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**Inextricably Intertwined - Environmental Management and the  
Public**

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# ARTICLES

## Inextricably Intertwined - Environmental Management and the Public

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## I. INTRODUCTION

Over the last forty years, the idea that the public holds a legal right to participate generally in government decision-making has gained wide acceptance both domestically and internationally.<sup>1</sup> This fact is especially true within the realm of environmental law, where government decisions greatly impact the environment in which all citizens must live. Generally, pro-participation arguments presuppose that because every non-natural act that affects the environment involves government decision-making at some level, the views of the public citizenry inhabiting that environment and consequently bearing the cost of its degradation should be considered during development and implementation of a workable policy.<sup>2</sup>

1. Public participation here means, generally, purposeful activities in which citizens take part in relation to government action or decision-making. See generally Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 266 (1999). For a definition of public participation in environmental decision-making, see *infra* note 2.

2. See Neil Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 PACE ENVTL. L. REV. 683, 683 (1993). This paper uses the term "environmental public participation rights" in order to capture the entire bundle of rights associated with public participation generally and apply such rights to environmental

The growing acceptance of environmental public participation rights is evident in the arena of international law<sup>3</sup> where recent international environmental initiatives have formed a critical mass around the evolving concept of sustainable development.<sup>4</sup> These broad initiatives, and the large number of specific legal instruments they spawn, place enormous import on the concept of environmental public participation as a key ingredient of sustainable development.<sup>5</sup> The growing international discourse has influenced many international aid agencies and private institutional investors to view the concept of sustainable development as the proper means towards achieving development in transitional States. For example, the United States Agency for International Development (USAID), the World Bank, and the Asian Development Bank have all formulated policies that require aid recipients and developers to adhere to certain principles and guiding rules promoting sustainable development as the concept has been recognized and codified by international law.<sup>6</sup> Consequently, these organizations and others mandate public participation as a key factor of sustainable development, and their funding is often predicated, at least in part, on how well developers and their host nations involve the public in project decision-making.

Many States, both developed and transitional, have also enacted broad statutory provisions providing for environmental public participation rights. Some have even adopted constitutional amendments to guarantee environmental public participation rights in governmental decision-making.<sup>7</sup> For example, public participation is a cornerstone concept found throughout U.S. environmental law. The Environmental Protection Agency (EPA) has created several non-regulatory programs aimed at including the public in meaningful ways in the decision-making process.<sup>8</sup> Likewise, many States in the European Union and the European Community have begun to implement ambitious public participation provisions of the United Nations Economic Commission for Europe (UNECE) Convention

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decision-making. Environmental public participation rights can generally be defined as the rights of the public citizenry within a nation-state to play a role in the creation, implementation, and enforcement of decisions, policy formation, and regulation that affects the environment. *Id.* Most scholars agree that for environmental public participation to be effective it must require, at a minimum, six elements: (1) education about the environment and factors which affect it, (2) access to information (and availability of that information), (3) participation in decision-making process, (4) transparency in the decision-making process, (5) opportunity for post-project analysis and monitoring, and (6) access to justice (enforcement and redress). *Id.*

3. International law here is taken broadly to mean all legal instruments, principles, understandings, and frameworks that arise from multilateral or bilateral conventions, declarations, agreements, and the general body of customary international law.

4. *See infra* Part IV.

5. *See infra* Part IV.

6. *See, e.g.,* WORLD BANK, *The Impact of Environmental Assessment* xviii, n.4 (Technical Paper No. 363, 1997); ASIAN DEV. BANK, *Environmental Risk Assessment: Dealing with Uncertainty in Environmental Impact Assessment* 9-12 (Env't Paper No. 7, 1991).

7. *See generally* Thomas Mullikin & Nancy Smith, *Community Participation in Environmental Protection*, 21 UCLA J. ENVTL. L. & POL'Y 75 (2003).

8. *See infra* Part III.

on Access to Information (Aarhus Convention).<sup>9</sup> One may also find broad environmental public participation rights in the developing world, where transitional States in Latin America, Asia, and the Middle East are working to develop environmental regulatory schemes guaranteeing public involvement in governmental decision-making.<sup>10</sup>

While growing more popular, the concept of environmental public participation is not universally applied. Although many political systems purport to make some provision for environmental public participation, the scope and effect of that participation is inconsistent.<sup>11</sup> The contours of a public "right" to participate in environmental decision-making remain dynamic and uncertain.

This paper advances a basic argument: environmental public participation rights are necessary to industrial development, and deliberate, effective, and well-reasoned economic growth can occur only after involvement of critical host-community stakeholders. Such rights should not be ignored by the governments of transitional States, nor should they be ignored by industry seeking to invest in those transitional States. Three factors support this position. First, and perhaps most importantly, there is a crucial nexus between the industrialization of society and the need for environmental regulation containing assurances of public participation in environmental decision-making.<sup>12</sup> Where industrial development occurs, public apprehension and concern for the protection of air, land, and water eventually follow. As States move through the stages of industrialization, the resulting environmental stressors intensify concern for the protection of the environment among a public that ultimately bears many of the externalities of development. Failure to recognize this phenomenon and to include the public as participants in environmental decision-making will have long-term negative consequences on industry. Therefore, public support is crucial to continued and sustainable development.

This "nexus" between public participation and successful economic growth is reflected in the historical experiences of developed and heavily industrialized States such as the United States and the States that make up the European Union. It is no coincidence that these States have created elaborate mechanisms for environmental public participation rights and have been the most successful at injecting those rights into broad, far-reaching environmental legislation.<sup>13</sup> A

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9. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, U.N. Doc. ECE/CEP/43, 38 I.L.M. 517 [hereinafter Aarhus Convention]; see *infra* notes 210-14 and accompanying text. The EU came into existence on November 1, 1993 as a result of the Maastricht Treaty. It incorporated but did not replace the EC. The EC is still referred to when discussing functions conferred by the European Community Treaty or its legal effect.

10. See *infra* Part IV.B.

11. Popovic, *supra* note 2, at 684 (quoting Henry J. Steiner, *Political Participation as a Human Right*, 1 HUMAN RIGHTS YEARBOOK 77, 77 (1988)).

12. See *infra* Parts II and III.

13. See *infra* Part III.

study of this historical nexus demonstrates how public concern resulting from industrialization created the impetus for the current public participation schemes embedded in the environmental legislation of these developed nations.

Second, both international and internal forces are compelling transitional States to secure environmental participatory rights for their citizens. International support for environmental participatory rights has resulted from the recognition that environmental public participation rights are a key factor for sustainable development.<sup>14</sup> Many transitional States have bound themselves by treaty to include the public in governmental decisions regarding the environment. Further, transitional States are finding it increasingly difficult to secure funding and aid for development without adhering to at least some minimum international standard of public involvement in decisions concerning development projects. In addition to international pressure, transitional States increasingly face internal pressure to implement environmental public participation rights as a means to mitigate the potentially disastrous consequences of public discord (e.g., rioting).<sup>15</sup> When the affected public is left out of the development process, transitional governments face potentially devastating consequences and long-term costs. The result is that transitional States have begun to recognize the importance of public involvement and are responding accordingly.

Finally, transitional States and private industry should not ignore public participation rights because the creation of these rights attracts capital investors. Capital investors generally recognize that the public's ability to participate in environmental decision-making produces positive economic outcomes essential for successful development.<sup>16</sup> Environmental public participation rights make good economic sense. Markets require a free flow of information. Investors like stability and seek proper risk allocation for their large capital outlays. When States implement public participation schemes, they facilitate information flow and ensure stability by creating a rule of law. As discussed above, the public's ability to participate can also alleviate public discord and promote acceptance of large infrastructure projects, another key factor for market stability.

This paper will examine these three factors in order to demonstrate the importance of environmental public participation rights to well-reasoned and sound development. Part II demonstrates how the historical progression of industrialization produced environmental stress that created the impetus for environmental regulation and the public's right to participate in that regulation. While this section focuses on Western examples, the nexus between industrialization and environmental public participation rights is universal. Therefore, the analysis is helpful to understand how environmental regulation emerges generally in States marching towards development.

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14. See *infra* Part IV.

15. See *infra* notes 227-37 and accompanying text (Cambodia).

16. See *infra* Part V.

Part III examines the product of this historical nexus by surveying actual public participatory rights found in the major pieces of EU and U.S. environmental legislation. This section argues that environmental public participation rights play a crucial role in developed States, and may serve as effective templates for transitional States seeking to implement such rights.

Part IV traces the international emergence of environmental public participation rights as a factor for sustainable development. As international law increasingly reflects a developed and refined concept of sustainable development, it builds a foundation for public participation rights in environmental decision-making. This section demonstrates how the interrelated concepts of sustainability and participation have deeply influenced binding regional agreements and international aid policies for development. Consequently, transitional States, bound by the formal mandates of these agreements and aid policies, are implementing environmental public participation rights to an unprecedented degree. This section also demonstrates how overwhelming internal pressure from concerned citizens forces transitional States to involve the public in environmental decision-making.

The final section explains the importance of enacting environmental public participation rights as a means of mitigating risk and allocating the cost of development among several stakeholders. The section concludes that industrial investors who build capacity in transitional States should recognize and encourage the implementation of such rights to ensure sustainable development.

## II. THE HISTORICAL NEXUS BETWEEN INDUSTRIAL DEVELOPMENT, ENVIRONMENTAL REGULATION, AND PUBLIC PARTICIPATION

Strong public concern for the environment, as a resource requiring protection from unmitigated human activity, is a relatively new development which has appeared only within the last forty years. Even more recent is the notion that the public should play an integral role in developing and enforcing an environmental regulatory scheme designed to alleviate environmental degradation, a notion that has yet to take root in many areas of the world.<sup>17</sup> To determine why the concept of environmental public participation has gained strong support in some countries, it is useful to trace the broader historical forces that have played a role in the development of public demand for environmental accountability. History shows that mounting public concern and demand for public participation rights result from the rise of environmental stress,<sup>18</sup> stemming largely from under-regulated

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17. This is clearly changing. *See infra* notes 238-63 and accompanying text.

18. In this article the terms "environmental stressors" and "environmental stress" are taken to mean those general factors (e.g., air pollution, water pollution, noise pollution, industrial waste, overcrowding, etc.) associated with the processes of large-scale industrial development. *See generally* MARTIN V. MELOSI, EFFLUENT AMERICA: CITIES, ENERGY, INDUSTRY AND THE ENVIRONMENT (2001) (discussing the connection between environmental stress and industrial development); ANTHONY WOHL, ENDANGERED LIVES: PUBLIC HEALTH IN

industrial growth, and greater scientific understanding of the effects of environmental stressors.

Environmental regulation<sup>19</sup> arises from concern about a public problem. This situation inherently requires three conditions: (1) the existence of one or more environmental stressors that affect the environment through nuisance, degradation, or other means; (2) the awareness (through scientific knowledge, education, ready dissemination of information, etc.) that environmental stressors are the root cause of environmental degradation; and (3) the existence of sufficient concern to remedy that degradation.<sup>20</sup> Such a combination of factors came together as a result of industrial revolutions, and the trend continues throughout the developed world with the rise of globalization.

While a survey of the events that led to the necessary combination of factors could form a multi-volume treatise, what follows is a simplification of these events, provided to ground recent environmental regulation and public participation rights in a deeper historical tradition. Using the industrialized West as an example, this section outlines the historical nexus between environmental stress caused by industrial development and calls by a concerned public for greater participation in environmental decision-making. While this framework is modeled after Western industrialization, it is also useful for understanding the ways in which the environmental effects of industrialization generally lead to calls for greater public participation rights and can be applied to current transitional States with a few modifications.

