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## Democracy in Development: Toward a Legal Framework for the Americas

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I.	THE ROOTS OF AN INTER-AMERICAN STRATEGY FOR PARTICIPATION .....	6
	<i>A. Stockholm</i> .....	6
	<i>B. Rio de Janeiro</i> .....	6
	<i>C. Miami</i> .....	9
	<i>D. Montevideo</i> .....	11
	<i>E. Santa Cruz</i> .....	14
II.	THE FORMULATION OF A STRATEGY FOR PARTICIPATION—THE MIAMI CONSULTATION .....	16
III.	A STRATEGY FOR PARTICIPATION—LEGAL POLICY PRIORITIES ...	20
	<i>A. Definitions</i> .....	20
	<i>B. Recommendations for Action</i> .....	23
	<i>C. Enabling Responsible Participation</i> .....	23
	<i>D. Strengthening Representative Institutions</i> .....	27
	<i>E. Expanding Avenues for Participation</i> .....	29
	<i>F. Access to Information</i> .....	30
	<i>G. Access to Process</i> .....	31
	<i>H. Access to Justice</i> .....	31
IV.	CONCLUSION .....	32

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"In Latin America, our citizens are more citizens than they were in the 80's."

Raul Brañes, Washington 1996<sup>1</sup>

As Latin America and the Caribbean have emerged from a period of economic and political instability over the past decade, no principle seems more crucial, and more misunderstood, than the principle of democratic decision-making. Some will argue that this region's recent progress is fueled by market liberalization and economic reform, and to be sure the market is a powerful engine of prosperity. Trade expansion and economic growth are now the *sine qua non* of regional dialog, and the Free Trade Area of the Americas (FTAA), first announced at the 1994 Miami Summit, has become the stage, the script, and the aspiration of almost all of the region's political actors.

However, without the democratic trends that initially helped to open markets and spur investor confidence, it is not clear that the region would be experiencing its present economic growth. Political reform, democratization in particular, made the region's economic reform and growth possible. Thus, while trade, treasury, and *hacienda* ministries focus on opening markets and securing new economic pacts, progress toward meaningful participatory democracy must continue on a parallel and equal path if the region's growth is to be sustained.

A market untempered by democracy will soon become a tool of political repression and social stagnation. If direct political power is accumulated along with wealth, development decisions will increasingly serve narrow interests and short-term goals. If instead political power is shared, even while wealth is accumulated, decisions will necessarily serve broader interests and more long-term goals. While competent enterprises and successful entrepreneurs may dominate the marketplace, the people must dominate development policy. Transparent and shared policy-making will help assure that the benefits of open markets and prosperity are more equitably distributed and that the benefits continue so they may inure to future generations. This approach will also reduce the negative side effects of economic growth, particularly where the growth depends on natural resource extraction or leads to environmental degradation.

Thus, for the economic growth and development currently underway in the Western Hemisphere to be sustainable, they must proceed within a framework of transparency, participation, and democratic decision-

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1. Raul Brañes, Statement during a meeting at the offices of the USAID Global Bureau Center for the Environment (May 1996). Brañes recently retired as the Legal Director of the United Nations Environment Programme Regional Office for Latin America and the Caribbean located in Mexico City.

making. As the region pursues economic growth it must pursue democratic strength with equal vigor.

Yet democratic strength is not a mere function of electoral process. It is true that progress toward democracy is often measured by the more obvious and fundamental indicator of a government chosen in free and fair elections marked by universal suffrage.<sup>2</sup> A true democracy, however, must additionally feature transparent and participatory decision-making and a government that is in constant dialog with its citizens to shape and direct its fundamental policies. It is pluralistic decision-making that is at the heart of democracy, and there must exist a “public space,” within which citizens learn from and debate each other, and where the government is informed about the public will.<sup>3</sup>

Often described as a “marketplace of ideas,”<sup>4</sup> this public space is a fundamental tool of a true democracy. If government does not facilitate, promote, and take its policy guidance from informed and open public deliberation, then democracy is no more than the periodic election of a monarch.

This principle is nowhere more important than in the field of development. With the great push in recent years toward making development more sustainable, there is a growing recognition that

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2. See, for example, the assertion that “Schumpeter (1943), Berelson (1954), Dahl (1956), and Lipset (1963), among others, have argued that allegedly inherent tendencies of mass publics to be authoritarian, irrational, antidemocratic, intolerant of civil liberties, and ill informed about political issues require that mass participation in decision making be confined mainly to leadership choice in elections that are carefully managed by plural, competing elites.” John A. Booth, *Introduction: A Framework for Analysis*, in *ELECTIONS AND DEMOCRACY IN CENTRAL AMERICA REVISITED* 3-4 (Mitchell A. Seligson & John A. Booth eds., 1995).

3. Ramón Daubón, Presentation to Opening Plenary, Montevideo Conference on Public Participation in Sustainable Development Decision-Making (August 1996) [hereinafter Montevideo Conference]. It is within this public space that citizens may find “that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). While Justice Brennan’s opinion in *Keyishian* dealt with academic freedom, the principle can be equally applied to the need for open debate in the greater civil society, and the ability of government to inform itself of the public interest and the public will through this debate.

4. This oft-used phrase found its expression in Justice Holmes’s dissent in *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting). Holmes’s dissent challenged an espionage conviction of five Russian-born defendants, some of whom were avowed “rebels,” “revolutionists,” and “anarchists” charged with circulating pamphlets that were, in the opinion of the majority, “obviously intended to provoke and to encourage resistance to the United States” in World War I. *Id.* at 617-18, 624. Holmes found “no hint at resistance to the United States,” but instead only an attempt “to change the mind of the country.” *Id.* at 628-29. He found no danger in this pursuit, reasoning that “[w]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” *Id.* at 630.

participation brings sustainability. When more affected parties join in decisions about development, it is more likely that the decisions will reflect long-term community interests rather than immediate and short-term profit making for a narrow interest.

Of course there are limits to the value of participatory decision-making. Anyone who considers the actions of a lynch mob will admit that community decision-making does not always achieve the most rational or sustainable result. But as Jefferson wrote, "I know of no safe repository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education . . . ."<sup>5</sup> Within the bounds of a rational legal framework, and informed by relevant sociological, technical, and scientific data, communities are almost always better at making decisions as a whole than any given individual within that community acting alone.

For all of these reasons, development in the Americas, in order to be sustainable, must be participatory and democratic. Those working in the development field—from road builders to agro-economic analysts—must consider the importance of input from the parties affected by and interested in the results of development. This input should both shape and direct development choices if they are to serve the future rather than simply serve the interests of a few advocates of a particular project or activity.

Yet experience in the Americas with the development of democracy suggests that building a framework for participation is not an easy task. Aside from the practical problems of translating open political debate into policies within systems that in some cases have historically functioned as oligarchies,<sup>6</sup> there even appears to be occasional philosophical resistance to engaging "civil society" in decision-making. Some governments appear to take the position that the representative of an elected government is better able to interpret or articulate the public will than nongovernmental actors or organizations who engage in a policy debate on behalf of the public.<sup>7</sup> While this position may have some

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5. Letter from Thomas Jefferson to William Charles Jarris (Sept. 28, 1820), in *THE WRITINGS OF THOMAS JEFFERSON* 177 (H.A. Washington ed., 1854).

6. See generally LESTER LANGLEY, *THE AMERICAS IN THE AGE OF REVOLUTION* (1996) (discussing the historic bases for elite or familial rule in the region).

7. This statement is based on informal interviews with representatives of various permanent missions to the Organization of American States conducted during 1996 and 1997. The author does not wish to identify specific individuals or delegations, as the conversations were not designed to be on the record, and their specific identities are not relevant to the scope of this Article.

philosophical roots in the Athenian notion that the state (or *polis*) is its citizens,<sup>8</sup> it denies the true meaning of this ideal when used to insulate governments from dialog with their citizens. This philosophical effort to set governments apart from their citizens breeds a practical tendency to challenge the backgrounds, motives, expertise—even the sources of funding for—nongovernmental actors. Often, the result is a breakdown of trust and productive engagement.

