HUMAN RIGHTS AND THE ENVIRONMENT:

REGIONAL CONSULTATION ON THE RELATIONSHIP BETWEEN HUMAN RIGHTS OBLIGATIONS AND ENVIRONMENTAL PRORECTION, WITH A FOCUS ON CONSTITUTIONAL ENVIRONMENTAL RIGHTS

23-24 January 2014, Johannesburg, SOUTH AFRICA

Convened by the United Nations Independent Expert on human rights and the environment with the United Nations Environment Programme, the Office of the High Commissioner for Human Rights, and the Legal Resources Centre of South Africa

NATIONS UNIES DROITS DE L'HOMME HAUT-COMMISSARIAT

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I. INTRODUCTION

1. This report summarises the outcomes of the regional consultation on the relationship between human rights obligations and environmental protection, with a focus on constitutional environmental rights, which took place in Johannesburg on 23-24 January 2014. The consultation was convened by the United Nations Independent Expert on human rights and the environment, the United Nations Environment Programme (UNEP), the Office of the High Commissioner for Human Rights (OHCHR), and the Legal Resources Centre (LRC) in South Africa.

2. UNEP and OHCHR have partnered in supporting the Independent Expert to undertake a joint project identifying and disseminating good practices related to human rights and the environment. A series of consultations have already been held to inform the good practices project, each of which addresses a particular set of thematic issues. This process began with a consultation in Nairobi (22-23 February 2013) that focused on procedural rights and duties, followed by consultations in Geneva (21-22 June 2013) on the relationship between environmental protection and substantive rights and duties, in Panama City (26-27 July 2013) on environmental protection and the human rights obligations related to members of groups in vulnerable situations, and in Copenhagen (24 October 2013) on how international institutions and mechanisms can integrate human rights with environmental protection.

3. This consultation builds on the previous consultations by continuing to examine the relationship between human rights obligations and environmental protection, with a focus on constitutional rights to a healthy environment.

4. The objectives of the consultation were: i) to identify environmental human rights obligations relevant to constitutional rights to a healthy environment; ii) to identify good practices at international, regional and national levels to inform the clarification of the topics of the consultation and to promote the replication of such practices; iii) to offer a platform for dialogue between participants, including facilitating the exchange of experiences, knowledge and lessons learned; and iv) to increase awareness of a human rights based approach to environmental policy development and protection.

5. The meeting gathered approximately 40 participants from throughout Africa, including academics, non-governmental organisations, practitioners, and staff from international organizations and government ministries.

6. The consultation, held over two days, focused on two areas. The first day was divided into four thematic sessions and focused on the conceptual and practical clarification and implementation of constitutional rights to a healthy environment. Session one provided an overview of the global trend to include environmental rights as constitutional rights, from international, regional and national perspectives. Session two addressed the value of constitutional environmental rights, or what such rights add to other methods of environmental protection. Session three discussed the implementation of constitutional environmental rights through litigation, including addressing how such rights have been adjudicated and enforced through the judicial system and obstacles to their judicial enforcement. Session four focused on implementation of constitutional environmental rights through other means, including through statutes, administrative actions and community development, as well as obstacles to such implementation.

7. The second day focused on good practices throughout the world relevant to realizing constitutional rights to a healthy environment. The meeting observed the Chatham House rules (i.e., points raised during the discussion were not ascribed to any specific participants). This was done to encourage those contributing to do so as candidly as possible.

8. The remainder of the report summarises the main outcomes from the meeting. Section II summarises the thematic panel discussions from the first day of the consultation, including an overview of the proliferation of constitutional environmental rights globally and a discussion of some benefits to adopting such rights as identified by participants. Section III summarises some good practices in this area identified during the consultation.

II. SUMMARY OF THE PANEL DISCUSSIONS

9. As noted above, the first day of the consultation was divided into four thematic panel sessions. The following discussion summarises many of the themes and issues that participants raised during these sessions.

A. THE PROLIFERATION OF CONSTITUTIONAL RIGHTS

10. At the outset, it is important to note that this consultation primarily focused on explicit constitutional rights to enjoy an environment of a certain quality, such as a healthy, clean or sustainable environment. It also acknowledged other ways that constitutions address environmental issues, including by "greening" other rights, such as rights to health or life, and by imposing duties on the government to protect the environment.

11. Although no global international agreement has explicitly recognized a right to a healthy environment, such a right is now recognized in many national constitutions and regional instruments, with over 90 national constitutions recognizing some form of the right since the mid-1970s.[1] About two-thirds of the constitutional rights refer to health and one-quarter refer to the right in terms of an ecologically balanced environment; alternative formulations include rights to a clean, safe, favourable or wholesome environment.[2] Participants recognised that African countries in particular have adopted substantive constitutional rights to a healthy environment, and with the recent adoption of the right to a healthy environment in the Tunisian Constitution, over 30 African countries have now incorporated such a right in their constitutions.[3]

12. Many subnational governments also recognize rights to a healthy environment, even if the right is not recognized in their national constitutions. For example, in the United States, Hawaii, Illinois, Massachusetts, Montana and Pennsylvania have substantive constitutional rights to a healthy environment despite the absence of such a right in the federal constitution.[4]

13. As a specific example of a constitutional right to a healthy environment, the consultation discussed the especially detailed language in section 24 of the South African constitution, which states:

> Everyone has the right—
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> a) to an environment that is not harmful to their health or well-being; and
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> b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
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> i. prevent pollution and ecological degradation;
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> ii. promote conservation; and

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[1] See David Richard Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012), p. 59.
[2] *Ibid*. p. 62. For the remainder of this report, the phrase "right to a healthy environment" includes the various alternative formulations of such a right.
[3] *See e.g. Ibid*. p. 149.
[4] James R. May and Erin Daly, *Global Environmental Constitutionalism*, Cambridge University Press 2014), p. 219.

> iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

14. Participants noted that part (a) of section 24 is formulated as a negative obligation. According to one panellist, although its application is expanded through a broad *locus standi* provision in South African law, the terms health and well-being do not extend to eco-system health, but rather are anthropocentric. According to the panellist, part (a) also guarantees a minimum standard of environmental protection that can be inferred from the words "health" and "well-being."

15. Part (b) is a more directive principle that creates positive duties on the State to protect the environment for present and future generations. It was suggested that this section could be extended to non-state actors if it was read in conjunction with section 8 of the Constitution, which provides that a "provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." Section 24(b) also provides that the right must be implemented by "reasonable legislative and other measures". Section 24 firmly establishes environmental protection and sustainability as key tenets in a development paradigm.[5]

16. The Constitutional Court has provided guidance on the meaning of Section 24. The decision in the case of *The Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others* was highlighted in particular as an important milestone, which held that section 24 must be implemented in the administrative processes in South Africa.[6] The Court stated:

> Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication, requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in

[5] See *Fuel Retailers Association of Southern Africa v DG Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC). For a comprehensive discussion of section 24 see Michael Kidd, *Environmental Law: A South African Perspective* (2nd ed, Juta, 2011); Jan Glazewksi, *Environmental Law in South Africa* (2nd ed., Butterworths, 2005).
[6] 1999 2 SA 709 (SCA).

our legal and administrative approach to environmental concerns.

17. The Constitutional Court has also elaborated what 'reasonable and other measures' means in several cases related to economic, social and cultural rights.[7] Glazewski has summarized the test for reasonableness to require measures that are comprehensive and co-ordinated, clearly allocating responsibilities and tasks; capable of promoting realization of the right; reasonable in conception and realization; balanced and flexible, providing for needs of different degrees of urgency, and refraining from excluding significant elements of society; and responsive to the most urgent needs and the management of crises.[8]

18. Participants also referred to the *Fuel Retailers* case as an important recognition of environmental protection in the development process.[9] *Fuel Retailers* stands for the proposition that section 24(b)(iii) obligates the government to treat the objectives of environmental protection and socio-economic development as interdependent and to refrain from pursuing one at the expense of the other.[10] According to *Fuel Retailers*, the government's obligation to consider economic interests and its obligation to consider environmental interests are mutually contingent upon each other.[11] "[The Constitution] envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development."[12]

B. POTENTIAL BENEFITS OF ADOPTING A CONSTITUTIONAL RIGHTS-BASED APPROACH TO ENVIRONMENTAL PROTECTION

19. Participants identified many potential benefits from including an environmental right in constitutions.[13] The following paragraphs highlight some of these benefits.

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[7] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC); *Grootboom* ibid; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); *Khosa v Minister of Social Development; Mahlaule v Minister of Development* 2004 (6) SA 505 (CC).
[8] Glazewski, note 5 *supra*.
[9] Note 5 *supra*.
[10] *Ibid*. ¶¶ 25-26.
[11] *Id*. at ¶ 45.
[12] *Id*. at ¶ 45.
[13] *See generally* Boyd, *The Environmental Rights Revolution*, note 1 *supra*.

20. First, it was suggested that the recognition of constitutional environmental rights can lead to the enactment of stronger environmental laws.[14] As the Independent Expert on human rights and the environment noted in his report on Costa Rica:

> During the visit of the Independent Expert, government officials and members of civil society repeatedly emphasized that the constitutional right symbolizes the importance Costa Rica places on environmental protection in general, and on the link between environmental protection and human rights in particular. There can be no doubt that article 50 [which established that every person has the right to a healthy and ecologically balanced environment] provides a strong basis for the country's environmental statutes and policies. For example, the Environment Act explicitly cites the constitutional right as one of the principles underlying that legislation (art. 2).[15]

21. Second, constitutional rights to a healthy environment can provide a safety net to protect against gaps in statutory environmental laws. As David Boyd suggests, the "existence of a constitutional right to health environment gives concerned citizens or communities a set of tools that may be effective in addressing problems despite the absence of legislation."[16]

22. Third, some participants stated that a constitutional right to a healthy environment can raise the profile and importance of environmental protection as compared to competing interests such as economic development. The emphasis on environmental protection can help to counteract the labelling of pro-environmental activists as anti-development or acting against the greater interests of the State.

23. Fourth, the inclusion of a right to environmental protection at the constitutional level also creates opportunities for better access to justice and accountability. National courts have often relied on environmental rights to allow suits by those affected by environmental harm. For example, as discussed in Section III on good practices, constitutional courts in Costa Rica, the Philippines and Argentina have relied on a constitutional right to a healthy environment to create a strong jurisprudence addressing

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[14] *Ibid*. p. 29 ("In many nations, entrenchment of a constitutional right to a healthy environment would require the enactment of stronger environmental laws in order to protect and fulfill the right.").
[15] See Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, Mission to Costa Rica, 8 April 2014, U.N. Doc. A/HRC/25/53/Add.1, ¶ 21.
[16] *Ibid*. p. 30. As David Boyd has explained, "the constitutional right could establish a floor below which rules for environmental protection cannot descend."

environmental impacts on humans. Section III reviews *Mendoza Beatriz Silva and other v. National Government of and Other in regards to damages suffered* (2008), where the Supreme Court of Argentina issued a sweeping decision based on Argentina's constitutional right to a healthy environment. The Supreme Court ordered multiple government agencies to implement a comprehensive clean-up programme of the Matanza-Riachuelo River under the supervision of a federal judge.

24. As Section III describes in more detail, access to justice is particularly strong when environmental rights are supplemented with procedural remedies that allow citizens to readily access constitutional courts, such as the use of *recurso de amparo* in Costa Rica, or where mechanisms are created to pursue constitutional claims on behalf of alleged victims, such as the *Ministerio Publico* in Brazil.

