> Kenya’s 2010 Constitution provides several procedural guarantees as well: public participation is a value and principle of governance;<sup>115</sup> government must include citizens “in the process of policy making;”<sup>116</sup> public participation must be included in national legislation to urban areas and cities governance and management;<sup>117</sup> and citizens are to be included in the creation of legislation and the work of the national and county legislatures.<sup>118</sup> When a right to public participation is not expressly granted by a country’s constitution, often courts will conclude that the constitutional guarantee of freedom of association guarantees public participation.<sup>119</sup>

The efficacy of a constitutionally guaranteed right to free association can be undermined by national laws that limit its scope. This is especially true when the constitution allows the conditions of the right to be fixed by national law. If organizations fear that they will be punished for criticizing the authorities, they are less likely to take full advantage of their constitutionally endowed rights.<sup>120</sup>

Several types of national laws address public participation in environmental matters, including environmental framework laws, laws governing various natural resources, and procedural laws. As with access to information and as shown in Figure 3.14,

there is considerable variation in the rights and protections addressed by these laws, even within the same country.

Several countries have adopted framework environmental laws that include provisions for public participation. In Chile, the *Ley sobre bases generales del medio ambiente* (General Law on the Environment) requires the Ministry of Environment to encourage and facilitate public participation in the formulation of policies, plans, and environmental quality standards.<sup>121</sup> Mexico’s *Ley general del equilibrio ecológico y la protección al ambiente* (General Law of Ecological Balance and Environmental Protection) takes this one step further, requiring the federal government to promote public participation in not only the formulation of environmental and resource policies, but also their implementation, evaluation, and monitoring.<sup>122</sup> Framework environmental laws may also establish specialized bodies for consulting the public on environmental matters.<sup>123</sup>

Laws governing natural resource extraction may include stipulations for public participation. In New Zealand, the Resource Management Act requires regional and district councils to develop their 10-year policies and plans in consultation with community stakeholders and interest groups, including the indigenous Maori people.<sup>124</sup> Sierra Leone has taken another approach to public participation, requiring holders of large-scale mining licenses to conclude benefit-sharing community development agreements with affected communities before commencing operations.<sup>125</sup> In South Africa, the Mineral

114 European Union. 2007. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. December 13. art. 10 (3). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

115 Art. 10(2).

116 Art. 232(1).

117 Art. 174(c).

118 Arts. 118(1)(b) and 196(1)(b).

119 Bruch, Coker, and Van Arsdale 2007.

120 Ibid.

121 Gobierno de Chile 2011, art. 70; Environmental Rights Database 2015.

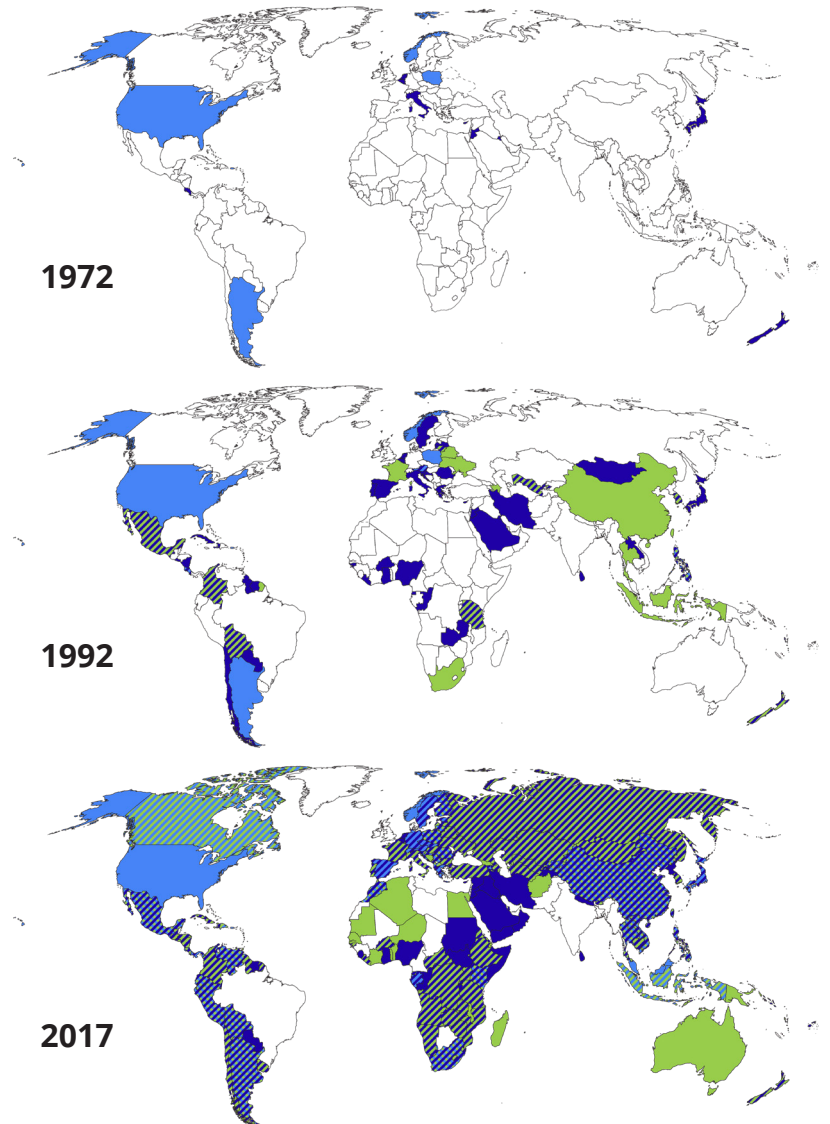
122 La Cámara de Diputados del Congreso de la Unión 1996, arts. 157-159; Environmental Rights Database 2015.