It is true—at least in the sustainable development field—that most nongovernmental organizations (NGOs) in the Latin American and Caribbean regions are not membership or constituency based.<sup>9</sup> Instead, they are “expert” organizations that derive their credibility from their academic knowledge of a subject rather than their representation of a specific group of citizens. They also often receive funding (or partial funding) from foreign or international sources, leading to the occasional charge that they have even less of a voice in domestic affairs than they might otherwise be entitled to.

These organizations are, however, a legitimate part of the public, and provide representative voices even where those voices cannot yet be self-financed. More importantly, they help to inform the debate through their expertise, and the broader public can take up their arguments when they resonate within a broader community. In a society where individuals are not historically inclined to join a policy dialog directly, these organizations are an important proxy for the public voice. They must be allowed to enter the debate even as more “representative” organizations evolve and individual citizens gain comfort with a participatory process.

These issues provide a theoretical background for efforts to expand public participation in decision-making in the hemisphere—efforts to create, maintain, and draw guidance from a “public space” that is open, inclusive, informed, and functional. The efforts have their roots in the *Stockholm Declaration of 1972*, and they have been nurtured at a hemispheric level through and after the 1996 Bolivia Summit of the Americas for Sustainable Development.

Interestingly, the efforts have continued on an international and regional level both to provide guidance for governments and nongovernmental actors operating at the national and sub-national level, as well as to open up multilateral organizations to greater nongovernmental input. While these efforts have created their own set of challenges, they have also created some unprecedented and important

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8. See PHILIP BROOKE MANVILLE, *THE ORIGINS OF CITIZENSHIP IN ANCIENT ATHENS* 6 (1990) (arguing that “[i]n fact, the state—the *polis*—was its citizens”).

9. See *DIRECTORY OF NATURAL RESOURCE ORGANIZATIONS IN THE AMERICAS* (Inter-American Found., 1995).

opportunities. This Article will explore the process to date in the Western Hemisphere—a process that is being catalyzed through the 1996 Bolivia Summit mandate for the formulation of an “Inter-American Strategy for Public Participation”—and will offer a perspective on legal frameworks that should be at the heart of the process.<sup>10</sup>

## I. THE ROOTS OF AN INTER-AMERICAN STRATEGY FOR PARTICIPATION

### A. *Stockholm*

At the first United Nations Conference on the Human Environment held in Stockholm in 1972, the delegates proclaimed that “[t]o defend and improve the human environment for present and future generations has become an imperative goal for mankind . . . .”<sup>11</sup> Because of the diversity of political systems represented at Stockholm, the Declaration could not speak openly of democracy, but it did conclude that “[t]o achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts.”<sup>12</sup>

### B. *Rio de Janeiro*

The somewhat veiled reference to citizen “responsibility” and involvement in “common efforts” in Stockholm was updated, and citizens were clearly identified as important to the decision-making process at the 1992 United Nations Summit on Environment and Development held in Rio de Janeiro (Rio Summit). At the Rio Summit, delegates from 109 nations and the European Community governments openly acknowledged that public participation is integral to sustainable development and to fulfilling the mutual commitments made in Rio. Principle 10 of the *Rio Declaration* recognizes that “[e]nvironmental

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10. The author has served as part of the technical team developing the Inter-American Strategy for Participation (ISP) to date, having helped to facilitate the Montevideo Conference where the ISP was conceived, as well as subsequent efforts to define and guide the ISP. Yet the ISP is, by its nature, a collaborative effort that has been and will be shaped by many individuals and organizations, and must ultimately be approved by the 34 member states of the Organization of American States (OAS). Thus, the views expressed herein are solely those of the author, unless otherwise indicated, and they should not be taken as a definitive interpretation of the ISP or its ultimate goals or objectives.

11. *Report of the United Nations Conference on the Human Environment*, para. 6, reprinted in U.N. Doc. A/CONF. 48/14 and Corr. 1 (1972), 31 ILM 1416 [hereinafter *Stockholm Declaration*].

12. *Id.* para. 7.

issues are best handled with the *participation of all concerned citizens*, at the relevant level.”<sup>13</sup>

The *Rio Declaration* also identifies categories of persons traditionally excluded from decision-making for whom integration into the decision-making process is deemed particularly important: women;<sup>14</sup> youth;<sup>15</sup> and indigenous people.<sup>16</sup> These groups are also the subject of separate chapters in the action plan that accompanied the *Rio Declaration, Agenda 21*.<sup>17</sup> Women,<sup>18</sup> youth,<sup>19</sup> and indigenous groups,<sup>20</sup> along with trade unions,<sup>21</sup> business and industry,<sup>22</sup> the “scientific and technical community,”<sup>23</sup> and “farmers and their representative organizations”<sup>24</sup> are identified in *Agenda 21* as communities that must be integrated into decision-making. *Agenda 21* also urges the “broadest public participation and the active involvement of non-governmental organizations and other groups.”<sup>25</sup>

The *Rio Declaration* and *Agenda 21* represent progress from Stockholm by openly endorsing a role for citizens in development decisions, and in promoting the integration of groups that do not traditionally have such a role. In fact, the *Rio Declaration* takes an even more important step by identifying three specific areas where citizen involvement should be promoted. Using language that is relatively prescriptive, Principle 10 of the *Rio Declaration* states:

At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the *opportunity to participate in decision-making processes*. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to*

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13. *Report of the United Nations Conference on Environment and Development*, Principle 10, U.N. Doc. A/CONF. 151/26/Rev.1 (1992) (emphasis added) [hereinafter *Rio Declaration*].

14. *Id.* Principle 20.

15. *Id.* Principle 21.

16. *Id.* Principle 22.

17. *Report of the United Nations Conference on Environment and Development*, Annex 2, Agenda Item 21, U.N. Doc. A/Conf. 151/26/Rev.1 (1992) [hereinafter *Agenda 21*].

18. *Id.* para. 24.4.

19. *Id.* para. 25.1.

20. *Id.* para. 26.3.

21. *Id.* para. 29.11.

22. *Id.* para. 30.1.

23. *Id.* para. 31.1.

24. *Id.* para. 32.6(c).

25. *Id.* para. 1.3; see also *id.* ch. 27.

*judicial and administrative proceedings, including redress and remedy,* shall be provided.<sup>26</sup>

Thus, Principle 10 of the *Rio Declaration* not only links participation in political processes to sustainable development, but also establishes three key principles that have since become the focus of formulating participation policy. These three principles can be described as:

- Access to information;
- Access to process; and
- Access to justice.

Together, the three “access principles” provide the most concise and pointed basis for understanding how governments can engage the public in a meaningful and productive manner. They provide a focus for legal and regulatory standards that assure open decision-making processes.

While some governments have since shied away from committing to specific legal mechanisms for participation,<sup>27</sup> the Rio delegates clearly accepted the importance of concrete legal mandates, and emphasized the use of legal and regulatory means to assure public participation. *Agenda 21* calls on governments “to promulgate or strengthen, subject to country-specific conditions, any legislative measures necessary to enable the establishment by non-governmental organizations of consultative groups, and to ensure the right of non-governmental organizations to protect the public interest through legal action.”<sup>28</sup> Governments are urged “[t]o develop or improve mechanisms to facilitate the involvement of concerned individuals, groups and organizations in decision-making at all levels,”<sup>29</sup> to “establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and [to] provide access to individuals, groups and organizations with a recognized legal interest.”<sup>30</sup>

*Agenda 21* also promotes “[m]echanisms for appropriate involvement of individuals and groups in the development and enforcement of laws and regulations on environment and development,”<sup>31</sup>

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26. *Rio Declaration*, *supra* note 13, Principle 10 (emphasis added).