#### A. STAGE ONE: DEVELOPING ENVIRONMENTAL CONSCIOUSNESS

Environmental concern requires consciousness of environmental problems. In the Western tradition, environmental consciousness developed gradually over centuries.<sup>21</sup> Ancient cultures throughout the world were at least cognizant of the problems associated with waste management and resource conservation.<sup>22</sup> In fact, many of the Greek city-states adopted waste management ordinances that required citizens to dispose of their trash outside their cities.<sup>23</sup> Both the Greeks

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VICTORIAN BRITAIN (1983).

19. This paper assumes that as environmental regulatory schemes develop, the chances for meaningful public participation increase. Therefore, the study of the developmental stages of environmental regulation in industrial society provides also a greater understanding of how environmental public participation has evolved over time.

20. A fourth element could be added: resources to effect regulation must also be available if regulation is to be accepted. However, resources are not necessary merely for the creation of an environmental regulatory scheme.

21. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE AND POLICY 60 (4th ed. 2003).

22. FRANK J. FROST, GREEK SOCIETY (5th ed. 1997); HENRY C. BOREN, ROMAN SOCIETY (2d ed. 1992); Paul Krugman, Editorial, *Salt of the Earth*, N.Y. TIMES, Aug. 8, 2003, at A17.

23. *Garbage through the Ages*, Wayne County Soil and Conservation District Webpage, at [http://www.waste-not.org/articles/garbage\\_through\\_ages.html](http://www.waste-not.org/articles/garbage_through_ages.html) (last visited Feb. 5, 2005).

and Romans built extensive and costly sewage systems that likely required numerous decisions at the governmental level regarding policy implementation.<sup>24</sup> Evidence even suggests that there was some level of public participation throughout this process, if only through the normal democratic processes of the *civitas*.<sup>25</sup>

However, Greeks and Romans were concerned more about dealing with the nuisance of human and animal waste than they were with the environmental effects of such waste. The chain of cause and effect between development, environmental degradation, and its negative impact on human health was not clearly understood. Humans did not consider the environment because they were not conscious of any real threat to the environment. Rather, the sewage systems were a common sense response to alleviate the unpleasant effects of waste by disposing of it responsibly.

The lack of any significant environmental consciousness continued throughout the Early and High Middle Ages. As the feudal hierarchical structure replaced the concept of the *civitas* and Christian anthropocentrism replaced scientific inquiry, political and social discourse involving public participation generally, and the protection of the environment specifically, were a dead letter.<sup>26</sup> Medieval Europeans not only lacked the resources and scientific knowledge to appreciate the relationship between environmental degradation and human health, but they also lacked any real political and social power to do anything about it.

However, two key historical events of the Middle Ages spurred the slow but consistent development of Western consciousness regarding the environment and the human impact upon it: the rise of the Medieval city and the evolution of the university.<sup>27</sup> The rise of the city increased trade and industry, created the framework for the modern market economy and produced environmental stress that impressed upon the public the notion that industry and overpopulation carried environmental consequences. The universities laid the foundation for the emergence of scientific inquiry and discovery and a more secular notion of critical analysis. Both movements would later become essential during the Renaissance and the so-called Scientific Revolution, and both were instrumental in the coming age of industrialization.<sup>28</sup> These events eventually ushered in a

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24. INSTITUTE OF WASTES MANAGEMENT, HISTORY OF WASTE AND RECYCLING INFORMATION SHEET, at <http://www.wasteonline.org.uk/resources/InformationSheets/HistoryofWaste.htm> (last visited Feb. 5, 2005).

25. *Id.*

26. Christian anthropocentrism stems from the Christian understanding of creation in which God created the earth and all of the plants, birds, fishes, and other animals on the planet for the benefit of man alone who was made in God's image. No item in the physical creation had any purpose other than to serve man's purposes. This belief, strongly held in the Middle Ages and up to the Scientific Revolution of the eighteenth century naturally stifled a great deal of early scientific curiosity and interest in ecological matters. See generally Lynn White, Jr., *The Historical Roots of Our Ecological Crisis*, 155 SCI. 1203 (1967).

27. See generally FRANCES GIES & JOSEPH GIES, LIFE IN A MEDIEVAL CITY (1969); JACKSON J. SPIELVOGEL, WESTERN CIVILIZATION – VOLUME I: TO 1715, 267-304 (4th ed. 2000).

28. See GIES & GIES, *supra* note 27, at 161-63.

move away from Christian anthropocentrism and toward humanism—the idea that humans should and must intervene in earthly events that affect them.<sup>29</sup>

### 1. Rise of the Medieval City

While towns and cities had formed an important function in Roman society, their numbers declined dramatically throughout the Middle Ages as society became increasingly fragmented and the economy moved towards agricultural subsistence.<sup>30</sup> By the period of the High Middle Ages, the development of new and more efficient agricultural practices led to an increase in food production and a general surplus in the food supply. Free from the need to produce their own food, many Europeans were eager to embark upon other economic functions and fled to emerging towns, often in the old Roman centers, where they could group together and pursue those functions.<sup>31</sup> These migrations effectively reinvigorated commerce and, as money began once again to circulate, craftspeople and merchants flourished. Their increasing numbers created newer, larger, and evolving markets, and the Medieval cities were born.<sup>32</sup>

Additionally, the food surplus kept food prices low and allowed townspeople to spend larger portions of their income on goods, ensuring the continued growth of markets. The aristocracy, eager to seize an opportunity to gain additional tax revenue, pledged resources to protect trade routes between cities.<sup>33</sup> While cities and markets revived only gradually, a regular exchange of goods had fully developed among the major population centers of Europe by the fourteenth century.<sup>34</sup> In fact, historians often speak of this period as one of “commercial revolution” whereby the system of new commercial practices and institutions developing alongside the expanded volume of trade eventually transformed all Western society.<sup>35</sup> This “commercial revolution” essentially formed the building blocks for the modern market economy and the foundation for industrialization.

Perhaps the most important aspect of the growth of cities during the Middle Ages was the rise of a quasi-environmental consciousness among these cities’ inhabitants. The physical environment of medieval cities was unpleasant.<sup>36</sup> Many of the early trades involved the slaughtering and tanning of animals. These industries, once they had become concentrated in cities, dumped vast amounts of

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29. SPIELVOGEL, *supra* note 27, at 340-42.

30. *Id.* at 266.

31. See GIES & GIES, *supra* note 27, at 212.

32. *Id.*

33. SPIELVOGEL, *supra* note 27, at 268.

34. Spielvogel writes that the goods of northern Europe could be traded at fairs in western Europe with goods from southern Europe and east Asia. “Northern merchants bought the furs, woolen, cloth, tin, hemp, and honey. . . and exchanged them for the cloth and swords from northern Italy and the silks, sugar, and spices from the [E]ast.” *Id.*

35. *Id.*

36. See GIES & GIES, *supra* note 27, at 167.

blood, tannic acids, fat, hair, and other waste products into the rivers surrounding cities.<sup>37</sup> Overcrowding was also an issue. Medieval towns were not allowed to exceed their chartered boundaries, and citizens did not want to relocate far beyond their city's defensive walls. As populations grew, space became limited.<sup>38</sup> City residents lived in cramped and unsanitary conditions where human and animal wastes and garbage were freely deposited on the streets, causing disease and poor health.<sup>39</sup> Further, with the larger urban populations burning wood and coal fires, high concentrations of smoke and soot created harmful amounts of noxious fumes.<sup>40</sup>

Townspeople became increasingly concerned and vocal about the growing pollution problems caused by overpopulation and burgeoning industrial development.<sup>41</sup> Fearing rebellion, or perhaps responding to it, city council members attempted to regulate industrial practices.<sup>42</sup> For example, some towns enacted ordinances prohibiting the burning of coal within one mile of the town boundary.<sup>43</sup> Others mandated that certain industries pollute the water downstream of the city.<sup>44</sup>

These regulations became even more widespread after the Black Death reaped devastating consequences on Europeans, wiping out over one-half of the total population of medieval Europe.<sup>45</sup> One immediate product of the plague was an awakening among townspeople that greater regulation of urban activity was necessary for public health.<sup>46</sup> While most of these regulations centered on promoting cleanliness and sanitation among the citizens themselves, many carried over to the trades and industries on the premise that all citizens of a town, including industry, had a responsibility to organize their affairs in a sanitary manner to promote the public health.<sup>47</sup>

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37. SPIELVOGEL, *supra* note 27, at 272.

38. *Id.*

39. *Id.*

40. GIES & GIES, *supra* note 27, at 77. *See also* Atmosphere Climate and Environment Information Programme, *History of Air Pollution*, in *ENCYCLOPEDIA OF THE ATMOSPHERIC ENVIRONMENT*, at <http://www.ace.mmu.ac.uk/ea/english.html> (last visited Feb. 5, 2005).

41. *See, e.g.*, SPIELVOGEL, *supra* note 27, at 272 (citing an order by the King of England to the town of Boutham requiring rectification of the town's physical condition).

42. *Id.* (citing city government attempts to require tradesmen and citizens to cart garbage and waste a specified distance from the city walls).

43. GIES & GIES, *supra* note 27, at 315.

44. *Id.*

45. The Black Death of course is the common historical name given to the smaller series of plagues that swept through Europe in the decades after 1340, in some localities causing a mortality rate as high as sixty-five percent. *See generally* PHILIP ZIEGLER, *THE BLACK DEATH* (1991); FRANCES GIES & JOSEPH GIES, *MARRIAGE AND FAMILY IN THE MIDDLE AGES* (1987).

46. *See, e.g.*, *Pistoia: Ordinances for Sanitation in a Time of Morality*, in *INTERNET MEDIEVAL SOURCEBOOK* (Paul Halsall ed., 1996), at <http://www.fordham.edu/halsall/med/pistoia.html> (last visited Feb. 5, 2005); *Plague and Public Health in Renaissance Europe*, Internet History Sourcebooks Project, at <http://www.iath.virginia.edu/osheim/> (last visited Feb. 5, 2005).

47. *See Pistoia: Ordinances for Sanitation in a Time of Morality*, *supra* note 46.

## 2. The Rise of the University

The emergence of the cities also instigated the rise of the university.<sup>48</sup> Unlike earlier monastic schools that existed throughout the Middle Ages, the universities, while church-based, were meant to be seats of learning for non-monastic clergy and laymen who sought education without wanting to become clergy. Perhaps the most notable aspect of the rise of the university is that it sparked a revival of interest in works of classical antiquity.<sup>49</sup> While this resurgence was not as deep or far-reaching as that which took place during the Renaissance, it was a significant step towards understanding and developing concepts of democracy and republicanism, key ingredients for the future development of public participation in government decision-making. Further, the universities generated a growing and intense interest in scientific discovery and the desire to understand the human condition through reason, an element crucial for later scientific inquiry into the effects of industrialization on environmental degradation.

Like the ancient Greeks and Romans before them, citizens of pre-industrial European society were still not concerned for the environment. Any clear understanding of how man-made environmental stressors impacted the environment and public health was limited to issues of sanitary improvement and resource management. However, the growth of medieval and renaissance cities and the contributions of burgeoning scientific thought contributed to an increasing concern in public health issues as well as a growing awareness regarding resource management and disease prevention.

As Europeans moved toward industrialization, the rise of the cities and universities precipitated both a growing environmental consciousness and a desire to stem degradation. These events also provided a catalyst for the Enlightenment and the Scientific Revolution, two movements that would play a seminal role in advancing scientific thought, technology, and republican idealism throughout the West.<sup>50</sup> These elements, both a new environmental consciousness and greater scientific understanding, were necessary preconditions for environmental regulation in Western society.<sup>51</sup> The exponential growth of environmental stress resulting from the Industrial Revolutions would eventually spark broad environmental concern and subsequent demand for environmental regulation.

### B. STAGE TWO: INDUSTRIALIZATION, ENVIRONMENTAL STRESS, AND GROWING PUBLIC CONCERN OVER DEGRADATION

Between 1850 and 1900, industrialization had fully come of age in most

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48. SPIELVOGEL, *supra* note 27, at 274.

49. *Id.* at 276.

50. *Id.* at 460-84.

51. *See supra* note 20 and accompanying text.

