

Draft proposal
to streamline and shorten Article 8 (Public participation) of the Regional Agreement on
Access to Information, Participation and Justice in Environmental Matters in Latin
America and the Caribbean

Prepared by The Elected Representatives of the Public with input from the public
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A. Objectives of Proposal

The objectives of the proposal are to:

- streamline the text with the objective of ensuring more effective and expedient negotiations
- make Article 8 consistent internally and with other provisions of the instrument
- capture all the necessary features of a modern framework for public participation
- differentiate clearly between the general provisions which are the core elements of public participation and additional provisions which are mostly to address the needs of individuals and groups in vulnerable situations and indigenous people.

B. Structure of proposal

This streamlined proposal, which consists of 15 articles, includes all the main provisions of the Preliminary Document prepared by the UN Economic Commission of Latin America and the Caribbean (UN ECLAC). We hope this more concise article will help to expedite negotiations while at the same time capturing all the essential elements of a meaningful public participation scheme.

Core elements

- area of application (para 1 and para 10)
- main principles (paras 2-4)
- procedural elements
 - notification - para 5
 - provision of information - para 6
 - submission of comments - para 7
 - obligation to take due account - para 8
 - obligation to inform about the decision - para 9
 - re-examination of projects and activities – para 10
 - special measures – para 11 - 15

Special measures (paragraphs 11-15) include measures to address the needs of individuals and groups in vulnerable situations and indigenous people.

Merged and omitted provisions

This proposal for Article 8 consists of 15 paragraphs while the Preliminary Document consists of 18 paragraphs. This proposal merges some existing provisions and in some cases paragraphs were omitted where similar provisions exist in other articles.

The following articles, or elements thereof, from the Preliminary Document were merged:

1. Articles 8.1 and 8.15
2. Articles 8.1 and 8.3
3. Articles 8.3, 8.8 and 8.16
4. Articles 8.6 and 8.16
5. Articles 8.3 and 8.17
6. Articles 8.7, 8.9 and 8.18
7. Articles 8.9 and 8.18

In several cases, paragraphs have been rephrased. In some cases where there is little rephrasing of the original paragraphs, text underlined in red are proposals made by governments as made in the Preliminary Document and text underlined in black are proposals from the public.

We have suggested two options for article 8.1. Option A creates an annex of projects and activities which require participation and Option B which requires participation in projects and activities that require an environmental assessment and are subject to environmental permits.

The following articles were omitted:

Article 8.11

We consider article 8.11 in the Preliminary document concerning public participation in international forums and negotiations to be generally covered by Article 5.11.

Article 8.10

Article 8.10 concerning manuals and guidance is not included in our proposal as we consider that this is adequately dealt with in Article 17.3.

C. Article 8 - Public participation in environmental decision-making

General provisions on public participation

Option A

- 1. The public shall have the right to participate, in accordance with this article, in the decision-making processes with respect to:**
 - a. projects and activities belonging to categories listed in Annex 1; and**
 - b. other projects and activities, including policies, strategies, plans, programs regulations or laws, which are related to the environment or may have significant impact on the environment.**

Each Party shall develop and apply clear criteria for the determination of whether an activity may have a significant impact.¹

Option B

- 1. The public shall have the right to participate, in accordance with this article, in the decision-making processes with respect to:**
 - a. proposed projects and activities which are subject to environmental impact assessment and other environmental permitting in accordance with national law;**
 - b. other proposed projects and activities, including policies, strategies, plans, programs, regulations or laws which are related to the environment or may have a significant impact on the environment.**

Each Party shall develop and apply clear criteria for the determination of whether an activity has a significant impact.

- 2. Each Party shall establish an open and inclusive participation framework in accordance with the provisions of this article to ensure early, impartial and effective public participation, when all options are still possible and when the public is able to have an impact on the respective decision-making process.²**
- 3. For the different phases of the public participation procedure, reasonable periods shall be provided that allow sufficient time to inform the public and enable it to prepare and participate effectively throughout the entire environmental decision-making process.³**
- 4. Each Party shall require the competent authorities to identify the public concerned and promote specific actions appropriate for their social, economic, cultural, geographical and gender characteristics to facilitate their informed participation including best media, formats and technical and financial assistance.⁴**

The Parties shall ensure that where the public concerned speak primarily languages other than the official language, the competent authority shall guarantee that the means are provided to facilitate their understanding and

¹ This paragraph is based on Articles 8.1 and 8.15 of the Preliminary document. The requirement to develop clear criteria for determining activities that may have a significant impact is to prevent arbitrary application of the test of significant effect.

² This paragraph is based on Article 8.1 of the Preliminary document and the proposal from Jamaica. The inclusion of “objective” and “early” participation is used in paragraph 8.3 of the Preliminary Document.

