

An Assessment of Access to Information, Public Participation and Access to Justice in Environmental Decision-Making in Asia-Pacific

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Table of Contents

Introduction.....5

Background

Scope and Methodology

ASEAN Intergovernmental Commission on Human Rights (AICHR) advancing rights-based approaches to environmental decision-making in ASEAN

Legal and Policy Framework.....9

Principle 10 of the 1992 Rio Declaration Environment and Development

Framework Principles on Human Rights and Environment

SDG 16 and the 2030 Agenda

Access Rights Regional Instruments..12

Developments in Europe

Developments in Latin America and the Caribbean

Good Practices for Access Rights.....15

Access to Remedies

Access to Information

Public Participation in Environmental Decision-Making

Enabling Environment

Constitutional Right to a Healthy environment

Recommendations and ways forward..26

Access to Justice

Access to Information

Public Participation in Decision-Making

Enabling a safe and healthy environment

Constitutional rights

Other Recommendations.....28

Conclusion.....30



Abbreviations

ADB	Asian Development Bank
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of South East Asian Nations
EAC	East African Community
EACJ	East African Court of Justice
ECOWAS	Economic Community of West Africa
EC	Environmental Court
ECCJ	ECOWAS Community Court of Justice
ECT	Environmental Court and Tribunal
EHRD	Environmental Human Rights Defenders
EIA	Environmental Impact Assessment
EWMI	East West Management Institute
ET	Environmental Tribunal
FOI	Freedom of Information
IUCN	International Union for the Conservation of Nature
MEA	Multilateral environmental agreements
MPE	Mekong Partnership for the Environment
MRC	Mekong River Commission
NET	National Environmental Tribunal
NGT	National Green Tribunal
ODI	Open Development Initiative
OGM	Operational Grievance Mechanisms
PNPCA	Prior Notification, Prior Consultation and Agreement
SADC	Southern African Development Community
SDG	Sustainable Development Goals
SEA	Strategic Environmental Assessment
SLAPP	Strategic Litigation Against Public Participation
SPREP	Secretariat of the Pacific Regional Environment Program
UN	United Nations
UNEP	UN Environment Program
UN ECE	UN Economic Commission for Europe
UN ESCAP	UN Economic and Social Commission for Asia and the Pacific



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INTRODUCTION

A. Background

Human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean, healthy and sustainable environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights¹. Environmental rights are composed of substantive rights (fundamental rights) and procedural rights (necessary to achieve substantive rights). Substantive rights include rights to a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems. Procedural rights include three fundamental access rights: access to information², public participation³, and access to justice⁴. This background paper provides an assessment of these access rights in Asia and the Pacific.

Procedural rights find their legal foundation in Article 10 of the Rio Declaration on Environment and Development 1992 (the Rio Declaration).⁵ Principle 10 sets out three fundamental rights: access to information, access to public participation and access to justice, as key pillars of sound environmental governance⁶. These rights are further developed in a number of instruments including the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted by countries at the 11th Special Session of United Nations Environment Program's (UNEP) Governing Council/ Global Ministerial Environmental Forum in Bali, Indonesia, in 2010.⁷

These access rights are now increasingly reflected in many environmental laws at the national level⁸. Furthermore, some Constitutions of UN Economic and Social Commission for Asia and the Pacific (ESCAP) member states also include the right to a healthy and clean environment⁹, such as Thailand, Indonesia and the Philippines. This is important as there is a positive link between a guarantee of environmental rights and improved environmental performance¹⁰.

Two multilateral environmental agreements (MEAs) which uphold procedural rights are the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention') based in Europe, and the 2018 Latin American and Caribbean Agreement on Access to Information, Public Participation and Access to Justice in Environmental matters ('Escazú Agreement'). MEAs such as the Aarhus Convention and the Escazú Agreement represent the result of global and regional consensus building around environmental matters and the defining of common goals to advance environmental rule of law and human rights based approaches to environmental decision-making.

These agreements align with UN General Assembly Resolution 53/144 on the Declaration on Human Rights Defenders and in particular Article 9 and Article 12 of the Declaration on States' obligations to provide an enabling environment for the exercise and enforcement of human rights, and with various resolutions such as the International Union for the Conservation of Nature (IUCN) Declaration on the Environmental Rule of Law adopted by the IUCN World Congress on Environmental Rule of Law, which provides that environmental rule of law is premised on key governance elements including access rights¹¹.

The development of the Framework Principles on Human Rights and the Environment (the Framework Principles)¹² by former UN Special Rapporteur on Human Rights and the Environment Professor John Knox have also advanced the discussion on the elements of the human right to a safe, clean, healthy and sustainable environment. The Framework Principles were presented to the UN Human Rights Council in March 2018 through Human Rights Council Resolution 37/59. As noted by Professor Knox, "the Framework Principles should be accepted as a reflection of actual or emerging international human rights law".¹³

1 <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what>

2 https://docs.wixstatic.com/ugd/80f01c_751ca12a36424f328aed4f37e8e76f74.pdf

3 https://docs.wixstatic.com/ugd/80f01c_36111bfa393a434294a67c86df518279.pdf

4 https://docs.wixstatic.com/ugd/80f01c_f06d4b224c1240ac86503d8693472a3c.pdf

5 Principle 10 was adopted in 1992 as a part of the Rio Declaration.

6 <https://www.unenvironment.org/civil-society-engagement/partnerships/principle-10>

7 <https://wedocs.unep.org/handle/20.500.11822/11182>

8 See Putting Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters <https://wedocs.unep.org/handle/20.500.11822/11201>


9 <https://www.ajne.org/resource/asia-pacific-judicial-colloquium-climate-change-using-constitutions-advance-environmental>

10 UNESCAP (2019). Empowering people for a more inclusive and equal Asia and the Pacific. https://www.unescap.org/sites/default/d8files/event-documents/APFSD6_1_R1E.pdf

11 IUCN World Declaration on the Environmental Rule of Law. I (d). https://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf

12 Knox, John (2018). Framework Principles on Human Rights and the Environment, <http://srenvironment.org/2018/01/24/framework-principles-on-human-rights-and-the-environment/>

13 Knox, John (2012). Report of the Independent Experts on the issue of human rights obligations relating to a safe, clean and sustainable environment, John H Knox: Preliminary Report, UN Doc A/HRC/22/43 (24 December 2012)



The Aarhus Convention is one of the pioneering legal instruments which aims to link environmental and human rights by granting rights to the public and enforcing obligations on state parties to implement environmental legal principles. The Aarhus Convention is currently the only international convention on procedural environmental rights that allows any State to join as a party. Parties to the Convention are obliged to take the necessary legislative, regulatory and other measures to implement the provisions and set the framework for enforcement.

The Escazú Agreement is the second regional instrument on access to information, public participation and justice, and is focused on many emerging environmental and human rights issues in Latin America and the Caribbean. It recognises the right to a safe environment and provides a framework for the provision of environmental and procedural rights. Notably, it includes a requirement that States provide for a “safe and enabling” environment for environmental and human rights defenders (EHRDs).

THERE IS NO PLANET B

B. Scope and Methodology

The objective of this assessment is to provide an overview of good practices that have emerged in relation to the implementation, protection and promotion of procedural access rights to enable the right to a safe, clean healthy and sustainable environment. The scope of the assessment covers the provision of access rights and the development of an enabling environment for the exercise of those rights. The report also provides some references to the role of environmental impact assessment (EIA) and strategic environmental assessment (SEA) as these are both important mechanisms for the implementation of access rights. Lessons learned from the implementation of EIA and SEA can assist in the development of the broader application of access rights.

This report broadly covers the good practices, advancements, issues and challenges of access rights in Asia-Pacific, but further detailed investigation and analysis are warranted. The report makes some broad recommendations on the way forward for the discussion of these achievement of these rights in the ESCAP Region, and more specifically in the ASEAN sub-region.



C. ASEAN Intergovernmental Commission on Human Rights (AICHR) advancing rights-based approaches to environmental decision-making in ASEAN

The ASEAN Human Rights Declaration (AHRD), an established framework for ASEAN human rights cooperation, specifically prescribes the right to a safe, clean and sustainable environment.¹⁴ In the second adopted ASEAN-UN Plan of Action (2021-2025) specific reference is given to collaboration on human rights and the environment. These opportunities for collaboration are further elaborated within the AICHR Five-Year Work Plan 2021-2025 including within Priority Areas 2.1, 2.5, 2.6, and 3.2 which provide for promoting mechanisms for coordinating to undertake consultations on linkages between human rights and the environment generally, and to explore initiatives to further integrate human rights-based approaches to environmental policy-making and protection.

The work done by the Mekong Partnership for the Environment (MPE) between 2014 and 2017 on the environment in the development of the 2017 Regional Guidelines on Public Participation in EIA¹⁵ has highlighted the commonalities of EIA systems in the Mekong countries and introduced a discussion about the importance of public participation and access to information in the EIA process. It was during a number of events and conferences organized by MPE that the idea of an ASEAN regional framework for EIA was first raised and discussed.

The AICHR has raised awareness about the role of EIA in the protection and promotion of human rights.¹⁶ Over the past five years, AICHR has held four workshops to address the linkages between human rights and environment/climate change. The First Workshop, "AICHR Workshop on Human Rights, Environment and Climate Change", was held in Yangon, Myanmar, from 13 to 15 September 2014. The Workshop aimed to map human rights obligations to a safe, clean and sustainable environment in ASEAN and the development of regional responses to establish a relationship between human rights, environment and climate change¹⁷.

The Second Workshop, "AICHR Workshop on the Implementation of Human Rights Obligations Relating to the Environment and Climate Change" was held in Mandalay, Myanmar, from 26 to 27 September 2015. The Workshop focused on the implementation of human rights obligations relating to the environment and climate change. One of the recommendations made by the Workshop was to consider an ASEAN Regional EIA as a planning tool to improve quality of development and large infrastructure projects and minimize their negative impacts.

¹⁴ General Principle 28(f), ASEAN Human Rights Declaration. https://www.asean.org/storage/images/ASEAN_RTU_2014/6_AHRD_Booklet.pdf

¹⁵ <https://www.pactworld.org/library/guidelines-public-participation-eia-mekong-region>. USAID funded project.

¹⁶ Knox (2013), p.12

¹⁷ Report of the Workshop on Human Rights, Environment and Climate Change organized by AICHR 2014

The planning tool should also incorporate a mechanism which will protect human rights and ensure that development projects take into consideration issues such as women rights, children rights, including biodiversity and climate change.¹⁸

Based on the recommendation of the Second Workshop, the Third Workshop, "AICHR Workshop on Rights-based Approach to Regional Management Strategy for an Effective Environmental Impact Assessment (EIA)", was held in Yangon, Myanmar, from 29 to 30 October 2017. The Workshop focused on the feasibility of developing a regional approach (e.g. guidelines or other instrument such as a Framework Agreement or Declaration) for environmental assessment that could address environmental, social, economic and human rights issues as part of ASEAN's management of environmental impacts.

