

Name: Roberto de la Maza Hernández	Researcher: Senior
Topic: Strengthening the role of major groups	Week No. 3
Title: The environmental impact assessment process as a mean of implementation of public participation and its limitations in Latin American countries.	Amount of hours used:
I certify that the attached material is my original work. No other person's work has been used without due acknowledgment in the text, or in attached written form. Except when reference is made in the text, or elsewhere if relevant, this material has not been presented elsewhere or extracted in whole or in part, from a document presented by me for another qualification or subject at any institution. I understand that the work submitted may be reproduced and/ or communicated for the purpose of detecting plagiarism. By submitting this material, I authorize the <i>ETHSustainability</i> to use, reproduce, edit and publish it without any limitations.	

I.- Introduction

Sustainable development represents a formula that takes in account the environmental assets, which permits economical and social advance of our different nations.

Achieving sustainability is not only the responsibility of national governments, as they require the active collaboration of all sectors of society. In this sense, there is co-responsibility between governments and the public sector, regarding the accomplishment of sustainable development; but this kind of shared responsibility requires that the public sector effectively participates in the decision-making process. Otherwise, it would be unfair to make it liable for the achievement of this goal.

Considering the aforementioned, the Environmental Impact Assessment (EIA) represents the ideal instrument that allows public participation in the decision-making process. The problem is that this participation faces serious limitations in many Latin American countries; thus, becoming a social obstacle for the success of sustainable development¹.

The present paper will review two main aspects: the importance of public participation concerning sustainable development; and the way EIA can facilitate it. Finally, it will refer to the obstacles regarding public participation in the EIA of Mexico, and how these have affected the execution of several development projects.

All the former, bearing in mind that an active public participation can strengthen the role of major groups; but considering them as a hole, and not as a fragmented segment of the population, as it is done in Agenda 21².

II.- What is public participation?

¹ As this was one of the topics reviewed on a previous paper, entitled Obstacles in making decisions for sustainable development, we will be referring to it.

² Agenda 21 recognizes the importance of public participation, but separating its role in major segments of the population, i.e. women, children, indigenous people, NGOs, etc.

Public participation can be defined as the involvement of citizens in governmental decision making processes. It ranges from being given notice of public hearings to being included in decisions that may affect a community.

In this sense, it can be asserted that public participation is a process integrated by different stages, situation which turns it in a complex and diverse subject; thus making more difficult its implementation.

Therefore, as it was mentioned in a former paper, public participation constitutes part of different social obstacles towards sustainable development³.

III.- How important is public participation when it comes to sustainable development?

In a democracy, the decision-making process has to be not only transparent but also open, in order to take in account the opinion of the social sector. Public participation *increases the accountability of the decision-maker and makes the process more legitimate in the eyes of the public*⁴. And, because of its nature, when it comes to environmental issues and sustainable development, public participation has to be even more intense.

The former can be stated for the following reasons:

1.- Most Latin American constitutions recognize the right of all citizens to a clean and healthy environment⁵. So national governments must ensure this right.

However, it is a fact that it has been difficult to adapt traditional legal instrument like civil liability, or the necessary legitimation to present legal actions against environmental damages, to guarantee this right. Accordingly, legal systems had to include new solutions that could allow complying with the constitutional mandate.

In this sense, public participation became one of the means that governments have in order to ensure this constitutional right; it permits the citizens to exercise it through their active involvement in the decision-making process.

2.- Sustainable development is defined as the one "*that meets the needs of the present without compromising the ability of future generations to meet their own needs.*" This means that our present society must live and grow without compromising this possibility for the future generations. In this sense, the responsibility towards environmental issues is shared by governments and the community. In other words, it creates co-responsibility between authorities and the public in general, regarding sustainable development⁶.

³ Roberto de la Maza Hernandez, Obstacles in making decisions for sustainable development, p. 4.

⁴ Stuart Bell and Donald McGillivray, Environmental Law, Blackstone Press, 2000, p. 215.