27. Several governments, for example, resisted specific language in the Summit of the Americas II Plan of Action that would call for the use of “legal and regulatory mechanisms” to assure public participation in development decision-making. The Summit of the Americas II will be held in April 1998 in Santiago, Chile.

28. *Agenda 21*, *supra* note 17, para. 27.13.

29. *Id.* para. 8.3.

30. *Id.* para. 8.18.

31. *Id.* para. 8.21(d).



and “mechanisms to allow non-governmental organizations to play their partnership role responsibly and effectively.”<sup>32</sup>

Thus, governments took a real stride forward at the Rio Summit as they affirmed the integral role of citizens in development decisions and provided an outline of the areas where the public should become engaged—emphasizing legal processes as important vectors for participation. But, predictably, *Agenda 21* stops short of specific recommendations. As an international consensus document, it relies on broad statements rather than concrete commitments. With the exception of one provision relating to trade union involvement in environmental audits and environmental impact assessments,<sup>33</sup> *Agenda 21* does not identify or endorse any particular laws or legal policies for integrating civil society into sustainable development decision-making.

### C. Miami

The 1994 Miami Summit represented a step forward for development participation as Miami partners embraced the importance of public participation at a hemispheric level and made a clear commitment to engage society in decision-making. In addition, participation was openly discussed and promoted in the context of democracy as an underlying political system. While the final Miami documents were less detailed than the *Rio Declaration* and *Agenda 21* on the subject of participation, the theme was clearly embraced as a regional priority.

In Miami, the heads of state affirmed that democracy includes not only free and fair elections, but also “the right of all citizens to participate in government.”<sup>34</sup> The governments committed to “facilitate fuller participation of our people in political . . . activity, in accordance with national legislation.”<sup>35</sup> They also affirmed the importance of including in the political dialog women<sup>36</sup> and indigenous groups,<sup>37</sup> deemed to be “traditionally marginalized.”<sup>38</sup>

The first chapter of the *Miami Plan of Action* is entitled “Preserving and Strengthening the Community of Democracies in the Americas,” and

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32. *Id.* para. 27.5.

33. Chapter 29 states that “[t]rade unions should . . . (a) Seek to ensure that workers are able to participate in environmental audits at the workplace and in environmental impact assessments.” *Id.* para. 29.11.

34. Summit of the Americas Declaration of Principles and Plan of Action, Dec. 9-11, 1994, Declaration of Principles paras. 3-9, 34 I.L.M. 808 [hereinafter *Miami Plan of Action*].

35. *Id.* para. 10.

36. *Id.* para. 19.

37. *Id.* para. 18.

38. *Id.* ch. I, pt. 3, para. 3.

includes three sections that encourage increased citizen participation.<sup>39</sup> One of these three sections is specifically devoted to “Invigorating Society/Community Participation,” and it begins with a broad statement of the values of civil society participation:

A strong and diverse civil society, organized in various ways and sectors, including individuals, the private sector, labor, political parties, academics, and other non-governmental actors and organizations, give depth and durability to democracy. Similarly, a vigorous democracy requires broad participation in public issues. Such activities should be carried out with complete transparency and accountability, and to this end a proper legal and regulatory framework should be established to include the possibility of obtaining technical and financial support, including from private sources.<sup>40</sup>

This section affirms a commitment to public participation and discusses aspects of a legal framework within which participation will occur. It also hints at an undercurrent in the Miami negotiation process concerning nongovernmental organization accountability. Some delegations expressed concern over the inclusion in national decision-making processes of NGOs whose sources of financing or control were external or simply unknown.<sup>41</sup> The language on transparency and accountability and the creation of a “proper legal network” thus appears aimed at the “activities” of nongovernmental actors, and not necessarily the conduct of the government.

This focus is also apparent in the first of four action items within the section entitled “Invigorating Society/Community Participation,” which commits governments to “[r]eview the regulatory framework for non-governmental actors with a view to facilitating their operations and promoting their ability to receive funds.”<sup>42</sup> This appears supportive of nongovernmental actors, offering the prospect of support for management, logistical, and financial needs. The following sentence, however, qualifies the offer, stating that “[t]his review will emphasize the management and oversight of resources as well as transparency and the accountability to society of said actors.”<sup>43</sup>

The governments go on to commit themselves to “take steps to improve” the participation of “traditionally marginalized” groups in “social activities and initiatives,”<sup>44</sup> to exchange progress reports at the

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39. *Id.*

40. *Id.* ch. I, pt. 3, para. 1.

41. This statement is based on informal interviews with participants in the Miami negotiation process.

42. Miami Plan of Action, *supra* note 34, ch. I, pt. 3, para. 2.

43. *Id.*

44. *Id.* ch. I, pt. 3, para. 3.

1996 Bolivia Summit,<sup>45</sup> and to “consider the development”<sup>46</sup> of an Inter-American Development Bank (IDB) program encouraging “responsible and accountable philanthropy and civic engagement in public policy issues.”<sup>47</sup>

While these commitments may appear progressive on their face, it should be recognized that the proposed IDB program appears to emphasize the accountability and responsibility of civil society actors—not governments. In addition, active participation by those “traditionally marginalized” is encouraged in “*social* activities and initiatives,” not *political* processes and public policy making.

Elsewhere in the *Plan of Action*, governments do commit to “[p]romote the participation of women in the decision-making process in all spheres of political, social and economic life,”<sup>48</sup> and to “[r]eview and strengthen laws for the protection of the rights of minority groups and indigenous people . . . to facilitate active civic participation.”<sup>49</sup> These commitments, taken at face value, seem to contemplate the right to engage in decision-making outlined in Rio, although they lack the *Rio Declaration*’s clarity.

In summary, the Miami Summit was a positive step forward for civil society’s participation in development decision-making, even while some of the tensions inherent in society’s relationship with the state began to crystallize. Central among those tensions is an issue that has become persistent for NGOs in the hemisphere: the call for NGO accountability, transparency, and responsibility.

#### D. Montevideo

While the Miami Summit inaugurated a series of quadrennial hemispheric summits focused on economic integration,<sup>50</sup> heads of state also agreed to meet more frequently on related issues. Bolivia’s President, Gonzalo Sanchez de Lozada, offered to host an interim meeting on sustainable development. This meeting was set for December 1996, and during the preceding year delegations representing the heads of state struggled both to define the agenda and to clarify the Bolivia meeting’s place in the hemispheric summit constellation.<sup>51</sup>

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45. *Id.* ch. I, pt. 3, para. 4.

46. *Id.* ch. I, pt. 3, para. 5.

47. *Id.*

48. *Id.* ch. I, pt. 18, para. 4.

49. *Id.* ch. I, pt. 2, para. 6.

50. See generally ROBIN ROSENBERG & STEVEN STEIN, *ADVANCING THE MIAMI PROCESS: CIVIL SOCIETY AND THE SUMMIT OF THE AMERICAS 4-5* (1995).

51. While the Miami participants agreed to hold a second hemispheric summit in Santiago, Chile, in 1998 (Miami II), the Bolivian Government insisted that its meeting should

Bolivia established an elaborate system of consultation designed to help define issues for the impending summit and to assure input from interested parties beyond the official delegations. As one part of this consultative process, a meeting was held in Montevideo, Uruguay, in August 1996, between governmental and nongovernmental representatives to discuss the importance of public participation in assuring sustainable development.

The Montevideo meeting was not designed to solicit public input on the merits of the Bolivia Summit themes (at the time still evolving) of health and education, agriculture and forestry, water and coastal resources, energy and minerals, and sustainable cities and communities, but rather to consider a place for public participation on the summit agenda as a theme in its own right. Separate processes were established to solicit public input on the merits of the themes, with the Organization of American States, University of Miami's North-South Center, and Colombia's Fundacion Futuro Latinamericano playing central roles in soliciting civil society input and reporting that input to the summit preparation committees.<sup>52</sup>

The Montevideo meeting, on the other hand, was focused on the role of civil society as a partner in sustainable development. Delegates sought to refine and strengthen governmental commitments to integrating society into sustainable development decision-making and to define priority areas for public participation. The meeting was attended by over 150 representatives of government and NGOs. While it was not an official meeting of governments, it was officially sanctioned as part of the Summit preparation process. Thus, official representatives spoke in some cases on behalf of their governments and in others from their own points of view.