25. Fifth, and more generally, participants suggested that constitutional environmental rights may lead to better environmental performance. According to research conducted by David Boyd, quantitative data indicates that countries with constitutional provisions related to the environment have superior environmental records:

> Nations with environmental provisions in their constitutions have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental agreements, and made faster progress in reducing emission of sulphur dioxides, nitrogen oxides, and greenhouse gas than national without such provisions.[17]

Although Professor Boyd cautioned that these correlations do not imply causation, he stated that "the consistency of the association suggests that such a relationship exists and warrants further investigation."[18]

C. RECOMMENDATIONS AND CHALLENGES MOVING AHEAD

26. Participants agreed that in most countries where constitutional rights to a healthy environment were established along with framework laws and policies that sought to implement the right, implementation was the major issue. For example, participants identified South Africa as a country with a strong constitutional right to a healthy environment, but with many implementation problems. Similarly, although Uganda has enshrined a constitutional

[17] *Ibid.* p. 273.
[18] *Ibid.*

right to a healthy environment since 1995, participants stated that not much had changed in terms of promoting environmental protection as a result.

27. Participants identified many reasons for the lack of implementation of environmental rights.

28. Access to information was seen as a major challenge to attempts to promote compliance with constitutional environmental rights. For example, one participant stated that in Ghana a bill on access to information has been sitting in parliament for years without action. In addition, even where access to information laws are in place, often information on projects with environmental impacts is not received in time to prevent damage. One participant noted that in South Africa, despite strong access to information laws, implementation challenges prevent interested and affected parties from accessing relevant information.

29. Participants also stated that a great amount of technical expertise and institutional capability is needed to implement a constitutional right to a healthy environment, particularly to challenge or regulate non-State actors. In many developing countries, the institutional apparatus to enforce violations of constitutional rights are either not in place or inadequate.

30. Participants recognised the benefits of a judicial approach to promoting compliance with a constitutional right, but also noted the limitations of using such approaches. For example, participants agreed that in many African countries neither the judiciary nor the legal community has the knowledge or expertise to address environmental issues effectively, particularly when it comes to fashioning remedies. And even when courts issue decisions requiring environmental protection, judges have difficulty ensuring compliance. Participants gave the example of Burkino Faso, where they said that magistrate judges have little or no understanding of constitutional environmental rights, and the classes at university are not sufficient to train lawyers in this area. In this respect, participants recognised the need to create judicial training programmes and to increase the environmental and human rights curriculums in law schools. Some examples of good practices related to the judiciary and constitutional right to a healthy environment are provided in Section III.

31. In addition, a lack of judicial independence was described as a major obstacle to implementing constitutional rights. The example was given of an African country where the day before a court is to deliver judgment on a mining-related case, the president of the country might call the judge. While the call might purport to be only to say hello, the

purpose would be to alert the judge to the political implications of his or her decision. Other examples were given where higher court judges will call lower court judges to influence the decision. Participants also stated that the private sector sometimes bribes judges to influence a decision.

32. Participants also noted court delays and the complex and technical nature of litigating environmental violations as reasons to consider additional compliance strategies. Court delays in the environmental context were critical because even short delays could allow for damage to the environment, which is often irreversible, to take place. Many participants expressed that a great deal of expertise and evidence are typically necessary to prove claims of environmental harm. Access to such expertise is also cost prohibitive for many potential plaintiffs.

33. Another major challenge participants identified was how to mobilise and educate communities about a right to a healthy environment, as well as how to facilitate communities' ability to raise claims when such rights are violated. One example given from Ghana and discussed in more detail in Section III involved the creation of a colour coding system to determine compliance with environmental performance, thus making environmental law and administrative processes more accessible to communities which have limited capacity to understand the complexities of the legal system.

34. Many participants identified legal pluralism as a major challenge to implementing constitutional environment rights. For example, in Africa, it is common for communities to operate largely without any reference to statutory systems, including constitutional rights, and often decisions on land use are made by chiefs or other traditional authorities. In other cases, individuals are unwilling to lodge complaints before monitoring or enforcement bodies because they fear reprisals from traditional leaders. The implementation of constitutional rights needs to consider this legal pluralism.

35. Participants also raised as a challenge the lack of definitional precision of a constitutional right to a healthy environment, including, as one participant mentioned, the need to identify indicators to measure the impacts of constitutional rights to the environment. Has the establishment of a constitutional right reformed laws? Has environmental quality improved? Has private compliance improved? Has well-being improved? Has education and awareness improved? In terms of scholarship, how many courses are taught, and what other types of informational opportunities exist?

III. GOOD PRACTICES

36. This section reviews good practices presented during the consultation. Participants were divided into four groups and each group was requested to identify and report on at least two good practices from anywhere in the world.

A. CRITERIA FOR SELECTING GOOD PRACTICES

37. Prior to breaking out into their respective groups, participants were provided with instructions to assist them to identify good practices. Participants were informed that generally, the term "good practice" is preferred to "best practice," because in many situations, it is not possible to identify a single "best" approach. Similarly, a "best" approach in one situation may not be considered as successful in another situation.

38. The term "practice" is defined broadly, to include legislation, policies, strategies, case law, jurisprudential shifts, administrative practices, projects, and so forth, and would also include practices that go beyond established legal obligations related to the environment. They might include, for example, efforts to assist communities to participate in environmental decision-making beyond what environmental review laws may require, or even local laws that go beyond national legal obligations. Practices can be implemented by a wide range of actors, including all levels of government, civil society, the private sector, communities, and individuals.

39. For the purposes of this consultation, participants were instructed that a *good* practice could be a practice that has helped realise or implement existing constitutional rights to a healthy environment.

40. In general, participants were instructed that the practice should be exemplary from the perspective of human rights and from that of environmental protection. Importantly, participants were told that there should be some evidence that the good practice actually is achieving or working towards achieving its desired objectives and outcomes.

B. GOOD PRACTICES IDENTIFIED DURING THE CONSULTATION

41. The remainder of the report provides a summary of some good practices presented during the consultation. It seeks to outline select practices that help to clarify how constitutional environmental rights can be better realised. Although there are many potential good practices not included in this report, the selection below highlights various key categories of practices that relate to the implementation of constitutional human rights to an

environment. These categories include examples of (1) active constitutional courts that have created a jurisprudence that interprets and applies constitutional environmental rights; (2) "green" administrative tribunals; (3) practices related to improving access to courts, including through broad standing provisions; (4) practices related to improving monitoring of environmental rights; and (5) practices related to providing access to environmental information.

