Feasibility Study on the Legal and Institutional Context in the Pacific

Towards the Development of a Sub-regional Instrument on Access Rights
This report is a collaboration between the UN Economic and Social Commission for Asia and the Pacific (UNESCAP) and the United Nations Environment Programme (UNEP). The development of this report was led by Matthew Baird. This report was finalized in December 2021. The report benefited from review undertaken by staff at UNESCAP and UNEP.

Manuel Castillo provided overall direction and guidance while Georgina Lloyd and Katinka Weinberger provided further technical review.

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This document presents an outline feasibility study on the Pacific’s legal and institutional context and capacities concerning the potential development of a sub-regional instrument on access rights. The first part of this study examines the international frameworks for the access rights elements. The second part analyses the regional mechanisms within the Pacific, and the third part looks at stakeholders in the Pacific and provides recommendations for the future.

This study is presented against the recognition that human rights and the environment are intertwined and interconnected. The growing discussion that a safe, clean, healthy and sustainable environment is a precondition to the exercise and enjoyment of human rights led to the United Nations Human Rights Council resolution in October 2021 recognizing the right to a safe, clean, healthy and sustainable environment as a human right.

There is also a recognition that 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. In the context of current discussions, there are five key elements to access rights: access to information, public participation, access to remedies, legal recognition of the right to a healthy and sustainable environment and an enabling environment to allow the exercise of these rights, including the protection of environmental human rights defenders (EHRDs).

In the context of the international frameworks, the study examines the role of the 1992 Rio Declaration and, in particular, Principle 10 on public participation in decision-making processes in environmental matters and the Sustainable Development Goal 16. The study also examines the two key international agreements on access rights — the Aarhus Convention and the Escazu Agreement. These international agreements support the human right to a safe, clean and sustainable environment by incorporating procedural rights and the five key elements of access rights.

The study then examines the regional instruments in the Pacific. Several environmental treaties in the Pacific already exist that provide for consideration environmental protection recognition. In particular, the Noumea Convention, and its protocols, provides for a potential regional mechanism for addressing and discussing access rights. The Secretariat of the Pacific Regional Environment Programme (SREP) has taken a strong lead on climate change and other environmental issues. SPREP, together with the PIF and the Secretariat of the Pacific Community, create some pathways to promote the discussion on access rights in the Pacific.

The second part of the study provided a brief overview of the Pacific’s national legal and policy framework for access rights. Pacific countries have addressed in domestic legislation some of the access rights issues. Access to information laws exist across the Pacific, although some of these laws may not meet international standards. Public participation in the context of Environmental Impact Assessment (EIA) does create a significant opportunity to implement the right of public participation.

In considering the developing international frameworks, the study also recognizes the work already being done by the Pacific Island Forum (PIF) on sustainable development and climate change in the Pacific.
SPREP has published the Environmental Impact Assessment Guidelines in 2016, entitled “Strengthening environmental impact assessment: Guidelines for Pacific island countries and territories”. These guidelines give a detailed overview of EIA processes in the region and provide tools and practices for national governments to efficiently implement the EIA. Access to remedies in environmental matters is the weakest of the access rights.

Finally, the study examines the constitutional provision for recognizing the right to a clean and sustainable environment. Fiji, Palau, Vanuatu and Papua New Guinea are leaders in constitutional recognition of rights relating to the environment. Customary law and custom are also elements that need to be incorporated in any discussion on access rights in the Pacific.

The study provides recommendations and ways forward for making a case for a regional agreement on access rights. 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. There is also a pressing need to address the continued persecution of environmental defenders, lawyers, and advocates in the Pacific.

These recommendations include the development of a Plan of Action and working groups to examine and consider the process and the subject matter of any regional agreement.

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**Key Steps Towards a Regional Framework on Access Rights**

- Making a case for a Regional Agreement
- Building Consensus
- Building on the Virtual Environment
- Setting up Compliance and Assistance Mechanisms
- Implementing Right to Information and Public Participation Measures
- Focusing on Environmental and Human Rights Defenders

A regional approach to safeguard procedural environmental rights paves the way to necessary reforms in policy, regulation, and judicial procedures to ensure that environmental rights are protected at the national level. Drawing from the experience in the EU, Latin America, and the Caribbean, a regional agreement for access rights would strengthen the domestic legal regimes to protect environmental rights by facilitating compliance of countries through appropriate implementing mechanisms. The Aarhus and Escazú Agreements provide the precedents for setting an enabling environment in the Pacific region to ensure the full exercise and safeguarding of environmental rights.
A. Background

It is now recognized that 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 establishing and respecting human rights. There is also a recognition that 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. In the context of current discussions, there are five key elements to access rights: access to information, public participation, access to remedies, legal recognition of the right to a healthy and sustainable environment and an enabling environment to allow the exercise of these rights, including the protection of environmental human rights defenders (EHRDs).