The participants reached general consensus on the benefit of and the need for a regional approach on effective EIA, recognized the value of preparing such an instrument for effective EIA and acknowledged that the scope and form of such an approach will need further consultation.¹⁹ The Fourth Workshop, "Regional Consultation on Commonalities of Environmental Impact Assessment (EIA) in ASEAN Member States and Advancing a Harmonized and Rights-Based Approach to Environmental Impact Assessment (EIA) in ASEAN", was held in Yangon, Myanmar, from 2 to 3 October 2019.

The Workshop was co-organized by AICHR and the Ministry of Natural Resources and Environmental Conservation of Myanmar in collaboration with UNEP.

As a way forward, the Workshop recommended the establishment of a Working Group or a Task Force to develop a Regional Framework for an effective EIA in ASEAN Member States²⁰. The Workshop also recommended the following ten points to be the integral part of any Regional Framework on Rights-Based Approaches:

This current work of AICHR on strengthening EIA in

1. Supporting Public Participation in EIA.
2. Protection of the Rights of Environmental Defenders and Enforcers²¹.
3. Rights to access information:
 - a. Identification of documents that are available and those exempt from disclosure;
 - b. Using technology better;
 - c. Pre-EIA Approval and post-EIA Approval and;
 - d. Effective Monitoring and Enforcement.²²

4. Specific references for consultation and inclusion of women and children, and marginalized or vulnerable groups²³ within the EIA Process.
5. Operational Grievance Mechanisms (OGM) and dispute resolution.
6. Defining the Role of EIA Consultants.
7. Trans-boundary EIA²⁴, including impact assessment and emergency planning.
8. Strategic Environmental Assessment.
9. ASEAN Environmental Quality Standards.²⁵
10. Indicators and Statistics to assist in strengthening capacity of EIA Agencies.

ASEAN, and the ten elements referred to above, are in alignment with the current international developments on strengthening procedural rights and providing an enabling environment for the enjoyment of these rights. This broader global framework is presented in the following sections.



Brian Evans

¹⁸ Report of the Workshop on the Implementation of Human Rights Obligations Relating to the Environment and Climate Change 2015

¹⁹ Report of the AICHR Workshop on Rights-based Approach to Regional Management Strategy for an Effective Environmental Impact Assessment 2019

²⁰ Report of the Regional Consultation on Commonalities of Environmental Impact Assessment (EIA) in ASEAN Member States and Advancing a Harmonized and Rights-based Approach to EIA in ASEAN 2019

²¹ The UN General Assembly has defined environmental defenders as "individuals and groups who, in their personal or professional capacity and in a peaceful manner strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna."

²² This would also examine opportunities to enhance effectiveness through use of technology and partnerships.

²³ This would include those groups referred to in the relevant HR treaties.

²⁴ Transboundary EIA is a mandatory obligation under international law. The section is to assist in clarifying the procedures for ASEAN Member States to meet these legal obligations

²⁵ It was not intended that the Framework would develop any EQS. This section only would refer to those standards adopted by ASEAN e.g ASEAN Marine Water Quality Standards.



LEGAL AND POLICY FRAMEWORK

A. Principle 10 of the 1992 Rio Declaration on Environment and Development

Principle 10 of the 1992 Rio Declaration on Environment and Development (the Rio Declaration) recognized “access rights”, which are the critical procedural rights of access to environmental information, right to participate and access to remedies in environmental matters. Part of Principle 10 reads:

These rights are identified as key pillars of a rights-

“Environmental issues are best handled with 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.”²⁶

based approach to environmental governance. Importantly, access to information is essential to participate in decision and policy making processes in an informed manner, while public participation is critical for the adoption of policies which consider the needs of communities and local conditions. Access to justice is also instrumental to ensure that the public can enforce rights and enhance accountability. Accordingly, procedural rights improve the ability of governments to ensure a clean and healthy environment.

In 2010, the UNEP Governing Council²⁷, unanimously adopted the “Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’ Matters” (Bali Guidelines) which set 26 non-binding voluntary guidelines that provide general guidance on the effective implementation of Rio Principle 10. In 2015, the UNEP developed an interpretation implementation guide for Rio Principle 10.²⁸



²⁶ Principle 10, 1992 Rio Declaration on Environment and Development

²⁷ The governing council of UNEP is the United Nations Environment Assembly (UNEA). It was previously known as the Global Ministerial Environment Forum.

²⁸ See <https://www.unenvironment.org/news-and-stories/story/unep-implementing-principle-10-rio-declaration>

B. Framework Principles on Human Rights and the Environment

The Framework Principles²⁹ focus on the obligations of States to ensure that human rights obligations, in the context of the environment, are protected and enhanced. Importantly, the Framework Principles identify some of the procedural rights that underpin the relationship between environment and sustainable development.

These include access to environmental information (Framework Principle 7), public participation (Framework Principle 9), access to effective remedies (Framework Principle 10), special measure for vulnerable peoples (Framework Principle 14), compliance with obligations for indigenous peoples (Framework Principle 15), protection of environmental defenders (Framework Principle 4) and provisions to allow for the exercise of these rights (Framework Principle 5).

The Framework Principles contain a clear recognition that the existence of environmental rights is based on the clear obligation of the State to provide the appropriate “safe and enabling environment” for the exercise of these rights. It also proposes that States must provide the appropriate opportunities to allow for the rights to be exercised.

The Framework Principles have identified, in broad terms, the connection between the emerging right to a safe, clean, healthy and sustainable environment (however defined) and existing norms of international environmental law. Effectively, it summarises “the main human rights obligations to the enjoyment of a safe, clean, healthy and sustainable environment”.³⁰

The role of prior impact assessment, including EIA and SEA, is crucial to allow consideration of potential impacts on “all relevant rights, including the right to life, health, food, water, housing and culture”.³¹

This assessment also integrates with other relevant principles including obligations of non-discrimination (Framework Principle 3), applicable domestic laws and international agreements (Framework Principles 11 and 13), and the obligations owed to those who are particularly vulnerable to environmental harm (Framework Principles 14 and 15).

The need for clear substantive environmental standards, which can also be used as a basis to assess and review project-based EIA, is recognised in Framework Principle 11.

The Framework Principles also recognise that potential transboundary environmental impacts can have a significant effect on the enjoyment of human rights. To this end Framework Principle 13 states:

States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.

To a significant extent, these Framework Principles reflect aspects of other regional approaches to the assessment of possible transboundary harm, such as the various EU EIA Directives, the Aarhus Convention, the Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention); and the SEA Protocol to the Espoo Convention.



²⁹ Human Rights Council Resolution 37/59 (2018). Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. <https://undocs.org/en/A/HRC/37/59>

³⁰ Knox, John (2018).

³¹ *Ibid*, p.13

C. SDG 16 and the 2030 Agenda

Within the 2030 Agenda, Goal 16 is devoted to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all and to the establishment of effective, accountable and inclusive institutions at all levels.³² Environmental rule of law and access to environmental justice are vital components of realising this SDG³³.

Therefore, the strengthening of legislation, establishment of Environmental Courts and Tribunals, and access to information and public participation are instrumental aspects of achieving this SDG.

Strengthening of the framework to finance sustainable development and means of implementation for the 2030 Agenda is provided by the Addis Ababa Action Agenda. Addis Ababa Agenda is the outcome document adopted at the Third International Conference on Financing for Development in July 2015 and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015³⁵.

The Sustainable Development Goals Report 2020³⁶ highlighted that from 2015 to 2019, the United Nations recorded at least 1,940 killings and 106 enforced disappearances of human rights defenders, journalists and trade unionists across 81 countries, with over half of killings occurring in Latin America and the Caribbean. In 2019, 357 killings and 30 enforced disappearances were reported in 47 countries. In terms of access to information progress is being made in ensuring this right through policies and binding laws. Such laws have now been adopted by 127 countries, with at least 27 adopting guarantees since 2014.

However, difficulties existed with the application of these laws and also review mechanisms in cases where access to information is denied.

In the Asia-Pacific region, 53 land and environmental defenders were killed in 2019, notably from the Philippines, India, Indonesia, Kazakhstan and Cambodia.³⁷ Widespread harassment of women journalists and other gender-specific threats have also been reported³⁸. 2020 recorded 20 killings of journalists and media workers according to 2020 Observatory of Killed Journalists³⁹, many of which relate to land, environment, and indigenous people's issues. Lawyers, prosecutors and judges have also been targeted and killed, including land reform and environment practitioners⁴⁰.

The 2019 Report noted that the pace of progress in establishing national human rights institutions (NHRIs) that are in compliance with the principles relating to the status of national institutions (the Paris Principles) must be accelerated. In 2018, only 39 per cent of all countries had successfully achieved compliance; an increase of 3 per cent (7 countries) from 2015⁴¹.

In the UNESCAP Asia and the Pacific SDG Progress Report 2020⁴², the greatest progress in peace, justice and strong institutions (Goal 16) had been made by North and Central Asia while the Pacific along with South-East Asia and South and South-West Asia were regressing and moving further from achieving the goal.

Targets linked to the environment³⁴:

Target 16.3

Promote the rule of law at the national and international levels and ensure equal access to justice for all

Target 16.6

Develop effective, accountable and transparent institutions at all levels

Target 16.7

Ensure responsive, inclusive, participatory and representative decision-making at all levels

Target 16.8

Broaden and strengthen the participation of developing countries in the institution of global governance

Target 16.10

Ensure public access to information and protect fundamental freedoms in accordance with national legislation and international agreements

Target 16.b

Promote and enforce non-discriminatory laws and policies for sustainable development

³² <https://sdgs.un.org/topics/institutional-frameworks-and-international-cooperation-sustainable-development>

³³ <https://www.unep.org/resources/factsheet/human-rights-and-environmental-rule-law>

³⁴ <https://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-16>

³⁵ <https://sdgs.un.org/topics/institutional-frameworks-and-international-cooperation-sustainable-development>

³⁶ Sustainable Development Goals Report, United Nations, 2020 <https://unstats.un.org/sdgs/report/2020/goal-16/> viewed 1 March 2021

³⁷ Global Witness. 2020. Defending Tomorrow: the climate crisis and threats against land and environmental defenders; see also Defending territories, defending our Lives: Protecting Human Rights and the Environment in Asia-Pacific Through System Change, Friends of the Earth Asia-Pacific, 2019

³⁸ <https://wedocs.unep.org/bitstream/handle/20.500.11822/35408/SDG16.pdf>

³⁹ <https://en.unesco.org/themes/safetyjournalists/dgreport#~:text=Key%20findings&text=Impunity%20for%20crimes%20against%20journalists,%2C%20and%2011%25%20in%202018.>

⁴⁰ See Lawyers Rights Watch Canada and International Association of People's Lawyers, 'List of Attorneys, Prosecutors, Judges, and Legal Workers Attacked with Murderous Intent in the Philippines During the Duterte Government Since July 2016', 31 March 2020

⁴¹ <https://unstats.un.org/sdgs/report/2019/goal-16/> viewed 1 March 2021

⁴² <https://www.unescap.org/publications/asia-and-pacific-sdg-progress-report-2020>, p.27

ACCESS RIGHTS REGIONAL INSTRUMENTS

A. Developments in Europe

UN Economic Commission for Europe

The UN Economic Commission for Europe (UN ECE) has been at the forefront in developing mechanisms that both support and enhance the role of domestic EIA law and environmental decision-making as well as examining ways that EIA can assist in the transboundary context. The three most internationally recognised instruments relating to environmental assessment are the following:

1. The Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention);
2. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
3. Protocol on Strategic Environmental Assessment (the SEA Protocol).