European States and the United States.<sup>52</sup> Building on the earlier achievements and innovations of the Industrial Revolution in Britain,<sup>53</sup> Western States were experiencing an age of solid economic expansion and prosperity.<sup>54</sup> As fortunes grew, so too did domestic and foreign markets for goods and services. The growth of trade that began with the rise of the medieval city blossomed into a full-scale market economy based upon a concept of free trade and interlocking, self-perpetuating consumer markets.<sup>55</sup>

Economic growth was supplemented by the existence of liberal free trade and laissez-faire policies pursued by recently centralized Western governments seeking to increase the tax base and promote a free flow of trade.<sup>56</sup> At the core of this pro-development, laissez-faire attitude among Western policy-makers was a belief that industrialization was the ultimate realization of human progress and that a faithful adherence to market forces, technological progress, and industrial development would cure all evils and build national prestige.<sup>57</sup>

Policy-makers felt that large-scale unrestricted industrialization was the surest way to develop a nation's strength. In many ways the facts substantiated this belief. By 1900, for instance, citizens of Europe and the United States were the richest consumers in the world.<sup>58</sup> Dramatic increases in population did not result in a lack of resources; rather, a steady rise in national incomes mostly resulted in a surplus of food, goods, and services.<sup>59</sup> The national incomes of Britain, Germany, and the United States more than doubled between 1850 and 1900.<sup>60</sup> Real wages increased in Britain by sixty-six percent during that same period.<sup>61</sup> Because transportation and production costs were cheaper, regulation was low, and labor was plentiful, the overall costs of goods and services declined to a point where nearly all segments of the domestic markets could purchase them.<sup>62</sup>

However, for all its progress, the nearly unregulated industrialization had serious environmental consequences for citizens of industrializing States and produced a number of environmental stressors providing the impetus for public concern and calls for greater environmental regulation.

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52. See MARVIN PERRY ET AL., *WESTERN CIVILIZATION: IDEAS, POLITICS & SOCIETY* 511-31 (6th ed. 2000); JACKSON J. SPIELVOGEL, *WESTERN CIVILIZATION - VOLUME II: SINCE 1550*, 582-607 (4th ed. 2000); MERRY WIESNER ET AL., *DISCOVERING THE WESTERN PAST - VOLUME II: SINCE 1500*, 143-78 (4th ed. 2000).

53. Britain was the first to industrialize in the late eighteenth-century. Enabled in part by town growth and food surpluses, Britain's industrialization brought mechanized factory production, steam engine, coal, and transportation systems to the fold. *Id.*

54. *Id.*

55. *Id.*

56. See ERIC HOBBSBAM, *THE AGE OF CAPITAL* 29-48 (1975).

57. *Id.*

58. See WILLIAM J. DUIKER, *TWENTIETH CENTURY WORLD HISTORY* 1-10 (1999).

59. HOBBSBAM, *supra* note 56, at 235.

60. DUIKER, *supra* note 58, at 7.

61. *Id.*

62. HOBBSBAM, *supra* note 56, at 230-50.

### 1. Overcrowding and Disease

By 1900, Western population had increased dramatically. In Europe, the population increased from 270 million to 460 million between 1850 and 1910.<sup>63</sup> Urban populations grew much faster than rural populations as people migrated to the cities out of economic necessity.<sup>64</sup> Not surprisingly, overcrowded conditions caused by dramatic increases in population created an unhealthy environment and poor quality of life for urban dwellers. While this was not a new phenomenon for rural Europeans, who for centuries endured poor living conditions, such rapid urbanization magnified the situation.<sup>65</sup> Dirty habits that might have been acceptable in the scattered countryside had disastrous and deadly consequences in densely packed tenement buildings.<sup>66</sup> Cities had neither the knowledge nor the capacity to deal with the problems of overcrowding, waste, and pollution associated with industrialization.

Surveys and Poor Commission reports from Britain during the middle of the nineteenth-century provide insight into the plight of the working-class urban dwellers in the larger industrial cities. A report on working-class housing in the city of Birmingham in 1843 describes the condition of working-class row houses in the city:

[They] are extremely numerous; . . . a very large number of the poorer classes of the inhabitants reside in them . . . Most of these houses are three stories high, and built, as it is termed, back to back. There is a wash-house, an ash-pit, and a privy at the end . . . and not infrequently one or more pigsties and heaps of manure. Generally, speaking, the privies . . . are in a most filthy condition. Many which we inspected were in a state which renders it impossible for us to conceive how they could be used; they were without doors and overflowing with filth.<sup>67</sup>

Other Poor Commissions reported that many urban tenants were forced to live in cellars under the ground with little ventilation and no more than twelve to fifteen square feet of living space.<sup>68</sup> Often, observers noted that six to eight people would share a room no more than seventy square feet.<sup>69</sup>

The lack of municipal control over sanitary measures and political will to implement environmental regulation perpetuated the unhealthy conditions and led to a host of deadly diseases.<sup>70</sup> Various Commission reports and primary

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63. See PERRY, *supra* note 52, at 512.

64. *E.g.*, The population of London doubled between 1800 and 1850. *Id.*; see also WOHL, *supra* note 18, at 3.

65. WOHL, *supra* note 18, at 4.

66. *Id.*

67. SPIELVOGEL, *supra* note 52, at 597 (citing an 1843 report on working class housing by the City of Birmingham).

68. *Id.*

69. E. ROYSTON PIKE, HUMAN DOCUMENTS OF THE INDUSTRIAL REVOLUTION IN BRITAIN 313 (1966).

70. *Id.* at 314.

accounts note that, without local regulation, city streets were regularly used as sewers and open drains. One observer noted that the streets were gutters onto which "the refuse of animal and vegetable matters of all kinds, the dirty water from the washing of clothes and of the houses are all poured and they stagnate and putrefy."<sup>71</sup> The unsanitary conditions resulting from overcrowding and poor sanitation created an environment where a number of fatal epidemic diseases could thrive, as illustrated by the great cholera epidemics that raged throughout the cities of England at the height of the industrialization.<sup>72</sup>

Public concern over cholera manifested into large public rallies, and riots were common in nineteenth-century England.<sup>73</sup> While it is difficult to estimate the riots' effect on eventual government action, Anthony Wohl has argued that the cholera epidemics of the 1830s, and the public response they elicited, played a large role in sufficiently alarming the central government of England to the need for the government to direct public health in local communities.<sup>74</sup> As a result, some of the initial regulations governing environmental conditions were enacted as Public Health Acts giving guidelines to the local communities in the areas of sanitation, waste disposal, water supply, and drainage.<sup>75</sup>

Thus, public concern, evidenced through public demonstrations, spurred government regulation of the environment. During this early period of industrialization one could begin to discern the inextricable nexus between environmental degradation caused by unmitigated industrialization and the need to address public concern associated with that degradation. The connection between human health and environmental management is the primary force behind future environmental standards and regulations.

## 2. Air Quality

The factory system that arose during the Western period of industrialization encouraged the centralization of production near urban centers.<sup>76</sup> The noxious fumes arising from factory smokestacks created health concerns among many in the growing populations living near factories. Urban dwellers were often forced to shut their windows tightly to keep out the stench and black soot from factories. Such actions merely increased the chances for infection in dwellings where disease was already prevalent. Many citizens in the cities lived under a "black

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71. *Id.* at 343.

72. WOHL, *supra* note 18, at 118-20.

73. *Id.* at 119. In 1832, over thirty riots broke out in London, Liverpool, Manchester, and other industrialized cities throughout England. *Id.*

74. See WOHL, *supra* note 18.

75. See, e.g., The Public Health Acts of 1848, 1866, 1872, 1875; Infectious Diseases (Notification) Act, 1889, 52 Vict., c.75 (Eng.); Rivers Pollution Prevention Act, 1876, 39 & 40 Vict., c.75 (Eng.) (Available in CHARLES JOSEPH HAWORTH, THE STATE LAW RELATING TO RIVERS POLLUTION (1897)).

76. See MELOSI, *supra* note 18, at 27.

canopy of smoke” and a constant fog which stung the eyes and inflamed the lungs.<sup>77</sup> In England, local urban health authorities reported hundreds of incidents of nausea, vomiting, bronchial and respiratory complaints, poor digestion, and lack of appetite to the Public Health Boards, which began linking such ailments to air pollution.<sup>78</sup> Several local citizen groups emerged to pressure the government to regulate pollution and promote cleaner air.<sup>79</sup>

### 3. Water Quality

Industrialization and urban growth also polluted the rivers. The need to discard factory and human waste and the population growth of the industrialized city led to the development of sewerage systems that pumped large amounts of untreated sewage into the rivers of newly industrialized nations. One official report described pollution in the Thames in England:

Throughout the whole course of the river . . . fouling of the water by sewage from cities, towns, villages, and single houses generally prevails. The refuse from paper mills [and] tanneries . . . passes into the stream. There is no form of scavenging practised for the surface waters of the Thames, but carcasses float down the stream until wasted by corruption. The river receives unchecked the whole of the pollution, solid and fluid, of the district; and this the same water, after it has been so polluted, is abstracted, sand-filtered and pumped into the Metropolis for domestic use.<sup>80</sup>

Industrial waste from factories added large quantities of metallic salts, lime, and chemical washes that combined to create a poisonous mix of industrial solvents sufficient to kill fish and infect thousands of citizens living and working downstream. In Britain, under pressure from numerous citizen groups, the government formed the Royal Commission on River Pollution in 1867.<sup>81</sup> The Commission made numerous recommendations regarding the shape that future legislation should take regarding water pollution.<sup>82</sup>

By the 1870s, increased environmental degradation, growing public anger over the effects of that degradation, and a largely pro-reform mindset resulted in a major piece of governmental regulation in the industrial era—the Public Health Act of 1875.<sup>83</sup> Though the Public Health Act did not strictly regulate the environment, it did recognize that the various forms of epidemic and endemic diseases afflicting industrial cities were directly caused by atmospheric impuri-

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77. See WOHL, *supra* note 18, at 208.

78. *Id.*

79. *Id.*

80. *Id.* at 233 (citing an 1867 report by the Royal Commission on the Pollution of Rivers).

81. *Id.* at 235.

82. *Id.* at 236.

83. Public Health Act, 1875, 38 Vict., c.55 (Eng.).

ties produced by both decomposing animal and vegetable substances, and the filthy conditions caused by overcrowding.<sup>84</sup>

The Act was far from comprehensive, and even in its day was criticized for being, "so little in the interests of the public and so vastly in the interests of polluters."<sup>85</sup> Even so, the Act was a response to growing public dissatisfaction with unchecked industrialization and served as an important precedent for future regulation. For the first time, government was charged, both nationally and locally, with the responsibility to take appropriate measures aimed at improving the quality of the water supply and eliminating waste and refuse.<sup>86</sup>

Two forces converged during the Industrial Revolution that had a profound effect on future generations of environmentalists. First, the environmental, social, and political consequences of largely unregulated industrialization became apparent to policy makers and affected citizens on a scale not possible until the event of mass industry. Second, governments began to realize that neither market forces nor the positive aspects of industrialization would, alone, mitigate industrialization's negative consequences. Additional regulation was needed if countries were to make successful use of industry. Yet, the scope of regulation and the role the public would play in creating or enforcing any regulatory scheme was still undecided. The Public Health Act in Britain was limited in scope and envisioned only a modest role for the central government, leaving the bulk of regulation a local issue.

#### C. STAGE THREE: THE U.S. REACTION – CENTRALIZING THE REGULATORY PROCESS

In the United States, too, the environmental consequences of unregulated industrial development were generating concern among many citizens who by the early twentieth-century began to clamor for some form of government regulation. As in Britain, environmental reform was first a response to obvious health hazards and focused mainly on legislating public health and sanitation at the local level.<sup>87</sup> However, as industrialization continued to expand and the environmental effects of that industrialization became more apparent, a number of factors began to affect the shape that environmental regulation would take in the twentieth-century.