On October 8 2021, the United Nations Human Rights Council (HRC) approved a resolution (A/HRC/48/L.23/Rev.1) on the right to a safe, clean, healthy and sustainable environment. The resolution recognized the right to a safe, clean, healthy and sustainable environment as a human right. The right is essential for the enjoyment of all other human rights and noted that the right to a safe, clean, healthy and sustainable environment is related to other rights that are in accordance with existing international law. The United Nations High Commissioner for Human Rights, Michelle Bachelet, highlighted that this resolution is about decisive action to protect people and the planet and the natural systems essential preconditions to all people’s lives and livelihoods.

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

These access rights are now increasingly reflected in many environmental laws at the national level. 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. Legal recognition of access rights is important as there is a positive link between a guarantee of environmental rights and improved environmental performance.

This document presents an outline feasibility study on the legal and institutional context and capacities in the Pacific concerning the potential development of a sub-regional instrument on access rights. The first part of this study will examine the international frameworks for the access rights elements. The second part will analyze the regional instruments within the Pacific, and the final part will look at stakeholders in the Pacific and draw recommendations for the future.

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2 https://docs.wixstatic.com/ugd/80f01c_c1a7d36d43f28fdef437e78f7f7274.pdf
3 https://docs.wixstatic.com/ugd/80f01c_f06d4b2361c4284e4c47d866038663472a3c.pdf
4 https://docs.wixstatic.com/ugd/80f01c_b48b324c1240ac866038663472a3c.pdf
The Pacific Islands Forum (PIF) is a political grouping with 18 members and several associate members, including Australia, New Zealand, the United Kingdom, the United States of America and France. Below is the list of members of the PIF and other associate members. The PIF is the key government stakeholder within the Pacific Region. Some countries in the region are fully independent, others are in a Free Association with a larger country, and some are constituent parts of larger countries. There have emerged three sub-regional groupings within the PIF.

1. **Micronesia**: Kiribati, the Marshall Islands (Compact of Free Association (COFA) with the United States), the Federated States of Micronesia (COFA with the US), Nauru, and Palau (COFA with the US).

2. **Melanesia**: Fiji, New Caledonia (a collectivity of France), Papua New Guinea, the Solomon Islands, and Vanuatu.

3. **Polynesia**: Cook Islands (Free Association with New Zealand), French Polynesia (a collectivity of France), Niue (Free Association with NZ), Samoa, Tonga, and Tuvalu.

The two French entities – New Caledonia (Melanesia) and French Polynesia (Polynesia) – joined the PIF in 2016, with Australian and New Zealand support.
The PIF has adopted the Pacific Roadmap for Sustainable Development, a Leaders Ocean Statement 2021, and a 2050 draft Strategy for the Blue Pacific (the Strategy). The Leaders Ocean Statement 2021 centred on oceans as the heart of the Pacific, with 96% of the region being ocean. This statement recognized the importance of the 2050 Strategy for the Blue Pacific as providing the guiding document to reinforce the prioritization of ocean and climate change considerations into all regional and national policies and plans, both public and private. It also recognized the significant challenges posed to the region by COVID-19 and the challenges for recovery.