Each of these international instruments draws from the existing environmental laws norms. Each of these instruments reflects the procedural nature of EIA.

The Economic Commission for Europe has adopted a Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context (the ECE Guidance) to support the two key European intergovernmental agreements on EIA and public participation – the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) and the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).

[The Convention of Environmental Impact Assessment in a Transboundary Context \(Espoo Convention\)](#)

The Espoo Convention is a preventative mechanism to avoid, reduce and mitigate significant environmental impacts intended to help make development sustainable by promoting international cooperation in assessing the likely impact of a proposed activity on the environment.

It applies, in particular, to activities that could impact the environment in other countries⁴³. It is important to note that the Espoo Convention is a process-oriented convention. Under the Espoo Convention the Parties shall take “all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.”⁴⁴

The obligations under the Espoo Convention extend to an obligation to require project level EIA, notify potentially affected countries, provide access to information to potentially affected parties and to allow comments and be informed on the final decision with respect to the project.⁴⁵

The Espoo Convention provides a list of activities in Appendix I that are covered by the Convention and a minimum list of information that should be included in the EIA in Appendix II.

The Espoo Convention is important as it is based on international environmental law norms and provides access to information and the right to participate and be informed of potential adverse impacts from activities having a transboundary impact.

⁴³ Vesna Kolar Planinšič (2016), Ministry of the Environment and Spatial Planning of the Republic of Slovenia. Various presentations to the MPE RTWG on EIA.

⁴⁴ Espoo Convention, Article 2.

⁴⁵ These are contained in Articles 3 to 6 of the Espoo Convention.

[Protocol on Strategic Environmental Assessment \(the SEA Protocol\)](#)

In addition to the Convention on EIA in a Transboundary Context, the Parties negotiated the SEA Protocol. This SEA Protocol entered into effect on 11 July 2010. The SEA covers the environmental assessment of policies or programmes by member governments which are likely to have significant environmental, including health, effects.⁴⁶

Under the SEA Protocol, Strategic Environmental Assessment is defined to mean:

The evaluation of the likely environmental, including health effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.⁴⁷

Unlike EIA, which is project specific, the SEA is the impact assessment process for plans and policies. Public participation and consultation are required by the member Parties.⁴⁸ The SEA Protocol refers to “early, timely and effective opportunities for public participation.”

It also requires that the public, including relevant NGOs, be provided with the necessary information to allow them to comment “within a reasonable time frame.” There is also a requirement from transboundary consultation, if it is likely that the implementation of the plan or policy will have a transboundary impact.⁴⁹

[Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters \(Aarhus Convention\)](#)

One of the most important elements of environmental governance is the need for effective public participation.⁵⁰ In order to achieve effective public participation, there is a need for the community to have access to the information prepared by the project proponent and by government concerning the project and its potential impact.

The Aarhus Convention was concluded as part of the UN ECE “Environment for Europe” process and entered into force on 30 October 2001⁵¹. It has been recognised as having global significance for the promotion of environmental governance. The Aarhus Convention contains three main pillars:

1. The rights of the public to access information about the environment and development;
2. The requirement for public participation in environmental assessment of specific development projects⁵²; and
3. The rights for the public’s access to courts and tribunals for justice in environmental matters⁵³.

As of 2021, there are 47 Parties to the Convention, 38 Parties to the Protocol on Pollutant Release and Transfer Registers (PRTRs) and 32 Parties to the amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs).⁵⁴

The Aarhus Convention recognised that the engagement of the public is vital for creating an environmentally sustainable future. This recognition has been continued with the Meeting of the Parties to the Aarhus Convention. One of the strengths of the Aarhus Convention is the ability of the parties to continue with negotiations to cover additional matters under the Aarhus Convention. This includes a Protocol to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers (PRTRs).

[European Union Directive 2011/92/EU on Environmental Impact Assessment](#)

In addition to the Aarhus Convention, other regional conventions have addressed the issues of access to information and public participation in EIA and SEA context.

In addition the European Union, through the EIA Directive 2011/92/EU as amended by Directive 2014/52/EU (the EIA Directive), has sought to promote the national implementation of the Aarhus Convention, which was ratified by the EU in 2005, and strengthen access



UNDP Thailand

⁴⁶ SEA Protocol, Article 4.

⁴⁷ SEA Protocol, Article 2.

⁴⁸ SEA Protocol, Article 8.

⁴⁹ SEA Protocol, Article 10.

⁵⁰ Jona Razzaque, in *Routledge Handbook of International Environmental Law*, p.65

⁵¹ <http://www.unece.org/env/pp/welcome.html> <http://europa.eu.int/comm/environment/aarhus/>

⁵² These matters are listed in Annex 1 of the Aarhus Convention. These matters also include any activity not specifically covered in the Annex, where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

⁵³ Aarhus Convention, article 4-9.

⁵⁴ <http://www.unece.org/env/pp/ratification.html>

to relevant information and public participation in EIA.

Article 3 of the EIA Directive clarifies the type of environmental information that should be provided in an EIA. Article 6 details the requirements on informing the public and what type of information should be provided. Article 7 provides for the process to be followed between Member States in the event of a project likely to have a transboundary impact. Article 9 requires the prompt notification of the decision to either approve or reject a project. Article 11 of the EIA Directive also requires countries to make provision for access to a review procedure before a court of law or another independent and impartial body.

The review process is to be “fair, equitable, timely and not prohibitively expensive” (Article 11(4)).

B. Developments in Latin America and the Caribbean

The most significant recent development is the *Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean* (the Escazu Agreement). It provides a framework for the provision of environmental and procedural rights, in including the requirement that States provide for a “safe and enabling” environment for environmental and human rights defenders⁵⁵. The negotiations began in 2014 and concluded in March 2018, after nine meetings of the negotiating committee⁵⁶.

The Escazu Agreement has now entered into force as of 22 April 2021. The objective of the Agreement is “to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.” (Article 1).

The aim of the Escazu Agreement is to recognize the linkages between human rights and environmental rights. It also links procedural rights already recognized under Principle 10 of the Rio Declaration, the Aarhus Convention and the Espoo Convention, and the attainment of the human right to a safe and healthy environment.

Furthermore, it also extends the conceptual idea that the human right to a safe and healthy environment applies not only to the current generation but also extends to future generations.

The terms of the Escazu Agreement focus on the

implementation of Principle 10 of the Rio Declaration in treaty-based law. Additionally, the terms of the treaty also reflect the need to provide for the protection of human rights defenders in environmental matters.

The Agreement includes implementing principles to be used in applying the terms of the Agreement (Article 3) including:

Article 4 outlines the general provisions of the Agreement. Substantively this includes:

- i) the Preventive Principle;
- ii) the Precautionary Principle;
- iii) the Principle of intergenerational equity; and
- iv) the Principle of permanent sovereignty of States over their natural resources.

Access to information is dealt with in Articles 5 and 6. Public participation is dealt with in Article 7:

- 4.1** Each Party shall guarantee the right of every person to live in a healthy environment and any other universally recognized human right related to the present Agreement.

Article 8 includes provisions for access to remedies

- Article 5.1** Each Party shall ensure the public’s right of access to environmental information in its possession, control or custody, in accordance with the Principle of maximum disclosure.

in environmental matters “in the framework of its

- Article 7.1** Each Party shall ensure the public’s right to participation and, for that purpose, commits to implement open and inclusive participation in environmental decision-making processes based on domestic and international normative frameworks.

domestic legislation.” Article 9 relates to the obligation of the member states to “guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights in environmental matters so that they are able to act free from threat, restriction and insecurity.”

Environmental impact assessment is also referred to in the Agreement in the access to information and public participation. The Agreement recognised the importance of these two mechanisms for effective EIA.⁵⁷

⁵⁵ Ninth meeting of the negotiating committee of the Regional Agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean, LC /CNP10.9/5 4 March 2018 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=en accessed 23 April 2018.

⁵⁶ De Silva (2018)

⁵⁷ See Article 6.3 and Article 7.9, 7.16 and 7.17.



Mohammad Rakibul Hasan

GOOD PRACTICES FOR ACCESS RIGHTS

A. Access to Remedies

The Pacific

Environmental Courts and Tribunals (ECTs) can be broadly categorized into two groups. The first group are operationally dependent ECTs that are attached to administrative bodies of the State, for example the USEPA Environmental Appeals Board. The other group consists of independent ECTs which form part of the court system. These are typically distinct specialized court within the general court structure, which enjoys lower administrative expenses and greater efficiency.⁵⁸

In Australia, examples of independent environmental courts are the Planning and Environment Court in Queensland, the Environment, Resources and Development Court in South Australia and the Land and Environment Court in New South Wales. The Land and Environment Court of NSW was established in 1980 and is widely regarded as one the most effective environmental courts in the world. Its decisions are reviewed by the appeals court and state Supreme Court.⁵⁹

New Zealand has established the New Zealand Environment Court, one of the oldest independent ECTs. Its judges and commissioners are trained in various scientific and technical subjects relevant to handling environmental cases, and it is capable of holding hearings at the places of issue, which makes it accessible and inclusive of the indigenous Maori. It also heavily utilizes alternative dispute resolution techniques led by its commissioners, resulting to high proportion of resolved cases with court hearings. These agreements can be submitted to the court to obtain a final court order⁶⁰.

In terms of standing to sue, New Zealand also has one of the more advanced legal personality legislation in the world. Legal personhood was conferred by law to the land of Te Urewera in 2017. The Māori tribe of Whanganui has also earned legal recognition for the Whanganui River, as their ancestor for 140 years.