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also be a presidential-level summit. A surprising amount of diplomatic energy was expended on this issue, with some delegations favoring a "ministerial" and others just a technical-level meeting, and at times rumors circulated that no meeting would be held at all. In the end, Bolivia ended up hosting a presidential-level "Hemispheric Sustainable Development Summit" (although the United States was represented by Vice President Gore). The "Bolivia Summit" was not viewed by most participants as "Miami II," an honor still reserved for Chile, but as an interim summit on a key Miami-related issue.

52. As part of this process, the OAS held a unique and historic session in the summer of 1996, where nongovernmental representatives addressed a formal session of the General Assembly to present their views on the content of the Bolivia agenda. Over 50 NGOs (many representing coalitions of organizations) made eight-minute presentations to the Assembly covering the range of issues to be addressed in Bolivia. While the governmental delegates appeared at times overwhelmed or inattentive, the event nonetheless represented the first time that nongovernmental representatives were granted an "official" audience before the OAS General Assembly.

Montevideo participants were asked to consider civil society participation in three broad thematic areas:

- Enabling responsible participation—focused on building the capacity of civil society representatives as responsible and representative voices of the community at large;
- Strengthening representative institutions—focused on building the capacity of governmental institutions to solicit, tolerate and integrate public input; and
- Expanding avenues for participation—focused on building *legal and regulatory mechanisms* for participation and meaningful public-private discourse.<sup>53</sup>

Montevideo participants were provided with a technical background document that further defined the three themes of public participation as follows:

*Enable Responsible Participation*—responsible participation includes processes by which citizen organizations are established and operated in a transparent and accountable manner, and engage in public deliberation effectively and with technical competence. Responsible participation can be enabled through education and training, management support, access to information and availability of technical services, and through a regulatory framework that facilitates the establishment and operation of non-governmental organizations, and promotes fiscal responsible, transparency and accountability to society;

*Strengthen Representative Institutions*—representative institutions are the legislative and executive components of government, at a national and local level, that are responsible for designing and implementing sustainable development policies. In a democratic context, these institutions operate as representatives of society and as channels for policy dialog and oversight. These institutions can be strengthened through improving research services and access to technical information and support, bettering internal and external communication mechanisms, improving means for intra-governmental coordination, increasing transparency in decision making processes, building internal mechanisms for soliciting and assimilating citizen input, and training civil servants in consultative and collaborative techniques; and

*Expand Mechanisms for Participation*—mechanisms for participation include means by which elements of civil society communicate with

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53. See Inter-American Seminar on Public Participation in Sustainable Development, Montevideo, Uruguay, Report on Proceedings, (Government of Uruguay 1996) at 6-7 [hereinafter Monteideo Report]. Note that the *Rio Declaration* principles of access to information, access to process, and access to justice appear to fall within this final theme.

government (and with each other) and participate in developing and implementing sustainable development policies. This can include public hearings, notice and consultation rule making, access to information, citizen advisory boards, citizen ombudsmen, judicial review mechanisms, and even the right to organize and operate NGOs in a responsible and accountable manner.<sup>54</sup>

Consistent with the emphasis on participation that Montevideo was meant to embody, the planners offered these thematic areas to participants as a proposed agenda, and asked that they accept, reject, or modify the themes accordingly. Through roundtable working groups, Montevideo participants adopted the three themes and expanded their definitions, identifying areas of importance and priorities for action.<sup>55</sup>

#### E. *Santa Cruz*

The results of Montevideo were reported to the Bolivia Summit preparatory committees, and during the final preparation process the results of Montevideo were incorporated and endorsed by reference in the Declaration and Plan of Action. The *Declaration of Santa Cruz de la Sierra* endorses civil society participation in decision-making in several areas and includes a commitment that the signatories from the thirty-four democracies of the hemisphere: “[w]ill support and encourage, as a basic requisite for sustainable development, broad participation by civil society in the decision-making process, including policies and programs and their design, implementation, and evaluation.”<sup>56</sup>

The *Santa Cruz Plan of Action for the Sustainable Development of the Americas* integrates participation concerns into each of its five substantive areas, including commitments:

- in the Health and Education area:  
“Strengthen programs to increase access to safe drinking water, control and improve air quality, and upgrade health conditions with a view to reducing mortality and morbidity among children and mothers, and establish environmental quality standards with the participation of civil society.”<sup>57</sup>
- in the Sustainable Agriculture and Forestry area:  
“Develop appropriate mechanisms to promote opportunities for public participation in the sustainable management of forests,

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54. *See id.*

55. *Id.* at 8-16.

56. Declaration of Santa Cruz de la Sierra, Dec. 7, 1996, at 12, para. 8 [hereinafter *Santa Cruz Declaration*].

57. Plan of Action for the Sustainable Development of the Americas, Dec. 7, 1996, pt. II.1, Initiative 1 [hereinafter *Santa Cruz Plan of Action*].

including on the part of indigenous and local communities, whose culture and needs should be respected and supported.”<sup>58</sup>

- in the Sustainable Cities and Communities area:  
“Develop legal, financial, and institutional frameworks which support local government involvement and facilitate private-sector participation in the financing and delivery of urban services and improved environmental management.”<sup>59</sup>
- in the Water and Coastal Resources area:  
“Promote public participation in the planning and decision-making process related to water resources. Public participation could be enhanced through education and awareness programs in schools and local communities. Where appropriate, establish public-private partnerships to promote programs that encourage compliance with laws and the adoption of mitigation measures to address water resources issues.”<sup>60</sup>
- in the Energy and Minerals area:  
“Encourage hemispheric, regional, and cross-border energy and mining cooperation by sponsoring consultations among the public and private sectors and civil society on specific issues relating to policies, trade measures, laws, tariffs, regulations, research, and institutional structures.”<sup>61</sup>

As with *Agenda 21* and the *Miami Plan of Action*, the heads of state in Bolivia stopped short of specific recommendations for concrete action at the state level. Instead, the *Santa Cruz Plan of Action* calls for the formulation of a hemispheric “strategy” for participation—presumably one that will include options and priorities for state-level action. In language initially proposed by the delegation from Chile and endorsed by several other delegations during the summit preparation process,<sup>62</sup> the *Santa Cruz Plan of Action*: “[e]ntrust[s] the OAS with assigning priority to the formulation of an *inter-American strategy for the promotion of public participation in decision-making for sustainable development*, taking into account the recommendations of the Inter-American Seminar of Public Participation held in Montevideo in 1996.”<sup>63</sup>

The Heads of State called for this Strategy to “promote the exchange of experiences and information . . . with regard to the formulation,

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58. *Id.* Initiative 19.

59. *Id.* Initiative 40.

60. *Id.* Initiative 53.

61. *Id.* Initiative 63.

62. Interviews with delegates and Summit preparation technical personnel in Washington, D.C. (Nov. 1996).

63. Santa Cruz Plan of Action, *supra* note 57, pt. III.4, para. 15 (emphasis added).

implementation, and improvement of sustainable development, policies and programs, legal and institutional mechanisms . . . training programs, and consultation processes used at both the national and regional level.”<sup>64</sup> The Bolivia Summit documents thus represent an important departure from previous multilateral pronouncements about public participation. While there is still no commitment to concrete action at a state level, there is an initiation of a process that may lead to concrete recommendations and, possibly, commitments. By calling for the OAS to “formulate” a “strategy,” the *Santa Cruz Plan of Action* set in motion a process that will result in a specific concrete set of recommendations for action at a hemispheric and state level. Moreover, by referencing Montevideo and specifically calling for the consideration of “policies,” “programs,” and, significantly, “legal and institutional mechanisms,”<sup>65</sup> the Bolivia Summit documents appear to be inviting specific and concrete proposals for institutional and legal reform within the proposed strategy.