# Table 1: Members of PIF, size and population

<table>
<thead>
<tr>
<th>AREA</th>
<th>COUNTRY/TERRITORY</th>
<th>LAND AREA (SQ.KM)</th>
<th>POPULATION (2020)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Melanesia</td>
<td>Papua New Guinea</td>
<td>462,000</td>
<td>8,500,000</td>
</tr>
<tr>
<td></td>
<td>Fiji</td>
<td>18,300</td>
<td>896,000</td>
</tr>
<tr>
<td></td>
<td>Solomon Islands</td>
<td>27,600</td>
<td>667,000</td>
</tr>
<tr>
<td></td>
<td>Vanuatu</td>
<td>12,200</td>
<td>300,500</td>
</tr>
<tr>
<td>Polynesia</td>
<td>Samoa</td>
<td>2,935</td>
<td>199,000</td>
</tr>
<tr>
<td></td>
<td>Tonga</td>
<td>747</td>
<td>100,000</td>
</tr>
<tr>
<td></td>
<td>Cook Islands</td>
<td>237</td>
<td>18,000</td>
</tr>
<tr>
<td></td>
<td>Tuvalu</td>
<td>26</td>
<td>10,640</td>
</tr>
<tr>
<td></td>
<td>Niue</td>
<td>259</td>
<td>1,611</td>
</tr>
<tr>
<td>Micronesia</td>
<td>Micronesia</td>
<td>701</td>
<td>103,000</td>
</tr>
<tr>
<td></td>
<td>Kiribati</td>
<td>810</td>
<td>119,000</td>
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<td></td>
<td>Marshall Islands</td>
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<td></td>
<td>Palau</td>
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<td></td>
<td>Nauru</td>
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<td>Australia</td>
<td></td>
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<td>25,700,000</td>
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<tr>
<td>New Zealand</td>
<td></td>
<td>271,000</td>
<td>4,700,000</td>
</tr>
</tbody>
</table>

# Table 2: Associate PIF members, size and population.

<table>
<thead>
<tr>
<th>ASSOCIATE MEMBERS</th>
<th>LAND AREA (SQ.KM)</th>
<th>POPULATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Caledonia (France)</td>
<td>18,575</td>
<td>278,500</td>
</tr>
<tr>
<td>French Polynesia (France)</td>
<td>4,167</td>
<td>275,918</td>
</tr>
<tr>
<td>Guam (US)</td>
<td>549</td>
<td>172,400</td>
</tr>
<tr>
<td>American Samoa (US)</td>
<td>200</td>
<td>56,700</td>
</tr>
<tr>
<td>Northern Mariana Islands (US)</td>
<td>464</td>
<td>56,200</td>
</tr>
<tr>
<td>Norfolk Island (Australia)</td>
<td>35</td>
<td>1,748</td>
</tr>
<tr>
<td>Tokelau (NZ)</td>
<td>12</td>
<td>1,499</td>
</tr>
<tr>
<td>Pitcairn Islands (UK)</td>
<td>47</td>
<td>50</td>
</tr>
</tbody>
</table>
The potential of the Ocean to meet sustainable development needs is enormous; but only if our oceans can be restored and maintained to a healthy and productive state. Ongoing trends of exploitation and degradation of marine ecosystems show that not only have endeavours to date been insufficient, but risks are increasing every day. More must be done to protect our Ocean as it provides solutions to some of our existential challenges, such as climate change.

As custodians of the Blue Pacific, we have demonstrated our leadership and collective resolve to protect the Pacific Ocean. It is our endowment fund, inherited from our ancestors and which we share with future generations. We must care for, invest in and nurture the Ocean to continue to benefit from it.16

The Leaders Ocean Statement 2021 noted:

The potential of the Ocean to meet sustainable development needs is enormous; but only if our oceans can be restored and maintained to a healthy and productive state. Ongoing trends of exploitation and degradation of marine ecosystems show that not only have endeavours to date been insufficient, but risks are increasing every day. More must be done to protect our Ocean as it provides solutions to some of our existential challenges, such as climate change.

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The key areas to be part of the 2050 Strategy include:

1. Recommitting to regional ocean policies
2. Ocean advocacy and engagement
3. Responding to the biodiversity crisis
4. Urgent climate change action
5. Securing the Blue Pacific
6. Conservation and sustainable management of the ocean and its resources
7. Maritime connectivity and renewable energy
8. Combatting marine pollution
9. Access to development finance and blue recovery 17

The current draft 2050 Strategy recognizes that the global and regional geopolitical and development context is shifting, and the enduring challenges of the "Blue Pacific Continent". These include:

1. Ongoing vulnerabilities to environmental, climate change, disaster risk and economic shocks;
2. Continued dependencies on aid and external financing;
3. Low levels of economic growth;
4. Stubborn levels of poverty and rising inequalities;
5. Structural constraints, such as distance from markets, small productive base, high transport costs.