First, the environmental movement became increasingly tied to the progressive movement of the early twentieth-century, a movement which generally sought to reform the ill social effects of industrialization. The progressive movement provided an organized structure in which to house a burgeoning environmental movement, which, unlike its counterpart in Europe, aimed at reforming more

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84. SPIELVOGEL, *supra* note 52, at 599.

85. WOHL, *supra* note 18, at 248.

86. *Id.* at 246-247.

87. *See* MELOSI, *supra* note 18, at 40.

than just sanitary conditions for public health purposes. Martin Melosi argues that by the 1890s, what was once merely a concern for public health had "expanded into a broader environmental perspective, indicating that reformers were beginning to see pollution not merely as an irritant but as an unwanted by-product of industrialization."<sup>88</sup> Fusing with the progressive movement helped to propel the environmental movement into the mainstream of social movements in the United States in the early twentieth century.<sup>89</sup>

While the progressive movement popularized and energized the environmental movement, carrying it beyond discussions of nuisance and public health, public calls for regulation were still very local in nature. This was partly due to the fact that environmental science lagged behind growing environmental concern. Pollution problems were seen as local isolated cases, and reformers did not understand the broad inter-relationships among multiple pollutants. For the average reformer, the goal was to eliminate pollution, not to regulate the source.<sup>90</sup> Many of the Progressive Era environmental movements, though popular, were led by technical professionals working within local municipalities. There was a great belief in the ability of technical experts to develop strategies to fight pollution, and the public as a whole placed a large degree of faith in this process.<sup>91</sup>

After World War II, a combination of forces drove the impetus for the modern, centralized, environmental regulatory scheme in the United States. Great strides in the science of ecology revealed the interlocking relationships among population growth, industrialization, resource use, and pollution and demonstrated that environmental degradation was not merely a local problem.<sup>92</sup> The new science, along with a bevy of popular and persuasive books and social activism, fueled and strengthened the conservation-based environmental movements already begun during the Progressive Era. Finally, several well-publicized environmental disasters convinced middle America that local remedies would not be enough to stem a rising environmental crisis.<sup>93</sup> The environmental movement was growing and, by the 1960s, hundreds of environmental groups emerged demanding more centralized federal regulation of industry.

By 1980, the major pieces of U.S. environmental regulation had been enacted,

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88. *Id.*

89. *Id.* at 213. Major Progressive Era environmental reform movements such as the conservation movement and the urban environmental movement made great strides to educate the urban population on the issues of resource conservation and addressing industrial waste and pollution.

90. *Id.* at 59.

91. *Id.* at 214.

92. See, e.g., PAUL R. EHRLICH, *THE POPULATION BOOM* (Ballantine Books 1986) (1968); BARRY COMMONER, *THE CLOSING CIRCLE: NATURE, MAN AND TECHNOLOGY* (Bantam 1980) (1971); Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243 (1968).

93. For example, 300 people died in New York City in 1963 due to the existence of concentrated air pollutants, the oil-polluted Cuyahoga River caught fire and burned for eight days in 1969, and 1969 brought the fish-kill in Lake Erie.

and the federal era of environmental protection had emerged.<sup>94</sup> These comprehensive statutes established the modern ground rules for environmental protection by mandating environmental impact assessment by public and private entities and establishing controls on air and water pollution, toxic substances, and hazardous wastes.

### III. THE IMPORTANCE OF PUBLIC PARTICIPATION RIGHTS TO MODERN ENVIRONMENTAL REGULATORY SCHEMES IN THE INDUSTRIALIZED WORLD

The modern environmental laws of the United States and the European States reflect a policy that encourages all types of active public participation in all aspects of environmental regulation.<sup>95</sup> Under the current environmental regulatory scheme of the United States, public participation mandates are ubiquitous. In fact, the EPA has recently launched a number of programs aimed at expanding the role of the public in the regulatory process in a way that emphasizes the need for a consensus-based holistic approach to environmental decision-making.<sup>96</sup> This section will detail the public participation provisions within the predominant environmental regulatory statutes in the United States as well as within the EPA's recent policy initiatives. For comparative purposes, this section will also highlight high-level environmental public participation initiatives in the European Union. The purpose for highlighting these provisions is to advance two goals: (1) to point out that environmental public participation rights have become crucial to environmental regulation and development in industrialized nations, and (2) to set forth the template for environmental public participation rights by examining the Western incarnation of those rights, a model that is currently being used by transitional States throughout the world.

#### A. PUBLIC PARTICIPATION MANDATES WITHIN MAJOR ENVIRONMENTAL ACTS OF THE UNITED STATES

From the traditionally reactive authorization of citizen-suit provisions to the more proactive participatory mechanisms aimed at public involvement in the policy formation stage, U.S. environmental regulatory law envisions a broad participation regime.

##### 1. The National Environmental Policy Act

Hailed by many as the statute that launched the "environmental decade" of the

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94. See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (2004); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2004); see also PERCIVAL, *supra* note 21, at 88.

95. See *supra* note 2 and accompanying text.

96. See *infra* notes 158-73 and accompanying text.

1970s, the National Environmental Policy Act (NEPA)<sup>97</sup> was signed into law in 1970 by President Richard Nixon.<sup>98</sup> In many ways NEPA represents the culmination of an escalating policy race between both parties in Washington, each determined to convince an increasingly alarmed and active public that it was more committed to environmental preservation and sustainable development than the other.<sup>99</sup> Essentially, NEPA codifies the general environmental policy of the United States by setting forth a number of broad principles and goals designed to ensure environmental responsibility among the agencies of the federal government.<sup>100</sup> Central to the statute is the policy statement that the federal government must use “all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans,” which has become standard phraseology for sustainable development.<sup>101</sup> Under NEPA, each federal agency is responsible for implementing the Act’s requirements. However, NEPA also created a central agency, the Council on Environmental Quality (CEQ), to coordinate compliance among the agencies and to conduct general rulemaking for the implementation and enforcement of the Act.<sup>102</sup>

To achieve its broad goals, NEPA instructs federal agencies to consider the likely environmental effects of their activities by conducting environmental impact statements (EIS). NEPA’s EIS provisions require that all federal agencies:

include in every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on: (i) the environmental impact of the proposed action, (ii) any adverse environmental impacts which can not be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between short-term uses of a man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>103</sup>

The courts have interpreted these EIS obligations to have a broad reach, and as a result, agencies devote a lot of time and economic resources to developing EISs.

Congress responded to public concern and demands for greater participation by including various mechanisms in NEPA to encourage the public’s participa-

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97. 42 U.S.C. § 4231-4347 (2004).

98. PERCIVAL, *supra* note 21, at 783 (citing Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government Environmental Performance*, 102 COLUM. L. REV. 903, 904 (2002)).

99. *Id.* at 784.

100. *Id.*

101. 42 U.S.C. § 4331(a) (2004); *see infra* notes 195-205 and accompanying text.

102. 42 U.S.C. §§ 4342, 4344 (2004).

103. 42 U.S.C. § 4332(c) (2004).

tion in helping develop and implement national environmental policies.<sup>104</sup> First, once an agency prepares an EIS, it must publish the EIS in the Federal Register for public review.<sup>105</sup> The public then, under the procedures set forth in the Administrative Procedure Act (APA)<sup>106</sup>, has an opportunity to comment on the EIS. Second, NEPA authorizes the CEQ to establish and seek assistance from a Citizen's Advisory Committee on Environmental Quality, a group composed of several academics, nonprofit organizations, and citizens.<sup>107</sup> Finally, NEPA provides the EPA with funding to make grants to nonprofit citizen groups to support and encourage participation.<sup>108</sup>

The CEQ regulations further stress public involvement in almost every aspect of NEPA implementation, extending from notice and comment procedures to redress in the courts for NEPA non-compliance.<sup>109</sup> In addition, the Act requires individual federal agencies to promulgate their own regulations for implementing NEPA in a way that supplements the CEQ regulations.<sup>110</sup> Taken together, these provisions ensure a strong commitment by all federal agencies to involve the public in government decisions regarding projects impacting the environment.

## 2. The Clean Water Act

Centuries of unabated industrialization had taken their toll on the fresh water supply of the United States by the middle of the twentieth century.<sup>111</sup> By 1970, most studies estimated that only thirty to forty percent of assessed waters were safe for fishing or swimming.<sup>112</sup> Faced with almost daily stories regarding the adverse health consequences of pollution levels in the water and incessant public calls for greater regulation of industrial polluters, Congress took action in 1970 with the Clean Water Act (CWA),<sup>113</sup> the most comprehensive source of federal regulatory authority to control water pollution.<sup>114</sup> The CWA institutes a permit system whereby legal dischargers are limited, by permit, in the amount of effluent

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104. 42 U.S.C. § 4331(c) (2004) (“[E]ach person has a responsibility to contribute to the preservation and enhancement of the environment.”).

105. 42 U.S.C. § 4332(c)(i)-(v) (2004).

106. 5 U.S.C. §§ 551-596 (2004).

107. 42 U.S.C. § 4345 (2004).

108. 42 U.S.C. § 4368 (2004).

109. *See, e.g.*, 40 C.F.R. § 1501.7 (2004) (calling for public input in agency “scoping” decisions); 40 C.F.R. § 1502.19 (2004) (allowing for ready public distribution of environmental impact statements to all who request draft copies of the relevant documents); 40 C.F.R. § 1503.1(a)(4) (2004) (requiring agencies to allow for open comment procedures); 40 C.F.R. § 1503.4 (2004) (requiring agencies to respond to comments from concerned parties).

110. 40 C.F.R. § 1507.3(a) (2004).

111. *See supra* Part II.

112. PERCIVAL, *supra* note 21, at 570.

113. 33 U.S.C. §§ 1251-387.

114. PERCIVAL, *supra* note 21, at 581.

they may discharge.<sup>115</sup> The CWA also prohibits all unpermitted discharges of pollutants from “point sources” into the “waters” of the United States.<sup>116</sup> Under the Act, states must plan for control of pollution from other nonpoint sources not covered by the permitting process.<sup>117</sup> The CWA has been described as “breathhtakingly ambitious” in that the Act’s broad mandates impose upon the nation’s regulatory framework the unenviable task of wholly eliminating the discharge of illegal amounts of pollutants into the nation’s navigable waters.<sup>118</sup>

Not surprisingly, public participation plays a prominent role in creating, implementing, and enforcing provisions of the CWA. As with NEPA, the CWA mandates broad public input, reaching through notice and comment proceedings into the development and enforcement of any regulation, effluent limitation, or agency plan.<sup>119</sup> Further, EPA’s regulations implementing the CWA afford the public the opportunity to participate, through advisory groups, in the production of policy guidance documents and citizen guide handbooks.<sup>120</sup> Citizens also routinely participate, through notice and comment proceedings, in the issuance, modification, and enforcement of permits under the National Pollution Discharge Elimination System (NPDES).<sup>121</sup> The EPA and relevant state agencies must not only provide the public the opportunity for input, but they must also promulgate regulations that set up specific guidelines for public participation.<sup>122</sup> This requirement creates a stable structure around the participation process and ensures a minimum level of effectiveness.

In addition to these traditional avenues of public participation, the EPA has recently initiated a number of programs designed to garner even greater public input with regard to the CWA. For instance, the agency has issued a new management strategy that seeks to implement source control measures for nonpoint sources of water pollution.<sup>123</sup> The strategy encourages broad integration of public input and promotes greater use of the Internet and other technology processes as a way to disseminate information and promote public input in environmental decision-making.<sup>124</sup>

### 3. The Clean Air Act

By the middle of the twentieth century, exposure to unhealthy levels of air pollutants such as carbon monoxide, lead, and ozone, along with more hazardous

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115. *Id.* at 582 (citing § 402 of the CWA).

116. *Id.* (citing § 301 of the CWA).

117. *Id.* (citing § 319 of the CWA).

118. *Id.*

119. 33 U.S.C. § 1251(e).

