



Submission to the Office of the United Nations High Commissioner for Human Rights on the Draft Guidelines on Effective Implementation of the Right to Participate in Public Affairs by the Center for International Environmental Law

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Since 1989, the Center for International Environmental Law (CIEL) has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL seeks a world where the law reflects the interconnection between humans and the environment, respects the limits of the planet, protects the dignity and equality of each person, and encourages all of earth's inhabitants to live in balance with each other. CIEL pursues its mission through legal research and advocacy, education and training, with a focus on connecting global challenges to the experiences of communities on the ground. In the process, we build and maintain lasting partnerships with communities and non-profit organizations around the world.

We appreciate the opportunity to provide comments in preparation of the *Draft Guidelines on Effective Implementation of the Right to Participate in Public Affairs*. By supporting and accompanying communities to exercise and defend their right to public participation, primarily within environmental decision-making at a local, national, and global scale, CIEL has gained extensive experience regarding the gaps and obstacles in the application, enforcement and protection of this right. The significance of creating guidelines for States to fully implement the International Covenant on Civil and Political Rights (ICCPR), namely article 25, at this moment when people are facing a global crisis of systemic constraining of these fundamental rights cannot be overstated.

General Considerations

The human right to self-determination by virtue of which all peoples can pursue what they determine to be their economic, social and cultural development through inclusive consultative processes, based on informed and meaningful dialog should be at the core of the guidelines on the right to participate in public affairs.

As the Human Rights Committee has noted, the right to participate is “a broad concept that relates to the exercise of political power. It encompasses all aspects of public administration, as well as, the formulation and implementation of policy at international, national, regional and local levels.”¹ Consequently, the guidelines should stress the importance of the right to participate at international levels. For example, as noted during the Addis Ababa regional consultation for these guidelines, decision-making processes at an international level will determine the environmental

¹ United Nations Office of the High Commissioner for Human Rights (OHCHR), *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service*, ¶ 5, CCPR/C/21/Rev.1/Add.7 (12 July 1996), <http://www.refworld.org/docid/453883fc22.html>.

future of the planet, and the level of participation in these processes therefore has profound consequences for those who will be most affected by these decisions.²

In recognition of the crucial role all citizens must play when participating fully in environmental decision-making, the Rio Declaration and Aarhus Convention solidified not only the link between environmental and human rights but the essential role that access to information, public participation in decision-making and access to justice in public environmental matters should have. An integral part of this fundamental right to participate is the right to access information. The guidelines should emphasize that States must ensure that all stakeholders, including those who have been historically marginalized and discriminated, have access to information in a timely and transparent manner.³ This will not only guarantee a meaningful and knowledgeable exchange and dialogue, but it also creates a way for States to facilitate and encourage people to participate stemming from the transparency and openness for all to access public forums. A State's willingness toward transparency will ultimately serve to create the conditions needed to participate within an environment of trust, security and respect for all stakeholders.

We would also emphasize the significance of women's participation in public affairs and the obstacles women face when they attempt to play a significant role in decision-making at all levels. As an example: foreign investment projects may have a particularly negative impacts on rural women, especially because the implementation of these projects can compound unequal power relations due to the fact that land ownership remains a domain of male privilege through the interplay between patriarchal structures, and retrogressive traditions. The Committee on the Elimination of Discrimination of Women has therefore crafted detailed recommendations outlining how States can ensure that rural women participate fully in decision-making processes, in particular on environmental issues.⁴ Additionally the Committee composed specific recommendations for State parties to implement regarding women's participation in political and public life at all levels and sectors.⁵

As recognized by the OHCHR "participation requires a long-term and genuine commitment to engage in processes of intensive dialogue regarding the development of policies, programmes and measures in all relevant contexts".⁶ The obligation of the State to guarantee meaningful engagement and participation of communities with regard to development policies and projects becomes ever more drastic when lives and livelihoods and the environment are at stake. After recognizing the need to obtain the views of people primarily affected by development projects, some international

² United Nations Economic Commission for Africa (ECA), Concept Note, *Regional consultation for sub-Saharan Africa on draft guidelines on the effective implementation of the right to participate in public affairs*, ¶ 13 (2017), http://www.ohchr.org/Documents/Issues/PublicAffairs/AddisCN_EN.pdf.

³ See United Nations Office of the High Commissioner for Human Rights (OHCHR), *General Comment No. 34: Freedoms of opinion and expression*, ¶19, CCPR/C/GC/34 (12 Sept. 2011), <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁴ United Nations Office of the High Commissioner for Human Rights (OHCHR), Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Mongolia*, ¶ 33 (10 Mar. 2016), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MNG/CO/8-9&Lang=En.