123 See Chapter 2.

124 UNEP 2006, 411.

125 Jensen and Cisneros 2015, 14; Natural Resource Governance Institute 2013.

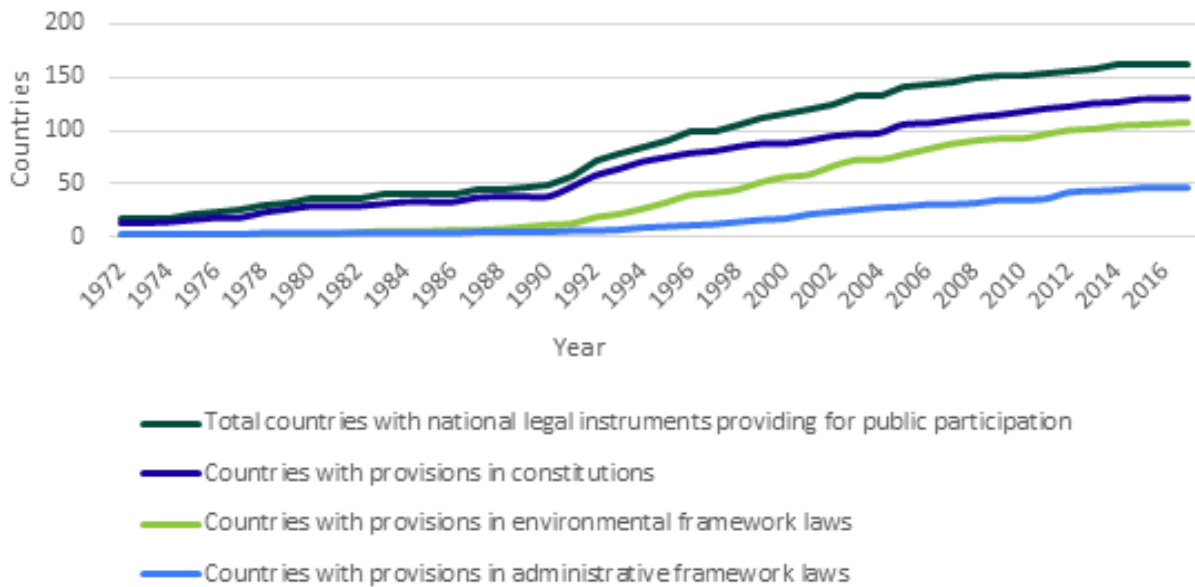
**Figure 3.12: Constitutional and Statutory Guarantees of Public Participation (1972, 1992, 2017)**



- Countries with constitutional provisions on public participation
- Countries with provisions in national administrative framework laws broadly guaranteeing public participation
- Countries with provisions in national environmental framework laws broadly guaranteeing public participation
- Countries with constitutional provisions on, and provisions in national administrative framework laws broadly guaranteeing public participation
- Countries with constitutional provisions on, and provisions in national environmental framework laws broadly guaranteeing public participation
- Countries with provisions in national administrative framework laws and national environmental framework laws broadly guaranteeing public participation
- Countries with constitutional provisions on, and provisions in national administrative framework laws and national environmental framework laws broadly guaranteeing public participation

<b>Countries with constitutional provisions on public participation</b>	<b>Countries with provisions in national administrative framework laws broadly providing for public participation</b>	<b>Countries with provisions in national environmental framework laws broadly guaranteeing public participation</b>
<p>Albania, Andorra, Angola, Argentina, Armenia, Austria, Azerbaijan, Bahrain, Belarus, Belgium, Bhutan, Bolivia, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cambodia, Central African Republic, Chile, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Eswatini, Ethiopia, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iran, Iraq, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Maldives, Marshall Islands, Mexico, Micronesia, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Oman, Palau, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russia, Rwanda, Saint Lucia, San Marino, Sao Tome and Principe, Saudi Arabia, Serbia, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Timor-Leste, Tonga, Turkey, Turkmenistan, Uganda, Ukraine, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe</p>	<p>Albania, Argentina, Armenia, Austria, Bolivia, Canada, China, Costa Rica, Croatia, Czech Republic, Dominican Republic, Ecuador, Estonia, Finland, Gabon, Germany, Greece, Indonesia, Japan, Kenya, Kyrgyzstan, Laos, Lithuania, Malaysia, Mexico, Micronesia, Montenegro, Morocco, Norway, Panama, Peru, Philippines, Poland, Romania, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, United States, Venezuela, Viet Nam</p>	<p>Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Azerbaijan, Belarus, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cabo Verde, Cambodia, Canada, Central African Republic, Chile, China, Colombia, Comoros, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Democratic Republic of the Congo, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Finland, France, Gambia, Georgia, Guatemala, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Indonesia, Italy, Kazakhstan, Kenya, Kiribati, Kyrgyzstan, Laos, Latvia, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Mauritania, Mexico, Mongolia, Montenegro, Morocco, Mozambique, Namibia, New Zealand, Nicaragua, Niger, Papua New Guinea, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russia, Rwanda, Samoa, Sao Tome and Principe, Senegal, Serbia, Slovenia, South Africa, Tanzania, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Zambia, Zimbabwe</p>
<p><i>Source:</i> Environmental Law Institute, based on data from FAOLEX, ECOLEX, The World Bank, Constitute, the European Soil Data Centre, and UN Environment.</p>		

**Figure 3.13:** Expansion of Constitutional and Statutory Guarantees of Public Participation



and Petroleum Resources Development Act requires the government and the mine operator to facilitate public participation or consultations with the community.<sup>126</sup>

In practice, according to the Environmental Democracy Index, laws on public participation lag behind those that ensure access to information: 79 percent of Index countries’ laws have fair or poor public participation provisions.<sup>127</sup>

### 3.3.2 Public Participation in Developing Laws, Regulations, and Planning

Public participation in the development of environmental laws and regulations gives legislators the benefits of the public’s perspectives and oversight. Although legislators are the elected representatives of the people, direct review and comment upon draft legislation by civil society and the public helps bring the public’s knowledge directly into the legislative process. This can be particularly important in highlighting issues regarding compliance, implementation, or enforceability that could either improve or decrease the effectiveness of the law. The process of engaging the regulated community in developing laws, regulations, and planning can increase compliance.<sup>128</sup>

126 Republic of South Africa, Mineral and Petroleum Resources Development Act, No. 28 of 2002, secs. 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b), and 39.