Interacting with these vulnerabilities and constraints is a changing global and regional context, including:

1. The COVID-19 global pandemic that has seen unprecedented border closures resulting in immediate and long-term health, economic and social challenges;
2. Emerging tendencies towards populism and nationalism;
3. Challenges to multilateralism, including willingness to withdraw from regional political groupings, withdrawal from multilateral trade agreements, and increased preferences for bilateral actions;
4. Rising inequalities causing social and political instability and undermining development;
5. Increased number of political actors and donors in the Pacific;
6. Challenges to the stability of the global rules-based order and competition between Pacific Rim major powers; and
7. Continued degradation of, and disputes over, natural resources.

The draft Strategy also recognizes the new opportunities for the Pacific region to explore:

1. Increased political attention on the role of oceans in development;
2. Increased political awareness on the climate change crisis facing Pacific Island nations;
3. Advances in technology that can enable the region to overcome limitations of distance;
4. A set of agreed values that underpin Pacific regionalism, including the cultural values that help guide the region;
5. New global frameworks and methodologies for valuing the immense ecosystems and biodiversity of the Pacific;
6. Shifts in the global power and globalization; and
7. Significantly increased investment by multilateral development institutions in the Pacific. 18

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15 https://www.forumsec.org/sustainable-development/
16 https://www.forumsec.org/2021/03/22/pacific-islands-forum-leaders-ocean-statement-2020-21/
17 https://www.forumsec.org/2021/03/22/pacific-islands-forum-leaders-ocean-statement-2020-21/
18 https://www.forumsec.org/2050strategy/
Any proposed development of an access rights framework will need to fit within the framework of the 2050 Strategy for the Blue Pacific. Early engagement with the PIF and other regional stakeholders will be important to engage these stakeholders early on.

Map of the Pacific States and Exclusive Economic Zones (EEZ)

FIRST PART:
International Legal and Policy Frameworks
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, the 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 policymaking processes in an informed manner. At the same time, public participation is critical for the adoption of policies that consider the needs of communities and local conditions. Access to justice is also instrumental in ensuring that the public can enforce rights and enhance accountability. Accordingly, procedural rights improve the ability of governments to provide a clean and healthy environment.

In 2010, the UNEP Governing Council 21 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” (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 10.22

**Framework Principles on Human Rights and the Environment**

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. 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”. 23

The Framework Principles 24 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).

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20 Principle 10, 1992 Rio Declaration on Environment and Development
21 The governing council of UNEP is the United Nations Environment Assembly (UNEA). It was previously known as the Global Ministerial Environment Forum.
The role of prior impact assessment, including EIA and SEA, can be enhanced to allow consideration of potential impacts on "All relevant rights, including the right to life, health, food, water, housing and culture". 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 recognized in Framework Principle 11.

The Framework Principles also recognize that potential transboundary environmental impacts can significantly affect 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.

Sustainable Development Goal (SDG) 16 and the 2030 agenda

Within the 2030 Sustainable Development Agenda, Goal 16 supports the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all and the establishment of effective, accountable and inclusive institutions at all levels. It has been identified in previous reports that environmental rule of law and access to environmental justice are vital components of realizing this SDG. Therefore, the strengthening of legislation, the establishment of Environmental Courts and Tribunals, and access to information and public participation are instrumental aspects of achieving this SDG.

SDG16 Targets linked to the environment:

- **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.
The Asia Pacific Forum is the network on NHRIs and includes members from Australia, New Zealand, Samoa, and Fiji in the Pacific.  

In the UNESCAP Asia and the Pacific SDG Progress Report 2020, the most significant progress in peace, justice, and strong institutions (Goal 16) had been made by North and Central Asia. The Pacific, along with South-East Asia and South and South-West Asia, were regressing and moving further from achieving the goals of SDG 16.

Several reports have also highlighted the challenges for EHRD in the Asia-Pacific region. Most of the data from Asia and the Pacific seems insufficient or incomplete.

**Aarhus Convention**

The first regional agreement to implement Principle 10 is the Aarhus Convention. Ratified on June 25 in 1998, the Convention brings countries in Europe and Central Asia together to establish the rights of individuals and groups concerning the environment. Specifically, it grants rights to the public to access information and justice and to participate in governmental decision-making regarding human and environmental issues.

Individuals are entitled to access environmental information held by public authorities without explaining their reasons. This includes information on the status of the environment and policies or measures taken to tackle its effects on human health. The institution holding this information should release the information to the applicant within one month. Moreover, the convention moves further and requires these institutions to publish such information without having to apply for them actively.