⁵ *Id.* at ¶ 23.

⁶ United Nations Office of the High Commissioner for Human Rights (OHCHR), *Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them*,

¶ 11, A/HRC/30/26 (23 July 2015),

<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx>.

finance institutions have created valuable resources providing detailed guidance for stakeholder consultation and participation which should be referenced in the creation of the guidelines.⁷

The shrinking of democratic spaces through the monopolization of the decision-making process by those in power is one of the greatest threats to the realization of participation rights.⁸ Of great concern are the numerous examples of this trend to delegitimize the claims of ethnic communities who oppose the encroachment of mining projects on their traditional lands.⁹

The harassment, criminalization and killing of human rights defenders are other serious threats to the right to participation. As the Bangkok regional consultation for these guidelines demonstrated, individuals and communities have been subjected to criminal charges when demanding their right to participation in projects affecting the environment.¹⁰ Thus participation should be ensured at all stages and levels of engagement within public affairs, providing the freedom for communities and stakeholders to organize as they choose, without fear of reprisal or retribution.

Participation in Investment Agreements and Investor State Dispute Settlement

Another area which warrants specific recommendations within the guidelines should be investment agreements and investor state dispute settlement (ISDS). The nature of investment agreements coupled with the opacity and unequal access to justice at dispute tribunals fosters a system where corporations can bring their claims against public interest laws, while denying access to justice for those who have been harmed by these same corporations.¹¹

The guidelines should ensure that investment agreements and investor state dispute systems do not impede the rights of citizens to public participation. These agreements provide broad corporate rights that affect a State's ability to protect human rights. For example, international investment agreements create a political space where foreign investors and local populations may struggle over the State's local resources. The use of local resources is fundamental to people's lives and livelihoods; therefore a host State's population must have the right to participate in any decision regarding impacts on the State's resources.

As exemplified by a myriad of international trade agreements, numerous investment protection provisions are negotiated within the context of trade agreements. States should ensure that the public is provided adequate information about the content of these agreements, including whether they contain investment protection and dispute settlement. For example, the European Commission held an (albeit narrowly circumscribed) consultation on the investment provisions in the proposed trade agreement with the United States. Likewise, the North American Free Trade Agreement is currently under renegotiation, yet civil society has been unable to participate in any meaningful way or engage in the discussion on investment provisions or dispute settlement as pertains to

⁷ See The World Bank, *Stakeholder Consultations in Investment Operations Guidance Note*, (2011), <http://documents.worldbank.org/curated/en/830941468323985308/pdf/671210WP00PUBL0ultations0Note0web20.pdf>

⁸ *Id.* at ¶ 16.

⁹ Sarah Anderson & Manuel Perez-Rocha, *Mining for Profits in International Tribunals*, p. 8, Institute for Policy Studies (Apr. 2013), <http://www.ips-dc.org/wp-content/uploads/2013/05/Mining-for-Profits-2013-ENGLISH.pdf>.

¹⁰ United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), *Regional consultation on draft guidelines on the effective implementation of the right to participate in public affairs: Summary of the discussions*, p. 3 (Oct. 2017), <http://www.ohchr.org/Documents/Issues/EqualParticipation/DraftGuidelines/BangkokSummaryDecisions.docx>.

¹¹ S2B, Center for International Environmental Law (CIEL), Rosa Luxemburg Stiftung, *A World Court for Corporations How the EU Plans to Entrench and Institutionalize Investor-State Dispute Settlement*, (2017), <http://www.ciel.org/wp-content/uploads/2017/12/AWorldCourtForCorporations.pdf>

Chapter 11.¹² States should also ensure that the public is adequately apprised about the range of human rights issues that could be implicated by these provisions.

As a result, many investment treaty negotiations take place with little transparency and limited public participation, where even members of parliament play a minimal role in the oversight of the negotiations.¹³ Agreements that are made during private negotiations and executed without public scrutiny necessarily impede the public's ability to participate in decision-making processes that may affect their human rights and the environment they depend on for their livelihoods.¹⁴ Thus, under the guise of the public good, important decisions are made by the executive in the absence of its citizenry but outside of any deliberative democracy.¹⁵ The Committee on Economic, Social, and Cultural Rights has specifically called on a State party to ensure that consultations with stakeholders are undertaken in the course of the drafting, negotiation and ratification trade and investment agreements.¹⁶ As an example, Costa Rica held a referendum on whether to ratify the Central American Free Trade Agreement, the only State to do so.¹⁷

Because the decisions to invite investment related to resource extraction and exploitation have such a direct effect on the human rights of communities who also use, protect and depend on those resources, the public must be provided with an opportunity to participate in the initial decision-making process about whether to invite any investment in a particular area in the first place. Unfortunately, the public is rarely engaged at this stage of decision-making.