⁵ These are the cases of article 19 of the Constitution of Chile; 41 of the Constitution of Argentina, and 4° of the Constitution of Mexico.

⁶ Article 15.III of the General Law of Ecological Equilibrium and the Protection of the Environment.

However, the problem lies in making accountable a society which often cannot participate in the decision making process. Most of Latin American communities are tired of being separated from the decision making process. Decisions usually are taken in an office, far away from the place where the project is going to be developed, and without the knowledge of the people that will suffer the direct consequences of it⁷.

In this sense, the Rio Declaration on Environment and Development recognizes in its principle 10 that *“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”*

From this statement, the Agenda 21 established in its 23.2 paragraph that a broad public participation is required, in order to achieve sustainable development.

Recently, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters establishes that sustainable development can be achieved only through the involvement of all stakeholders.

Consequently, as the international instruments abovementioned showed, it must be recognized that public participation constitutes an essential part of sustainable development.

IV.- The environmental impact assessment process as a mean of implementing public participation for sustainable development:

Exclusively on an environmental level, the EIA constitutes an information-gathering exercise carried out by the developer, which enables a competent authority to understand the environmental effects of the project, before deciding whether or not to grant permission for that proposal⁸.

However, in other countries the EIA has become more than an assessment on environmental aspects.

In this sense, the concept of environment that is included in the National Environmental Policy Act (NEPA) of the United States of America has included more than pure natural aspects by the Congress and Judicial decisions⁹. Environmental Impact Statements (EIS) must take in account public health issues and historical and cultural aspects.

⁷ Roberto de la Maza Hernández, op. cit., p. 4.

⁸ Stuart Bell and Donald McGillivray, op. cit., p. 347.

⁹ Roger W. Findley, Environmental Law in a Nutshell, West Publishing Co., 1996, pp. 28 and 29.

More recently, the Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment 85/337/EEC stated in article 3 that “*The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:*

- *human beings, fauna and flora,*
- *soil, water, air, climate and the landscape,*
- *the inter-action between the factors mentioned in the first and second indents,*
- *material assets and the cultural heritage.”*¹⁰

Therefore, it is possible to appreciate that the range that is assessed includes more aspects than pure ecological issues.

This wide focus of EIA is what makes it a mean to prevent environmental and social conflicts originated by the execution of a development project, as it incorporates information and concerns related to both kinds of issues into the decision-making process.

But how can the EIA effectively incorporate information regarding social aspects into the decision-making process?

Since its origins in the environmental legislation of the United States of America, the EIA has been closely related to the tradition of public consulting. Consequently, “*one of the most important issues relating to the content of an EIS is its scope*”¹¹. In this sense, “*Scoping is intended to obtain early participation by other agencies and the public in planning the EIS, ...*”¹². Therefore, the importance of scoping determined that it became by itself a special stage of the EIA process of the NEPA.

All the former, considering that public scoping would complement the environmental knowledge required for the decision-making process, and provide with the social information that could avoid conflicts. In this sense, some authors consider that if public opinion is not incorporated into the decision-making process, the assessment will not be integral, and therefore, the project will fail¹³.

Since then, public participation on the EIA process has evolved in most countries. Nowadays, it is worldwide considered as a guideline of the assessment process and not only

¹⁰ Text of the Council Directive available at <http://europa.eu.int/comm/environment/eia/full-legal-text/85337.htm>

¹¹ Roger W. Findley, op. cit., p. 35.

¹² Ibid, p. 34.

¹³ Leopoldo Burguete Stanek, “Desarrollo Sustentable y Participación Social” in Memorias del Primer Encuentro Internacional de Derecho Ambiental, Secretaría de Medio Ambiente y Recursos Naturales, Instituto Nacional de Ecología, 2003, p. 129.

as a possibility of citizens to deliver to the authorities a complaint, comments or suggestions about a developing project¹⁴.