127 Environmental Democracy Index 2015a, 3.

128 See, e.g., Freeman and Langbein 2000.



In some countries, the public can participate directly in the process of drafting and proposing laws. In Brazil, for example, draft laws can originate from a variety of sources, including civil society groups. A non-governmental organization drafted Federal Law No. 9985 of 18 July 2000, which established the National System of Nature Conservation Areas. Before legislators finalized the law, members of the public discussed and modified the

law in a nation-wide series of workshops and public consultations.<sup>129</sup> Most countries, though, are still developing procedures for engaging the public in drafting laws. The Environmental Democracy Index found that among the 70 countries profiled, 0 percent ranked very good, 21 percent ranked good, 44 percent ranked fair (i.e., limited practice), and 31 percent ranked poor (i.e., no practice).<sup>130</sup>

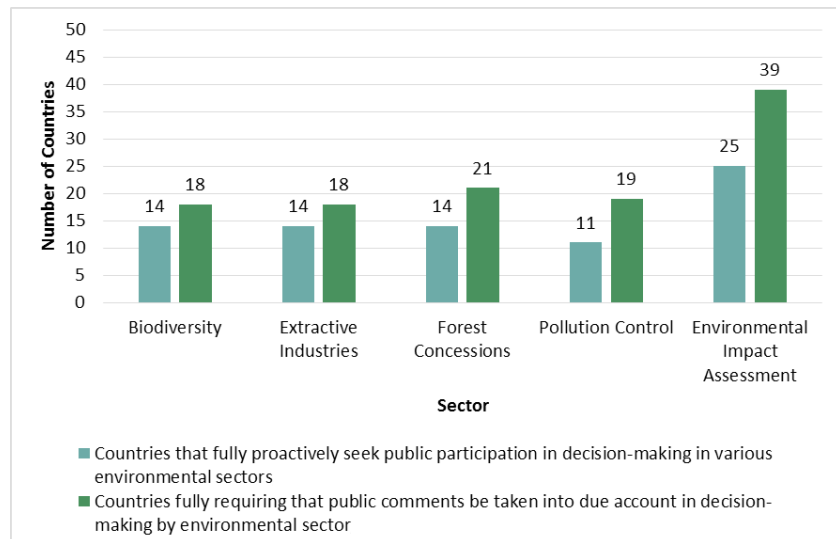
Many countries have adopted national administrative procedure or public participation laws that require all government regulations be subject to public notice-and-comment procedures. In Georgia, the public must have an opportunity to participate in the development of all regulations through a public administrative proceeding.<sup>131</sup> Each proposed regulation must include a public review period of 20 working days

129 UNEP 2006, 403–404.

130 <http://www.environmentaldemocracyindex.org>.

131 *Ibid.*

**Figure 3.14: Public Participation Guarantees by Sector (Environmental Democracy Index)**



Source: Environmental Democracy Index 2015a.

followed by a public hearing for suggesting possible modifications. This is similar to the process described in the U.S. Administrative Procedure Act of 1946, which requires public notice of proposed rulemaking and the opportunity to submit written comments, data, views, or arguments, to which the relevant agency is required to consider and provide written responses.<sup>132</sup> An analysis of nine pilot countries by The Access Initiative found that all nine adopted environmental impact association regulations that included public participation, but many are deficient and in half of the countries participation is limited to certain parties and occurs too late or too infrequently throughout the decision-making processes.<sup>133</sup> The analyses cited a similar study conducted of environmental impact assessment laws and regulations in 15 Latin American and Caribbean countries that revealed a similar trend, indicating that

132 5 U.S.C. sec. 553 (b)–(c).

133 Henniger et al. 2002, 74.

proper compliance and enforcement of full public review and participation could be improved upon.

With the growth of the internet, a growing number of countries have introduced electronic systems to foster citizen participation in drafting laws and regulations. In 2001, Estonia launched the “I Decide Today” campaign, which enables Estonian ministries to upload draft bills and amendments so that citizens can review, comment, and make proposals on the legislation over a 14-day period. They can also respond to comments already submitted. At the close of the commenting period, all remarks go back to the Ministry for review. Revised legislation is made public, and registered users of the system may vote in support. While the system has not been as effective as hoped because not as many people are using it as expected, it nonetheless encourages regular citizen participation and monitoring of national laws.<sup>134</sup>

Public participation also plays an important role in planning. The form this participation takes may be a single consultation (such as a charette, in which stakeholders meet to discuss and revise plans or projects); the establishment of a dedicated working group that meets repeatedly over time; or the creation of ongoing tools for participation, such as online forums that allow comment and response. Such participation helps to ensure that developers and planners address community concerns and issues of compliance with specific laws; they can also build an informal social contract that can fosters compliance.<sup>135</sup> For example, Antigua and Barbuda developed a Sustainable Island Resource Management Zoning Plan through extensive stakeholder consultation, designating different categories of land and marine use with an associated set of

activity guidelines and regulations for each type of use.<sup>136</sup> A review of community-based natural resource management projects in the Philippines noted that in order to be more effective, the natural resource management “planning process should include local perceptions of the resources, identifying areas of intervention and risks, possible alliances and arrangements, and areas needing technical guidance.”<sup>137</sup>

The internet can allow citizens to engage much more actively in planning processes. Harava (“Rake” in Finnish) is an interactive map-based application for collecting feedback from citizens to gain a wider perspective in decision making. It was created in 2013 by Finland’s Action Program on eServices and eDemocracy to encourage public participation in planning at the municipal level.<sup>138</sup> It functions as a question-and-answer platform for discussing ideas with local authorities, and its map-survey function allows citizens to mark their ideas on an online map, such as the location of proposed new green spaces. As of 2015, around 70 percent of Finland’s major cities and 60 percent of Finnish nongovernmental organizations used Harava.<sup>139</sup>

Laws, regulations, and plans often change dramatically as they are being vetted by the public, so that the revised version is substantially different from what the public reviewed. It is important to keep the public informed of substantial changes to the proposal and to allow comment on those changes so that the final decision has been fully reviewed by the public. When agencies have dramatically revised draft proposals so that the final version includes elements not previously proposed for public review, even when the ideas were generated by the

134 World Bank 2009.  
135 Odette 2005.

136 Environmental Rights Database 2015.  
137 USAID 2012, xvii.  
138 <http://www.eharava.fi/default.aspx>.  
139 Ibid.

public, then courts have required additional public participation so that the public has had a chance to comment upon the proposal. For example, in the United States, a federal appellate court invalidated a final rule governing monitoring of air pollution sources because it was substantially different from the proposed rule and did not effectively provide prior notice and an opportunity to comment.<sup>140</sup> The court held that “an agency’s proposed rule and its final rule may differ only insofar as the latter is a logical outgrowth of the former.”