120. *See* 40 C.F.R. §§ 124.51-124.66 (2004).

121. *Id.*

122. *Id.*

123. *See* EPA Draft Strategy to Control Nonpoint Source Pollution.

124. *Id.*

air pollutants such as mercury and benzene, caused adverse health conditions among many U.S. citizens.<sup>125</sup> There were thousands of documented cases concerning respiratory tract problems, eye and throat irritation, lung disease, retardation, and leukemia among citizens of all races and backgrounds.<sup>126</sup>

Against this backdrop, the Clean Air Act (CAA)<sup>127</sup> amendments, enacted in 1970, sought to broadly regulate releases of specific types of harmful air pollution.<sup>128</sup> Like the other major environmental statutes created in the early 1970s, the CAA mandated that the EPA, in combination with the states, create and enforce regulations aimed at an ambitious program of pollution reduction.

Similar to the CWA, the CAA allows the public to participate broadly in the creation, implementation, and enforcement of its provisions. The Act provides for public notice and comment to related consent orders and settlement agreements between polluters and the EPA.<sup>129</sup> The Act also mandates public notification of violations of national ambient air quality standards.<sup>130</sup> Further, citizens have an opportunity, under the provisions of the Act, to participate in the EPA's rulemaking procedures regarding implementation and enforcement of the CAA.<sup>131</sup> Finally, the public has the opportunity, through notice and comment proceedings, to participate in the creation and implementation of a state's plan for how to implement the national standards, and citizens have full access to nearly all information submitted by owners and operators of existing, modified, and new sources of air pollution pertaining to whether those owners and operators remain in compliance with the state's plan and with the CAA generally.<sup>132</sup>

Some critics have called into question the success of both the CAA and the CWA at implementing broad participation rights both regionally and nationally.<sup>133</sup> However, there is evidence that localized public participation initiatives have garnered attention. For example, in EPA Region 10, the EPA's Water Division published a document called the EPA Lakewalk Manual: A Guidebook for Citizen Participation.<sup>134</sup> This document was designed to empower local participation by teaching concerned citizens how to visit lakes in the region to

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125. See PERCIVAL, *supra* note 21, at 491-94.

126. *Id.* at 492.

127. 42 U.S.C. §§ 7401-7671 (2004).

128. See PERCIVAL, *supra* note 21, at 494.

129. 42 U.S.C. § 7413(g) (2004).

130. 42 U.S.C. § 7427(a) (2004).

131. 42 U.S.C. § 7607(d), (h) (2004).

132. See 40 C.F.R. §§ 51.102, 51.285 (2004).

133. See generally Janet S. Hathaway, *The Clean Air Act and the Intermodal Surface Transportation and Efficiency Act*, in AMERICAN BAR ASSOCIATION, PUBLIC PARTICIPATION 28, 31-32 (1994) (annual conference report of the Public Services Division, Standing Committee on Environmental Law of the ABA); Spyke, *supra* note 1.

134. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA LAKEWALK MANUAL: A GUIDEBOOK FOR CITIZEN PARTICIPATION (1996); Spyke, *supra* note 1, at 283.

compile water quality data.<sup>135</sup> The manual also instructs those citizens on how to turn over the collected data to the EPA or to environmental groups with the capability to analyze the data to determine whether the water quality meets CWA guidelines.<sup>136</sup> The pamphlet includes worksheets and template forms to aid citizens in data recordation.

In another example of successful local participation, the EPA has launched a series of initiatives designed to garner public input in local transportation and economic development planning aimed at reducing detrimental air emissions.<sup>137</sup> These programs are designed to involve the local public earlier in the planning process and to arm citizens with the information necessary to effectively participate in environmental decision-making.<sup>138</sup> The EPA has made it a priority to enhance the public's education, thereby enhancing the public's ability to participate, by providing credible information and technical assistance to local citizens who want to develop alternative strategies for consideration by local planning boards.<sup>139</sup> This meaningful participation has had success in empowering ordinary citizens, in addition to traditional environmental groups, to affect real environmental policy at the grassroots level.

Perhaps most significantly, both the CAA and the CWA provide citizens with the power to enforce the Acts' provisions through use of the citizen suit.<sup>140</sup> Citizen suits permit citizens to act as "private attorneys general" and to bring legal actions to force the EPA to enforce provisions of the environmental statutes.<sup>141</sup> These suits are brought on behalf of the public at large and typically seek to compel action rather than to vindicate purely personal loss. Under the provisions, citizens may bring two types of suits: (1) "enforcement suits" against violators to enforce the requirements of the environmental law in question; and (2) "action-forcing suits" against public officials for an alleged failure to perform "nondiscretionary" duties under the environmental law in question.<sup>142</sup> Citizens bringing suits under these provisions can typically seek injunctive relief, civil penalties, or both. Congress injected the right to bring citizen suits into the CWA and the CAA to guard against the possibility that "special interest creep" in the agency might at times impede the agency from acting to enforce the provisions of the Act.<sup>143</sup> The lawsuits also allow citizen groups to act as the eyes and ears for

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135. Spyke, *supra* note 1, at 283.

136. *Id.*

137. See Hathaway, *supra* note 133, at 28-29.

138. *Id.*

139. *Id.*

140. 33 U.S.C. § 1365; 42 U.S.C. § 7604; see Mullikin & Smith, *supra* note 7.

141. See generally JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* (1987).

142. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 40-1 (1995).

143. *Id.*

the EPA when the agency experiences periods of budget shortfalls.<sup>144</sup> While citizens face a number of constitutional limitations and statutory requirements (both substantive and procedural) in bringing lawsuits under these Acts, the presence and availability of citizen suits as an enforcement mechanism contribute to the already broad arsenal of environmental participatory powers garnered by the public.

#### 4. The Comprehensive Environmental Response, Compensation, and Liability Act

Perhaps more than any other major piece of environmental legislation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>145</sup> came about as a direct result of growing public concern and dissatisfaction with the unmitigated consequences of unregulated industry practices.<sup>146</sup> CERCLA is arguably the most comprehensive legislative approach to federal environmental protection.<sup>147</sup>

CERCLA authorizes the EPA to spend monies from a "Superfund" (funded initially through a tax on chemical feedstocks) on operations for short-term removal of hazardous substances, longer-term remediation, or both, depending on conditions set forth in the Act.<sup>148</sup> The federal government can then bring an action for cost recovery against any or all potentially responsible parties as designated under the Act, whether or not those parties were ultimately responsible for the release of the hazardous substance.<sup>149</sup>

Like the other major environmental acts, CERCLA contains provisions creating broad public participation at all levels. Most of the participation provisions are aimed at ensuring the locally affected public plays a crucial role in the cleanup of identified "Superfund" sites located in their communities.<sup>150</sup> For example, the Act mandates a process by which the public can participate in the development of administrative records related to removal and remediation actions.<sup>151</sup> This ensures the local public has a hand in supervising the creation of the only official evidentiary record an administrative court may review upon a legal challenge brought before it.<sup>152</sup> In addition, the public has a right to judicial

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144. Mullikin & Smith, *supra* note 7, at 76.

145. 42 U.S.C. §§ 9601-9675 (2004).

146. CERCLA was nearly a direct response to the Love Canal disaster in Niagara, New York in 1978. For an excellent treatment of this event and the tremendous public response it triggered, see JUDITH A. LAYZER, *THE ENVIRONMENTAL CASE: TRANSLATING VALUES INTO POLICY* 52-77 (2002).

147. See PERCIVAL, *supra* note 21, at 224.

148. 42 U.S.C. §§ 9604, 9606 (2004).

149. 42 U.S.C. § 9607 (2004).

150. 42 U.S.C. § 9613(a) (2004).

151. 42 U.S.C. § 9613(k) (2004) (removal actions deal with emergency removal while remedial actions tend to be long-term clean-up projects that are more permanent in effect).

152. According to CERCLA and the APA, a reviewing administrative court may only look to the

review of any regulation promulgated under the Act, and the public must be given notice and chance to comment during public meetings on the scope and effect of all removal actions, including alternative plans.<sup>153</sup> The EPA is required to respond to any significant comments and/or new information submitted during these public meetings.<sup>154</sup> Like the CWA and the CAA, CERCLA ensures that citizen participation in the public meetings is meaningful by offering citizens technical assistance grants designed to aid public understanding of complex clean-up concepts.<sup>155</sup> Once a final clean-up plan and remedy is selected, CERCLA mandates public notification regarding any changes from the original plan.<sup>156</sup> Finally, CERCLA provides for citizen suits against the EPA for failure to perform all nondiscretionary duties under the Act.<sup>157</sup> However, this provision is narrower than those under the CWA and the CAA and has been interpreted by the courts to delay such suits until the remediation is undertaken.<sup>158</sup>

B. THE FUTURE OF ENVIRONMENTAL PUBLIC PARTICIPATION IN THE UNITED STATES:  
MOVING BEYOND NOTICE AND COMMENT PROCEEDINGS

Recently, the EPA has expanded public participation beyond pure statutory mandates by encouraging a public role in consensus building. The EPA's rationale for its consensus building efforts is that public participation is more effective when key public stakeholders are included in the environmental decision-making process at the earliest possible time and when public stakeholders' opinions are given equal weight in relation to all other stakeholders, such as lobbyists, government officials, experts, and non-governmental organizations (NGOs).<sup>159</sup> Two notable examples are found in recent EPA initiatives calculated to: (1) build holistic integration of environmental decision-making based on consensus building, and (2) include environmental justice protections to existing permitting processes that would ensure the equitable treatment of minority communities by requiring their participation in decisions that affect their environment.

The consensus-building approach, to be effective, requires that all interested parties develop implementation proposals for the initiation of a project affecting the environment or the resolution of an environmental issue. The merits of the

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administrative record. 42 U.S.C. § 9613(k) (2004); 5 U.S.C. § 557 (2004).

153. 42 U.S.C. § 9613(k)(2)(B) (2004).

154. *Id.*

155. 42 U.S.C. § 9617(e) (2004).

156. 42 U.S.C. § 9622(d)(2) (2004).

157. 42 U.S.C. § 9659(a)(2) (2004).

158. *See Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1024 (3d Cir. 1997); *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990).

159. *See Spyke*, *supra* note 1, at 287 (citing Lawrence E. Susskind, *Overview of Developments in Public Participation*, in AMERICAN BAR ASSOCIATION, PUBLIC PARTICIPATION 2, 2 (1994) (annual conference report of the Public Services Division, Standing Committee on Environmental Law of the ABA)).

proposals are discussed and debated in a series of roundtable sessions moderated by neutral facilitators, and a final solution is only accepted when consensus, not total agreement, is reached.<sup>160</sup> Every participant must agree that the negotiations were conducted in good faith and that all issues were heard and resolved within the limits imposed by law and economic feasibility.<sup>161</sup>

An example of this holistic consensual approach to environmental decision-making can be found in EPA's "Green Communities Program," launched in 1997,<sup>162</sup> which encourages local communities to work towards a "shared vision" of sustainable development.<sup>163</sup> The EPA helps communities to work toward a shared vision through a five-step program, based largely around the concept of consensus building.<sup>164</sup> The EPA shares information liberally with communities seeking to implement such programs to enable all the stakeholders to conduct meaningful discussions and create lasting, effective policies based on consensus.<sup>165</sup>

Recognizing that poor and minority communities often fail to take advantage of traditional public participation avenues for a variety of reasons, the EPA, pursuant to an executive order,<sup>166</sup> has taken steps to ensure that all citizens have a voice in decisions that affect their environment. The agency has devised an Environmental Justice Checklist that effectively forces the integration of environmental justice considerations into public participation programs.<sup>167</sup> The EPA's injection of environmental justice concepts into its regulations represents the acknowledgement that public participation in environmental decision-making requires inclusion of all public actors to be both fair and effective. Failure to include all actors from the onset of a decision inevitably leads to future conflict if the concerns of affected stakeholders are not addressed.