Whether such concrete proposals emerge from the ensuing process, and whether those proposals are ultimately endorsed in subsequent hemispheric meetings or applied at a national level remains to be seen. At the very least, Santa Cruz has given root to a new and focused dialog about how laws, institutions, and broader societal policies can be changed to integrate participatory democratic principles into the development process in the Western Hemisphere. This dialog alone is bound to stimulate progress at least among those countries looking for a meaningful way to integrate their citizens into their development path. It may also lead to some new and innovative commitments at a multilateral level that will raise the baseline for participatory development in the region. As the following section describes, important steps are already being taken to give life to the Bolivia mandate on public participation, and these steps are already having profound and possibly lasting consequences.

## II. THE FORMULATION OF A STRATEGY FOR PARTICIPATION—THE MIAMI CONSULTATION

The Organization of American States wasted no time in accepting the Bolivia mandate on public participation. Less than sixty days after the Summit, on February 5-7, 1997, a group of experts met at the North-South Center of the University of Miami to discuss the *Santa Cruz Declaration* and *Plan of Action*, and to discuss priorities for and mechanics of formulating an Inter-American Strategy for Participation

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64. *Id.* para. 16.

65. *Id.*



(ISP).<sup>66</sup> The experts consisted of lawyers and other professionals from governments, NGOs, and multilateral funding institutions.

The expert group generally agreed that the ISP itself would need to be formulated through an iterative and transparent process that may take twelve to fifteen months and that the technical elements of a strategy will have to be reviewed and approved at the political level by the governments of the hemisphere. The group thus focused both on the steps needed to formulate the ISP and the potential of the strategy itself.

The experts reviewed and assessed the mandates of Santa Cruz and earlier multilateral commitments and the working committee reports and results of the Montevideo Seminar on Public Participation for Sustainable Development. Based on these commitments, and a discussion of technical, logistical, and political issues in implementing an effective strategy, participants identified priority issues that should be considered as an ISP is formulated for the hemisphere. These issues, identified as “Considerations in Formulating a Strategy for Participation,” include:

- Look for common problems and solutions
- Think of all the Americas (not just south)
- Look for concrete actions
- Think of all elements of civil society (not just national level NGOs)
- Recognize differences between states (and limitations of various states)
- Consider all levels and sectors of government
- Try to support initiatives arising from civil society (not top down)
- Stay focused on the five Santa Cruz areas of concern
- Consider each country’s culture of participation
- Stay focused on environmentally-sustainable development (not broader civil society issues)<sup>67</sup>

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66. In fact, the OAS had planned ahead for the Miami meeting. As soon as language relating to ISP formulation was inserted in the draft of the *Santa Cruz Plan of Action*, the OAS Unit for Sustainable Development and the Environment developed plans for an expert consultation on Public Participation in Miami following the Summit. Under a “no regrets” approach, the Unit planned to have the experts consult on participation generally if the draft language did not survive intact, and to consult on Bolivia follow-up if the plan of action was adopted as drafted. The Unit had secured funding for the Miami meeting from USAID and the Global Environment Facility even before the December Summit.

67. “Participants recognized that the definition of sustainable development accepted in Santa Cruz is not focused solely on the *environmental* sustainability of development. At the same time, environmental issues may serve to energize and motivate civil society because environmental concerns are often concrete and tangible for citizens at a local level.

- Balance the three Montevideo themes (enabling participation, strengthening representative institutions & expanding avenues of participation)
- Focus at the policy and decision-making level.<sup>68</sup>

In addition, the expert group in Miami agreed that the ISP should focus on four priority areas:

1. Legal and Institutional Frameworks;
2. Systems for Gathering, Sharing, and Disseminating Experiences and Information about Participation;
3. Capacity Building for Public and Private Sectors;<sup>69</sup> and
4. Consultative Fora (as a mechanism):
  - a) to further develop the ISP; and
  - b) to demonstrate successful civil society integration in development decision-making.<sup>70</sup>

The Miami experts also sought to identify activities that should be undertaken within these four priority areas, both in the formulation of the ISP itself (ISP Formulation Priorities) and as elements of an ISP that might be presented for review and approval at the hemispheric political level (ISP Priorities).<sup>71</sup>

Within the first priority area, legal and institutional frameworks, the Miami experts identified the following priorities:

*ISP Priorities*

At the *hemispheric* level

- Develop a forum for consultation and follow-up on civil society participation within OAS

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Environmental policy-making processes may thus serve as uniquely appropriate demonstrative models for engaging civil society in sustainable development in a positive and concrete manner.” E. Dannenmaier & Z. Girón, *Report on Miami Consultation* (OAS Technical Document) (February 1997) at 3 n.7 [hereinafter *Miami Consultation Report*].

68. *See id.* at 3, fig. 2.

69. *Id.* at 4. The expert group discussed at length the appropriate focus of capacity building efforts, and it was ultimately agreed that both public and private sector actors would benefit from such efforts. Some participants maintained that the ISP should focus on building capacity among elected officials and public servants as a priority, as an Inter-American strategy “may be uniquely suited to making progress in this area, where other programs have sought to focus on civil society sectors.” *Id.* at n.10.

70. *Id.* at 4, fig. 3.

71. The expert group recognized that the ISP is to serve as “a strategic planning tool—an outline for how the countries of the hemisphere will reach the goal of greater meaningful citizen participation,” and “how the OAS and other institutions of the Inter-American system will open up to civil society.” *Id.* at 5.

- Create position(s) for civil society representative(s) within the OAS
- Create and strengthen fora for participation in sustainable development issues within other hemispheric multilateral agencies
- Present and review report on the status of laws on civil society participation in environmental decision-making

At the *national* level

- Report on institutional status of “National Sustainable Development Councils” and redefine their functions where necessary
- Develop the basis for presenting periodic national reports on the state of civil society involvement in sustainable development decision-making
- Strengthen legislation on civil society participation in sustainable development, especially concerning:
  - Norms for notice and consultation on environmental policies at the local, regional, and national level
  - Rules for access to information
  - Mechanisms for access to administrative and judicial fora
  - Financing and operating Civil Society Organizations

*ISP Formulation Priorities*

At the *hemispheric* level

- Define institutional focal points in the OAS to manage and support ISP formulation
- Establish and implement inter-agency coordination mechanisms among concerned donors and bilateral or multilateral organizations
- Develop framework and charter for ISP
- Designate focal points within “National Sustainable Development Councils” for consultation on formulation of ISP

At the *national* level

- Prepare report(s) on the status of laws on civil society participation in environmental decision-making<sup>72</sup>

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72. *Id.* at 5-6, fig. 4.

The results of the Miami Consultation formed the basis for a new OAS program to formulate the ISP called for in Santa Cruz. In mid-1997, OAS received funding for this program from the Global Environment Facility (GEF) and the U.S. Agency for International Development (USAID), and work has begun on specific elements, including the legal and regulatory component.

### III. A STRATEGY FOR PARTICIPATION—LEGAL POLICY PRIORITIES

The very purpose behind the iterative development of an ISP is to assure that the strategy is informed by experiences and lessons learned at a local and regional level in recent years. For this reason, the suggestions provided here are necessarily preliminary suggestions that should be tested against the experience and conclusions highlighted through the ISP process. With that caution, the following suggestions are offered.

#### A. *Definitions*

The phrase “public participation in sustainable development decision-making” should be subject to a common definition. As straightforward as it may seem, almost every element of the phrase has been disputed at some point during the process leading to the call for an ISP.