### **3.3.3 Public Participation in Assessment, Permitting, and Awarding Concessions**

Public participation in the assessment of environmental impacts, permitting of facilities, and awarding of concessions is particularly important for ensuring that the decisions adhere to the substantive and procedural requirements set forth. These decisions about particular facilities, use of resources, and other activities often have the greatest impact on the health, livelihoods, and welfare of communities. At the same time, there are many reasons why the governmental review and decisions may not necessarily adhere to the legal requirements. There often are not enough staff to review the various assessments, permits, and concessions, and the staff are overworked. The government may prioritize investment, which can provide an incentive for staff to approve projects, even if there may be concerns. And with considerable revenues often at stake, there may be corruption associated with high-value concessions, projects, and facilities.

Experience has shown that actively engaging the public in these decisions provides

an effective means of addressing these challenges and increasing the likelihood that the legal requirements will be followed, increasing the environmental rule of law. Thus, recognizing these benefits of public engagement—as well as the reductions in project costs associated with protests when the public is not engaged—public participation is increasingly required during the development of projects with potentially significant environmental impacts, the provision of permits or licenses, and the awarding of concessions. As of 2017, 161 countries require public participation in environmental processes.<sup>141</sup> In many cases, the requirements are still evolving: the Environmental Democracy Index reports that just 11 percent of countries rated as good or very good in requiring public participation in review processes.<sup>142</sup>

As discussed in Section 3.2.3 and highlighted in Figure 3.15, most States have adopted environmental impact assessment laws. These laws often require public participation and consultation during the assessment process in order to better incorporate the public’s interests, knowledge, and values in the assessment.<sup>143</sup> In addition, most multilateral financial institutions, such as the World Bank, require projects they finance to provide an environmental and social impact assessment that includes stakeholder engagement.<sup>144</sup> Some private banks ascribe to the Equator Principles, which have a similar requirement.<sup>145</sup>

141 As illustrated in Figures 3.12-3.13, these requirements are found in national constitutions, framework environmental laws, administrative laws, and laws governing environmental impact assessments; accordingly, some requirements apply more broadly than to environmental issues.

142 Environmental Democracy Index 2015b.

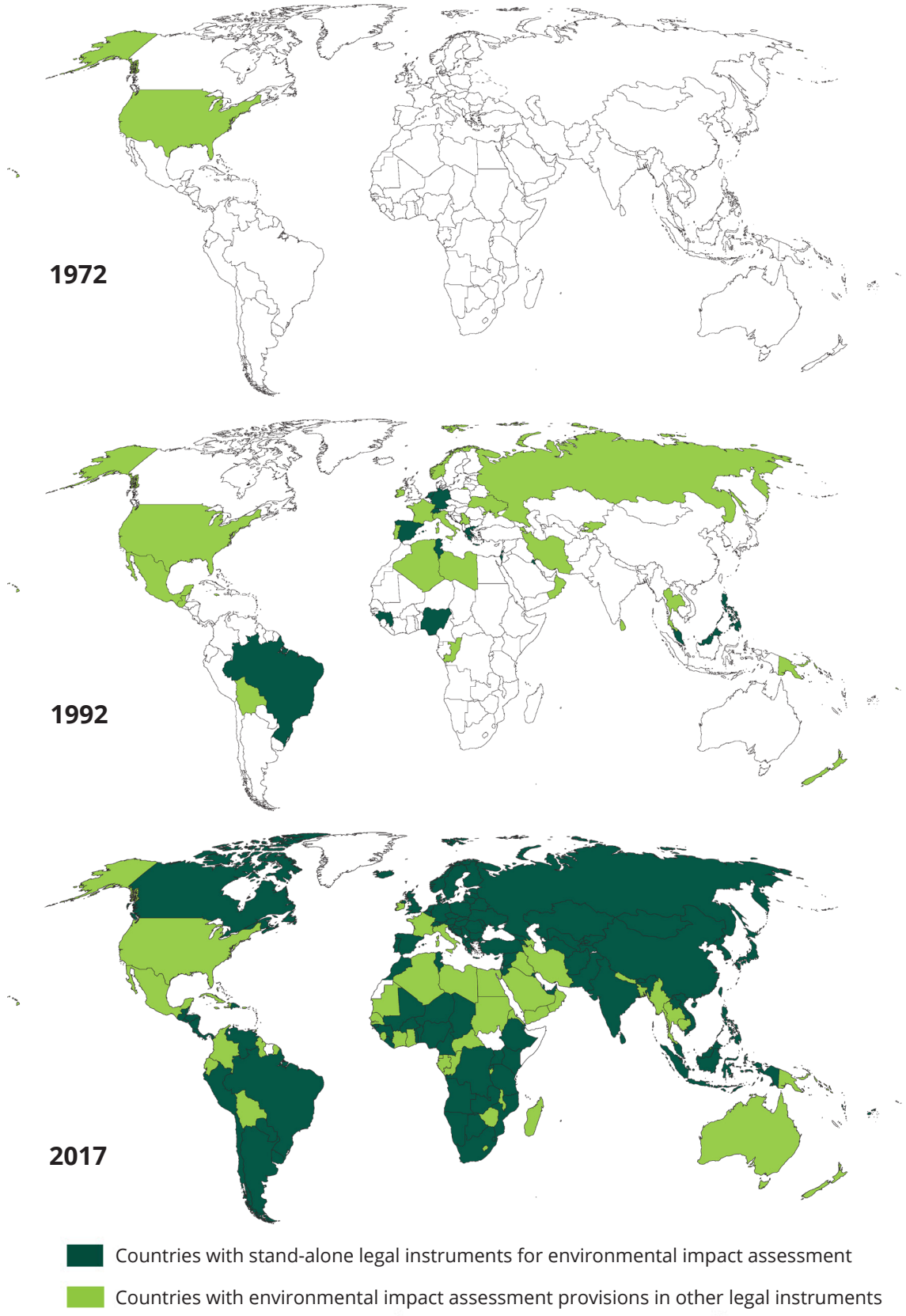
143 Environmental Rights Database 2015.