This recognition comes with two appointed representatives from the government and the tribe.

Furthermore, the Taranaki volcano has also been accorded legal personality, and is the first mountain in New Zealand to be recognized as such⁶¹.

Aside from courts, remedies for violation of environmental rights may also be coursed through national human rights institutions. For example, the Human Rights and Anti-Discrimination Commission in Fiji also covers cases which enforce the right to a healthy environment⁶².

North Asia

Some environmental protection legislation in Mongolia prescribes standing to sue for individuals to get compensation for environmental damages, e.g.in forest legislation⁶³.

China saw the expansion of the right of access to remedies in the revision to the Environmental Protection Law of the People's Republic of China 2014 (EPL 2014).

Article 4 provided that protecting the environment is a fundamental national policy of the State and Article 6 created the legal obligation on all entities and individuals to protect the environment. In addition to creating a large number of green benches and courts, the EPL 2014 also provided citizens, legal persons and other organisations with the right to report to environmental protection or other departments any environmental pollution or failure to legally perform duties with respect to environmental protection (Article 57).

Article 58 also provided for specific environmental social organisations with the power to bring proceedings in court for the environmental harm.

⁵⁸ Pring, George and Pring, Catherine (2016), *Environmental Courts and Tribunals: A Guide for Policymakers*. United Nations Environment Programme (UNEP). Nairobi.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See <https://www.earthlawcenter.org/blog-entries/2019/4/rights-of-the-pacific-ocean-initiative>

⁶² United Nations Children's Emergency Fund (UNICEF) (2020), *Children's Right to Healthy Environment in East Asia and the Pacific*. UNICEF East Asia and Pacific Regional Office

⁶³ Article 20.1.1. Demand that violators of forest legislation who have caused damage to the forest fund or their health or property are held legally responsible and pay financial compensation for the damages. Law on Forests 2012 (Mongolia)

South Asia

India established the National Green Tribunal (NGT) under the National Green Tribunal Act 2010. The NGT has an established principal bench in New Delhi and five regional benches that aim to cover all states in India. To ensure access for all remote areas, the NGT follows a circuit procedure. The multi-disciplinary composition of the NGT follows best practices in enhancing environmental access to justice through both scientific and legal expertise.⁶⁴ The NGT has jurisdiction to rule on first-instance civil cases relating to the environment and appellate jurisdiction, while also including an option to have a ruling by the NGT reviewed by the Supreme Court of India.

The establishment of the NGT has resulted in higher quality rulings that are more sensitive to regional and scientific issues arising in environmental litigation. This can be seen in its ruling *Krishi Vigyan Arogya Sanstha v Ministry of Environment and Forests*⁶⁵, where the Tribunal established national guidelines on the nuclear radiation levels and introduced a requirement to report any potential radiation arising from future thermal power projects.

In Pakistan, the Environmental Tribunal Rules 1999 established two environmental tribunals, one in Lahore and one in Karachi. In practice, the tribunals have three members – a chairperson who is a current or retired judge of the High Court and at least one of the other two has to be a technical member of the environmental field.⁶⁶ These environmental tribunals are considered to be effective when compared to the best practices, given that they are independent from the other branches of the government.⁶⁷

Furthermore, Pakistan also has 250 trial and high courts that are designated “green benches”. An effective feature of Pakistani green benches is “continuing mandamus” – the power for the ECT to continue to have jurisdiction over the case after its ruling in order to monitor compliance.⁶⁸

ASEAN

Article 5 of the ASEAN HRD provides that “every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or law.” This article is consistent with the principles of access to justice as outlined in the Aarhus Convention and the Framework Principles.

Many jurisdictions in ASEAN have provisions for environmental cases and some have established environmental divisions or Green Benches. Thailand, Malaysia, Indonesia, and Cambodia all have established green chambers or green benches. Indonesia has a system of certification for judges in environmental cases.

The Philippines and Thailand have developed special rules of procedure in environmental law cases. Many of these measures are able to be used by individuals and civil society to seek access to remedies in environmental matters.

*The Rules of Procedure for Environmental Cases of the Supreme Court of the Philippines*⁶⁹ contain some of the most relevant provisions for the conduct of environmental cases. The Rules deal with matters including interim injunctions (Temporary Environmental Protection Orders), the Writ of Kalikasan (Nature), provisions to deal with Strategic Litigation Against Public Participation (SLAPP) suits, citizen suits, and the writ of continuing mandamus.

All of these provisions are relevant to the access to remedies requirements. The Writ of Kalikasan is for “threats of environmental destruction with such magnitude to affect multiple provinces” and writ of continuing mandamus is aimed to “compel government agencies to perform a ministerial duty as it relates to the environment”.

Africa

Kenya, being the first country to have authorized ECTs in its Constitution, has adopted a National Environmental Tribunal (NET) whose principal function is to decide appeals from decisions of national environmental agencies on EIA licenses for developments⁷⁰.

The NET falls under the Ministry of Environment and typically consists of an interdisciplinary panel of five members. Kenya’s NET has a very limited jurisdiction however, it arguably has a great impact on environmental decision-making in the country. Its fees are lower than regular courts to make it accessible and the NET has wide powers to pass an injunction or revoke licenses.

Appeals from NET previously went to the High Court but now go to the Environment and Land Courts (ELCs). The ELCs operate as a specialist High Court which oversees all cases relating to land administration and management and have a wide jurisdiction as granted by the Kenya Environment and Land Court Act 2011.

The comprehensive jurisdiction of this Environment Court (EC) is one of the leading examples of best practices for the operations of ECTs. Notably, Kenya is one of few jurisdictions to have an environmental Ombudsman (Public Complaints Committee on Environment), along with the NET and ELC⁷¹.

Ten ECTs are in operation at the State level in Nigeria, however there are no national level courts⁷².

64 Gitanjali Nain Gill, *Access to Environmental Justice in India with special reference to National Green Tribunal: A Step in the Right Direction*, December 2013, OIDA International Journal of Sustainable Development 06:04 (2013)

65 Order dated September 20, 2011 <https://www.informea.org/en/court-decision/krishi-vigyan-arogyasanstha-ors-vs-ministry-environment-forests-ors>

66 Martin Lau, *The Role of Environmental Tribunals in Pakistan: Challenges and Prospects*, Yearbook of Islamic and Middle Eastern Law, 1-48, 2018

67 Ibid.

68 Pring and Pring, *op cit.*

69 https://lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html

70 Pring and Pring, *op cit.*

71 Ibid, p.33

72 Ibid, p.33

Europe

Sweden's Land and Environment Court established in 1998 and acknowledged the need for scientific/technical and legal knowledge within its judiciary. Sweden has five regional ECs and one appellate court. Sweden's Environmental Code provides that each of the regional ECs is to consist of one law trained "judge", one environmental "technical expert" and two "lay expert" members⁷³.

Other examples of ECs and ETs in Europe include Spain, Finland, and Greece all of which have one EC each. Belgium has two ECs; the UK has one ET and four ECs. Austria has 10 ECs and environmental Ombudsmen offices located in each of its nine states⁷⁴.

B. Access to Information

The Pacific

An example of notable access to information developments in the Pacific is the establishment of the Pacific Environment Portal which is available online. It contains substantial national and regional environmental data, the purpose of which is to provide a safe storage for datasets which can be used for monitoring and evaluation, planning, forecasting and reporting, among others. This initiative is part of a larger Pacific Data ecosystem which is led by Secretariat of the Pacific Regional Environment Programme (SPREP) and the Pacific Community (SPC)⁷⁵.

The Constitution of Papua New Guinea provides that "every citizen has the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society" (Sec. 51), and this may include environmental information. It also lists a number of exceptions, which is considered to be in accordance with international standards. The National Policy on Information and Communication was adopted in 1993 to further implement the constitutional mandate⁷⁶.

In Vanuatu, there is no express constitutional mandate to the right to information but the Right to Information Act No. 13 was passed by Parliament in 2016, the coverage of which could include records that relate to the environment⁷⁷.

In terms of environmental education, there have also been effective policies in the Pacific. In Fiji, climate change and the environment are integrated in their the national curriculum, as its national climate change policy seeks to "ensure that national education supports long term capacity building and employment transitions to a climate-ready workforce"⁷⁸.

Fiji has also collaborated with other Pacific Island countries to establish a network of environmental data portals, which feeds into Pacific Environment Portal for environmental management purposes.

Asia-Pacific Region

Within the Asian Region, the Asian Development Bank (ADB) has developed a best practice Access to Information Policy 2018.⁷⁹ This policy was ranked first in the 2018 Aid Transparency Index. The ADB was ranked first out of 45 development organisations. The Access to Information Policy 2018 provided a policy principle and clear exceptions as well as a clear process for information requests and an appeal process if request are denied. The Policy Principles provide for "clear, timely and appropriate disclosure" with a "presumption in favour of disclosure", "limited exceptions", "proactive disclosure", "clear appeals process" and "continuous monitoring" (p.7).



⁷³ Ibid, p. 27

⁷⁴ Ibid, p. 94

⁷⁵ See <https://pacific-data.sprep.org/> and <https://pacificdata.org/>

⁷⁶ Foldes, Adam et al (2018). Right to Information in Asia-Pacific: How 11 countries perform on SDG 16.10. Transparency International.

⁷⁷ Ibid.

⁷⁸ Republic of Fiji National Climate Change Policy 2018-2030 (72)

⁷⁹ <https://www.adb.org/documents/access-information-policy> (viewed 1 March 2021)

The ADB has also established a two-stage appeals process. The first is an ADB President appointed Access to Information Committee, the second in an Independent Appeals Panel. This information policy operates in addition to the disclosure obligations under any environmental assessment or the provision of information to project-affected people and other stakeholders.

North Asia

Mongolia has an environmental protection law which prescribes the duty to ensure that education incorporates environmental protection and ecology. Furthermore, their national sustainable development plan, integrates climate change in the curriculum⁸⁰.

To access environmental information, the Mongolian Ministry of Environment and Tourism in Mongolia has dedicated a website for publicly accessible environmental data, which includes datasets on forests, protected areas, air pollution, among others⁸¹. China has also made provisions for the access to environmental information. Chapter V of the EPL 2014 provides clear legislative guidance on the rights of citizens and other persons to access environmental information.

Article 53 states that “citizens, legal persons and other organizations shall, according to the law, have the rights to obtain environmental information and participate in and oversee environmental protection.” Article 54 requires the various environmental protection departments to release “information on environmental quality and the monitoring of key pollution sources and other significant environmental information of the State”.