In this sense, public participation allows *the developer the opportunity of communicating with all parties who are likely to have an interest in the project*¹⁵. Therefore, misunderstandings can be avoided, and every person can freely exercise its right to a clean and healthy environment, before it can be damaged by a developing project.

All the former demonstrates that both, preventative principle and public participation constitutes the basis of EIA.

V.- The limitations of public participation in the environmental impact assessment process:

In Mexico, the EIA is regulated by the General Law of Ecological Equilibrium and the Protection of the Environment (LGEEPA)¹⁶. Article 28 of this legislation defines it as the procedure throughout the environmental authority determines the conditions that should be observed by activities and projects which could cause environmental damage.

The public participation process inside the EIA procedure is located in article 34, which states that once the environmental authority has received an EIS and integrated the corresponding file, the later must be available for public consultation.

However, the problem is that there are two limitations to the public participation process:

On the one hand, the third paragraph of article 34 states that the environmental authority may enhance a public consultation process, only if it is requested by any person from the affected community. Thus, the consultation process is confined to the population that lives in the community where the project or activity is planed to be developed.

On the other hand, article 34.III determines that the environmental authority may organize a public meeting for information, only if the planned project can cause serious damages to the environment, the ecosystems or the public health. In this case, the Law gives a discretional faculty to the environmental authority to decide whether or not to have a public meeting for information, without having to explain or justify its decision.

The aforementioned can be acknowledged in several cases. Just to name some, the Chapala II Citizen Submission on Enforcement Matters case¹⁷, where the submitters "*assert that the public has participated in a number of consultations regarding the condition of the basin, with no known results, and they allege that there is an absence of government action for them to challenge before the administrative courts. According to the Submitters, this results*

¹⁴ Juan Rosa Moreno, Régimen Jurídico de la Evaluación de Impacto Ambiental, Editorial Trivium, 1993, p. 259.

¹⁵ Stuart Bell and Donald McGillivray, op. cit., p. 367.

¹⁶ Ley General del Equilibrio Ecológico y la Protección al Ambiente. Published on January 28 of 1988 (Diario Oficial de la Federación).

¹⁷ Submitted to the North American Commission for Environmental Cooperation on the 23 of May 2003.

in Mexico's failure to effectively enforce the LGEEPA provisions related to ensuring effective citizen participation in Mexican environmental policy and citizen involvement in environmental protection."¹⁸.

As well, another example to illustrate this kind of failure is that of the project for the new international airport of Mexico City, where the opposition of society stopped the construction of this infrastructure, though it was highly needed.

As it can be seen, these obstacles have caused various social complaints and conflicts, which ended affecting the development of many projects. Unfortunately, it is true that in the Mexican EIA process, public participation does not constitute an essential element.

VI.- Conclusions:

As it has been explained, there is no reason to restrain public participation on the EIA process. On the contrary, this kind of public involvement in the decision-making process could reduce or even prevent social conflicts generated by different developing projects.

In this sense, public participation should be encouraged by the authorities, and not seen as an obstacle for economic growth, or private investment. Both, governments and private sector should realize that sustainable development also includes social factors. Therefore, it is not enough to incorporate environmental considerations into the decision-making process.

If this is achieved, then costs will be avoided, and development will truly be sustainable.

Besides, it is clear that limiting public participation on the EIA represents a violation of several Constitutional rights and international agreements. Specifically in the case of Mexico, it results in contravention of article 4th, paragraph four, and article 26, second paragraph of the Mexican Constitution; as well as article 1(h) of the North American Agreement on Environmental Cooperation¹⁹, which states as an objective of this agreement to "*promote transparency and public participation in the development of environmental laws, regulations and policies;*".

Finally, EIA represents an exception instrument that should be applied to development projects that could have serious negative impacts on the environment. But on a general level, the decision-making process should be assessed as a whole, taking in account environmental and social impacts on the planning stage. Therefore, national governments on the region should begin a strategic environmental and social assessment of their plans and policies, which could reduce the need of making individual evaluations of every project.

¹⁸ Information available at <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=90>

¹⁹ Subscribed between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America