144 World Bank Group 2007

145 See <http://equator-principles.com/>.

140 *Environmental Integrity Project v. E.P.A.*, 35 Env’tl. L. Rep. 20, 204, U.S.App.D.C. 2000.

**Figure 3.15:** Countries with Environmental Impact Assessment Laws (1972, 1992, and 2017)





Year	Countries with stand-alone legal instruments for environmental impact assessments	Countries with environmental impact assessment provisions in other legal instruments
1972		United States
1992	Philippines, Israel, Netherlands, Spain, Brazil, Malaysia, Switzerland, Guinea, Germany, Greece, Kuwait, Tunisia, Nigeria	United States, Algeria, Armenia, Congo, France, Guatemala, Iran, Ireland, Italy, Jamaica, Kyrgyzstan, Libya, Mauritius, Mexico, New Zealand, Norway, Oman, Palau, Papua New Guinea, Portugal, Russia, Saint Kitts and Nevis, Samoa, Serbia, Sri Lanka, Ukraine, Thailand, Bolivia
2017	Afghanistan, Albania, Angola, Argentina, Armenia, Austria, Bahrain, Belarus, Belgium, Belize, Benin, Bhutan, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cabo Verde, Cameroon, Canada, Chad, Chile, China, Costa Rica, Croatia, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, El Salvador, Estonia, Eswatini, Ethiopia, Fiji, Finland, Georgia, Germany, Greece, Guatemala, Guinea, Guinea-Bissau, Honduras, Hungary, Iceland, India, Indonesia, Israel, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Mali, Malta, Marshall Islands, Micronesia, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Netherlands, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russia, Rwanda, Samoa, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syria, Tajikistan, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, Tanzania, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Zambia	Algeria, Andorra, Antigua and Barbuda, Australia, Azerbaijan, Bahamas, Bangladesh, Bolivia, Burundi, Brunei Darussalam, Cambodia, Central African Republic, Colombia, Comoros, Congo, Côte d'Ivoire, Cuba, Dominica, Ecuador, Egypt, Equatorial Guinea, Eritrea, France, Gabon, Gambia, Ghana, Grenada, Guyana, Haiti, Iran, Iraq, Ireland, Italy, Jamaica, Kiribati, Lesotho, Libya, Madagascar, Malawi, Maldives, Mauritania, Mauritius, Mexico, Myanmar, Nepal, New Zealand, Oman, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sudan, Thailand, Trinidad and Tobago, United States, Yemen, Zimbabwe

*Source:* Environmental Law Institute. Researchers started with two databases (ECOLEX and FAOLEX) to find the earliest enacted legal instrument for environmental impact assessments in all UN-recognized countries. Where necessary or if possible, a secondary source was sought using search engines.

*Notes:* This map shows countries with a stand-alone, legally binding national instrument establishing or defining the use of environmental impact assessments in a country (in dark green) and countries with legally-binding provisions found in framework environmental laws or other laws. The map does not account for regional agreements such as the European Union's 1985 decree, 85/337/EEC (unless a country has a legal instrument executing the requirements discussed in such an agreement).

### Case Study 3.7: China's Enhanced Public Participation Requirements

China greatly enhanced its public participation requirements by adding Chapter 5, Environmental Information Disclosure and Public Participation, in its 2014 revisions to its Environmental Protection Law. Under article 56, "The project owner of a construction project for which an environmental information report should be prepared pursuant to the law shall explain relevant situations to the potentially-affected public when preparing the report, and solicit public opinions. The competent department responsible for examination and approval of the report shall [publish] the full text of the environmental information report upon receipt thereof with exception of State secrets or commercial secrets. In the case of a construction project failing to solicit public comments sufficiently, the competent department shall order the project owner to fulfill the task."<sup>a</sup>

China published rules implementing these requirements, Measures for Public Participation in Environmental Protection.<sup>b</sup> These rules require greater explanation of projects by the project owners and competent departments to the public. Further, they not only require that the agencies "take into full consideration" the opinions and suggestions of the public on environmental matters, but that they give feedback to the public and nongovernmental organizations "in an appropriate manner."<sup>c</sup> It also provides that agencies may give financial support and guidance to civil society.<sup>d</sup>

a. Wang 2017, 154.

b. See Bourdeau et al. 2015.

c. Wang 2017, 155.

d. Ibid.

Cameroon's procedure for public consultation in the preparation of impact assessments is similar to that of other countries in outlining standard national legal requirements for public participation.<sup>146</sup> Cameroon's process obliges the Ministry of Environment and Nature Protection to carry out public consultations with nongovernmental organizations and local communities in the vicinity of proposed project sites. In order to provide the opportunity for a thorough review of the draft assessment, the public is notified several weeks before the consultations

take place. Local representatives are sent a schedule of meetings, a description of the project, and an explanation of the goals of various project components. The consultation usually takes the form of several public hearings.<sup>147</sup> Issues emerging from the process, such as impact monitoring, are integrated into the project environmental management plan. China's new environmental protection law also contains a chapter devoted to public participation, as discussed in Case Study 3.7.

146 UNEP 2006, 400.

147 Décret N°2005/0577/PM du 23 février 2005 sur les modalités de réalisation des études d'impact environnemental, 2005, 3.

The Bali Guidelines provide that States should “seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.”<sup>148</sup> As a result, public participation cannot be distilled into a simple checklist to meet each situation—to make public engagement meaningful in assessment processes depends on the context for each assessment. It may be necessary to create non-technical summary documents in a variety of languages that are made available through traditional means, such as public display in municipal centers and on websites, but also through active delivery to potentially impacted communities that might not otherwise be included in traditional government decision making.<sup>149</sup> For example, when Adastra Minerals undertook an assessment process in Katanga Province, Democratic Republic of the Congo, the target communities had low literacy, little understanding of the national language, and almost no use of paper (due to scarcity). They relied upon local radio stations, posters using mostly graphics, communications in Swahili in addition to French, and mobile phones and text messaging to contact people and engage local communities.<sup>150</sup>