This requirement extends to environment protection departments at the county level. There is also a requirement for public disclosure by polluting entities major pollutants, discharge methods and concentration and volume of discharged pollutants similar to the Pollutants Release and Transfer Register under the Kyiv Protocol (Article 56).

South Asia

Several South Asian jurisdictions have established ‘right to information’ laws.

India has a robust right to information legal framework which has been utilised successfully in environmental litigation. India’s Right to Information Act of 2005 (RTI Act) has been used in test litigations to establish the ambit of the Right to Information Frameworks in relation to environmental clearances⁸².

Bangladesh’s *Right to Information Act* has been utilised by activists and local communities to hold authorities accountable⁸³.

Community leader Masum Billah applied for “disclosure of a list of mills and factories which revealed that half were operating without the proper clearance, leading to an increased risk of environmental pollution and threatening the health of local inhabitants”. With the support of Article 19, Masum Billah has filed legal action against the Department of Environment and Khulna Development Authority (KDA)⁸⁴.

Pakistan, in its Pakistan Environment Protection Act 1997, requires the environmental agency to provide “information and guidance to the public on environmental matters” and establishes procedures for public consultation in EIAs⁸⁵.

Nepal has a *Right to Information Act 2007* and Maldives has a *Right To Information Act 2014*, however the connection with environmental processes is not clear. In practice, it appears that for both countries access to information is often denied or not disseminated in accordance with the Acts⁸⁶.

Bhutan and Afghanistan do not have an RTI or any other laws relating to access to information.

ASEAN

Access to environmental information in ASEAN can be challenging however a number of countries do provide for specific legal rights to access environmental information mostly within the context of SEA or EIA.

In 2016, President Duterte issues the Presidential Executive Order No 2 that: “Every Filipino shall have access to information, official records, public records and to documents and papers pertaining to official acts, transactions or decisions, as well as to government research data used as basis for policy development.”⁸⁷ The Order has been implemented at a national and local level.

Vietnam, Indonesia and Thailand all have laws that provided for access to information.

One non-government initiative in the Mekong Region is the Open Development Initiative (ODI) (<https://opendevdevelopmentmekong.net/>).

ODI, a project of East-West Management Institute (EWMI), stimulates public demand, builds coalitions, and offers a constantly evolving platform to support the transparent sharing and analysis of data to improve and inform constructive dialogue and decision-making for sustainable and equitable development.

ODI has been active in the open data sector in the Mekong region since 2011. It was launched as a Mekong regional project in 2015.

80 Art. 36 (1) Environmental Protection Law (Mongolia)

81 See <https://www.mne.mn/>

82 Thayil, Naveen, ‘Public Participation in Environmental Clearances in India: Prospects for Democratic Decision-Making’, *Journal of the Indian Law Institute*, October-December 2014, Vol. 56, No. 4, pp. 463-492. See example *Shibani Ghosh v Ministry of Environment and Forests*, Decision No. CIC/SG/C/2011/001398/16936 order of the Central Information Commission, January 18, 2011.

83 <https://www.article19.org/resources/bangladesh-droit-information-environnement/>

84 Ibid.

85 Section 6: Functions of the Federal Agency

86 https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/maldives/draft_foi_bill_chri_analysis.pdf and

87 <https://www.article19.org/resources/country-report-the-right-to-information-in-nepal/>

88 <https://www.officialgazette.gov.ph/2016/07/23/executive-order-no-02-s-2016/>

Africa

The African Charter of Human and Peoples' Rights and the Declaration of Principles on Freedom of Expression in Africa declare freedom of information (FOI) as an integral part of fundamental rights. In applying the charter, the African Commission in the *SERAC v Nigeria*⁸⁸ case expounded that the state had failed to provide Victims with access to information to ensure their participation.

Twenty-two countries have passed national FOI laws in light of these declarations as of 2017.⁸⁹ These include: Angola, Ethiopia, Uganda, Zimbabwe, Liberia, Guinea, Nigeria, Tunisia, Niger, Togo, Burkina Faso, Sudan, South Sudan, Cote d'Ivoire, Mozambique, Sierra Leone, Rwanda, South Africa, Tanzania, Kenya, Morocco, Malawi.

Europe

The Aarhus Convention as implemented in the EU Access to Information Directive (Directive 2003/4) imposes duties on public authorities in any EU Member State to collect and disseminate environmental information as well as release information that they hold.

C. Public Participation in Environmental Decision-making

The Pacific

Environmental Impact Assessment constitutes a significant role in ensuring that the right public participation in environmental decision-making is upheld. Accordingly, the SPREP has published the Environmental Impact Assessment Guidelines in 2016, entitled "Strengthening environmental impact assessment: Guidelines for Pacific island countries and territories"⁹⁰.

These guidelines give a detailed overview of EIA processes in the region, and provides tool and practices for national governments to efficiently implement the EIA. There is also specific guidance for specific sectors such as coastal tourism to complement the guidelines and assist governments implement EIA in a holistic manner⁹¹.

The regional EIA guidelines highlight the need to engage stakeholders meaningfully, prescribing an iterative process to gather inputs and insights from local communities and relevant stakeholders. The guidelines aim to facilitate reforms in EIA legislation to require extensive stakeholder engagement with the local communities and resource owners or users. This includes ensuring not only transparency and making EIA reports publicly available, but also providing report summaries translated to the local language.

Public participation through the EIA process includes ensuring that there are proper announcements and opportunities for public review of the EIA. In sum, the guidelines offer support to ensure that projects are planned well and publicized by the proponent. This element of transparency and making information easily understandable⁹² facilitates public participation to bring out issues and concerns that may be considered.

To this end, SPREP conducts capacity building and technical assistance for Pacific Island countries, which includes policy development and review of EIA legislation suited for local conditions, as well as trainings and workshops.

An important development related to the access right to information and public participation is the creation of the Pacific Network for Environmental Assessment, to assist Pacific island governments in the EIA process. The online platform provides opportunities for government officers to request assistance from SPREP, answers queries on pertinent EIA questions and provides resources and templates, among others⁹³.



⁸⁸ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria, ACPHR Communication 155/96 (2001).

⁸⁹ Africa Freedom of Expression Exchange <https://www.africafex.org/access-to-information/22-african-countries-that-have-passed-access-to-information-laws>

⁹⁰ Endorsed at the 11th Conference of the Parties to the Convention for the Protection of Natural Resources and Environment of the South Pacific Region (Noumea Convention). The Noumea Convention (1986) prescribes in Article 16: "Environmental Impact Assessment 1. The Parties agree to develop and maintain, with the assistance of competent global, regional and subregional organisations as requested, technical guidelines and legislation giving adequate emphasis to environmental and social factors to facilitate balanced development of their natural resources and planning of their major projects which might affect the marine environment in such a way as to

prevent or minimise harmful impacts on the Convention area"

⁹¹ See Secretariat of the Pacific Regional Environment Programme (SPREP), Coastal Tourism Development in Pacific Island Countries and Territories

⁹² In the regional EIA Guidelines, the four objectives of stakeholder engagement are: familiarise stakeholders with the project planning and approval process; get input from stakeholders on potential project impacts, which may be perceived or actual impacts; get feedback from stakeholders on project design and impact mitigation measures; and build and maintain constructive relationships between all parties.

⁹³ See <http://pnea.sprep.org>

North Asia

The Revised Guidelines on Environmental Impact Assessment in a Transboundary Context for Central Asian Countries was published in 2019 to ensure proper guidance for development projects to safeguard the environment towards long-term sustainable growth. This development takes from the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), especially on transboundary infrastructure-development. It seeks to assist governments in transboundary environmental impact assessment procedures, law and policy reform.

The guidelines necessitate transboundary EIA to facilitate effective participation from relevant stakeholders and the public and provides that comments from the public may be provided to the country of origin, upon mutual agreement between the competent authorities of the countries concerned⁹⁴.

South Asia

Public Participation in most South Asian jurisdictions is contained in EIA provisions.

EIA legislation has been enacted in India, with the regulations passed under the *Environment Protection Act 1986*. EIA in India is conducted in four steps, screening, scoping, consultation and appraisal. The third stage, consultation, requires input from relevant stakeholders in the form of written responses and during a public hearing. State pollution control boards are responsible for facilitation and conduct of the public consultation for all categories of projects. The public is required to be notified via major national newspaper and a regional newspaper.

EIA announcement must be made via radio, television or public announcements if newspapers are not available and must specify the time and venue of the hearing.⁹⁵

Regulation 10 of Pakistan's *Environmental Protection Agency Regulations 2000* requires the invitation of written comments from stakeholders of every project on its EIA report, along with a subsequent public hearing which must be advertised in an English and Urdu newspaper.⁹⁶ Similar provisions are adopted in the individual state acts for Balochistan, Punjab, and Sindh. The Federal EPA features the public hearing notice on its website, along with the newspaper advertisements.

Sri Lanka's *National Environmental (Amendment) Act 97* contains EIA provisions. EIA reports are first submitted to the Project Approving Authority (PAA) which makes the reports available for public comments. Comments must be sent to the Central Environmental Authority (CAA) within 30 working days.

A public hearing may be held at the discretion of the PAA. Bhutan's *Environmental Assessment Act 2000* stipulates that any project that requires a development consent from Secretariat of the National Environment Commission shall ensure that "concerned people and organizations are consulted before submission of environmental assessment document"⁹⁸.

Maldives's *Environment Protection and Preservation Act (4/93) 1993* requires EIA for all development projects that might have a significant effect on the environment. Under this Act, two regulations passed in 2007 and amended in 2012, establish EIA requirements for any projects that may have a significant effect on the environment.

Like other EIA regulations, Maldives's EIA Regulations have provisions on the inclusion of public participation. Public participation is present in two stages: reporting stage and review stage. In the reporting stage, the consultant is required to make available the list of persons involved, time and locations of the meetings. During the review stage, Article 13 of the regulations stipulate that EIA reports should be published for the public during the review period. While Article 7 provides that the period of review differs on the amount of money paid by the proponents⁹⁹.

From a participatory point-of-view this process is viewed to be unfair.¹⁰⁰ Article 13 also states that a public hearing must be held for controversial and complex projects, however these terms are not defined.¹⁰¹

ASEAN

The work done by the Mekong Partnership for the Environment (MPE) between 2014 and 2017 on the environment in the development of the *Regional Guidelines on Public Participation in EIA* has highlighted the commonalities of EIA systems in the Greater Mekong Sub-Region countries¹⁰² and introduced a discussion about the importance of public participation and access to information in the EIA process.

It was during a number of events and conferences organised by MPE that the idea of an ASEAN regional framework for EIA was first raised and discussed. The collaborative process to develop these *Regional Guidelines* which brought together government, civil society and international experts is also described in the *Regional Guidelines*.¹⁰³

The Technical Working Group comprised on 6 people from each of the five Mekong Countries from government and civil society.

