Assessment of Access to Information, Public Participation and Access to Justice in Environmental Decision Making in ASEAN

SUMMARY OF RECOMMENDATIONS PREPARED FOR ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS -UNITED NATIONS JOINT EXPERT MEETING ON HUMAN RIGHTS AND THE ENVIRONMENT JUNE 2021

"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."
- Professor John Knox

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, public participation, and access to justice. This background paper provides a summary of recommendations based on a report prepared for the United Nations in May 2021 on access rights in Asia and the Pacific.

Procedural rights find their legal foundation in Principle 10 of the 1992 Rio Declaration on Environment and Development (the Rio Declaration). 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. 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 UNEP’s Governing Council/ Global Ministerial Environmental Forum in Bali, Indonesia, in 2010.

The development of the Framework Principles on Human Rights and the Environment 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”.

16 PEACE, JUSTICE AND STRONG INSTITUTIONS
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 human rights defenders (EHRDs).
The ASEAN Human Rights Declaration 2012 (AHRD), an established framework for ASEAN human rights cooperation, specifically prescribes the right to a safe, clean and sustainable environment. In Article 5 of the AHRD 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.”

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 ASEAN Intergovernmental Commission on Human Rights (AICHR) has raised awareness about the role of EIA in the protection and promotion of human rights. 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.

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 Environmental Impact Assessment (EIA) as a planning tool to improve quality of development and large infrastructure projects and minimize their negative impacts.

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.

Based on the recommendations 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.

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 the United Nations Environment Programme (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 Environmental Impact Assessment (EIA) in ASEAN Member States.
The 2019 Workshop also recommended the following ten points to be the integral part of any Regional Framework on Rights-Based Approaches:

1. Supporting Public Participation in EIA.
2. Protection of the Rights of Environmental Defenders and Enforcers.
3. Rights to access information:
   a. Using technology better;
   b. Pre-EIA Approval and post-EIA Approval and;
   c. Effective Monitoring and Enforcement.
4. Identification of documents that are available and those exempt from disclosure;
5. Specific references for consultation and inclusion of women and children, and marginalized or vulnerable groups within the EIA Process.
6. Operational Grievance Mechanisms (OGM) and dispute resolution.
7. Defining the Role of EIA Consultants.
8. Trans-boundary EIA, including impact assessment and emergency planning.
10. ASEAN Environmental Quality Standards.
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:

“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.”

These rights are identified as key pillars of a rights-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. Procedural rights improve the ability of governments to ensure a clean and healthy environment.
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.

Targets linked to the environment:

16.3
Promote the rule of law at the national and international levels and ensure equal access to justice for all

16.6
Develop effective, accountable and transparent institutions at all levels

16.7
Ensure responsive, inclusive, participatory and representative decision-making at all levels

16.8
Broaden and strengthen the participation of developing countries in the institution of global governance

16.10
Ensure public access to information and protect fundamental freedoms in accordance with national legislation and international agreements

16.b
Promote and enforce non-discriminatory laws and policies for sustainable development

Framework Principles on Human Rights and the Environment

The Framework Principles on Human Rights and the Environment 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 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.
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 of the Rio Declaration, owing to the shared issues and challenges in setting standards and strengthening institutional frameworks.

- 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.

- 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.

- 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 at it would provide opportunities for cooperation through mechanisms among parties to the instrument, and technical, policy and legal support as a regional UN mandate.

- 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.

- 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.

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.

- 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.

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.

- 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.
Summary of 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 including the potential for a regional agreement. These are preliminary recommendations designed to support the implementation of access rights across a variety of institutions and through a number of mechanisms.

I. Access to Remedies

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.

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.

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.

II. 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. Free, 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
specify 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 access to information in environmental decision-making should be as limited to the extent possible, and such exceptions should provide compelling and legitimate reasons for denial.

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**III. 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.

**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.

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**IV. Enabling a safe and healthy environment**

**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.

**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.

**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.

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**V. 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.
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 of the Rio Declaration. 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.