1. Active Constitutional Courts

42. In many countries, constitutional courts have actively enforced the constitutional right to a healthy environment.

43. For example, the Independent Expert on human rights and the environment during his visit to Costa Rica took note of the direct enforcement by the Constitutional Chamber of the Supreme Court, which has developed an extensive jurisprudence applying the right to a wide range of environmental issues. As the Independent Expert noted, since 1995, much of the case law of the Constitutional Chamber has concerned the application of article 50 of the Costa Rican Constitution, which sets forth the right to a healthy environment. According to the report of the Independent Expert, the Constitutional Chamber "has reviewed issues of constitutionality in environmental matters on 85 occasions between 1989, when the Chamber was established, and 2012 and has reached findings of unconstitutionality 36 times, or 42 per cent of the total."[19]

44. Some cases where the Constitutional Chamber has held that article 50 has been violated include by a law permitting the hunting of green turtles; by the authorization of timber harvesting in the habitat of the green macaw; by the authorization of construction in Las Baulas National Park; and by the failure of the Government to take adequate measures to protect groundwater in approving a high-density urban development.[20] The Independent Expert noted that:

> the Constitutional Chamber has defined the scope of article 50 broadly, transcending basic or primary protection of environmental components such as water to include factors relating to the economy, tourism, farming and other activities.[21] It has held that the right requires not only that the State refrain

[19] See *Report of Independent Expert on Mission to Costa Rica*, note 15 *supra*, ¶ 23.
[20] Boyd, *The Environmental Rights Revolution*, note 1 supra, pp. 136-137.
[21] Constitutional Chamber Decision No. 2541-12.

> from direct violations, but also that it protect against violations from others,[22] and in this regard, it has underscored the role of the State as the guarantor for the protection and safeguarding of the environment and natural resources.[23] Although plaintiffs may not necessarily demand that the State take a particular course of action, they are entitled to insist that the State adopt measures that are suitable for the protection of the right.[24]

45. In Argentina, the Supreme Court issued a far reaching and innovative decision regarding the constitutional environment right in *Mendoza Beatriz Silva and others v. National Government of Argentina and others in regards to damages suffered* (2008). Section 41 of the Argentine Constitution states:

> All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law.

46. The plaintiffs¸ a group of concerned residents of the Matanza-Riachuelo River basin, filed a complaint against the national government, the province and city of Buenos Aires as well as several private companies, based in part on the constitutional right to a healthy environment, seeking compensation for damages resulting from pollution of the basin, stoppage of contaminating activities, and a remedy for collective environmental damage. After providing initial rulings in 2006 requiring the government to conduct an environmental assessment and in 2007 ordering the government to establish a comprehensive clean-up and restoration plan for the river, the Court issued a comprehensive final ruling in 2008, in which it identified three main objectives for the clean-up effort and ordered the defendants to undertake a wide range of remedial actions.[25] Prior to the 2008 ruling, after recognising that it lacked the knowledge to evaluate the clean-up plan, the Court took the innovative step of ordering the intervention of the University of Buenos Aires, which through

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[22] Boyd, *The Environmental Rights Revolution*, note 1 *supra*, p. 136.
[23] Constitutional Chamber Decision No. 14991-12.
[24] *Report of Independent Expert on Mission to Costa Rica*, note 15 *supra*, ¶ 23 (internal citations omitted).
[25] *See* Boyd, *Environmental Rights Revolution*, note 1 *supra*, pp. 129-30.

its expertise would advise the Court on the adequacy of the clean-up plan presented by the State authorities.[26]

47. The objectives set by the Court for the clean-up programme included the improvement of the quality of life for the inhabitants of the basin and the environmental restoration of all the river basin's components.[27] It also ordered the River Basin Authority to carry out the clean-up programme subject to judicial oversight and to include the national government, the province of Buenos Aires and City of Buenos Aires as members of the Authority.[28] The Court ordered the Authority to assume responsibility for any non-compliance or delays, noting that the failure to comply with any of the established deadlines under the clean programme will result in the imposition of a daily fine on the president of the River Basin Authority.[29] The Court ordered many actions as part of the clean-up programme, including among others:

- to organise within 30 days a system of public information on the internet for the general public that includes all information related to the clean-up programme;
- to eliminate all industrial pollution by relocating businesses or requiring them to undertake a treatment plan to stop pollution;
- to improve drinking water, sewage and storm drainage systems;
- to put in place specific health programmes to meet the needs of the river basin population;
- to form a committee of interested non-governmental organisation in collaboration with the national Ombudsman to monitor compliance with the clean-up programme.[30]

According to Boyd, "the decision reflects the growing use of creative approaches to ensure compliance with court orders."[31]

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[26] *Mendoza Beatriz Silva and others v. National Government of Argentina and others in regards to damages suffered* (2008), ¶ 8, English translation available at ESCR net's web page: http://www.escr-net.org/sites/default/files/Sentencia_CSJN_2008_english.pdf.
[27] *Ibid*. ¶ 17 (I).
[28] *Ibid*. ¶ 16.
[29] *Ibid*. ¶ 18.
[30] *See Ibid*. ¶¶ 17-21.
[31] *See* Boyd, *Environmental Rights Revolution*, note 1 *supra*, p. 131.