While “public” is often used to distinguish government, or public-sector, from nongovernment, private sector, in this context it is meant to include all nongovernmental, nonmilitary actors, individually or collectively, directly or through their (nongovernmental) representatives—including formal and informal nongovernmental and grass roots organizations, communities, business and industry associations, trade groups, labor organizations, and student groups. While indigenous people (or peoples, as Canada has insisted throughout the Summit process)<sup>73</sup> present a unique set of concerns because of their differing constitutional status in the countries of the Americas and because of their unique claim to sovereignty in some cases, they should also be included as members of the public entitled to consultation in policy decision-making where their interests are affected in the context of national or local decisions.

If this list excludes any nongovernmental and nonmilitary<sup>74</sup> entity, it should be deemed included for purposes of a working model of the

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73. Interviews with delegates to Summit preparatory meetings in Miami, Florida (Feb. 7, 1997).

74. To say that the military is not a part of “civil society” is not to suggest that military representatives have no place in development policy dialog. Military sites and activities have a

public. The point is to cast the net broadly and reach any representative of any identifiable interest or potential interest. Processes can later be designed to assure fairness and equity so that a given interest group is not over-represented or double-counted, but the definition should begin broadly and inclusively.

The term “participation” presents a more difficult definition because the manner and degree of inclusion in any decisional process will vary depending on the subject, the legal framework, and the political and social context of a decision. Participation should thus be understood to include the full range of options that engage and integrate the public into the process of making or implementing a policy choice. The *Rio Declaration* provides a useful point of departure by emphasizing access to information, access to process, and access to justice as the means by which participation is made effective.<sup>75</sup> It is also an important reminder that participation can sometimes be as basic as being informed about the facts that underlie a decision. At the other end of the spectrum is the United States Administrative Procedure Act,<sup>76</sup> which mandates that public input into decision-making must not only be received, but also somehow considered before a final decision is made.<sup>77</sup>

It should be noted that, even in the most representative democracy, it is the government that must ultimately make and implement a decision—hopefully based on its perception about what is in the public good. Likewise, in the international context, representatives or agents of governments must also make decisions based on their perception of the interests of their client states (informed, in theory, by the interests of their respective citizens). The most that civil society representatives can hope for is to be consulted and heard during the decision-making process and to have their ideas fairly considered by governments. While some of these representatives might wish to see their ideas or proposals directly reflected in national or multilateral decisions, such a result might well be

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very large potential impact on the environment and natural resources and should be subject to regulation and control just as a commercial enterprise (of course, with due consideration for confidentiality and national defense concerns). In addition, some countries have engaged the military directly in environmental enforcement and compliance activities. For example, Nicaragua, Paraguay, and Venezuela each have a role for the military in monitoring and guarding designated protected areas. While the recent history (and to some extent, the present reality) of the military’s role in the region warrant caution in integrating the armed forces into policy dialog, the time has come to constructively engage responsible military officers, as one of many relevant government actors, in sustainable development decision-making.

75. See *supra* note 26 and accompanying text.

76. 5 U.S.C. §§ 551-559, 701-706 (1996).

77. See, e.g., *id.* § 553 (requiring agencies to provide notice of proposed rule making to allow interested parties to submit comments and to consider “relevant matter presented”).

a distortion of the democratic process where other voices are less apparent but equally interested in the outcome.

The term “sustainable development” is likewise subject to much debate, and no single definition seems to have emerged. For the purpose of the Inter-American Strategy for Participation, the definition ultimately adopted for the Bolivia Summit must suffice, because it is that definition which provides the scope for the ISP. “Sustainable development” as defined for the Bolivia Summit encompasses development that is sustainable in the environmental, social, and political contexts.<sup>78</sup>

Finally, “decision-making” is meant to be a short-hand reference to formulating, implementing, and enforcing policies and decisions. Again, the Rio notion of access to both process and justice can be viewed as a point of departure. The public should be consulted and integrated into the process of formulating and shaping development policy, including the laws and regulations that provide a framework for that policy. In addition, the public should have access to mechanisms of justice, as defined in a national context, in order to assure that policies, including laws and regulations, are implemented and enforced.

In the context of preparing for the April 1998 Summit of the Americas II in Santiago, Chile, one government representative to the Summit Implementation Review Group (SIRG) surprised his counterparts by objecting to language that called for engaging civil society in “decision-making.”<sup>79</sup> Despite the fact that earlier Summit language and *Agenda 21* specifically use the term, this representative insisted that the wording be changed. Claiming to act upon strict instructions from his capital, the representative argued that decision-making is solely the government’s province as a matter of constitutional law and that his president could not sign a document that purported to relinquish this authority to civil society.<sup>80</sup> When reminded that his president had just signed such a document at the Santa Cruz Summit, the representative reportedly claimed that this must have been a “mistake.”

Of course, it is the government’s role and ultimate responsibility to make final policy decisions. Engaging civil society organizations as partners in the process does not diminish that role nor relinquish that responsibility. It is not clear what animated the government representative on this occasion, but the argument that civil society cannot be engaged in “decision-making” in a constitutional democracy—as a constitutional matter—appears specious. Nevertheless, with deference to

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78. See, e.g., Santa Cruz Declaration, *supra* note 56, para. 10.

79. Interviews with SIRG representatives in Washington, D.C. (December 1997).

80. *Id.*

the juridical subtlety inherent in the argument, it may be useful to bear in mind that the term “decision-making” refers to a process, not an ultimate decisional responsibility. Citizens should be a part of the process of making rules and regulations and the process of judicial review. Apart from the judicial practice of granting a jury the responsibility of fact-finding at trial (remembering that it is the judge who makes findings of law), citizens have a place in discussing, recommending, investigating, and helping to shape policy—but governments alone have the responsibility of making the ultimate decision. The citizens’ ultimate recourse for poor decisions is, of course, the ballot box.

### *B. Recommendations for Action*

The specific tools, or mechanisms, for engaging the public in decision-making processes must be defined at a national level (or multilaterally, where the process is regional). Yet the range of possibilities falls into the three categories that provided the themes for discussion at the Montevideo Conference: Enabling responsible participation; strengthening relevant institutions; and expanding avenues for participation.

### *C. Enabling Responsible Participation*

As noted earlier, the genesis for this theme was based on two distinct, and to some extent contradictory, concerns. First was the concern of NGOs that their capacity to be effective in the policy arena, including their ability to organize, find funding, and even their right to exist, needs to be secured. Second was the concern of governments that NGOs are often foreign-financed, unaccountable, and sometimes irresponsible in the positions that they take.

These concerns relate to the operation and activities of NGOs, which are only one avenue for public participation, but they have helped to crystallize the issue of how the public can be empowered to participate in a responsible and effective manner. The preoccupation with integrating organized nongovernmental groups into decision-making also reflects the reality that such groups are a natural means for participation in a democracy and that increasingly populous and complex democracies are often inhospitable to individual voices (unless amplified by large bank accounts). Thus, the question of how to enable participation often becomes a question of how to enable NGO participation.

The legal and practical limits on organizing and operating an NGO can be very real and debilitating. In some countries, forming a nonprofit corporation can take months or years, whereas forming a for-profit

corporation takes only days. At the same time, unless nonprofit organizations enjoy some preferred tax status (either limiting their liability to pay otherwise applicable corporate taxes or providing some tax advantage for contributions to the organization), it may be difficult to remain economically viable. Thus, responsible participation could be enabled by establishing mechanisms that simplify the formation of nonprofit organizations and provide some preferred tax status.

NGOs, and individual citizens, can also be empowered to participate responsibly through access to information and capacity building. Some argue that any sound from the public, no matter how faint or unintelligible, is important. Indeed, in a pure democratic model, this is true. Yet importance does not equate with effectiveness, and it would be unreasonable to appreciate the citizens' voice as if it were a work of art without giving it effective recourse. There must be an effort to assure that the sounds of the people become intelligible and resonant so that they may have maximum effect and import. While there is inherent value in even the most illiterate and inarticulate of opinions, it is one of the functions of an elected government to educate the speaker and make the facts available for him to analyze and articulate.