This approach to environmental decision-making is similar to the Collaborative Compact Model that has been successfully used to create binding industry and community partnerships in the United States. Based upon mutual understanding of needs and priorities, interested parties can develop effective and meaningful rules governing the management of the environment. The Collaborative Compact Model "is based on the belief that there is a clear parallel between

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160. *Id.*

161. See Lawrence E. Susskind, *Overview of Developments in Public Participation*, in AMERICAN BAR ASSOCIATION, PUBLIC PARTICIPATION 2, 4 (1994) (annual conference report of the Public Services Division, Standing Committee on Environmental Law of the ABA).

162. See *EPA Green Communities – Who We Are*, Environmental Protection Agency, at <http://www.epa.gov/greenkit/whoweare.htm> (last modified Nov. 10, 2003) [hereinafter Green Communities Program].

163. See Spyke, *supra* note 1, at 288.

164. See Green Communities Program, *supra* note 162.

165. *Id.*

166. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

167. See Spyke, *supra* note 1, at 290; see also Douglas McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 *ECOLOGY L.Q.* 705, 724 (1994).

rational regulatory promulgation and reasoned environmental debate.”<sup>168</sup>

Scholars and practitioners have levied several criticisms against the relevant provisions regarding environmental public participation.<sup>169</sup> They argue that while the current slate of U.S. environmental laws may have put an effective participatory structure in place, the public is still dispossessed of the necessary traits to effectively participate in that structure.<sup>170</sup> Many also argue that the goals of public participation are relatively vague and often conflict with one another.<sup>171</sup> For instance, public participation is said to empower the individual and emphasize direct interaction with and access to decision-makers. These concepts conflict with existing predominant theories of collectivism and republicanism, which are deeply ingrained in modern Western political thought.<sup>172</sup> It is also argued that public participation processes are costly and time consuming and run counter to concepts of efficiency and control, two key rationales for administrative law.<sup>173</sup>

With regard to specific acts, critics argue that while the CAA, the CWA, and CERCLA allow stakeholders to participate in all aspects of environmental decision-making under their purview, often they do not do enough to locate key stakeholders, and when they do, they do not go far enough towards helping stakeholders understand the complexities and technical nature of the environmental documents.<sup>174</sup> Finally, many argue that even where the major acts provide for early participation and make available and understandable key documentation, citizen participation fails its objectives because citizen groups (and especially individual citizens) do not have the resources to compete with other stakeholders whose interests may run counter to their own.<sup>175</sup>

These are valid considerations, and they are the subject of several important scholarly articles. However, notwithstanding the ultimate effectiveness of the participation provisions and mandates in any part or all of the major acts in U.S. environmental law, the fact remains that the public has come to play a key role in environmental decision-making and cannot be extricated from the process.

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168. Mullikin & Smith, *supra* note 7, at 90.

169. See, e.g., Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?*, 26 ENVTL. L. REP. 10,527 *passim* (Oct. 1996); W.R. Derrick Sewell & Timothy O’Riordan, *The Culture of Participation in Environmental Decisionmaking*, 16 NAT. RESOURCES J. 1, 17 (1976); Daniel A. Farber, *Environmentalism, Economics, and the Public Interest*, 41 STAN. L. REV. 1021, 1034 (1989); Susskind, *supra* note 161.

170. Farber, *supra* note 169.

171. See Spyke, *supra* note 1, at 273.

172. *Id.*

173. *Id.*

174. *Id.* at 274.

175. *Id.* at 275.

C. ENVIRONMENTAL PUBLIC PARTICIPATION IN THE EUROPEAN UNION: AARHUS AND BEYOND

This subsection highlights the major trends in environmental public participation throughout Europe by examining the pertinent provisions of the Aarhus Convention, a far-reaching multilateral agreement focused on public participation rights.<sup>176</sup> The purpose of this subsection is to expose a thread of continuity among European Union, European, and U.S. law regarding the great extent to which environmental public participation rights, and the elaborate legislative mechanisms to secure those rights, have surfaced and now play a crucial role in environmental decision-making throughout most developed regions of the world.

The first fifteen member States of the European Union, and the European Community itself, have created environmental regulatory schemes containing significant provisions allowing for broad public participation in environmental decision-making. Like the United States, the shared historical experiences of Europeans have led to the recognition that the public must play a crucial role in implementation and enforcement of policies that affect the air, land, and water around it. Building on this tradition of environmental public participatory rights, the Aarhus Convention sought to create a multilateral agreement, negotiated and signed under the auspices of the United Nations, to ensure that all countries guarantee some form of participation in environmental decision-making.<sup>177</sup> Forty European States, including the first fifteen member States of the European Union and the European Community, have signed the agreement.<sup>178</sup> Several EU member States have already ratified the agreement, and most others are currently working internally to secure the support necessary for ratification.<sup>179</sup>

The Aarhus Convention aims to ensure basic public participatory rights in environmental decision-making. The agreement binds States to establish a minimum baseline structure upon which they can build three core systems of participatory rights: (1) the public's right of access to information, (2) the public's right to a forum to participate, and (3) the public's right of access to the justice system.<sup>180</sup> These principles establish the basic foundation of environmental public participation rights and have been developed for some time in academic literature. However, they were first embodied as legal principles in the Rio Declaration in 1992.<sup>181</sup> Most developed European States already provide these

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176. See Aarhus Convention, *supra* note 9.

177. See Sean T. McAllister, *The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y 187 (1998).

178. See UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, *Aarhus Convention*, available at <http://www.unece.org/env/pp/> (last visited Feb. 5, 2005).

179. *Id.*

180. McAllister, *supra* note 177, at 189. Aarhus Convention, *supra* note 9, arts. 5(1)(b), 6(1)(a), 6(11), 9(1), and Annex I.

181. See *infra* note 203 and accompanying text.

rights to their citizens. However, the Aarhus Convention ensures that these rights never fall below a minimum threshold.<sup>182</sup> In this sense, Aarhus represents a reaffirmation by Europeans that the public should play an important role in decisions that affect the environment. Moreover, Aarhus seeks to bring the participatory practices in the transitional States within Europe into balance with the more developed European States and the European Union generally.<sup>183</sup>

Aarhus assigns the same importance to environmental rights as to human rights and calls on its signatory nations to work toward the incorporation of environmental rights to that degree (i.e., by giving environmental rights constitutional guarantees).<sup>184</sup> While most of the parties to the agreement have stopped short of elevating environmental public participation rights to the level of constitutionally guaranteed human rights, all of the signatories have imposed upon themselves the obligation to provide all citizens with access to information and the opportunity to participate.

Most significantly, Aarhus represents an earnest attempt to comply with one of the core principles of the Rio Declaration—that environmental public participation rights are not just legal rights in a democratic society, but also are crucial human rights essential to successful sustainable development and to securing the rights of future generations.<sup>185</sup> The concept is critical to understanding the evolution of environmental public participation rights from rights that are merely given by the government to rights that cannot be taken away. Such advanced notions of participation as a human right are gaining ground globally and provide a glimpse into the future scope of public participation rights.

#### IV. TOWARD AN INTERNATIONAL HEGEMONY: ENVIRONMENTAL PUBLIC PARTICIPATION RIGHTS, SUSTAINABLE DEVELOPMENT, AND THE DEVELOPING WORLD

Two forces play crucial roles in pushing transitional States to implement environmental public participation rights. First, a number of important multilateral agreements, both international and regional, have given import and legal substance to the concept of public participation in environmental decision-making. These agreements have helped create sound legal principles to which many transitional States look for guidance in creating and implementing their own mechanisms.<sup>186</sup> Second, there is growing internal pressure on transitional States, rooted in public concern for the environment that acts as a driving force for the implementation of environmental public participation rights.

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182. McAllister, *supra* note 177, at 192.

183. Namely former Eastern bloc countries and Turkey.

184. McAllister, *supra* note 177, at 192.

185. *See infra* note 203 and accompanying text.

186. Popovic, *supra* note 2, at 691.

This section demonstrates how the twin concepts of sustainability and participation have deeply influenced binding regional agreements and international aid policies for development. Consequently, transitional States, bound by formal mandates, are implementing environmental public participation rights to an unprecedented degree. This section also describes how overwhelming internal pressure from concerned citizens forces transitional States to involve the public in environmental decision-making.

#### A. INTERNATIONAL ENVIRONMENTAL AGREEMENTS

Environmental public participation is a relatively recent concept within the recognized framework of broad international initiatives.<sup>187</sup> In fact, from 1940 to 1970 there were no explicit environmentally-oriented international initiatives.<sup>188</sup> Instead, early international initiatives focused on concepts such as human rights and equity. Yet, these instruments played an important role in laying the foundation for future international discourse on environmental public participatory rights. For example, the Universal Declaration of Human Rights provides that "everyone has the right to take part in the government of his country, directly or through chosen representatives."<sup>189</sup> Article 19 of the Declaration provides also that "everyone has the right to freedom of opinion and expression; this right includes freedom to . . . seek, receive, and impart information and ideas through any media."<sup>190</sup> Likewise, the International Covenant on Civil and Political Rights provides that every citizen "shall have the right and the opportunity . . . (a) to take part in the conduct of public affairs, directly or through freely chosen representatives."<sup>191</sup> Thus, while these instruments do not focus specifically on public participation in environmental issues, they do set forth principles that form the basic prerequisites to public participation and serve to acknowledge public participation as a basic human right, deserving protection and encouragement.<sup>192</sup>

In the 1970s and 1980s, two events resulted in a growing number of international environmental initiatives containing specific provisions that focused on the right to public participation in environmental decision-making. First, a series of environmental crises (e.g., the toxic contamination resulting from the 1978 Love

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187. Here, international initiatives are understood to mean conventions, agreements, declarations, general policy statements, and other forms of non-binding and non-enforceable international policy instruments.

188. See Somrudee Nicro et al., *Public Involvement in Environmental Issues: Legislation, Initiatives and Practice in Asian Members of ASEM Countries*, in URBANIZATION AND ENVIRONMENT PROGRAM, PUBLIC INVOLVEMENT IN ENVIRONMENTAL ISSUES IN THE ASEM – BACKGROUND AND OVERVIEW 31-43 (Thailand Environment Institute & Finnish Environment Institute) (2002) [hereinafter ASEM Report]. The report was disseminated at the fourth annual ASEM Meeting in Copenhagen, Denmark, Sept. 22-24, 2002.

189. G.A. Res. 217A, U.N. GAOR, 3d Sess., at 139, U.N. Doc. A/810 (1948).

190. *Id.* art. 19.

191. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 55, U.N. Doc. A/6316 (1966).

192. Popovic, *supra* note 2, at 686. (The early focus, of course, was on the emerging post-colonial states, and the United Nations believed that public participation would be necessary for successful development).

Canal disaster and the 1984 Union Carbide explosion in Bhopal, India) forced leaders and organizations throughout the world to take notice of the global scale of environmental degradation.<sup>193</sup> This heightened awareness stimulated a number of international meetings on the environment and provided the catalyst for the global movement towards the concept of sustainable development.<sup>194</sup> Second, increasingly popular and powerful environmental NGOs were permitted a place at the table during these meetings, and they forced the international community to include public participation rights as part of sustainable development.<sup>195</sup>

### 1. Sustainable Development

The concept of sustainable development emerged in 1972 with the commencement of the U.N. Stockholm Conference on the Human Environment.<sup>196</sup> This conference is generally recognized as marking the first large-scale international meeting linking the effects of human activities with environmental degradation.<sup>197</sup> Stockholm's stated goal, among other things, was to highlight the extent of the degradation resulting from pollution and resource destruction, and the conference was the first to acknowledge that social well-being was intimately related to environmental well-being.<sup>198</sup> The Declaration acknowledged that economic development was necessary for improvements in the living standards of the world's poorer and undeveloped States and proposed a number of principles to ensure such development would be sustainable.<sup>199</sup> Perhaps the most successful accomplishment of Stockholm is that it placed environmental concerns at the forefront of the international legal agenda for the next three decades and spawned a number of important international agreements regarding sustainable development.<sup>200</sup>

In 1987, the U.N.-sponsored World Commission on Environment and Development (Brundtland Commission) released *Our Common Future*, perhaps the most influential expression on sustainable development to date.<sup>201</sup> The Brundtland Commission, like Stockholm, posited that economic development was necessary for human development but stressed that current patterns of development and consumption (in both the developed and developing areas of the world) must

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193. See ASEM Report, *supra* note 188.

