

Access to Justice in environmental matters for sustainable development
Contribution of the *Société de Législation Comparée* to the Open Working Group on Sustainable Development Goals (United Nations)¹

The development of effective environmental law is considered to be a fundamental building block of environmental sustainability. Among the elements allowing this development, access to justice in environmental matters is widely recognized as a key-factor for effective environmental governance. Effective access to justice for citizens and NGOs contributes to the quality of environmental law implementation and complements action of States.

From the first Rio Earth Summit to the Rio+20 Summit, the role of access to justice has been constantly stressed, in particular by judges and prosecutors at the highest level.

The Principle 11 of the Rio declaration on Environment and Development recalls that “*States shall enact effective environmental legislation.*” and the Principle 10 states that “*Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*”. The recently adopted Resolution of the UN General Assembly on the Rule of Law (A/RES/67/1 24 September 2012) recalls that “*the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.*”.

In 2002 in Johannesburg, the First Global Judges Symposium acknowledges the positive developments of environmental justice, especially in developing countries. In 2012, at Rio+20, over 250 of the world’s Chief Justices, Attorneys General and Auditors General adopted the Rio+20 document entitled ‘*The Future We Want*’. In this contribution, judges proposed Principles for the Advancement of Justice, Governance and Law for Environmental Sustainability which include “*accessible, fair, impartial, timely and responsive dispute resolution mechanisms*”.

Scientific evidence demonstrates the positive role of access to justice in environmental matter as regard sustainable development.

The Rio Declarations are solidly based on scientific evidence provided by numerous theoretical and

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empirical economic studies. Environmental interests are to be qualified as “diffuse interests”, i.e. interests that are not strong enough by themselves to afford the cost of traditional litigation proceedings. Environment being among the public goods, there is a strong theoretical justification for providing specific means for protection of these goods beyond market rules². This protection is primarily to be guaranteed by the State but the general public has also obviously a role to play either to complement State action, to compensate State inaction or to challenge State decisions with adverse consequences on the environment.

Specific principles guaranteeing effective access to justice in environmental matters have to be adopted.

Access to justice in environmental matters is not conceived as one model or one set of rules to be applied uniformly³. It can take different forms and adaptations depending on the specific legal traditions and the national legal systems. It could stress the role of Alternative Dispute Resolution. It could adopt different balances between administrative proceedings and judicial proceedings. It could rely on Specialized Environmental Courts or Boards. It could include the use of class-actions with various forms.

Regional conventions, such as the Århus convention (UNECE), may also play an important role in guaranteeing access to justice in environmental matters and in developing specific international control mechanisms⁴. In addition, regional Human Rights Courts – such as the European Court of Human Rights – have developed case-law highlighting the right to access to justice in environmental matters.

However, beyond this diversity in tools and means, a certain number of features for guaranteeing effective access to justice in environmental matters should be preserved :

a- environmental non-governmental organizations should be granted access to justice.

Environment non-governmental organizations play an essential role as regard expertise for preservation of the environment. They defend also the interests of nature and therefore could complement the State action through awareness raising, education and protection of the environment. Being often confronted to threats to the environment, these organizations should be granted legal standing in order to compensate the lack of interest in implementation of environmental law outside the governmental bodies due to the absence in many environmental cases of direct threats to human health, property or even economic values⁵. This does not preclude States to define national rules for limiting access to justice to organizations presenting guarantees and based on genuine environmental interests. However, these rules should not in practice lead to deny access to justice to non-governmental organizations.

b- administrative and judicial proceedings should be effective in terms of cost and duration

Cost and duration of proceedings are obstacles which *de facto* lead to severely limit access to justice. Costs of proceedings are playing a particular deterrent effect in access to justice in

2 See in particular among numerous publications the founding works of Paul A. Samuelson (1954). "The Pure Theory of Public Expenditure". *Review of Economics and Statistics* (The MIT Press) 36 (4): 387–389, Garrett Hardin, "The Tragedy of the Commons". *Science* 162 (3859): 1243–1248. 1968

3 See the report from George and Katherine Prings, "Greening Justice: Creating and Improving Environmental Courts and Tribunals" 2009

4 See the example of the compliance committee institutionalized by the Århus convention.

5 M. Hedemann-Robinson, "Enforcement of European Union Environmental Law: Legal Issues and Challenges", 2007

environmental matters due to the often unbalance situation of plaintiffs and defendants : individuals vs companies, small companies vs State, non-governmental organizations vs big companies. Duration of proceedings is another hurdle in the way to access to justice. Plaintiffs may refrain from filing a case if they know that the case may take several years to be adjudicated. This is not only an issue related to costs but mainly an issue related to the moral burden which is imposed on plaintiffs with non-ending litigations and to the absence of adequate remedies to environmental deteriorations which may have taken place before an administrative or judicial decision.

c- interim measures and injunctive relief should be possible

The objective of environmental justice is to avoid deterioration of nature. Compensations are ranking only second. That is the reason why interim decisions and injunctive relieves are judicial tools which needs to be implemented in environmental cases. The purpose of interim decisions is to prevent definitive environmental damages in cases where plaintiffs have presented substantial grounds which, before full adjudication of the case, reveal the need to preserve their rights by, for instance, suspending an administrative decision. This is obviously crucial in cases where the environmental damage – for instance in terms of loss of biodiversity – would be materially impossible to repair. Injunctive relief is also needed to avoid that judicial decisions remain without effects beyond a declaration of illegality. Providing effective remedies in environment matters means that administrative or judicial decisions to not only decide in the legality of certain behaviors but have concrete effects in terms of environment protection.

Following Rio+20, UNEP established the International Advisory Council for the Advancement of Justice, Governance and Law for Enforcement Sustainability with the task of “*engaging the legal and auditing community worldwide, supporting the development and implementation of environmental law at all levels, and encouraging the further expansion of environmental jurisprudence*”. This forum should play a key-role for providing guidance on concrete implmeentation of the above mentionned principles.

1- The development of access to justice in environmental matters is to be included in the evaluation of the performance of governance as regard sustainable development .

2- Access to justice in environmental matters may take different forms and adapt to the different legal systems and legal traditions. However, it should at least :

a- grant specific access to justice to environmental non-governmental organizations

b- guarantee limited costs and limited duration of proceedings

c- allow interim measures and injunctive relief

3- The UNEP International Advisory Council for the Advancement of Justice, Governance and Law for Enforcement Sustainability should develop non-binding recommendations to countries as regard implementation of points 1 and 2.