48. The Philippines has also seen an active constitutional court willing to address environmental harm. The Philippines Constitution includes as a State policy that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[32] The Supreme Court of the Philippines has addressed this Constitutional provision in many cases. The first major case the Court decided was the *Minors Oposa* case,[33] in which a group of parents filed a class action law suit on behalf of their children and future generations asking the court to order the government to cancel all existing timber license agreements in the Philippines and to stop issuing new licenses. The Court in *Oposa* clarified that the environmental right in the Constitution, although falling under the section dealing with State policy, is nonetheless a legally enforceable and self-executing right with correlative State duties.[34]

49. In 2008, in *Concerned Citizens of Manila Bay*[35](*CCMB),* the Supreme Court of the Philippines issued a sweeping decision based on the environmental right in the Constitution. This case started when a group of residents in Manila filed a complaint against several government agencies for the cleanup, rehabilitation, and protection of Manila Bay based on violations of their constitutional rights, various statutes and international law. During the trial court proceedings, tests conducted at Manila Bay showed that the amount of fecal coliform content at various beaches ranged from 50,000 to 80,000 most probable number (MPN)/ml when government regulations prescribed as a safe level for bathing and other forms of contact recreational activities as not exceeding 200 MPN/100 ml.[36]

50. The Court, referring to its earlier decision in *Oposa*, reaffirmed the far-reaching scope of the constitutional right to a healthy environment. It stated that:

> the right to a balanced and healthful ecology need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications. Even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and

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[32] Philippines Constitution of 1987, art. II, sec. 16.
[33] *Minors Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (30 July 1993) (Phil.).
[34] See Boyd, *Environmental Rights Revolution*, note 1 *supra*, p. 167.
[35] *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, G.R. Nos. 171947–48, 574 SCRA 661, 665 (18 December 2008) (Phil.).*
[36] *Ibid*.

> women representing them cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible. Anything less would be a betrayal of the trust reposed in them.[37]

51. Based on the constitutional right and other legislation and regulations enacted to implement the constitutional right, the Supreme Court issued a multi-faceted order that required a wide range of government agencies to take coordinated action to rehabilitate the Bay as well as to put in place measures to prevent and control the discharge of additional pollution. It emphasized "the extreme necessity for all concerned executive departments and agencies to immediately act and discharge their respective official duties and obligations." The Court explained that:

> The cleanup and/or restoration of the Manila Bay is only an aspect and the initial stage of the long-term solution. The preservation of the water quality of the bay after the rehabilitation process is as important as the cleaning phase. It is imperative then that the wastes and contaminants found in the rivers, inland bays, and other bodies of water be stopped from reaching the Manila Bay.

52. Relying on the writ of "continuing mandamus," the Court also required each of the 13 agencies it addressed in its order to submit a quarterly progressive report to the Court of the activities undertaken in accordance with its decision.[38] The Court explained that the principle of "continuing mandamus" would allow the Court "under extraordinary circumstances, [to] issue directives with the end in view of ensuring that its decision would not be set to naught by administrative inaction or indifference."[39]

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[37] *Ibid*. (internal citation omitted).

[38] See e.g. Republic of the Philippines Supreme Court, Rules of Procedure for Environmental cases, A.M. No. 09-6-8-SC, 29 April 2010, Rule 8 ("If warranted, the court shall grant the privilege of the writ of continuing mandamus requiring respondent to perform an act or series of acts until the judgment is fully satisfied and to grant such other reliefs as may be warranted resulting from the wrongful or illegal acts of the respondent. The court shall require the respondent to submit periodic reports detailing the progress and execution of the judgment, and the court may, by itself or through a commissioner or the appropriate government agency, evaluate and monitor compliance. The petitioner may submit its comments or observations on the execution of the judgment").

[39] *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay,* note 35 *supra*.

2. Efficient, low cost environmental administrative courts and tribunals

53. Some countries have set up strong administrative tribunals that provide easy access to those seeking to challenge environmental permits or illegal environmental activities. Participants noted that such administrative tribunals facilitate access to justice and provide remedies in situations where there may be a violation of constitutional rights to a health environment.

54. For example, in Costa Rica the Environmental Administrative Tribunal created by the 1995 Environment Act No. 7554 has jurisdiction to hear complaints for violations of all laws protecting the environment and natural resources (art. 111). The Tribunal can carry out on-site visits to determine the nature of environmental damage, and when it finds that a violation has occurred, it can impose fines and administrative sanctions for the elimination or mitigation of the damage caused. It can also take interim measures of protection according to the *in dubio pro natura* or precautionary principle (arts. 98, 99 and 108). The combination of these factors makes the Tribunal an effective mechanism to provide access to a wide range of remedies to individuals and communities threatened with environmental harm. The Tribunal has issued decisions suspending operations at pineapple-processing plants and pineapple plantations, for example, on the ground that they are not complying with applicable pollution standards.[40] Moreover, as noted by the Independent Expert, in addition to these traditional legal remedies, the Tribunal has adopted creative approaches to engage with various stakeholders in the field of environment protection.[41] To increase awareness in the pineapple industry of unsound environmental practices, for example, it developed a training and outreach programme that included scientific and legal instruction on the environmental impacts of pineapple processing as well as on the legal framework that compelled intervention by the Tribunal. The result was to build greater awareness of, and support for, the need to change practices in order to better protect the environment.[42]

55. India, although not recognising an express right to environment in its Constitution, has nonetheless created an effective green tribunal to address environmental

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[40] The Economist Intelligence Unit, *Costa Rica: Environmental Law*. Available from http://country.eiu.com/article.aspx?articleid=211299405.
[41] *Report of Independent Expert on Mission to Costa Rica,* note 15 *supra*, ¶ 32.
[42] *Ibid*.

harms. The National Green Tribunal was established for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources, and has been operating since July 2011.[43] The Tribunal may provide relief and compensation to victims of pollution and other environmental damage, for restitution of property damaged, and for restitution of the environment. The objective of the Tribunal is, through its dedicated jurisdiction in environmental matters, to provide speedy environmental justice and help reduce the burden of litigation in the higher courts. According to the World Wildlife Fund India (WWF India), the Tribunal from its inception until March 2014 has adjudicated 393 cases, and WWF India has observed that the Tribunal has "delivered a number of significant judgments on range of issues from across the country. This Tribunal is therefore an important step in the access to justice on matters concerning the environment and its mandate is much wider than earlier environmental Courts and Authorities and other such Courts."[44]

3. **Improving access to courts, including broad standing provisions**

56. Some countries have facilitated access to justice and remedy by making it easier for community members to have access to court to seek remedies for violations of the right to a healthy environment.