194. See *infra* notes 200-26 and accompanying text.

195. See ASEM Report, *supra* note 188.

196. *Report of the United Nations Conference on the Human Environment*, at 3, U.N. Doc. A/CONF.48/14 (1972), revised by U.N. Doc. A/CONF.48/14/Corr. 1 (1972) [hereinafter Stockholm Declaration 1972].

197. See ASEM Report, *supra* note 188.

198. Stockholm Declaration 1972, *supra* note 196.

199. *Id.*

200. Popovic, *supra* note 2, at 700.

201. See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE*, (1987) [hereinafter Brundtland Report] (defining sustainable development as development that meets present needs without compromising the ability of future generations to meet their own needs).

change course to fit within the planet's ecological limits.<sup>202</sup> *Our Common Future* stressed that environmental concerns and economic concerns were related and that both must be attacked through a series of initiatives aimed at poverty reduction, education, conservation, and, most importantly for this paper, public participation.<sup>203</sup>

Global attention to sustainable development peaked at the 1992 U.N. Conference on Environment and Development in Rio de Janeiro (Rio).<sup>204</sup> The size and scope of Rio speaks to its significance. The conference brought together representatives from 179 States and included the Earth Summit, the largest-ever meeting of world leaders.<sup>205</sup> Taking the helm from the Brundtland Commission, the conference aimed to address, authoritatively, what many considered to be an emerging triumvirate of crucial problems: environmental protection, social progress, and economic development.<sup>206</sup> In the end, Rio produced two international agreements, two statements of principles, and a major action agenda on worldwide sustainable development, thus laying the groundwork for States around the world to incorporate the concept of sustainable development into their binding regional agreements and domestic legislation.<sup>207</sup>

## 2. Injecting Public Participation into Sustainable Development: The Role of the Non-Governmental Organization

One of the forces driving the notion that public participation should play an important role in the evolving concept of sustainable development was the growing prominence of NGOs.<sup>208</sup> The public was not involved in the processes that produced early environmental initiatives such as Stockholm; there was simply no protection of the public interest other than through the State representatives. The recognition of public involvement had to surface in the processes that produced the initiatives before it could appear in the text of the initiatives themselves. Once the United Nations allowed NGOs to take part in environmental conferences, the NGOs pushed for provisions that would allow for greater public participation and promote greater public awareness and education.<sup>209</sup>

Consequently, the international environmental instruments that emerged throughout the 1980s and 1990s reflected this new spirit of participation. For example, the World Charter for Nature, a resolution of the U.N. General

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202. *Id.*

203. *Id.*

204. United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter Rio Declaration].

205. Popovic, *supra* note 2, at 700.

206. *Id.*

207. *Id.* at 701.

208. See ASEM Report, *supra* note 188.

209. *Id.*

Assembly, explicitly imposes a duty upon the public to act in accordance with their national legislation and provides that "all persons . . . shall have the opportunity to participate . . . in the formulation of decisions of direct concern to their environment."<sup>210</sup> Several environmental agreements have since followed suit with similar provisions.<sup>211</sup>

Thus, the twin concepts of sustainability and participation combined to make environmental public participation rights a key feature in the modern international environmental landscape. By the time of the Rio Conference in 1992, global support for environmental public participation reached its zenith of expression.<sup>212</sup> Addressing public participation specifically, Principle 10 of the Rio Declaration states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each 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 judicial administrative proceedings, including redress and remedy, shall be provided.<sup>213</sup>

The Rio Declaration essentially codified the basic and familiar concepts underlying effective public participation: (1) access to information, (2) right to participate in decision-making, (3) right to judicial enforcement, and (4) remedy.<sup>214</sup> With the Rio Declaration, public participation in environmental decision-making became a legitimate part of the discourse of international environmental law and a legitimate policy expression to which many transitional States would strive to achieve.<sup>215</sup> Furthermore, the philosophy of the Rio Declaration would come to permeate all subsequent major international environmental initiatives that now almost universally affirm the concept of public participation.<sup>216</sup>

The importance of broad international initiatives such as the Rio Declaration lies not in any particular legal obligation set forth by the initiative itself; rather, such initiatives are important because they provide a framework for an opera-

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210. *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 18, U.N. Doc. A/37/51 (1982) (referencing principle 23).

211. *See, e.g.*, Draft International Covenant on Environment and Development, art. 12, U.N. Doc. A/CONF.151/PC/WG.III/4 (1991); Brundtland Report, *supra* note 201.

212. *See* Rio Declaration, *supra* note 204.

213. *Id.* at 878.

214. *See supra* note 2 and accompanying text.

215. Popovic, *supra* note 2, at 699.

216. *See generally, e.g.*, United Nations Conference on Environment and Development, Agenda 21, U.N. Doc. A/CONF.151/PC/100/Add. 1 (1992) [hereinafter Agenda 21]; Malmo Declaration, U.N. UNEP, 6th Sess., Doc. UNEP/GC/SS.VI/1 (2000).

tional right that reflects international consensus.<sup>217</sup> Furthermore, such broad instruments often form the basis for regional agreements, many of which not only set forth more specific obligations but are enforceable as multilateral and bilateral treaties. Because Rio has tied public participation to the concept of sustainable development, countries are implementing participatory processes as a part of their overall desire to implement sustainable development initiatives.<sup>218</sup>

A number of regional initiatives also incorporate public participatory rights into their environmental agreements. For example, Asian and European (ASEM) partners have developed both binding and non-binding regional agreements focusing on environmental conservation and sustainability.<sup>219</sup> These agreements contain provisions that promote the enhancement of public environmental awareness by developing and implementing education programs and facilitating the sharing of environmental information among government, industry, and citizen groups.<sup>220</sup> Further, ASEM has embarked, at the ministerial level, on a non-binding Asian initiative that would seek to implement public involvement in environmental issues on the level of that sought by Europeans under the Aarhus Convention.<sup>221</sup>

Likewise, the Arab Ministerial Conference on Environment and Development has issued an Arab Declaration on Environment and Development and Future Perspectives (Arab Declaration).<sup>222</sup> The Arab Declaration, among other things, stresses that environmental protection and sustainable development require that States give "support" to individuals, local organizations and non-governmental organizations.<sup>223</sup> The Arab Declaration views these groups as representative of popular participation, a concept which must be given "due attention."<sup>224</sup> Under this view, individuals and organizations shall have the "right to acquire information about environmental issues . . . access to data . . . and to participate in the formulation and implementation of decisions that may affect their environment."<sup>225</sup>

In Central and South America, the Organization of American States (OAS) has initiated the Inter-American Program of Action for Environmental Protection.<sup>226</sup> This resolution of the General Assembly of OAS places a high priority on public awareness and participation. It directs its members to promote greater education

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217. See Popovic, *supra* note 2.

218. See Agenda 21, *supra* note 216, at 219.

219. See ASEM Report, *supra* note 188.

220. *Id.*

221. *Id.*

222. Letter of the Conference on Environment and Development, 46<sup>th</sup> Sess., Agenda Items 34, 77(e)-(h), 78 & 79, at 4, U.N. Doc. A/46/632 (1991) [hereinafter Arab Declaration].

223. See Popovic, *supra* note 2, at 688.

224. See Arab Declaration, *supra* note 222.

225. *Id.*

226. Inter-American Program of Action for Environmental Protection, Resolution of the General Assembly of the Organization of American States (OAS), AG/RES.1114 para. (g), (u) (1991).

and information access to the general public and NGOs so that such groups can participate in efforts to improve and protect the environment in the region.<sup>227</sup>

This section has provided a glimpse of international environmental agreements, instruments, and initiatives that deal with public participation rights to demonstrate the global evolution of such rights. Public participation rights have evolved in the international environmental legal arena as steadfastly as they have evolved within the environmental legal regimes of the most developed States in the world. Transitional States are increasingly bound to insert the rights created in these agreements into their own domestic legislation.

#### B. INTERNAL PRESSURE FORCES PUBLIC PARTICIPATION: THE CAMBODIAN EXAMPLE

While international initiatives identify a framework for environmental public participation rights, the driving force for implementation of those rights, especially in a way that binds the State, can only come from strong internal public demand. In responding to internal pressure, transitional States can look to the international framework for guidance on how to properly channel public participation so that public discord does not cause potentially harmful instability.<sup>228</sup>

The Cambodian example illustrates that where transitional countries neglect to implement sufficient environmental regulatory control and to include the public in the regulatory processes affecting the environment, the public response to environmental degradation can be overwhelmingly destabilizing. Faced with such internal pressure and agitation for greater regulatory control over industrial growth, as well as calls for improved public participation, transitional States like Cambodia are increasingly turning to the international framework for guidance.

Cambodia, like many transitional States, suffers from a past marred by political violence, a lack of financial resources, and a centralized government whose actions and officials are not often subject to oversight or public scrutiny. There is a wealth of natural resources in the country, and the government is currently actively pursuing a course of infrastructure development. However, Cambodia currently lacks an effective environmental regulatory structure, and the affected public in Cambodia has very few outlets for participation in environmental decision-making.<sup>229</sup>

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227. *Id.*

228. This example is derived directly from one of the authors' experiences in Cambodia as corporate counsel for an involved party in this matter. The author had the unique experience of witnessing the public angst that can result in unmitigated environmental degradation in a country which lacks proper participatory structures.

229. See generally Alan K.J. Tan, *APCEL Report: Cambodia, Preliminary Assessment of Cambodia's Environmental Law*, Asia Pacific Center for Environmental Law, available at <http://sunsite.nus.edu.sg/apcel/dbase/cambodia/reportc.html> (last visited Feb. 5, 2005). For instance, while Cambodia has a general environmental law on the books allowing for the prosecution of individuals found responsible for destroying the environment or endangering public health, there is currently: (1) little oversight or regulation regarding the disposal of hazardous waste, (2) little or no public say in how hazardous waste is handled within Cambodia, (3) no knowledge of whether, when, how, or whose waste is being disposed of, and (4) no control of the process for

In 1998, 4000 tons of hazardous toxic waste containing high levels of mercury were dumped illegally in Cambodia.<sup>230</sup> The waste originated at a Taiwanese petrochemical company.<sup>231</sup> Two people died from direct exposure to the waste, and the ensuing backlash sparked mass rioting and hysteria among local citizens. Fearing contamination, upwards of ten thousand residents fled the area.<sup>232</sup>

As the weeks went on, allegations were investigated as to whether the Taiwanese chemical company gave several members of the Cambodian government U.S. \$3 million in bribes to ignore its illegal dumping activities.<sup>233</sup> The illegal disposal of the hazardous waste and the associated political scandal illuminated the near-total inadequacy of Cambodia's environmental laws. There were no records of the dumping, few reporting procedures, and little regulatory process by which anyone could be held accountable.<sup>234</sup> Feeling powerless and frustrated with their government's reluctance to act, many Cambodian citizens throughout the country took to the streets and launched massive protests.<sup>235</sup> Subsequent government crackdowns on these riots only fueled more violent resistance, resulting in further turmoil and even death.<sup>236</sup> Within a matter of weeks, ever-larger public crowds were demanding apologies from the key actors, even Taiwan, and calls to overthrow the current regime were becoming more vocal.<sup>237</sup> In a short time, Cambodia was facing a real crisis, largely due to public anger over inadequate environmental regulatory processes and a lack of formal public participation.