³ This paragraph is based on Article 8.4 of the Preliminary Document.

⁴ This paragraph is based on Article 8.6 and 8.16 of the Preliminary Document.

participation through processes and forms of organization specific to their traditions and cultural identity (Argentina).⁵

5. The public shall be informed by public notices or by other appropriate means including electronically and orally , in an effective, timely and adequate manner , of the following matters:
 - a. the type or nature of the environmental decision-making in non-technical language;
 - b. the competent authority responsible for the decision-making process [and of other public authorities involved];
 - c. the procedure specified for public participation, including the date on which the procedure will begin and end (Jamaica), and the possibilities offered to the public to participate, in particular, details of the competent authorities from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions, including the date and place of any public consultation or hearing as applicable.⁶
6. The competent authority shall identify the scope of information relevant to the decision-making which is deemed necessary for an effective public participation and seeking to improve ease of access (Perú) shall ensure that the public has free of charge and effective access to such information as soon as it becomes available. The relevant information shall encompass at least the following:
 - a. Description of the proposed project or activity; including the site and the physical and technical characteristics where applicable,
 - b. Description of the potential effects and impacts of the project or activity on the environment and humans;
 - c. Description of alternatives to the proposed project or activity, including alternative locations and technologies, where applicable;
 - d. Description of the measures to be established to prevent, reduce and offset those effects and impacts, and the means of verification of compliance of such measures;
 - e. A non-technical summary of points a), b), c) and d) above; and
 - f. Reports and opinions addressed to the public authority.⁷
7. Any member of the public shall have a right to present comments, including any observations, information, analysis or opinions, that he or she considers relevant, to be submitted directly to the competent authority responsible for decision-making process in writing, orally (Perú), or through electronic means,

⁵ This paragraph is based on Articles 8.6 and 8.16 of the Preliminary Document.

⁶ This paragraph is based on Articles 8.3 and 8.17 of the Preliminary Document.

⁷ This paragraph is based on Articles 8.3 and 8.17 of the Preliminary Document.

at a public hearing or consultation or other established mechanisms.⁸

8. The outcome of the participation process shall be duly taken into account by the competent authority when making decisions. The decision shall be accompanied by a justification including:
 - a) the reasons and considerations on which the decision is based;
 - b) the legal basis for the decision;
 - c) a description of the relevant public participation procedure;
 - d) an explanation of how due account was taken of the outcome of the public participation including the reasons for not accepting any comments made by the public.⁹
9. The competent authority shall ensure that once a decision has been adopted, the public is promptly informed in writing about the possibilities to inspect the decision and its justification, as well as of existing avenues for appealing the decision adopted. The decision and its justification shall be publicly available.¹⁰
10. Each Party shall ensure that when a competent authority re-examines or updates projects or activities referred to in paragraph 1, the provisions contained in this article are observed.¹¹

Special measures

11. None of the foregoing paragraphs shall imply that participation supplants the right of indigenous peoples to consultation and consent. (Peru)¹²
12. The right of individuals and groups in vulnerable situations and indigenous peoples to participate in decision-making in respect of any policies, plans and programmes that have an impact on their territories or populations shall be guaranteed. (Peru)¹³
13. Each Party shall require the competent authorities to make efforts to identify individuals and persons in vulnerable situations and indigenous peoples directly affected by the project or activity and promote specific actions, appropriate to

⁸ This paragraph is based on Article 8.5 of the Preliminary Document.

⁹ This paragraph is based on Articles 8.7, 8.9 and 8.18 of the Preliminary Document.

¹⁰ This paragraph is based on Articles 8.9 and 8.18 of the Preliminary Document.

¹¹ This paragraph is based on Article 8.8 of the Preliminary Document.

¹² This paragraph is based on Article 8.16 bis of the Preliminary Document which is a proposal from Peru.

¹³ This paragraph is based on Article 8.15 bis of the Preliminary Document which is a proposal from Peru.

their cultural characteristics, to facilitate their informed participation in decision-making, including technical and financial assistance.¹⁴

14. When individuals or groups belonging to an indigenous people are affected, the Parties shall ensure compliance with national legislation and international standards ~~on this matter are observed in the~~ exercise of their individual and collective rights. (Perú)¹⁵

15. The Parties shall encourage the establishment of permanent formal spaces for consultation on environmental matters in which representatives of various groups and sectors will participate.

They shall also encourage the formation of spaces for consultation in emergencies or extraordinary situations.¹⁶

¹⁴ This paragraph is based on Article 8.13 of the Preliminary Document.

¹⁵ This paragraph is based on Article 8.14 of the Preliminary Document.

¹⁶ This paragraph is based on Article 8.12 of the Preliminary Document.