The *Regional Guidelines* cover principles of EIA and public participation, access to information, public participation in the EIA process, and public participation

94 Revised Guidelines on Environmental Impact Assessment in a Transboundary Context for Central Asian Countries, United Nations Economic Commission for Europe (2019)

95 Thayyil Supra 33.

96 Obaidullah Nadeem, Thomas Fischer, 'An evaluation framework for effective public participation in EIA in Pakistan', Environmental Impact Assessment Review 31 (2011) 36-47

97 National Environmental (Amendment) Act, No. 53 of 2000, Parliament of the Democratic Socialist Republic of Sri Lanka, Certified on 18th August 2000

98 <http://oag.gov.bt/wp-content/uploads/2010/05/Environmental-Assessment-Act-of-Bhutan-2000English-version.pdf>

99 Zuhair, Mohamed Hamdhan, Kurian, Priya, Socio-economic and political barriers to public participation in EIA: implications for sustainable development in the Maldives, (2016), Impact Assessment and Project Appraisal, 34:2, 129-142

100 Ibid.

101 Ibid.

102 Thailand, Viet Nam, Cambodia, Myanmar and Laos PDR.

103 <https://www.pactworld.org/library/guidelines-public-participation-eia-mekong-region> viewed 1 March 2021

in project monitoring, compliance and enforcement. It did not address the issue of access to remedies.

The Regional Guidelines were drafted over a period of 18 months with four review meetings. This was followed by national public consultations, with the draft *Regional Guidelines* having been translated into each national language. Over 488 individuals and 2200 comments were received and reviewed and the final draft was adopted by consensus at the final working group meeting in January 2017.¹⁰⁴ National guidelines, based on these principles, were developed in Cambodia and Myanmar in 2017-2018. The National Draft Guidelines have not yet entered into force.

The 1995 *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (the Mekong River Agreement), requires member countries to provide notification, and have prior consultations to discuss transboundary impacts for water projects in the Mekong River Region that may have an impact on neighbouring countries, before any commitment is made to proceed.¹⁰⁵

One of the key features of the Mekong Agreement, as mentioned above, is the requirement of prior consultation. This was further enhanced by the Procedures for Notification, Prior Consultation and Agreement (PNPCA) that were adopted in 2003. The PNPCA were adopted to promote better understanding and cooperation among the Mekong River Commission (MRC) member countries. The guiding principles of the PNPCA were:

The aim of PNPCA, similar in substance to the notification requirements under the Espoo Convention, was to provide other member countries with prior notification of development that would likely have a transboundary impact. The PNPCA would also

- Sovereign equality and territorial integrity;
- Equitable and reasonable utilization;
- Respect for rights and legitimate interests;
- Good faith;
- Transparency.¹⁰⁶

allow the impact party an opportunity to consider the information contained in the Notification and to request further information or clarification.

The time for Prior Consultation was set at six months with the possibility of extension¹⁰⁷. Approval was to be considered on a case-by-case basis.¹⁰⁸

The MRC has also attempted to promote a transboundary EIA framework. In 1998 the MRC agreed to formulate and adopt a system for environmental assessment in a transboundary context.

Following a report prepared by Environmental Resources Management in April 2002 guideline report was presented to the MRC.

In 2009 the Environmental Law Institute conducted a further review¹⁰⁹ and assessed the EIA/SEA Proposed Framework in the context of global best practice and provided a revised draft framework. To date this transboundary Framework has not been further advanced.

Africa

In terms of EIA facilitating public participation, Ghana, Mauritius, Egypt and South Africa are used as examples by Bety and Godfred, as they have relatively advanced EIA requirements in the continent. Within these jurisdictions, the requirements for public participation differ greatly as follows¹¹⁰:

- Egypt - not mandatory
- Ghana – mandates hearings
- Mauritius – report to be advertised to public and open to comments but no other specifications
- South Africa – required by law and guidelines on consultation

It is clear that measures for public participation must have clearly specified guidelines and must specify the stages at which the public is to be consulted.

The African Commission on the African Charter on Human and Peoples' Rights, has identified within Articles 16 and 24 several procedural obligations, including that of providing for meaningful public participation in environmental decisions which may affect communities. This is seen in the Commission's statement in the *Ogoniland* case:

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.¹¹¹

¹⁰⁴ Guidelines on Public Participation in EIA in the Mekong Region, PACT, 2017, p.53

¹⁰⁵ Mekong River Commission, Transboundary EIA, <http://www.mrcmekong.org/about-mrc/programmes/environment-programme/transboundary-eia/>

¹⁰⁶ PNPCA, Article 3.

¹⁰⁷ PNPCA, Art 5.5

¹⁰⁸ PNPCA, Art 6.

¹⁰⁹ Establishing a Transboundary Environmental Impact Assessment Framework for the Mekong River Basin, an Assessment of the Draft Mekong River Commission TBEIA Framework, Environmental Law Institute, April 2009.

¹¹⁰ Bety, Campion, Godred, Essel, 'Environmental Impact Assessment and Sustainable Development in Africa: A Critical Review', Environment and Natural Resources Research, Vol. 3, No. 2, 2013

¹¹¹ SERAP v Nigeria Judgment No. ECW/CJ/JUD/18/12.(Ogoniland case)

D. Enabling Environment

The Pacific

Many Pacific Island countries have enacted relevant environmental legislation, notably on marine conservation. The Secretariat of the Pacific Regional Environment Programme (SPREP) whose aim is the 'protection and sustainable development of the region's environment' has been assisting member governments to comply with environmental commitments, and is considered to be one of the most active among regional environment programmes in the Asia-Pacific¹¹².

The environment and human rights framework has been raised as essential for the sustainable development in the Pacific. This statement from the Pacific Islands Forum Secretariat encapsulates this position, to wit: "...Without support for all human rights, [any] real prospect for communities and for Forum member States to attain sustainable development goals will remain elusive. The interdependence among all human rights is indisputable."¹¹³

North Asia

In 2021, Mongolia became the first Asian country to adopt legislation protecting human rights defenders when the State Great Khural (Parliament), adopted the Law on Legal Status of Human Rights Defenders, which is set to enter into force on July 1, 2021.

Under the law, human rights defender is defined as 'any individual who acts separately or in association with others to promote the realization of human rights and freedoms and takes part in respecting and protecting the human dignity and commonly recognized principles and norms of international law through non-violent and peaceful means', and the law aims 'to establish legal grounds for respect, protection, promotion, and fulfillment of the rights of human rights defenders through identifying actions, rights and prohibitions apply to human rights defenders as well as common obligations of state organizations and officials, non-governmental organizations, and business entities, and protection mechanism for human rights defenders.'

It law defines a number of rights such as protest, assembly, participation in public affairs, etc. and provides that a violation can warrant either criminal or civil liability.

Many of the provisions on rights, violations and remedies would necessarily apply to environmental human rights defenders¹¹⁴. Pursuant to the passage of the law, amendments will be made to the law on Human Rights Commission for the addition of member accountable for human rights defenders matters, as well as the establishment a committee for the protection of human rights defenders, composed of members from government and non-government organizations.¹¹⁵

ASEAN

The best legislative example in ASEAN comes from the *Indonesian Environmental Protection Law 2009*. Under Chapter X the law states:

Part One - Right

Article 65

- (1) Everybody shall be entitled to proper and healthy environment as part of human rights.
- (2) Everybody shall be entitled to environmental education, information access, participation access and justice access in fulfilling the right to proper and healthy environment.

Article 66

Everybody struggling for a right to proper and healthy environment may not be charged with criminal or civil offense.

Part Two - Obligation

Article 67

Everybody shall be obliged to preserve the environmental functions as well as control environmental pollution and/or damage.



112 Boer, Ben, Environmental law and human rights in the Asia-Pacific. In book: Environmental Law Dimensions of Human Rights 201, pp.134-179
113 Ibid.

114 <https://wedocs.unep.org/bitstream/handle/20.500.11822/35408/SDG16.pdf>
115 <https://www.montsame.mn/en/read/259478>

These Articles provide a clear set of rights and obligations that provide significant legislative force to access rights in Indonesia.

In Thailand, under its recently released National Action Plan on Business and Human Rights, recognition has been given to the need for greater protection to Human Rights and Environmental Defenders. The Rights and Liberties Protection Department has collaborated with various sectors in developing a manual for human rights defenders and distributing to human rights defenders in the area of field visits or coming into contact with the Rights and Liberties Protection Department.

It is also proposed to amend the Act on Witness Protection in Criminal Case B.E. 2546 (2003) to provide greater protection to witnesses in environmental cases.

The Office of the Court of Justice has attempted to amend the law to prevent the Anti-Strategic Lawsuit Against Public Participation (SLAPP) by proposing to amend the Criminal Procedure Code, Section 161/1, in order to allow the court to exercise discretion in the event that the people are plaintiffs (meaning the victim is a person or juristic person). The court has the power to dismiss or not accept the case, if the court considers that the prosecution has the intention to dishonestly or distort the facts or to bully or take advantage of the defendant.

These actions are still on-going but reflect good regional practice to promote a more enabling environment in Thailand.

Africa

Several African jurisdictions have seen a rise in international and regional judiciaries used to litigate environmental claims. A prominent example includes the African Charter on Human and Peoples' Rights, a regional treaty signed by all the states of the African Union except Morocco.

The African Commission on Human and Peoples' Rights established in various judgments the extent of Article 24 of the African Charter on Human and Peoples' Rights 1981. Article 24 of the African Charter states:

All peoples shall have the right to a general satisfactory environment favourable to their development.

African Commission on Human and Peoples' Rights passed its first judgment in Nigeria based on Article 24 of the African Charter on Human and Peoples' Rights. Several landmark cases including *Social and Economic*

Rights Action Centre and another v Federal Republic of Nigeria (Ogoniland) case, the African Commission stated that Article 16 and 24:¹¹⁶

The *Ogoniland* ruling was notable as it imposed a

recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."¹¹⁷

substantive requirement on signatory states to 'take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.¹¹⁸

Apart from the continental human rights frameworks under the African Union, various regional economic communities (RECs) enforce these frameworks. The most prominent of these are Economic Community of West Africa (ECOWAS), East African Community (EAC), Southern African Development Community (SADC).¹¹⁹ These include the ECOWAS Community Court of Justice (ECCJ) and East African Court of Justice (EACJ) which have decided the seminal *SERAP v Nigeria*¹²⁰(*Ogoniland* case) and *African Network for Animal Welfare v Tanzania*¹²¹ cases.