Ultimately, the government arrested around one hundred public officials, demanded an apology from the Taiwanese chemical company, and required the company to clean up its waste.<sup>238</sup> Fearing future backlash, the Cambodian government is now attempting to change many of its existing environmental laws to reflect greater controls on waste management and create more thorough reporting mechanisms for hazardous waste dumping.<sup>239</sup> The government is also exploring ways to provide the public with greater dissemination of information pertinent to environmental decision-making, including the initiation of several

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doing so. *Id.*

230. See Seth Mydans, *Cambodia Town's 'Luck' Leaves Illness in Its Wake*, N.Y. TIMES, Jan. 4, 1999, at A3; *Cambodia Sends Toxic Waste Back Home*, BBC NEWS (Apr. 2, 1999), at <http://news.bbc.co.uk/1/hi/world/asia-pacific/310362.stm> (last visited Feb. 5, 2005).

231. See *Cambodia Sends Toxic Waste Back Home*, *supra* note 230.

232. *Id.*

233. See Human Rights Watch, *Human Rights, Justice and Toxic Waste in Cambodia*, at <http://www.hrw.org/reports/1999/cambotox> (last visited Feb. 5, 2005).

234. *Id.*

235. *Id.*

236. *Id.*

237. See Danielle Knight, *Toxic Waste Heads Back to Taiwan*, ASIAN TIMES ONLINE (Apr. 3, 1999), at <http://www.atimes.com/china/AD03Ad01.html> (last visited Feb. 5, 2005).

238. See *id.*; see also Marc Lifsher, *Toxic Waste from Asia Head to State*, WALL ST. J., Mar. 24, 1999, at CA1.

239. See Knight, *supra* note 237.

programs to educate the public on how to monitor waste.<sup>240</sup>

#### V. ECONOMIC INCENTIVES FOR ENVIRONMENTAL PUBLIC PARTICIPATION

There is another compelling factor driving transitional and developed States to embrace the concept of environmental public participation: it simply makes good economic sense. Capital investors generally recognize that the public's ability to participate in environmental decision-making produces positive economic outcomes essential for successful development. Successful economic markets require a free flow of information. Because environmental public participatory schemes stress the importance of education and access to information, they facilitate the free exchange of information, thereby fueling investment, a crucial component of development.<sup>241</sup>

Perhaps most importantly, public participation mitigates economic loss by properly allocating the risks associated with development, including environmental risks, among all the parties involved.<sup>242</sup> As such, transitional States and capital investors are beginning to implement environmental regulatory regimes and public participation as a means of achieving sustainable growth, allocating risks, and attracting investment.<sup>243</sup> This section explores the concept of environmental risk, as faced by transitional States, and how publication participation rights can allocate that risk among interested stakeholders.

#### A. IMPLEMENTING PUBLIC PARTICIPATION AS A MEANS TO ALLOCATE ECONOMIC RISK IN TRANSITIONAL STATES

To effectively compete in the global economic atmosphere, transitional States must put into place a solid infrastructure. Infrastructure is a foundational element of economic development and includes power generating and distribution facilities, telecommunications networks, irrigation and freshwater systems, waste management and disposal operations, and transportation mechanisms.<sup>244</sup> In the competitive world of transitional States, a well-developed infrastructure provides the advantage critical to attract foreign investment and to retain domestic capital.

There are two certainties transitional States face when attempting to construct

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240. See U.S. AGENCY FOR INT'L DEV., CAMBODIA (1999) at <http://www.usaid.gov/pubs/cp99/ane/kh.htm> (last visited Feb. 5, 2005); INT'L INST. FOR ENV'T AND DEV., REPORT OF THE CONFERENCE ON THE ROLE OF PUBLIC PARTICIPATION 16 (2001), at [http://www.iied.org/mmsd/mmsd\\_pdfs/IBA\\_public\\_participation.pdf](http://www.iied.org/mmsd/mmsd_pdfs/IBA_public_participation.pdf) (last visited Feb. 5, 2005); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, ECONOMIC SOCIAL AND CULTURAL RIGHTS, COMMISSION ON HUMAN RIGHTS para. 61-66, U.N. Doc. E/CN.4/2000/50 (2000).

241. Popovic, *supra*, note 2 at 708.

242. See Edward McCutcheon, *Think Globally, Act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations*, 31 CORNELL INT'L L.J. 395 (1998).

243. *Id.*

244. See THE WORLD BANK, *World Development Report: Infrastructure for Development* (1994), available at [http://www.worldbank.org/archives/dev\\_94023.htm](http://www.worldbank.org/archives/dev_94023.htm) (last visited Feb. 5, 2005).

infrastructure on a grand scale: (1) infrastructure projects are extremely costly and usually require foreign direct investment from outside public or private sources, and (2) infrastructure projects will have an impact on the environment of the local communities hosting them and on the transitional State as a whole. In fact, there is evidence that a rapid rate of infrastructure growth (and consequently economic growth) is proportionately related to an increase in environmental degradation.<sup>245</sup>

It is often argued that environmental degradation occurs, among other reasons, because transitional States fail to enforce environmental regulations, even where they exist, to lower project costs and attract investors.<sup>246</sup> In effect, States neglect to internalize the costs of environmental degradation in implementing their infrastructure projects for fear that higher short-term project development costs will stifle economic growth,<sup>247</sup> thereby passing on environmental costs to the public as a whole.<sup>248</sup> Transitional States have more economic incentive to use the environment as a form of subsidy for development rather than to impose a regulatory scheme on industry to protect the environment.<sup>249</sup> Under this economic rationale, the local citizenry that ultimately bear the external environmental costs of development is almost completely excluded from the decision-making process.

However, as the Cambodian case demonstrates, the long-term costs imposed by a State's failure to enforce its regulations and to embrace public participation in environmental decision-making can be much more significant than short-term economic gain.<sup>250</sup> Environmental degradation is an economic cost, as is unmitigated public angst. Conversely, both the procurement of public "buy-in" and the mitigation of the environmental effects of development confer an economic benefit because they can properly allocate risk among all stakeholders. The actions of the Mekong River Commission (MRC) provide a useful example.

#### B. CASE STUDY: MEKONG RIVER COMMISSION

The following case study demonstrates how transitional States are moving to implement international standards of environmental public participation rights as a means of alleviating public discord and properly allocating the environmental risk associated with development.<sup>251</sup> The participatory instruments relevant to

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245. McCutcheon, *supra* note 242, at 403-6 (citing nine categories of environmental degradation: deteriorating air quality, deteriorating water quality, atmospheric change, environmental deterioration in urban areas as result of population growth, soil degradation and deforestation, destruction of biodiversity, deterioration of coastal resources, pollution from agro-chemicals, and deterioration of natural and cultural heritage).

246. *Id.* at 397.

247. *Id.*

248. *Id.*

249. *Id.*

250. *See supra* notes 227-37 and accompanying text.

251. *See supra* Parts III & IV.

the agreement among the States forming the MRC illustrate that there is economic, social, and political utility for States to create and implement effective environmental public participatory schemes.

The Mekong River is one of the world's great rivers and a major income provider for millions of people.<sup>252</sup> For thousands of years, the river's annual flood-drought cycles have been essential for the sustainable production of rice and vegetables on the floodplains and along the riverbanks during the dry season.<sup>253</sup> The Mekong River basin also has great potential for developing hydro-electricity facilities, transportation infrastructure, agricultural innovation, abundant fisheries and a tourism industry, all of which are significant to the social and economic development of the countries in the basin.<sup>254</sup>

Given its potential for economic development, there are serious challenges affecting the viability of the river. The current population in the Mekong River basin is over 60 million and is likely to exceed 100 million by 2025.<sup>255</sup> A dramatic increase in population will no doubt serve to increase pressure on the river's natural resources. Also, investors, eager to generate capital, seek to develop necessary infrastructure as quickly as possible and with few restrictions.<sup>256</sup> The need to balance the desire for economic development in the area with the desire to protect the environmental sustainability of the river basin has never been greater. It is crucial that all of the countries within the Mekong River basin cooperate to create economic development that is sustainable, reduces poverty, builds capacity, and protects the environment and ecosystem.<sup>257</sup>

Largely due to the influence of Rio and local NGOs, the MRC was reorganized in 1995 as an international river basin authority with the status of an international regional treaty.<sup>258</sup> The MRC is made up mainly of member States from southeast Asia, and has monetary support from donor countries and from the World Bank, the Asian Development Bank and U.N. Development Program.<sup>259</sup> The stated purpose of the MRC is to establish cooperation in all fields of sustainable development, including utilization, management and conservation of the water and related resources of the basin, navigation, flood control, fisheries, agriculture, hydropower, and environmental protection.<sup>260</sup>

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252. Tran Tuan Anh, *Vietnam's Co-operation for Development in Mekong River Basin*, NHAN DAN, March 13-14, 2004, available at <http://www.nhandan.org.vn/english/20040313/bai-eco2.html> (last visited Feb. 5, 2005).

253. *Id.*

254. *Id.*

255. Tun Myint, *Globalization, Democracy and Domestic Law: Democracy in Global Environmental Governance: Issues, Interests, and Actors in the Mekong and the Rhine*, 10 *IND. J. GLOBAL. LEG. STUD.* 287 (2003).

256. *Id.*

257. *See id.* at 300.

258. *Id.* at 299.

259. *Id.*

260. *Id.* at 300.

More recently, the MRC established the Mekong River Basin Development Plan (BDP) to identify and seek investment for high priority projects directed to achieving sustainable development in the region.<sup>261</sup> The MRC and the donor agencies recognized that the most ambitious infrastructure plans were the ones that affected the most stakeholders and had the greatest potential impact on the environment. However, these ambitious infrastructure plans also held out the most promise for beneficial economic development. Thus, the BDP makes a serious effort to identify the most useful (yet most potentially harmful) projects and to subject those projects to a rigorous plan designed to achieve sustainable development according to the principles set forth in Rio and its progeny.<sup>262</sup>

What is most striking about the BDP, for the purposes of this paper, is the agreement's level of commitment to environmental public participation as a crucial element of sustainable development. Arguably, three of the four member countries are not genuinely democratic. They have long histories of under-inclusion of public stakeholders and have traditionally offered few avenues for public participation in government decision-making generally. Yet, when it came to the development of the BDP, the MRC committed itself to an open process whereby "all concerned shareholders will have a chance to participate."<sup>263</sup> The MRC has made good on its promise to include the public. For example, in 1999 the MRC launched a BDP task force to study the ways in which it could advance meaningful public participation in its decisions and has since developed a policy geared towards assuring that will happen.<sup>264</sup> The approach has already been met with some success, and the MRC has become widely recognized for these successful efforts.<sup>265</sup>

## VI. CONCLUSION

Since the earliest days of organized society, the public has demanded involvement in its environment because of, and typically in response to, adverse epidemiological impacts. The experiences of the MRC and Cambodia demonstrate that environmental public participation rights are necessary for development. Deliberate, effective, and well-reasoned growth can occur only after critical involvement of host community stakeholders and the impacted public. Transitional States, as well as the greater international community, have em-

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261. Under the plan, the MRC will cooperate to seek investment for development plans designed to build sustainable practices in irrigated agriculture, watershed management, fisheries, hydropower, navigation, transport, water-related tourism and flood control. See MEKONG RIVER COMMISSION FOR SUSTAINABLE DEVELOPMENT, BASIN DEVELOPMENT PLAN, at <http://www.mrcmekong.org/programmes/bdp/bdp.htm> (last visited Feb. 5, 2005).

262. *Id.*

263. See MEKONG RIVER COMMISSION FOR SUSTAINABLE DEVELOPMENT, *supra* note 261.

264. *Id.*

265. See Myint, *supra* note 255.

braced the concept of environmental public participation rights, and a growing number of regional multilateral agreements are producing successful outcomes as a result of incorporating environmental public participatory schemes into workable sustainable development plans. Ultimately, such rights cannot and should not be ignored by government or industry.