57. For example, many countries have broadened the notion of legal standing to allow greater access to courts in environmental matters.[45] As the Independent Expert on human rights and environment has stated in relation to Costa Rica, "Lowering the barriers to access for those claiming violations of constitutional rights in general, and for environmental rights in particular, is truly an exemplary practice and one that should be an inspiration to other States."[46]

58. In Costa Rica, Article 48 of the Constitution provides for the remedy of *amparo* in order to maintain or re-establish the enjoyment of rights set out in the Constitution, as well as those of a fundamental nature established in international human rights treaties enforceable in Costa Rica. The *amparo* cause of action has been construed very broadly, to

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[43] See website of the National Green Tribunal, http://envfor.nic.in/rules-regulations/national-green-tribunal-ngt.
[44] WWF website, http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal.
[45] *See* May and Daly, note 4 *supra*, pp. 128-140.
[46] *See Report of Independent Expert on Mission to Costa Rica*, note 15 *supra*, ¶ 28.

allow any person to file a case regarding a constitutional right without a lawyer, with no filing fees, in any language, at any time, on any day of the year and in any form, including handwritten notes.[47] Furthermore, in 1994, the Constitutional Chamber broadened the notion of legal standing further by establishing the principle of *intereses difusas* whereby individuals are allowed to bring actions on behalf of the public interest, including in the interest of environmental protection.[48]

59. *Amparo* and *intereses difusas* have enabled the people of Costa Rica to have easy access to the Constitutional Chamber, and they have responded.[49] In 2012 alone, the Constitutional Chamber received 14,953 amparo petitions; it has received 68,537 petitions since 1989.[50]

60. In the Philippines, the Supreme Court has enacted Rules of Procedure for Environmental Cases that provide many mechanisms to facilitate petitioners to bring cases before the Court.[51] The Rules, which list as an objective "[t]o protect and advance the constitutional right of the people to a balanced and healthful ecology,"[52] include a broad standing provision for citizens to bring cases before the Court. The Rules specify that "[a]ny Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws."[53] For such citizen suits, the Court will also defer the payment of any filing or other legal fees until after judgment is issued by the Court.[54] The Rules also address strategic lawsuits against public participation, also known as SLAPP suits, which it defines as "legal action[s] filed to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights."[55] The Rules give the opportunity for plaintiffs to raise cases that they believe are SLAPP suits with the Court, and the Court then shifts the burden on the defendant to demonstrate that the counter suit is not a SLAPP suit.

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[47] Law on the Constitutional Court, Title III.
[48] Constitutional Chamber Decision No. 503-94.
[49] *See generally Report of Independent Expert on Mission to Costa Rica*, note 15 *supra*, ¶ 28.
[50] See http://sitios.poder-judicial.go.cr/salaconstitucional/estadisticas.htm.
[51] See note 38 *supra*.
[52] *Ibid*. Rule 1, sec. 3(a).
[53] *Ibid*. Rule 2, sec. 5.
[54] *Ibid*. Rule 2, sec. 12.
[55] *Ibid*. Rule 6.

The Rules set short timetables for the resolution of such law suits and if the Court dismisses the SLAPP suit, it may award damages, attorney's fees and costs of suit under a counterclaim if such has been filed.[56]

4. Independent and effective monitoring bodies

61. Other countries have created independent bodies or mechanisms that are tasked with monitoring and enforcing constitutional rights, including those relating to environmental protection.

62. For example, in Costa Rica, the Office of the Ombudsperson is an independent body of the Legislature, which has the general responsibility of protecting the rights and interests of Costa Ricans by ensuring that the public sector meets standards set by the Constitution, statutes, conventions, treaties and general principles of law, as well as standards of morality and justice.[57] It has the authority to investigate, either on its own initiative or upon request, complaints of alleged human rights violations by public authorities through administrative acts or omissions in the exercise of administrative functions. The Ombudsperson can initiate judicial or administrative proceedings to address such violations and can also participate in the legislative process, including through participating in parliamentary debates and reviewing legislative proposals, in order to promote the human rights of citizens.[58] Much of the work of the Ombudsperson in recent years has concerned environmental issues, including the constitutional right to a healthy and ecologically balanced environment. In 2011, of the 3,305 cases received by the Office of the Ombudsperson, 311 concerned the right to a healthy environment.[59] In approaching those cases, the main function of the Ombudsperson has been to promote the active participation of representatives of civil society and to monitor the performance of government institutions.[60]

63. Another example of a powerful and effective monitoring and enforcement body is the *Ministerio Publico* in Brazil. Article 225 of the Brazilian Constitution provides

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[56] *Ibid*.
[57] Office of the Ombudsperson Act (Ley de la Defensoría de los Habitantes de la República) (No. 7319) 7 Nov. 1992, arts. 1 and 2. Available from www.dhr.go.cr/.
[58] *Ibid*. arts. 12 and 13.
[59] See http://dhr.opendata.junar.com/dashboards/7737/investigaciones-abiertas/.
[60] 2012–2013 Annual Report of the Ombudsperson, pp. 314 and 315. Available from www.dhr.go.cr/la_defensoria/informes.html; *see also Report of Independent Expert on Mission to Costa Rica*, note 15 *supra*, ¶¶ 33-4.

that "[a]ll have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations."[61] The 1988 Brazilian Constitution provides the *Ministerio Publico* with broad powers to monitor and enforce violations of, among other things, Constitutional rights. The Constitution established the *Ministerio Publico* as a permanent institution essential to the jurisdictional function of the State and that is functionally independent from the Executive Branch with the "duty to defend the juridical order, the democratic regime and the inalienable social and individual interests."[62] Article 129(3) of the Constitution further outlines that one of the functions of the *Ministerio Publico* is "to institute civil investigation and public civil suit to protect public and social property, the environment and other diffuse and collective interests." Pursuant to its mandate, the *Ministerio Publico* has been extremely active in the area of environmental protection, including both in terms of enforcement and policy development.[63] For example, in the state of Sao Paolo alone, the *Ministerio Publico* brought over 4000 environmental cases.[64] Moreover, the recent years has seen the *Ministerio Publico* use the threat of prosecution as means to negotiate settlement agreements with polluters which are referred to as "conduct adjustment agreements."[65] These agreements allow the *Ministerio Publico to* avoid the high costs, delays and uncertainty in the court system.[66]