Impact assessment documents are often prepared by project proponents on behalf of the state agency. This can result in a subtle or even obvious bias toward the project, for which state agencies must be alert.<sup>151</sup> For example, when the company constructing the Dakota Access Pipeline created an

environmental assessment for the U.S. Army Corps of Engineers, it determined that the project would not impact disadvantaged communities because none were located near the project. But a reviewing court struck down this conclusion, noting the assessment had arbitrarily decided to examine only communities within one-half mile of a pipeline borehole, which excluded the entire Standing Rock Sioux reservation, which was located more than one-half mile but less than one mile from the pipeline.<sup>152</sup>

Public participation is equally critical in decision making related to permits and licenses. These can take the form of facility permitting, media-specific discharge permitting, integrated permitting, sectoral permitting, and environmental auditing.<sup>153</sup> Global standards for the type of information that should be included in permits for industrial emissions and available through public participation procedures are under development.<sup>154</sup> Some countries subject the licensing of ongoing activities, such as industrial facilities and their discharges, to the same public participation requirements that apply to environmental and social impact assessments. For example, in Bulgaria public participation is a compulsory and essential part of the permitting process for industrial construction, operation, and renovation, and for integrated permits for storing dangerous substances.<sup>155</sup> Other countries have concluded that the award of permits triggers the environmental and social risk assessment laws and their public participation requirements.<sup>156</sup>

148 UNEP 2015, Guideline 9.

149 UNEP 2015, 84-85.

150 IFC 2007, 37.

151 *See, e.g.*, Bruch et al. 2007 (when comparing actual impacts with predicted impacts in environmental impact assessments for five projects with effects on transboundary watercourses, observing an “optimism bias” that the environmental and social impacts were always predicted to be less than they actually were).

152 *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, June 14, 2017 (D.D.C. 16-cv-01534).

153 *See* UNEP 2015, 70.

154 UNEP 2015, 83; EU Industrial Emissions Directive, 2010/75/EU, <http://ec.europa.eu/environment/industry/stationary/ied/legislation.htm>.

155 UNEP 2006, 412.

156 Foti et al. 2008, App. 4.

### Case Study 3.8: Increasing Income and Forest Cover through Community Involvement

Forest cover in the Nueva Vizcaya region of the Philippines declined from 85 percent to 25 percent from the early 1980s to the early 2000s due to legal and illegal logging.<sup>a</sup> The Philippines government undertook the Trees for Legacy Program, which included several measures to involve the community in reforestation and watershed protection. It used the country's Local Government Code of 1991 to co-manage local forests with local government units. The program increased land and forest tenure for local citizens and offered financial incentives for communities to participate actively in forest planting and preservation. Public participation in local government planning and government increased as civil society was given more opportunities for input. Poverty incidence in the province dropped from 52 percent to 3.8 percent by the time the project ended in 2004. In addition, programs were put in place to help increase financial management at the local level, improve health care, and take care of disadvantaged populations, such as the deaf and blind. Forest fires were virtually eliminated, and there was a marked improvement in water supply for domestic use and irrigation.<sup>b</sup> The local congressman wrote that the project's success lay in pairing the technical expertise of the Department of Environment and Natural Resources with the oversight and implementation skills of the local community.<sup>c</sup>

- a. <https://www.innovations.harvard.edu/tree-legacy-tree-resources-education-enterprise-and-legacy>.
- b. USAID 2012, 29-30.
- c. Agbayani 2005.

Public consultation on permitting decisions helps to ensure that the rights of neighboring communities are reflected. This may even lead to the amendment or even rejection of a permit application. As discussed in Section 4.3.2, when a mining company sought to clear a forest area in order to mine for bauxite in the Niyamgiri hills, the Indian Ministry of Environment and Forests consulted with the Dongria and Kutia tribes that inhabit the surrounding area. After the discussions, the village and community representatives from twelve villages surrounding the site rejected the proposed mine based on concerns it would violate their religious and cultural

rights. Subsequently, the Ministry rejected Vedanta's application.<sup>157</sup>

Concessions are often awarded in a multi-step process, and public consultation is vital to each step. Many countries conduct resource planning to help determine what resources to exploit, when, and how. Public participation provides key input to these planning exercises and helps to ensure that the required procedures and standards are adhered to, as discussed in Section 3.3.2. When ministries come to award specific concessions to particular concessionaires, another round of

<sup>157</sup> Environmental Rights Database 2015. See also the discussion on free, prior, and informed consent in Section 4.3.2 infra.



consultation, often through environmental and social impact assessment, is conducted.

### 3.3.4 Community-Based Natural Resource Management

Perhaps the fullest form of involving the public in environmental decision making is community-based natural resource management, where the community is empowered to manage natural resources directly and to benefit from the resources. Prior to contemporary forms of government, communities often managed their resources directly without the intervention of a central state authority. Community management of resources has demonstrated many benefits, including increased compliance with locally established norms and institutions, sustainable management of resources, benefits flowing directly to communities, and promotion of good governance in local institutions.<sup>158</sup>

Experience over the past 40 years demonstrates that national agencies often struggle to effectively manage natural resources that are often in remote areas and about which national authorities may lack local knowledge. By empowering local communities to either assist in or be primarily responsible for natural resource management, a certain amount of power is reallocated to local communities that have a stake in sustainable resource management and that often have a long tradition of customary laws and institutions sustainably governing resource use. Experience implementing community-based natural resource management in developing countries suggests that local communities can sustainably manage natural resources while using democratic institutions that often help empower women.<sup>159</sup> Case Study 3.8 highlights

the success of community management of forests in the Philippines.

Devolving management authority over resources to communities is not a panacea. Lessons from areas where communities have been empowered to manage resources suggest that many communities need assistance to help establish or reestablish governance mechanisms that are inclusive and effective at resource management.<sup>160</sup> Just as there is no “one-size-fits-all” approach to public participation, communities have to learn how best to manage their resources within the local culture and context in conjunction with subnational and national authorities. Customary laws and institutions have to be monitored to ensure they do not contravene statutory laws, and the rights of traditionally disadvantaged populations have to be monitored by government to ensure they are fairly treated by customary institutions.<sup>161</sup>

A review of community-based natural resource management projects in Southern Africa found that they helped democracy take root in local institutions and enabled women to take leadership positions in community institutions.<sup>162</sup> But it also found challenges, including a failure at times to widely consult community members, capture of benefits by chiefs, and financial mismanagement. Capacity building for local communities and reasonable oversight by national agencies were found to be effective responses.<sup>163</sup>

Citizens are key government allies in monitoring and enforcing environmental and natural resource laws. Providing citizens with the tools and legal protection to act as the eyes and ears of environmental monitoring

<sup>160</sup> Blaikie 2006; Kellert et al. 2000; Pomeroy 1995.