Public authorities are required to make a platform that will enable the public and civil society groups, particularly the ones prone to risks, to advance their views on proposals or projects that could potentially harm the environment. The views should be taken into account, and the concerned parties should be informed on the final decisions and their reasons.

Regarding access to justice, the parties should establish an environment where the public can challenge and require the revision of projects that violate the two above-mentioned rights or environmental law in general.

The United Nations Economic Commission facilitated the development and implementation of the Aarhus convention for Europe (UN ECE), one of the five regional commissions under the jurisdiction of the United Nations Economic and Social Council that aims to promote pan-European economic integration. In addition to the UNECE, the Convention was developed with environmental non-governmental organizations (NGOs). It is important to note that there were already some existing processes that facilitated the development of the Convention, namely the "Environment for Europe" process and European Union law. For improved implementation and compliance, the Convention required the EU to adopt a new law (the Aarhus regulation) after the acceptance of the European Union as a party in order to enforce the application of the Convention in all the EU’s institutions and bodies.

Notably, there are still challenges in the implementation of the Aarhus convention, especially in eastern Europe and East Asian countries that have ratified it. Some mandates for access to information, public participation, and access to justice have not been in line with governance approaches, e.g. former Soviet Union Republics' limited access to information. Moreover, economic considerations may prevent the sharing of environmental information. Other factors such as lack of transparency, accountability, and openness in environmental decision-making hinder the effective implementation of the Convention.

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31 https://www.asiapacificforum.net/members/
34 UNECE, 1998
35 UNECE, 2014; Zaharchenko & Goldenman, 2004
36 Berthier & Kramer, 2014
37 Zaharchenko & Goldenman, 2004
38 Rua, 2021.
The Escazu Agreement, which focuses on Latin America and the Caribbean, exhibits some similarities with the Aarhus Convention. They both have three procedural rights. The Escazu Agreement highlights the “Safe and healthy enabling environment to exercise rights for environmental and human rights defenders”. The Agreement is more explicit about human rights than the Aarhus convention and the obligation to maintain an enabling environment for the exercise of these rights. This may be attributed to Latin America’s economic reliance on primary industries, such as raw natural materials and commodities, which have resulted in conflicts. The agreement thus benefits more indigenous peoples and human rights defenders on access rights.

The Escazu Agreement was developed after the adoption of the UN Declaration on the Rights of Indigenous Peoples (2007). There was the active participation of governments and public representatives, scholars, and experts to develop the agreement. The United Nations Conference on Sustainable Development (Rio+20) also played an essential role in initiating and supporting the agreement. 39

These international legal and policy frameworks, as well as Multilateral Environmental Agreements (MEAs), can be a benchmark to the promotion of access rights in the Pacific region. It may draw some lessons from these agreements and adopt a regional instrument that fosters the implementation of the five access rights discussed. This process could be undertaken in relation to existing regional instruments such as the Convention for the Protection of Natural Resources and Environment of the South Pacific Region (the Noumea Convention) and its protocols, which bring together many countries in the Pacific region to address environmental destruction issues.

Parties should discuss how to include access rights and what enabling environment is needed to implement and ensure their compliance in the region. The enabling framework would require reforms in policies, regulations, judicial procedures and institutional arrangements. UN bodies have been playing an important role in the implementation and compliance of the MEAs at both regional and national levels. These bodies can provide support and technical assistance to enforce access rights.
SECOND PART: Regional Context and Institutional Arrangements

REGIONAL INSTRUMENTS IN THE PACIFIC

Pacific Regional Environment Programme (SPREP)

The Secretariat of the Pacific Regional Environment Programme (SPREP) is the Pacific region’s primary inter-governmental organization for environment and sustainable development (SPREP). SPREP works to promote cooperation in the South Pacific Region, provide assistance to protect and improve the environment, and ensure sustainable development for present and future generations (Article 2). SPREP assists Parties to the Noumea Convention, Waigani Convention and Apia Convention (see below).