Governments can best exercise that function by assuring that the public and its representatives have education and training, not just at a fundamental level, but also with respect to issues surrounding development decisions. The point is not to strengthen elementary education systems—although that is one of the most fundamental needs of a functional democracy—but rather to build programs that will educate citizens on the technical and practical issues raised by sustainable development decisions. Education and training programs may thus be just as important to, for example, a hydroelectric project, as resettlement programs. Needless to say, such efforts must begin sufficiently in advance of a decision to allow for capacity to be built before decisions are taken.

Equally important is access to information and data that will inform opinions about development. While this is one of the three principles that guide the creation of mechanisms for participation<sup>81</sup> (the other two being access to process and access to justice), it is perhaps the most fundamental principle when it comes to enabling responsible participation. How can a community, for example, be expected to offer meaningful input into a facility siting decision if they do not have basic data about the operations and byproducts of the facility?

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81. See *Rio Declaration*, *supra* note 13, Principle 10.



As much as some governments may fall back on the idea of “responsible” participation as a defense to the perceived excesses of, and outside influences on, civil society organizations, it is access to information that ultimately assures responsibility. Opinions formed by civil society representatives based on an informed analysis of relevant scientific and technical data are much less likely to be hysterical and unreasonable, two oft-stated government fears. Moreover, informed opinions based on relevant scientific and technical data are more often correct. Governments should welcome the input of civil society when it leads to technically sound decisions.

As for accountability among nongovernmental actors, it is necessary to consider accountability from a financial versus an ideological standpoint. Governments speak in terms of accountability of NGOs and point to financing issues,<sup>82</sup> while one gets the impression that some are actually much more concerned about ideological accountability. The concept of the “loyal opposition” has yet to fully take root in some Latin American countries, and NGOs that openly disagree with government policy are accused of being irresponsible on that basis alone.

Certainly, finances and ideology are linked at a practical level. Individuals and organizations are naturally inclined to feel beholden to the source of their financing, and sometimes the connection between a source of funding and the nature of a group’s public position is direct and obvious. Yet policies aimed at promoting responsible participation should remain focused as much as possible on financial rather than ideological accountability.

In financial matters, organizations that operate on a nonprofit basis may have special tax advantages, and governments should properly establish systems to assure accountability. This includes accountability to donors for responsible funds management consistent with stated organizational goals or with the conditions of a specific gift. It also includes some measure of accountability to society as a whole because of the privileged status that a tax advantage may offer.<sup>83</sup> This broader

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82. See, for example, the United States proposal prior to the Miami Summit of the Americas to pursue “an integrated program [that] would include a model legal/tax framework for the operation of NGOs . . . .” *Fourteen Summit Agenda Initiatives Presented by the United States to Governments of the Hemisphere*, reprinted in Rosenberg & Stein, *supra* note 50, at 4.

83. Indeed, part of enabling responsible participation is providing certain tax or other advantages to political interest groups, academic institutions, or other noncommercial organizations so that they may thrive on local support for their ideas, without the need to rely upon commercial activities or “outside” donors.

accountability may begin to trench upon ideological concerns and should be approached cautiously.<sup>84</sup>

In ideological matters, there should be no effort to make members of civil society organizations accountable to governments. In fact, the democratic model holds just the opposite. It is governments that owe their ideological accountability to the people.<sup>85</sup> Instead, civil society organizations are accountable either to their constituencies or to their principles. Membership-based organizations, or organizations that claim to be representative of one or another interest group, gain their legitimacy from representing an identifiable sector or group of society. Other policy groups or academic organizations gain their legitimacy from their principles or the power of their intellectual output.<sup>86</sup>

Both types of groups have a place in the policy debate, although elected governments will often pay more heed to membership organizations for obvious reasons. In any event, the responsibility of these nongovernmental actors with respect to this type of ideological accountability should be limited to rules that promote transparency of mission. This will aid in financial accountability and in a broader understanding of an organization's place within society and the political arena, without limiting a group's mission or attempting to influence its ideology.<sup>87</sup>

Thus, an effort must be made to enable responsible participation, not as a means of limiting or controlling organizations perceived as irresponsible, unaccountable, or subject to "foreign influence," but as a means of promoting responsibility through the application of relevant scientific and technical knowledge and information to the problems of development. At the same time, efforts should be made to encourage the formation and operation of NGOs that can promote education and

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84. For example, the Ku Klux Klan and the Red Cross are both NGOs. While one might imagine a government wishing to confer certain advantages on one over the other because of their distinct missions, the distinctions are usually far less obvious.

85. Again, it is important to recognize that civil society organizations are but one measure of public opinion, and not in any sense a surrogate for the *polis*. See *supra* note 8 and accompanying text.

86. While it might be difficult to categorize an environmental group that represents, for example, endangered species in one of these two categories, they can be placed in the second principle or intellectual category for the sake of discussion because their representation is more a matter of principle than the consent of their constituency.

87. See Norman Uphoff, *Why NGOs are not a Third Sector: A Sectoral Analysis with Some Thoughts on Accountability, Sustainability and Evaluation*, in NON-GOVERNMENTAL ORGANIZATIONS—PERFORMANCE AND ACCOUNTABILITY—BEYOND THE MAGIC BULLET ch. 2 (Michael Edwards & David Hulme eds., 1996) (discussing NGO accountability to their constituencies, as opposed to their governments).

information sharing as well as research and advocacy, while assuring fiscal responsibility and mission transparency.

*D. Strengthening Representative Institutions*

While this second Montevideo theme was originally intended to focus on governments as representative institutions,<sup>88</sup> participants at the conference working group on the theme ended up making recommendations for strengthening both nongovernmental and the governmental sector. The strengthening of nongovernmental actors has been treated under the “Enabling Responsible Participation” section because efforts to strengthen nongovernmental actors should focus on enabling and some separate focus should be reserved for the government and for public servants.<sup>89</sup>

With this focus in mind, the principal concern is to build government institutions (including the individuals within those institutions) that are open to and tolerant of discourse and capable of sorting through and applying the input that is received in the course of dialog with civil society.

Government tolerance is an attribute that is fundamental for any dialog to work. While all parties concerned have to be willing to accept the give and take of a discussion, and accept that contradictory opinions and agendas will be voiced, it is the government actor who must keep the dialog open despite the discord. More than one government official has been ready to shut off the discussion, ignore the input, or refuse to answer questions when civil society members got particularly strident, intransigent, or even abusive. But the “public space” must remain open, even to serious discord, if more difficult problems are going to be resolved through democratic means. Moreover, government actors must find a way to apply what is learned, even if the learning is sometimes painful, and select a policy that reflects the most appropriate path in light of all the input.

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88. See Montevideo Report, *supra* note 53, at 7.

89. The reasons why the Montevideo working group chose to emphasize nongovernmental as well as the governmental sector are not entirely clear. It may have emanated from a desire to avoid singling out governments as needing to be strengthened—exacerbated by the fact that the working group members were not privy to the proceedings of a separate working group focusing specifically on civil society strengthening (or enabling). While this diplomatic, as well as practical, solution makes sense in the context of the second theme viewed on its own, I maintain that these concerns are readily addressed when all three themes are viewed as a whole—one dealing with nongovernmental enabling (a concept which includes strengthening); one dealing with governmental strengthening; and one dealing with avenues, or mechanisms, for linking the two sectors through participation.

To some extent, the problem is socio-cultural and not legal. One cannot readily find legal mechanisms that will make public servants more tolerant, more open, nor more sentient when it comes to applying what is learned. But laws can establish a framework for processes that require dialog, that keep the public space open, and that force even a reluctant public servant to consider public input, in writing, and explain how it was or was not applied in a given instance.