<sup>161</sup> USAID 2013, 21-22; *see also* Section 5.1.4 *infra*.

<sup>162</sup> *Ibid.*, 22.

<sup>163</sup> *Ibid.*; *see also* Kawamoto 2012 (corruption in the community management of diamond revenues addressed through intervention by the Government of Sierra Leone and awareness raising).

<sup>158</sup> *See generally* USAID 2013.

<sup>159</sup> *Ibid.*

and enforcement agencies can greatly increase detection and compliance with laws. Increasingly, governments have turned to local citizens to act as de facto government agents.

Citizen participation in monitoring and enforcement rarely hands direct enforcement authority for environmental laws to the citizens—this would contravene rule of law by negating the checks and balances of the legal system. Instead, citizens are often called upon to report any behavior that appears illegal or to report actual wrongdoing to the authorities so that the authorities can act, as described in Case Study 3.9.

Citizens may organize groups that periodically investigate facilities, concessions, and other permitted entities to ensure compliance with the law. For example, Waterkeeper organizations in 44 countries on six continents monitor local water bodies to determine whether anyone is illegally discharging.<sup>164</sup> They may sample effluent being discharged to ensure compliance with published standards. And they monitor ambient water quality to ensure compliance. Where they find violations, they document them and share their findings with the government. They may also bring citizen suits to enforce, if the government declines to file suit. There are over 300 Waterkeeper organizations around the world. It is important to note that these organizations conduct their efforts in public spaces—and do not trespass in their investigations.

Because of the tremendous power imbalances between citizens and those who break environmental laws, it is critical that citizens be given legal protection through whistleblower laws, which are discussed at length in Section 4.4.2. These protections can include provision of confidential telephone hotlines and internet tools to enable the

public to report environmental problems.<sup>165</sup> Legal protections prohibiting retribution against whistleblowers is crucial. For example, the 2014 revision of China's Environmental Protection Law includes protections for whistleblowers who report environmental violations. Because whistleblowers often suffer retaliation, the law instructs environmental protection departments to keep the identity of whistleblowers confidential in order to protect their "legitimate" rights.<sup>166</sup>

Agencies often engage the public in monitoring and enforcement through collaboration between private citizens, civil society, and government agencies so that agencies can couple their expertise with the local knowledge and presence of citizens and nongovernmental organizations. In Cameroon, for example, the Last Great Ape Organization has collaborated with the government since 2006 to enforce the country's wildlife laws. Although it does not participate directly in the enforcement of wildlife or other environmental laws, representatives of the organization regularly participate in investigations, field operations, legal affairs, and post-conviction visits with convicted individuals.<sup>167</sup> Through civil society's contributions, the government has improved compliance and enforcement, achieving an 87 percent success rate in prosecuting violators of wildlife laws and accruing damage awards up to US\$200,000.<sup>168</sup> Extensive media coverage of the collaboration (some 365 media pieces in TV, radio, and print per year) has also led to greater public awareness of wildlife laws.<sup>169</sup>

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165 These are sometimes mandated by law. Under the Surface Mining Control and Reclamation Act, for example, citizens are allowed to report violations relating to coal mines and to accompany the inspector on an inspection that results from the citizen's complaint (30 U.S.C. sec. 1271(a)(1)).

166 Yang 2014.

167 UNEP 2006, 488-489.

168 See Clynes 2010.

169 Last Great Ape Organization Cameroon 2016.

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164 Cronin and Kennedy 1999; Luchette and Crawford 2008.

### Case Study 3.9: Integrating Information, Participation, and Reporting

“Publish What You Pay Indonesia” is an innovative example of the integration of access to information with public participation in environmental monitoring and enforcement. This Android-based internet application enables the public to check the location of oil, gas, and mining concessions, the revenue they generate, and the social conditions in the surrounding area. It also ties to the government-run citizen complaint and information submission system, LAPOR.<sup>a</sup> The application maps the concession locations so that the public can detect if a concession is operating outside of its boundaries, information that is often difficult to determine for an average citizen who would not know the legal boundaries of a concession. Provision of information about the revenue generated and the socio-economic status of the region allows the public to understand the concession’s economic contribution to the region.

Integration of the LAPOR system allows citizens to contact government directly. This innovative system was established in 2011 to allow citizens to provide feedback to the government on key initiatives. It was so popular that it was expanded to all areas. A mandate was put in place that any complaint be responded to by the responsible agency within five working days. Citizens can send complaints by texting, on its website, through its mobile app, or on Twitter.<sup>b</sup> The LAPOR system also lets government officials communicate with one another and verify that agencies are being responsive to citizens’ needs. The system currently fields over 500 complaints per day.<sup>c</sup>

- a. <https://www.opengovpartnership.org/stories/open-mining-extractive-data-disclosure-citizen-empowerment>.
- b. <https://govinsider.asia/innovation/inside-lapor-indonesias-complaints-unit/>.
- c. Ibid.

In 2015, China announced it would pay rewards of up to 50,000 yuan to residents who reported serious environmental violations, including the dumping of hazardous waste or radioactive materials, and 3,000 yuan to residents who report firms that are improperly using or tampering with environmental monitoring equipment.<sup>170</sup>

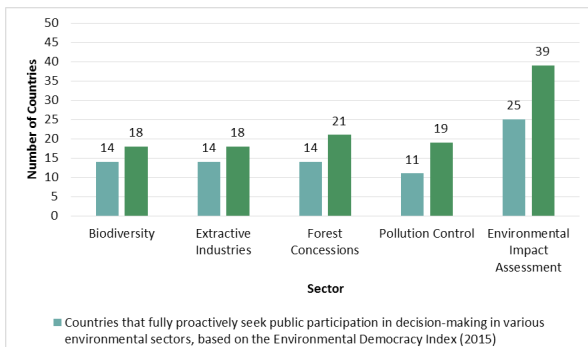
In some countries, the government deputizes volunteers to enforce environmental laws. In Fiji, the Fisheries Act enables the minister

responsible for fisheries to appoint honorary fish wardens. The wardens are tasked with the prevention and detection of violations of the Act. These volunteers play an important role in policing customary fishing grounds, and they are usually a member of the tribe or clan that owns the fishing grounds.<sup>171</sup> In the Philippines, the Implementing Rules and Regulations of the Wildlife Act provides for measures to deputize members of the public as Wildlife Enforcement Officers. The Act

170 Wong 2017.

171 UNEP 2006, 408–410.

foresees the deputation of private volunteers and citizen groups to assist in all aspects of the Act's enforcement, including the seizure of illegal wildlife, arrest (even without a warrant), and surveillance.<sup>172</sup>



Women from Komo (Republic of the Congo) learning to map in the forest, as part of the Extreme Citizen Science (ExCiteS) Intelligent Maps project. Photo: Gill Conquest/ExCiteS, University College London (CC-BY-SA 3.0).