Anindya Phani

¹¹⁶ Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Individual Report on the Asia-Pacific, Arab, and African regions as well as the European Social Charter, Report No. 12, December 2013, OHCHR, Special Procedures of the United Nations
¹¹⁷ *Ibid.*
¹¹⁸ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2006) AHRLR 60 (ACHPR) (*Ogoniland* case)

¹¹⁹ Michael Addaney, Chantelle Gloria Moyo, 'Chapter 8: Experiences from African Regional Human Rights Courts and Tribunals in the Protection of Environmental Rights' in *Human Rights and the Environment under African Union Law* eds. Michael Addaney, Ademola Oluborode Jegede
¹²⁰ *SERAP v Nigeria* Judgment No. ECW/CCJ/JUD/18/12. (*Ogoniland* case)
¹²¹ Reference No. 9 of 2010 (ANAW).

Europe

Importantly, the Treaty of Lisbon which enacted the Charter of Fundamental Rights of the European Union includes Article 37 on the environment.

“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”

This provision has had extensive reach over the EU's policy making, including in the introduction of directives such as the Habitats Directive, the Ambient Air Quality Directive and the Water Framework Directive.

Additionally, the European Committee on Social Rights which oversees the European Social Charter (a Council of Europe treaty on economic and social rights) interprets Article 11 include a right to a healthy environment. It provides procedural and substantive obligations for each signatory to execute these rights.¹²²

Procedural obligations

- (1) Obligation to take precautionary measures
- (2) Obligation to provide information about environmental harm

Substantive obligations

- (1) Obligation to adopt measures as stated in *Marangopolous*¹²³
- (2) Obligation to create and comply with threshold value for emissions



Shahab Naseri

E. Constitutional Right to a Healthy environment

The Pacific

The Constitution of the Republic of Fiji provides that “every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures” and “to the extent that it is necessary, a law or an administrative action taken under a law may limit, or may authorise the limitation of, the rights set out in this section” (Article 40, Fiji Constitution).

It is a broadly formulated right to a clean and healthy environment. Interestingly, the limitation of these rights ‘to the extent that it is necessary’ has been said to potentially limit legal action to enforce environmental rights, as it requires further legislative fiat.

North Asia

The Constitution of the Republic of Korea provides that “all citizens have the right to a healthy and pleasant environment” (art 35(1), Republic of Korea Constitution). The Framework Act on Environmental Policy which provides for the basic principles in environmental law is based on this constitutional mandate, and also serves as the keystone of Korean environmental law.¹²⁴

South Asia

Most South Asian states have a reference to environmental rights in their constitutions. Nepal's constitution has an explicit reference to a *right to a healthy environment*.¹²⁵ This right is supplemented by robust provisions such as a right to seek compensation for any harms caused by pollutants¹²⁶, requirements that the State must pursue a policy of conservation and management of natural resources¹²⁷ and policies that minimizes harm to the environment¹²⁸.

Nepal's constitution also stipulates that the environmental policies regarding must be taken with a view to preserving intergenerational use of the environment.¹²⁹ However, Article 36 of Nepal's constitution makes it clear that these duties on the government are unenforceable, thereby limiting the effectiveness of these rights.

Similarly, Bhutan has multiple references to the environment in its constitution of 2008. However, Bhutan adopts a stewardship approach citing that “every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of the present and future generations.”¹³⁰ Thus referencing an individual duty to protect the environment.

122 OHCHR 2013, Op Cit.

123 Marangopoulos Foundation for Human Rights v. Greece, Complaint No. 30/2005 (European Social Committee 2006).

124 Lee, Jay Junyong, Sangmin Kim and Tong Keun Seol. Environmental Law in South Korea. Lexology

125 Article 30, Constitution of Nepal 2015

126 Article 30(1), Constitution of Nepal 2015

127 Section 51(g), Constitution of Nepal 2015

128 Section 51(g)(7), Constitution of Nepal 2015

129 Section 51(g)(1), Constitution of Nepal 2015

130 Article 5(1), Constitution of Bhutan 2008

131 Article 5(2), Article 5(3), Constitution of Bhutan 2008

132 Article 22, Constitution of Maldives

133 Article 23, Constitution of Maldives

134 Article 48A, Constitution of India

135 Article 51A, Constitution of India

136 Dr. Mohiuddin Farooque v Bangladesh & others (1996) 48 DLR 438; Dr. Mohiuddin Farooque v Bangladesh & others CA No.24/1995

137 Afghanistan Constitution of 2004

138 Report A/HRC/43/53

139 <https://environment.asean.org/agreement-on-the-conservation-of-nature-and-natural-resources> viewed 1 March 2021

The Constitution prescribes extensive duties for the Government to conserve the countries environment including to maintain forest cover at 60% of Bhutan's land.¹³¹ Maldives' Constitution references the State's "duty to protect and preserve the natural environment, biodiversity and the beauty of the country for the benefit of present and future generations".¹³² The addition of "future generations" references the principle of intergenerational equity. Furthermore, every citizen has a duty to protect the environment.¹³³

India's Constitution references the State's¹³⁴ and its citizens'¹³⁵ duty to protect and improve the environment. Bangladesh's Constitution does not have an explicit reference to the environment, however, the Supreme Court of Bangladesh has interpreted its right to life provisions in Articles 31 and 32 to include a right to healthy environment.¹³⁶ The preamble to Afghanistan's constitution includes a reference to "attain ... sound living environment for all inhabitants of the land",¹³⁷ however, the placement in the preamble limits its enforceability. Article 15 of Afghanistan's constitution includes a requirement for the State to adopt measures to improve forests and the living environment.

ASEAN

Constitutional recognition of the right to a healthy environment varies in the 10 ASEAN Member States. In the Special Rapporteur on Human Rights and the Environment, to the 43rd Session of the Human Rights Council in 2020, Dr. David Boyd reviewed the legal recognition of the right to a health environment in national constitutions of UN members.¹³⁸

In the ASEAN Region, he identified that Indonesia, Philippines, Thailand and Viet Nam contained provisions in their Constitutions whilst the other six AMS did not. However there are challenges in the interpretation of some of these provisions. Indonesia (Article 28h(1)) and the Philippines (Section 16 of Article II) contain explicit recognition of the right of persons, or the people, to enjoy, or live in, a balanced and healthy environment.

The Constitutions of Thailand, Viet Nam, Myanmar, and Cambodia all provided for the duty of the State to protect the environment, and the Constitution of Laos PDR includes an obligation on all citizens and organisations to protect the environment. The Constitutions of Malaysia, Singapore and Brunei Darussalam do not contain any specific provision regarding these rights obligations. It has already been observed that all ASEAN Member States have adopted the ASEAN Human Rights Declaration that does include a reference to the right to a safe environment.

The ASEAN Agreement on the Conservation of Nature and Natural Resources 1985 (not in force), provided in Article 1 the Fundamental Principle that obliged

the AMS to undertake "the measures necessary to maintain essential ecological process and life-support systems, to preserve genetic diversity, and to ensure the sustainable utilization of harvested natural resources under their jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development."¹³⁹

Africa

The 2010 Kenyan Constitution includes the right to a healthy environment as a substantive right. The Constitution places specific obligations to realize this right, including *inter alia*, ensuring public participation in environmental processes,¹⁴⁰ maintaining tree cover at 10 per cent of the land area,¹⁴¹ protecting genetic resources and biodiversity.¹⁴² Section 24 of South Africa's Constitution provides that everyone has a right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the benefit of present and future generations.¹⁴³ These are to be executed through legislative measures that prevent pollution and ecological degradation, promote conservation, secure ecologically sustainable development and use of natural resources.¹⁴⁴

This right has been used to litigate climate change successfully, as seen in the case *Earthlife Africa Johannesburg v Minister of Environmental Affairs*.¹⁴⁵ The following African countries include substantive environmental rights in their constitutions: Cameroon, Burkina Faso, Benin, Angola, Cape Verde, Central African Republic, Chad, Congo-Brazzaville, Democratic Republic of Congo, Cote d'Ivoire, East Timor, Egypt, Ethiopia, Gabon, Guinea, Malawi, Mali, Mauritania, Mozambique, Senegal, South Africa, Sudan, Togo, Uganda.¹⁴⁶

For example, Namibia's Constitution specifically empowers the Ombudsman to investigate problems related to environmental damage.¹⁴⁷ Meanwhile, Benin, Chad, the Democratic Republic of Congo and Niger have provisions prohibiting the importation of toxic waste. Uganda and Malawi have references to the protection of biodiversity.¹⁴⁸

Europe

Most European jurisdictions have some reference to the environment in their constitution. These rights are supplemented by rigorous duties by the European Union to protect and maintain the environment.¹⁴⁹

Moreover, many states have comprehensive provisions within their constitutions relating to the environmental rights and policy, e.g. France¹⁵⁰, Portugal¹⁵¹ and Switzerland.¹⁵² However, not all rights in European states' constitutions are enforceable. For instance, Article 53(3) of Spain's constitution limits the ability of citizens and NGOs to file lawsuits based on the right to a healthy environment.¹⁵³

139 <https://environment.asean.org/agreement-on-the-conservation-of-nature-and-natural-resources> viewed 1 March 2021

140 Article 69(1)(d), Constitution of Kenya 2010

141 Article 69(1)(b), Constitution of Kenya 2010

142 Article 69(1)(e), Constitution of Kenya 2010

143 Collins Odote, Chapter 15: Human Rights-based Approach to Environmental Protection: Kenya, South African and Nigerian Constitutional Architecture and Experience in Human Rights and the Environment under African Union Law eds. Michael Addaney, Ademola Oluborode Jegede

144 *Ibid.*

145 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* [2017] JOL 37526 (GP)

146 David Boyd, The Status of Constitutional Protection for the Environment in Other Nations, David Suzuki Foundation (2013) <https://david Suzuki.org/science-learning-centre-article/status-constitutional-protection-environment-nations/>

147 Article 91, Constitution of Namibia (1990)

148 Boyd, *supra*

149 See above in enactment of Aarhus Convention at Directive

150 The French Constitution (1958) includes the Charter for the Environment (added in 2004) which includes comprehensive substantive rights.

151 Article 9, Article 52, Article 66, Constitution of the Portuguese Republic (1976)

152 Section 4: Environment and Spatial Planning, Section 6, Energy and Communications; Federal Constitution of the Swiss Confederation (1999)

153 Boyd, *supra*



Ferdinand Edralin/ UNDP

RECOMMENDATIONS AND WAYS FORWARD

In view of the status of access rights in Asia-Pacific, and the recent developments especially at the regional scale, the following recommendations are presented. These ways forward are envisaged to build consensus around regional approaches for rights based environmental decision-making.

These are preliminary recommendations designed to support the implementation of access rights across a variety of institutions and through a number of mechanisms.