As an example, the United States Administrative Procedure Act requires that agencies explain why relevant public input was not applied in final decisions.<sup>90</sup> While some would argue that this system is not ideal, and does not always work, and others would point out that the burden required for such an approach would not be easily met in the development context prevalent in much of the hemisphere, it still provides an interesting ideal to consider.

In addition, many of the recommendations of the Montevideo working group may lend themselves to implementation through legal or regulatory frameworks. The working group on strengthening institutions recommended the following:

- “Reaffirmation by the Heads of State of the political will to forward sustainable development through citizen participation.  
\* \* \*
- Opening channels for gathering and delivering information among the various public and private organizations and between representatives at all levels and those they represent in the decision-making process.
- Strengthening communication channels among key social actors, and their links with mass media.
- Increased transparency in decision-making and the use of resources.
- Human resources training in both the public and private sectors.  
\* \* \*
- Offering technical support to representative organizations.  
\* \* \*
- Exchange of experiences and information among organizations at both national and hemispheric levels.”<sup>91</sup>

Of these recommendations, several can be adopted as part of a framework to promote tolerance and acceptance of public input. For example, the

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90. See *supra* note 76.

91. Montevideo Report, *supra* note 53, at 15-16.

first recommendation, calling for a reaffirmation of “political will” from governments, is essential. Governments may affirm the importance of participation, both through pronouncement of heads of state at the hemispheric level, and through legislative mechanisms calling for public consultation in laws dealing with key development issues—such as environmental impact assessment and protected areas laws. To the extent governments promote participation, public servants will not only get the message that their leaders are serious about the issue, but they will also be required to implement consultative processes and other mechanisms that will build their experience and understanding of the issues.

In addition, laws that require transparency of governmental processes will ultimately promote tolerance, because the public will become aware of instances of intolerance and, theoretically, be able to threaten a recalcitrant public servant’s job.<sup>92</sup> In addition, offering training and human resource support can be required by law and could go a long way toward building an individual’s capacity. Finally, information and experience sharing can be mandated, certainly at a regulatory level, and would prove useful both to promote individual efforts to capture and describe challenges and successes in public participation and in promoting the replication of successful models. Also, since it is in part the government mind-set that needs to be reformed, the circulation of information about public input and means to integrate public opinions into decision-making will reinforce and promote an individual’s tendencies to open up to public participation.<sup>93</sup>

#### *E. Expanding Avenues for Participation*

Expanded avenues, or mechanisms, for participation are the means by which the public engages in a continual dialog with its government to inform government decisions—both about what policies should be, and about how those policies are to be implemented. Of the three Montevideo themes, this is the one that most readily lends itself to the application of legal and regulatory approaches. It is also the one that harks back to *Agenda 21* and the three principles of access. Within those *Agenda 21* principles, most mechanisms for participation lie, and laws that seek to

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92. The proof of this theory depends largely on whether the public has recourse to judicial review in the event that government actors do not meet legislative or regulatory standards regarding participation.

93. This hypothesis is not meant to be naïve in understating the possibility that experiences to be shared will be negative, but instead is meant to reflect the belief that governments can and will find positive experiences among whatever challenges may exist, and can develop means to accentuate and replicate models that result in these more positive experiences.

guarantee access along those lines will go a long way toward securing meaningful participation.

*F. Access to Information*

Access to information is one of most important means of assuring that civil society input is responsible because it assures that civil society has the facts. Mechanisms can be as simple as requiring that environmental compliance data filed with governmental offices be open to the public or as potentially burdensome as requiring that the government produce data upon which it relies in making administrative decisions, but they are essential to informing the debate that lies at the heart of participatory decision-making.

Efforts should be made to open to the public both information in the government's possession and, under some circumstances, information maintained by private parties. Where a government collects information from private parties (for example, environmental compliance statistics), due regard should be given to protecting legitimate business secrets, but the data should otherwise be available. The chief exceptions to this rule should be where there is a legitimate national security concern, or where the government is engaged in an enforcement action and disclosing the information would adversely affect the action. The United States also permits the government to withhold certain analytical information while it is in the process of decision-making (so-called "pre-decisional" information), but requires that the analysis eventually be provided.<sup>94</sup> Such an exception makes sense as long as it does not extend to underlying data, which should be available to the public so that it can better engage in the decision-making dialog.

Access to information developed and maintained by private parties is somewhat more problematic, but it should generally be made public where it directly relates to a development decision concerning health or environment (allowing an exception for truly confidential business information) or where it relates to compliance with the law.

Finally, the public needs better access to information about the rules themselves—both the substantive rules that govern development and health and environmental protection, and the procedural rules that will govern access to the process itself. This is in part a function of basic educational and interest levels, but efforts can be made to increase the transparency of and access to the laws on development.

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94. See Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1996); see also *Maricopa Audobon Society v. United States Forest Serv.*, 108 F.3d 1089 (9th Cir. 1997) (discussing the "deliberative process" exception to the Freedom of Information Act).

*G. Access to Process*

Access to process includes both the process of making and the process of implementing and enforcing development decisions. Decisions can be made at both a legislative and administrative level, and depending on the structure of a government, there is room for public input at both levels. Successful mechanisms include notice and comment or consultative rule making, the creation of public-private or representative boards or committees, and public hearings.

Access to the process of implementing policies, through monitoring programs, review boards, and advisory councils, are also important. Laws are frequently criticized in the Americas because they are not fully enforced or complied with, and engaging citizens in the process of monitoring compliance can be an effective means of addressing this issue without unduly increasing the budget for enforcement.

*H. Access to Justice*

At a fundamental level, public participation will have little meaning if citizens lack the right to seek effective judicial review. This should serve as a mechanism for civil society to challenge government actors who fail to follow the rules that govern how development should be pursued as well as the rules that govern how the public is to be consulted. Access to justice is also, in some cases, a way for citizens to challenge other private parties or businesses that have failed to comply with the laws, such as public health and environmental laws, that assure that development will be sustainable.

Some doubt that the United States experience with so-called environmental citizen suits, which allow citizens to act as private attorneys general, would work in other countries in the region; but there is substantial evidence to the contrary. In Chile in 1997, an environmental NGO sued under a constitutional provision guaranteeing a healthy environment and halted a major timber concession because the state environmental agency had not issued a legal environmental impact permit.<sup>95</sup> In fact, no implementing regulations were ever issued for the process under Chile's 1995 Basic Environmental Law, and the Supreme Court found that the permit was *de facto* illegal.<sup>96</sup> The regulations had been unwritten for two years after the law passed, yet they were issued within weeks of the Supreme Court ruling invalidating the concession.<sup>97</sup>

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95. See Jonathan Friedland, *Green Chile: Across Latin America, New Environmentalists Extend Their Reach*, WALL ST. J., Mar. 26, 1997, at A1.

96. See *id.*

97. See *id.*

Civil Society access to justice is a very powerful tool, and it is a fundamental element of any public participation program. Of course, its success relies on a capable and independent judiciary, but giving citizens access to the courts to address development issues will itself create positive pressure for the strengthening of judicial systems.

#### IV. CONCLUSION

For better or worse, this Article is written as the Inter-American Strategy for Public Participation is in the earliest stages of formulation. Basic study has yet to be conducted on what legal mechanisms for participation are already on the books in the region, much less what mechanisms seem to be working and why. While practitioners in every country are aware of the means available for engaging in policy making and implementation, no real basis for comparative study exists.

One of the key goals of the OAS effort to formulate an Inter-American Strategy for Participation is to conduct research which will lay the foundation for comparative analysis of the laws on development participation. That analysis will do a great deal to secure for citizens a meaningful role in deciding how their countries will be developed and how their futures will be shaped. That analysis, and the work that follows, will help assure, to paraphrase Jefferson, that the citizens of the Americas really can become “the safe repository of the ultimate powers of society.”<sup>98</sup>

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98. Letter from Thomas Jefferson, *supra* note 5.