Citizens also serve as critical monitors of environmental quality in many countries using so-called citizen science. Equipped with basic training, citizens can monitor water quality, air quality, species diversity and prevalence, and many other environmental indicators.<sup>173</sup> They can greatly extend the reach of government resources with little investment on the government's part to collect significantly more data than trained government technicians. While this information can be very helpful, citizen-generated data may not always substitute for data collected using official government methods and official chains of custody, which may be required by courts under their rules of evidence. In such circumstances, countries may wish to consider legal amendments that recognize the use of citizen science in investigations and prosecution, even if it may still be challenged in court.

There are several innovative and impactful uses of citizen science.<sup>174</sup> The sea turtle monitoring network Grupo Tortuguero investigates turtle diet, distribution, and disease at sites throughout northwestern Mexico. Thanks to the partnership between biologists, agencies, and communities, new marine protected areas have been established and sustainable fisheries practices that protect both turtles and livelihoods have been implemented. In the United States, the West Oakland Environmental Indicators Project allows individuals living in a poor neighborhood to collect air-quality and health data documenting the impact of air pollution on local citizens. And as illustrated in the photo to the left, scientists from University College London are working in the Republic of the Congo where smartphones allow individuals to record environmental impacts, such as poaching and illegal logging.<sup>175</sup>

While engaging the public to address a specific task is helpful, public engagement is often most helpful when it creates a relationship that will endure over time and build trust and understanding between citizens, the government, and companies. For example, the International Finance Corporation has reported experiences in Peru where mining companies engaged with communities through participatory science and scoping a site even before exploration, and this engagement helped forge a relationship between community members and the companies that facilitated future dealings.<sup>176</sup> These efforts demonstrate the benefits of investing in effective and locally relevant public participation to improving environmental and social compliance and outcomes.

172 Ibid.

173 See generally Blaney et al. 2016.

174 See Bonney et al. 2014.

175 Ibid.

176 IFC 2007, 74, 115.



### 3.4 Opportunities and Recommendations

Civic engagement is a cornerstone of environmental rule of law that leverages the resources of civil society and the public to better inform government decision making, assist in monitoring and enforcement of environmental laws, and hold accountable the regulated community and government agencies. Public participation in environmental decision making makes it more likely public concerns are surfaced early and can be addressed before private or government resources have been committed to a certain outcome. And engagement of the public in a meaningful dialogue with government and project proponents can help create trust and social cohesion that extends far beyond environmental issues.

Many States have taken steps to require access to information and public participation in environmental decision making. In many cases, the next step is to **provide more detailed requirements and procedures as well as training to implementing agencies** so that these requirements can have their full effect. Sufficient experience has been gained after decades of implementation that best practices and key methodologies can be broadly shared across government.

The relatively simple act of making environmental information accessible to the public can have a profound impact on compliance and enforcement. Publishing concession contracts online lets citizens know the boundaries and environmental requirements expected of concessionaires. Reporting environmental monitoring information and publishing periodic state-of-the-environment reports empowers citizens to decide what are the foremost environmental threats and how effectively the government is addressing them.

Many countries are using websites to their great advantage in engaging the public. **Websites can make information more readily available, collect citizen monitoring data and complaints, connect citizens with government officials, and allow officials to respond to citizen inquiries with speed and efficiency.** Although web interfaces are not a replacement for face-to-face relationship building with citizenry, they can simultaneously engage more people and lessen the burden on government of providing meaningful public participation.

With the broad acceptance of the importance of access rights, governments can focus on **fostering a culture of civic engagement** in which officials understand the value of engaging civil society. Actively informing the public of government data and vetting government decisions with citizens can become part of the mission of front-line agencies as much as their sectorial responsibilities. As the value of public review and input becomes more clear, bureaucratic resistance should drop, provided that resources are provided to allow agencies to foster this culture.

Agencies would not expect an auditor to be able to answer legal questions nor that a lawyer could audit a financial statement. In the same fashion, **agencies need dedicated, professional staff to engage civil society and to serve as a resource for government staff on civic engagement.** The diversity of legal requirements in this area coupled with the many techniques available to meaningfully engage the public make such positions essential to supporting agency staff who are required to engage or inform the public. In addition, given the highly political nature of many environmental decisions, a small investment in active and skilled professional civic engagement can result in significant payoffs through avoided conflicts and increased social cohesion.

One clear opportunity for improving environmental rule of law through civic engagement is ***expanding the use of citizen science***. Citizens can be the eyes and ears of government with a minimal amount of training and resources. Citizen science allows anyone with a cell phone and internet connection to become a pollution monitor, species tracker, and violation reporter. While citizens are not a replacement for trained government officials, they can greatly extend the reach and impact of environmental laws and agencies.

Civic engagement at times requires ***building the capacity of the public to engage thoughtfully and meaningfully*** with government and project proponents. Educating the public about their rights to access information and participate is a necessary first step, and providing tailored assistance when a community is unable to engage should be considered part of government's responsibility. This can build a more robust citizenry that can support stronger government and rule of law.

Civic engagement is easy to support as a slogan and idea, but requires attention, resources, and commitment to implement to its full potential. As countries work to implement laws that require access to information and public participation, many new techniques and best practices are coming to the fore. It is also becoming more apparent that civic engagement, even when it means addressing disagreements and controversies, when handled skillfully helps build relationships among communities, government, and business and strengthens the broader social fabric.