A. Access to Justice

- **Establish green courts.** Environmental courts and tribunals are instrumental to expedite the delivery of justice relating to the redress of violations of environmental rights and the enforcement of environmental law. 'Green benches' or environment-specific courts and tribunals serve to strengthen the capacity of national governments to protect the right to a healthy environment.
- **Strengthen judicial systems to ensure accountability.** Judicial proceedings must abide by fair trial standards. Legal systems should evolve with environmental courts and tribunals, alongside corresponding environmental remedies that provide redress for violations of environmental rights. Legal remedies such as anti-strategic lawsuits against public participation (anti-SLAPP suits) and citizens' suits should be promoted, as well as effective grievance and dispute resolution mechanisms.
- **Adopt procedural rules for environmental cases.** Procedures for the protection of the environment must be adopted, including injunctions and protective writs to prevent further environmental harm during the court case. Accordingly, remedies that prevent activities which threaten to damage or are already damaging the environment should be enacted.

- **Ensure access to the justice system.** Environmental defenders should be given appropriate legal remedies for the redress of the violation of their rights and should not be prevented from filing legal action. Central to this is the right to be protected from Strategic Legal Actions against Public Participation (SLAPP), not only for those who engage in litigation but also for individuals who are working on advocacy, outreach or campaigning.

- **Establishing right to compensation for damage.** Affected stakeholders may be given a right to seek compensation for environmental damage because of environmentally destructive activities and projects which may have adversely impacted them.

B. Access to Information

- **Define environmental information broadly.** The information envisaged in these access rights may be taken to include all environmental information related to environmental issues. This includes all relevant data on the projects that may have an impact on the environment and the people. It should also include information from both terrestrial and marine activities.
- **Secure Free, Prior, Informed Consent.** Prior Informed Consent and Advanced Informed Agreement procedures must be set in place to provide for the regulation of international exchange of resources or products, including waste, that could have adverse effects on human health and the environment. This is in accordance with Rio Principle 19, whereby States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

- **Establish a clearing house of environmental information.** The public clearing house can serve as the central repository and archive of all environmental information, datasets and pertinent documents. The clearing house may obtain such data from government, and include information submitted by private sector for compliance.
- **Disseminate environmental information clearly.** The dissemination program of the government on how to exercise the access rights to information and public participation should be clearly defined, with specified processes and reasonable time frames. Furthermore, government agencies should also be proactive in publishing information through enacting laws and regulations for monitoring or reportorial requirements, and duties to publish environmental threats.
- **Restrict reasons for denial.** Refusal or limiting public access to information in environmental decision-making should be as limited to the extent possible, and such exceptions should providing compelling and legitimate reasons for denial of access.

C. Public Participation in Decision-making

- **Conduct environmental and social impact assessments.** Proponents should be required to conduct environmental and social impact assessments as well as mitigation plans. These should include the means and processes to mitigate negative environmental and social impacts. The assessment should also cover how the project or activity may affect the full exercise of human, social and cultural rights, and the broader people's right to the environment. Social development plans are also useful to ensure the sustainability of socioeconomic and environmental programs and may include programs to rehabilitate degraded areas; manage displacement of local communities, and alternative livelihood, among others.
- **Stakeholder identification.** Proponents and authorities should conduct a comprehensive identification process to determine stakeholders involved and ensure that they are involved meaningfully in the decision-making process.
- **Create effective platforms public participation.** Public participation in decision-making should be a genuine and meaningful process for all stakeholders involved. Hence, it is imperative to get concerns and inputs of stakeholders at early stages, where they may still influence the outcome of the decision.

D. Enabling a safe and healthy environment

- Introduce legislation specifically protecting the rights of environmental defenders and recognizing their role in environmental protection. Such legislation and policies would implement the UN Declaration on Human Rights Defenders and would also create a positive enabling environment where human and environmental rights are recognized and respected. Discriminatory laws should be reformed, and broader rules enacted to ensure that the rights of advocates are upheld.
- Amend existing laws, such as defamation laws and trespass laws that are used by corporations against environmental defenders. Defamation laws should be amended so that legal entities and directors of those entities cannot make a claim for defamation. Peaceful protests must be protected.
- Prevent and Investigate promptly and impartially all extrajudicial killings and attacks against environmental defenders. Through the course of the investigation, protective measures must be taken to guarantee the safety and security of environmental advocates. Environmental defenders must be afforded their right to an impartial and fair trial, and any form of threats or violence against them must be condemned.
- Provide support to indigent environmental defenders. Governments may provide support to indigent environmental defenders who may want to press charges and engage in litigation in response to violation of their environmental rights. This may include providing free services of counsels and support in litigation expenses.
- Expand role of national human rights institutions in the environment. Human rights institutions may be given further roles in assistance to environmental defenders as important human rights advocates. Accordingly, they may provide legal assistance and lead in further fact-finding and investigations on alleged environmental violations.

E. Constitutional rights

- Adopt constitutional rights to a healthy environment. This includes the specific and executory right to a healthy environment under the constitution as an ideal but may also include a bill of environmental rights such as specific access rights and the establishment of the enabling environment of these rights, without discrimination, exclusion or fear of reprisal.

OTHER RECOMMENDATIONS

Making the Case for a Regional Agreement

Global developments in environmental law governing procedural rights provide a solid foundation for establishing a regional framework for the protection of procedural environmental rights. The case for a regional arrangement also stems from the notion that a regional approach is the most appropriate means to ensure the implementation of Principle 10, owing to the shared issues and challenges in setting standards and strengthening institutional frameworks.

- a.** A regional approach provides the impetus for developing a stronger enabling environment that would necessitate reforms in policy, regulation and judicial procedure to ensure environmental rights (and EHR Defenders) are protected at the national level.
- b.** The experience in the Escazú Agreement reveals that although negotiating countries recognized at the outset the need for promoting and protecting environmental rights, there remains a need for a regional agreement to ensure their full enjoyment. In the Asia-Pacific region, there is also a pressing need which may be highlighted if framed within the context of compelling issues such as continued persecution of environmental defenders, lawyers and advocates, among others.
- c.** The Escazú Agreement has been seen as a guide for other developing countries and regions to emulate.

Facilitating National Implementation through UN Support

A regional instrument will be instrumental to the implementation of Principle 10 of the Rio Declaration at the national level as it would provide opportunities for cooperation through mechanisms among parties to the instrument, and technical, policy and legal support as a regional UN mandate.

- a.** This regional arrangement would facilitate south-south cooperation and improve knowledge exchange and best practices. Such initiatives are also envisaged to be tailored to the regional circumstances and dynamics in order to face common challenges across countries in the region.
- b.** A regional UN-mandated support system would then ensure effectual compliance over time through the establishment of appropriate implementation mechanisms that provide support and technical assistance for the adoption and enforcement of access rights.



Supriya Biswas

Building Consensus.

For the Escazú Agreement, negotiating countries committed to develop and implement a Plan of Action in 2014 to develop a regional instrument for access rights. This was supported by the UN Economic Commission for Latin America and the Caribbean (ECLAC) as technical secretariat and was a key driver to the development of a regional instrument that was to become the Escazú Agreement.

- a.** In the Escazú experience, the Plan of Action established the creation of two working groups. The first worked on capacity building and cooperation, while the other focused on the access rights and the development of the instrument. It was noted that since the formation of these groups, involved stakeholders have been very active in pushing the agenda and process forward.
- b.** Crafting a similar plan in preparation for a regional instrument in Asia-Pacific will likely be helpful in moving forward with the initiative. This might also lead to extending further networks and building strategic partnerships that are vital to jumpstart the process and foster interest within the negotiating countries. Moreover, the Action Plan could provide a good platform to cultivate the organic support that is required to have further discussions on the matter.

Highlighting the Nexus with Regional Human Rights Initiatives.

A regional framework for access rights is supported by current initiatives in ASEAN to mainstream human rights and the environment in EIAs through the AICHR. A broader regional approach provides support for setting an enabling environment to ensure that environmental rights, within the wider context of human rights, can be fully and freely exercised across the region.

- a.** The Aarhus Convention and the Escazú Agreement both provide clear mechanisms to strengthen the right to a safe, clean and sustainable environment, which is also provided for in the ASEAN Human Rights Declaration.

Setting up Compliance and Assistance Mechanisms.

Strengthening the legal regime for the promotion of access rights and the protection of environmental rights through a binding regional agreement can promote national law reform by facilitating compliance through appropriate implementing mechanisms.

- a.** Such an arrangement is envisaged to bring about the introduction of national legislation specifically institutionalizing access rights and procedure for environmental redress, protecting environmental defenders and providing for the full exercise of environmental rights.
- b.** As a necessary consequence of the regional agreement, focus needs to be drawn on strengthening national systems to implement the resulting binding obligation. These “compliance mechanisms” can be better denominated as Implementation or assistance mechanism to remove negative connotation of punitive approaches for non-compliance among signatories. This mechanism principally seeks to help parties fulfill their obligations under the agreement.

Focusing on Environmental Human Rights Defenders.

Within the Asia-Pacific context, it is important to ensure that the rights of EHRD are protected. The regional framework is envisioned to spur reform at the national level to create a positive enabling environment where human and environmental rights are recognized and respected.

- a.** Such reforms should include ensuring effective access to the a dispute resolution system. Moreover, environmental defenders should be given appropriate legal remedies for the redress of the violation of their rights, and violators must be effectively sanctioned, prosecuted and held accountable.

CONCLUSION

The preliminary findings highlight that there is a considerable number of examples of good practice for procedural rights from the global and regional landscapes, including the Asia-Pacific region itself. In both legislation and policy, the experience from various regional and national initiatives can be examined to advance the discussion of access rights among ESCAP member countries.

However, despite positive developments in legislation and policy frameworks that advance access rights in the region, many countries are still facing challenges in implementing Principle 10. A regional instrument initiated by ESCAP countries would ensure that the provisions take into consideration the specific regional dynamics and national attributes. This would benefit both the process and the outcome by providing a sense of ownership of the regional initiative, which is tailored to member countries' needs and realities on the ground.

A regional approach to safeguard procedural environmental rights paves the way to necessary reforms in policy, regulation and judicial procedures to ensure environmental rights are protected at the national level. Drawing from the experience in the EU and Latin America and the Caribbean, a regional agreement for access rights would strengthen the national legal regimes for the protection of environmental rights by facilitating compliance of countries through appropriate implementing mechanisms.

There is a clear opportunity to support governments to strengthen environmental governance in the ESCAP region, in particular as a responsible response to a post-covid build back better strategy. The Aarhus and Escazú Agreements, in conjunction with the Framework Principles on Human Rights and the Environment, provide the precedents for setting an enabling environment that could be applied in the Asia-Pacific region to ensure the full exercise of environmental rights.



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