

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

**Technical Briefing Paper prepared for Expert Meeting on Human Rights and the Environment**

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## Abbreviations

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



Brian Evans

# 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 rights<sup>1</sup>. 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 information<sup>2</sup>, public participation<sup>3</sup>, and access to justice<sup>4</sup>. 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).<sup>5</sup> Principle 10 sets out three fundamental rights: access to information, access to public participation and access to justice, as key pillars of sound environmental governance<sup>6</sup>. 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.<sup>7</sup>

These access rights are now increasingly reflected in many environmental laws at the national level<sup>8</sup>. 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 environment<sup>9</sup>, 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 performance<sup>10</sup>.

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 rights<sup>11</sup>.

The development of the Framework Principles on Human Rights and the Environment (the Framework Principles)<sup>12</sup> 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".<sup>13</sup>

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](https://docs.wixstatic.com/ugd/80f01c_751ca12a36424f328aed4f37e8e76f74.pdf)

3 [https://docs.wixstatic.com/ugd/80f01c\\_36111bfa393a434294a67c86df518279.pdf](https://docs.wixstatic.com/ugd/80f01c_36111bfa393a434294a67c86df518279.pdf)

4 [https://docs.wixstatic.com/ugd/80f01c\\_f06d4b224c1240ac86503d8693472a3c.pdf](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](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](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.<sup>14</sup> 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 EIA<sup>15</sup> 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.<sup>16</sup> 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 change<sup>17</sup>.

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.

<sup>14</sup> General Principle 28(f), ASEAN Human Rights Declaration. [https://www.asean.org/storage/images/ASEAN\\_RT2014/6\\_AHRD\\_Booklet.pdf](https://www.asean.org/storage/images/ASEAN_RT2014/6_AHRD_Booklet.pdf)

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

<sup>16</sup> Knox (2013), p.12

<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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 States<sup>20</sup>. 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

4. Specific references for consultation and inclusion of women and children, and marginalized or vulnerable groups<sup>23</sup> within the EIA Process.
5. Operational Grievance Mechanisms (OGM) and dispute resolution.
6. Defining the Role of EIA Consultants.
7. Trans-boundary EIA<sup>24</sup>, including impact assessment and emergency planning.
8. Strategic Environmental Assessment.
9. ASEAN Environmental Quality Standards.<sup>25</sup>
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.



#### 1. Supporting Public Participation in EIA.

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