States must also ensure adequate public participation when deciding whether to allow a specific type of investment. Foreign investment contracts, such as private agreements between a foreign corporation and the host State, are negotiated without public participation, making it impossible for the host State's local population to judge whether or not their elected governments are acting in their best interest during contract negotiations. Although permitting processes which have some level of public participation (such as environmental impact assessments) may be associated with specific investment agreements or policies, the implicit decision to allow the investment has already been made.

The Working Group on the issue of human rights and transnational corporations has also recommended that States ensure that those who may be affected by investment contracts made with international investors be able to participate in the decision-making process.¹⁸

As the participants in the Addis Ababa regional meeting for these guidelines observed, the protection of the right to access information is an essential tool in ensuring the right to participate,

¹² See Center for International Environmental Law (CIEL), *As NAFTA Negotiations Open, Doors Close on Transparency*, (August 16, 2017). <http://www.ciel.org/news/nafta-negotiations-open-doors-close-transparency/>

¹³ Lorenzo Cotula, *Democratising International Investment Law: The Case and Channels for Citizen Engagement*, in *RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES* 263, 264–64 (Kavaljit Singh & Burghard Ilge eds., 2016), <https://www.somo.nl/wp-content/uploads/2016/03/Rethinking-bilateral-investment-treaties.pdf>.

¹⁴ See Nicolàs M. Perrone, *The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?*, 7 *TRANSNAT'L L. THEORY* 383 (2016).

¹⁵ Cotula, *supra* note 10, at 265.

¹⁶ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of France*, ¶ 10, E/C.12/FRA/CO/4 (13 July 2016).

¹⁷ See Eliza J. Willis & Janet A. Seiz, *The CAFTA Conflict and Costa Rica's Democracy: Assessing the 2007 Referendum*, 54 *LATIN AMERICAN POL. & SOC.* 123 (2012).

¹⁸ United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to Mongolia*, ¶ 88, A/HRC/23/32/Add.1 (2012), http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/32/Add.1.

“including as a means to challenge the opacity of decisions made by private actors performing public functions, such as multinational corporations dealing with environmental issues and land rights.”¹⁹

Furthermore, when an agreement has been made and put into effect, the local population needs to have an understanding of the rights assigned to foreign investors in order to continue participating in the agreement’s enforcement.²⁰ To enforce international investment agreements, foreign corporations are granted the right to bring claims to an arbitral tribunal. This right is unique, sometimes given to host states but never to individuals, even though individuals’ rights may be affected by the foreign corporation’s actions within the host State.²¹ The possibility for affected peoples to participate in ISDS is not a guaranteed right, and when participation is specifically permitted by the tribunal, the affected parties are limited to submitting amicus curiae briefs.²² The public should also have the opportunity to participate in the investor-state dispute settlement process. Thus, the guidelines should recommend that States should not agree to arbitration or judicial processes that do not allow full rights of intervention to the concerned citizens.

Moreover, when disputes arise between the foreign corporation and the host State, they are often resolved through negotiations before even reaching arbitration.²³ Many investment agreements explicitly require that the foreign corporation and host State negotiate before the foreign corporation can pursue ISDS, and as a result, the private negotiations between the foreign corporation and the host State are shielded by confidentiality, as is the eventual settlement.²⁴ It is common for disputes to be settled before reaching formal ISDS, which can result in major concessions by the State and adverse effects on local resources, with no opportunity for the local population to participate in the negotiations at all. Thus, the guidelines should also recommend that States allow public participation in the decision and conditions about whether to settle an investor-state dispute or not.

We welcome the OHCHR’s initiative to develop robust Guidelines that may serve States in the Effective Implementation of the Right to Participate in Public Affairs. For all communication regarding this submission please contact CIEL attorneys Carla García Zendejas and Layla Hughes at lhughes@ciel.org.

¹⁹ United Nations Economic Commission for Africa (ECA), *Regional consultation on draft guidelines on the effective implementation of the right to participate in public affairs: Summary of the discussions*, p. 3 (Sept. 2017), <http://www.ohchr.org/Documents/Issues/PublicAffairs/SummaryDiscussionsAddisAbaba.docx>.

²⁰ Perrone, *supra* note 11, at 394.

²¹ Kaitlyn Y. Cords & Anna Bulman, *Corporate Agricultural Investment and The Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes*, 20 UCLA J. INT’L L. & FOR. AFF. 87, 114 (2016).

²² Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 832 (2011).

²³ Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 458 (2010).

²⁴ *Id.*