64. In Mexico, the National Human Rights Commission (CNDH) has played an important part to help address environmental harms. A Constitutional reform in 1999 gave

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[61] See Boyd, *Environmental Rights Revolution*, note 1 *supra*, p. 132, citing Leslie K. McAllister, *Making Law Matter: Environmental Issues in Latin America and the Caribbean* (Stanford, Stanford University Press 2008).
[62] See Constitution of Brazil (1998), art. 127, English Translation, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=218270
[63] Boyd, Environmental Rights Revolution, note 1 *supra*, p. 132; Leslie K. McAllister, "Public Prosecutions and Environmental Protection in Brazil," in *Environmental Issues in Latin America and the Carribean*, edited by A. Romero and S. West, pp. 207-29 (New York, Springer 2005); Bernardo Mueller, Who Enforces Enforcement?:
Can Public Prosecutors in Brazil Break the Endless Regress? Department of Economics University of Brasilia, Brazil (August 2006), available at http://www.isnie.org/ISNIE06/Papers06/07.3%20(no%20discussant)/mueller.pdf
[64] Boyd, *Environmental Rights Revolution*, note 1 *supra*, p. 132, citing Leslie K. McAllister, *Making Law Matter: Environmental Issues in Latin America and the Caribbean* (Stanford, Stanford University Press 2008).
[65] *Ibid.*
[66] *Ibid*.

the CNDH full autonomy as an agency with its own budget.[67] The mandate of the CNDH is to "protect, observe, promote, study, and disseminate the human rights protected by the Mexican legal system."[68] To this effect it can receive and investigate complaints on human rights violations and make recommendations on its findings to the government, including outlining corrective actions.[69]

65. Although a right to a healthy environment was not included in the Mexican Constitution until 2012, the CNDH issued a number of recommendations related to environmental protection prior to this. For example, in Recommendation 012/2010, the CNDH found that the National Water Commission failed to comply with environmental standards that required it to treat and clean up polluted water in the Santiago River, causing the death of a child and affecting the health of people living in the vicinity of the river.[70] To address the pollution, the CNDH recommended that the National Water Commission, among other things, warn residents near the river of the risk of pollution on their health, enact effective environmental protection guidelines, and take steps to clean-up and restore the affected areas.[71] In another case, the CNDH found that the untreated wastewater being released into the Usumacinta River violated, among other things, the human rights to an adequate environment and drinking water of the inhabitants in the area.[72] In addition to issuing recommendations, the CNDH can organise preventive programs in human rights, promote human rights awareness, and assist government agencies to comply with international human rights obligations.[73] For example, in September 2012 the CNDH organised, in collaboration with the North American Commission for Environmental Cooperation (CEC). a seminar on human rights and access to environmental justice with a specific focus on non-judicial mechanisms and means for citizen participation.[74]

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[67] See CNDH's website, http://www.cndh.org.mx/Antecedentes.
[68] Law of the CNDH, art. 2, available on CNDH's website, http://www.cndh.org.mx/sites/all/fuentes/documentos/conocenos/ley_CNDH.pdf.
[69] See CNDH's website, http://www.cndh.org.mx/Atribuciones. See also Human Rights Watch, "Mexico's National Human Rights Commission: A Critical Assessment" (2008).
[70] CNDH, Recommendation 012/2010, 2 March 2010.
[71] *Ibid*.
[72] CNDH, Recommendation 54/2011, 4 October 2011; *see also* Recommendation 68/2009, 20 October 2009.
[73] CNDH's website, http://www.cndh.org.mx/Atribuciones.
[74] See programme details on the CNDH website, http://www.cec.org/Storage/140/16646_004_CNDH_Final_Agenda_en_FINAL.pdf.

66. South Africa provides a good example of a joint monitoring body comprised of civil society, government and the private sector. The history leading up to inclusion of civil society in the joint monitoring body is a good practice that civil society throughout the world can draw from. In 2008 an Australian company, Coal of Africa (CoAL), applied for a mining right in South Africa on land less than seven kilometres from the boundaries of a UNESCO recognised World Heritage Site called the Mapungubwe Cultural Landscape.[75] Initially, a group of civil society organisations made efforts to prevent CoAL from mining in the Mapungubwe region, but over time the organisations united to form the Save Mapungubwe Coalition. The Coalition undertook a wide variety of strategies that included engaging with the public participation process required by South Africa's environmental and mining laws, litigation and direct negotiations with the government and CoAL.[76] Eventually, through persistent and focused litigation that challenged all of the administrative permits that CoAL received, the company decided to negotiate with the Coalition and entered into a Memorandum of Understanding (MOU) which set the terms of the negotiations.[77] According to one member of the Coalition, "[i]t was hoped that [the company] and the Coalition could set a best practice precedent both for meaningful engagement with civil society and for a mine binding itself to environmental management commitments, over and above, what was legally required."[78]

67. Unfortunately, negotiations did not achieve an agreement; however, at the same time an Environmental Management Committee (EMC) was set up by the relevant government agencies to monitor the mine.[79] The EMC is a multi-stakeholder body set up under South African environmental law to monitor the mining company's compliance with the conditions of their environmental and mining licenses and authorisations. Initially the Coalition participated in the EMC as an observer. This allowed the Coalition to form a positive working relationship with the members of the EMC—government and CoAL—despite having previously been adversaries. The positive and constructive presence of the Coalition eventually led to the EMC accepting the Coalition as a full member of the

[75] Cite Centre for Applied Legal Studies (CALS), The Mapungubwe Case Study: A Research Report, February 2014, available at CALS website, http://www.wits.ac.za/files/bilsp_112254001405415643.pdf, p. 18.
[76] *See generally Ibid*.
[77] *Ibid*. pp. 27, 31.
[78] *Ibid*. p. 31.
[79] *Ibid*. p. 33.

monitoring group, and soon thereafter even nominating a member of the Coalition as Chair of the EMC.[80] According to one Coalition member, "[t]his would not be possible without the acceptance of the Coalition as a pivotal member of the EMC by the majority of members. The Coalition's rapid move from a peripheral to central role on the EMC promises to clear a path for other civil society Coalitions to play a similar role in other environmental oversight institutions."[81] Moreover, the Coalition has been able to have a strong influence on the operations of the mine to ensure that it is in compliance with all legal requirements. One coalition member explained:

> While the path has often been steep and strenuous, the Coalition has carved itself a place on the EMC, and is now in a position to play a pivotal role in a multi- stakeholder governance forum. It has played a driving role in increasing the level of scrutiny of CoAL's compliance record. The EMC has exercised its power to make recommendations to secure improved environment practices from CoAL, including improved planning for accidents and emergencies. It has further consistently raised the importance of participation by mine-affected communities in decisions affecting their lived environment.[82]

5. Good practices related to access to information

68. Many countries have enacted access to information provisions related to the environment, which participants identified as an important step towards guaranteeing a right to a healthy environment. In some countries, constitutions directly address access to information related to environmental protection. For example, in the Czech Republic, Article 35(2) of the Charter of Fundamental Rights and Freedoms provides that "[e]veryone has the right to timely and complete information about the state of the environment and natural resources."[83] Other countries have general access to information provisions in their Constitutions that can supplement a constitutional right to a healthy environment. For example, in South Africa, Article 32 of the Constitution provides:

> 1) Everyone has the right of access to- (a) any information held by the state; and (b) any information that is held by another

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[80] *Ibid*. p. 36.
[81] *Ibid.* p. 36.
[82] *Ibid*.
[83] *See* May and Daly, note 4 *supra*, pp. 244-45 (listing countries that provide for rights to information on environmental matters.

> person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

69. Some countries have gone beyond responding to requests for information by proactively providing environmental information to the public. For example, in South Africa, the Department of Environmental Affairs has created the South African Waste Information Centre (SAWIC), a website that provides a wide-spectrum of information on waste management to the public.[84] In addition to providing access to all laws and regulations governing waste management, SAWIC also provides an up-to-date list of all waste management licenses and license applications, including licenses to remediate contaminated land, treat wastewater, dispose waste on land, and store waste.[85]

70. The South African Department of Environmental Affairs also publishes an annual report on all enforcement related activities. This report provides information on statistics for enforcement, including administrative citations and fines issued, criminal cases brought, number of convictions, number of facilities inspected, and number of staff working on compliance monitoring and enforcement.[86] According to one participant from South Africa, the annual compliance and enforcement report "gives incredibly valuable information to civil society to use to empower it to take legal action and to use as softer advocacy tools, such as to criticise companies engaged in illegal activities."

71. In Canada, the province of Ontario has also created a web-based Environmental Registry where the public can access a wide spectrum of environmental-related information. The Environmental Registry was created pursuant to the requirements of the Ontario Environmental Bill of Rights, a comprehensive law whose purpose is, among other things, to protect the right to a healthful environment.[87] According to the website, the Environmental Registry "contains 'public notices' about environmental matters being proposed by all government ministries covered by the Environmental Bill of Rights. The

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[84] See Department of Environmental Affairs Waste Information Center, http://sawic.environment.gov.za/?menu=75.
[85] *Ibid*.
[86] See e.g. South African Department of Environmental Affairs web site, https://www.environment.gov.za/mediarelease/necer_201213report.
[87] Ontario Environmental Bill of Rights (1993), S.O. 1993, CHAPTER 28, sec. 2.

public notices may contain information about proposed new laws, regulations, policies and programs or about proposals to change or eliminate existing ones."[88] The public notices provide information on where to find the details about the proposals, how and where to send comments, and the deadline for having comments considered.[89] Through providing internet access to environmentally-relevant information, the Environmental Registry allows the public to exercise its right under Ontario's Environmental Bill of Rights to be given public notice of a range of government proposals and decisions related to environmental matters, and to provide comments on those issues.

72. Ghana also provides a good example of how to make environmental law and administrative processes more accessible to communities who do not have the capacity to understand the legal system. The programme, known as AKOBEN, was launched in 2010 and is implemented by the Ghanaian Environmental Protection Agency (GEPA). It uses a five colour rating scheme to access the performance of mining and manufacturing operations in a manner that is easily understood by the public.[90] According to GEPA:

> The highest level of performance—a GOLD rating—goes beyond the requirements of formal regulations and it signifies that a company applies international best practices for environmental management, and properly follows its corporate social responsibility policies. In contrast, the worst possible rating is a RED rating which is assigned to those companies that do not have a valid permit or a certificate as required by the Environmental Assessment Regulation LI 1652. An operation could also get a RED rating if its: (1) emissions and effluents exceed the environmental quality standards for discharging toxics into the environment, or (2) on-site hazardous waste management practices cause serious risk to physical or human environments.[91]

73. Ratings are annually disclosed to the general public and the media, and the disclosure aims to strengthen public awareness and participation about environmental issues as well as provide incentives for companies to comply with regulations and undertake good

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[88] Government of Ontario, Environmental Registry, http://www.ebr.gov.on.ca/ERS-WEB-External/content/about.jsp?f0=aboutTheRegistry.info&menuIndex=0_1.
[89] *Ibid*.
[90] *See* Ghana Environmental Protection Agency, AKOMEN website, http://www.epaghanaakoben.org/.
[91] *Ibid*.

practices.[92] Disclosures from 2009-2012 are available on the website of GEPA. From sixteen mining companies rated in 2012, none received a gold rating while seven received a red rating.[93]

[92] *Ibid*.
[93] *Ibid*.