Table 3: Parties to Regional Conventions for which SPREP is Secretariat

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>NOUMEA CONVENTION</th>
<th>WAIGANI CONVENTION</th>
<th>APIA CONVENTION</th>
</tr>
</thead>
<tbody>
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<td>✓</td>
<td>✓</td>
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</tr>
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<td>Vanuatu</td>
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</table>
The Convention for the Protection of Natural Resources and Environment of the South Pacific Region (Noumea Convention)

The Noumea Convention entered into force in 1990 (Convention for the Protection of the Natural Resources and Environment of the South Pacific Region). The convention is the Pacific region’s component of the UNEP Regional Seas Programme. The UNEP Regional Seas Programme has been UNEP’s regional mechanism for the conservation of marine and coastal environments since UNEP’s establishment in 1974.41 Like other regional seas conventions, the Noumea Convention provides the frameworks for Pacific nations to take appropriate measures to address the degradation of oceans, including pollution and sea and land-based sources of pollution. Twelve Pacific countries are party to this convention. The Emergencies Protocol and Dumping Protocol fall under the scope of this convention.

Emergencies Protocol

The Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific is a part of the legal framework for the protection of natural resources defined in the Noumea Convention. The agreement enhances cooperation among the Parties when faced with the threats and effects of pollution incidents. The protocol establishes the frameworks to ensure regional collaboration in the protection of the South Pacific Region from the impact of pollution incidents. This includes sharing of information about officials charged with activities covered by the protocol and about the laws and institutions relating to combating pollution incidents. Communication of information concerning pollution incidents is also in the protocol. Parties to the convention can seek assistance from other parties to deal with a pollution incident via SPREP. It also includes the steps to be taken when responding to a pollution incident.

Dumping Protocol

The Protocol for the Prevention of Pollution of the South Pacific Region by Dumping to the Noumea Convention is the instrument for the contracting to meet the obligations of the Noumea Convention and the IMO Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972). The protocol establishes a framework for the Parties to take all appropriate measures to prevent, reduce and control pollution in the area by dumping. The protocol prohibits the dumping of wastes such as mercury and mercury compounds, crude oil, and wasted and persistent plastics.

It makes provisions for exemptions to this rule through the issuance of permits. Parties are required to communicate incidents of dumping that have occurred or are under suspicion of occurring to other Parties. All Pacific countries except for Australia are a part of Protocols adopted on behalf of the convention. Australia has only ratified the Emergencies Protocol.

The Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (the Waigani Convention)

This Convention entered into force in 2001. It represents the regional implementation of the Basel Convention to regulate the transboundary movements of hazardous wastes. However, the Waigani Convention also covers radioactive wastes, and its territorial coverage includes each Party’s Exclusive Economic Zone (200 nautical miles), while the Basel Convention only extends to the outer boundary of each Party’s sea (12 nautical miles). It is designed to reduce or eliminate transboundary movements of hazardous and radioactive wastes into the region, reduce the production of such wastes in the region and assist Parties to the Convention in the management of the hazardous and radioactive wastes that they generate. Countries should ban the importation of wastes and minimize the production of such wastes. It is an effective protective mechanism to prevent hazardous and radioactive wastes from entering or being dumped in the region.12 Pacific countries have ratified the convention.

The Convention on Conservation of Nature in the South Pacific (Apia Convention)

The Apia Convention entered into force in 1990. It commits the Parties to the Convention to take action to create protected areas to preserve ecosystems and places of scenic, geological, aesthetic, historical, cultural or scientific importance. It also prohibits the taking or killing of fauna unless it is regulated. Parties must agree to maintain registers of endangered flora and fauna and extend protection to these species. It has been noted that many of the obligations under this treaty are also to be found in the Convention on Biological Diversity (1992).
ACCESS RIGHTS SURVEY OF LEGAL AND POLICY LANDSCAPE

Access to Information

The right to information (RTI) means that persons and organizations have a legally recognized right to request and obtain access to information, subject to limited exceptions, from the public, and in some instances, private bodies performing public functions. Individuals also have a right to access and correct all personal information held by public and private bodies about themselves.  

RTI laws provide a legal framework for individuals to request access to documents held by public bodies. Currently, nine countries in the Pacific have enacted or are in the process of enacting an RTI law.  

Table 4. Right to Information Law and Policies in the Pacific

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>LAW / POLICY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cook Islands</td>
<td>Official Information Act 2008</td>
</tr>
<tr>
<td>Federated States of Micronesia</td>
<td>Draft Freedom of Information Bill</td>
</tr>
<tr>
<td>Fiji</td>
<td>Information Act 2018</td>
</tr>
<tr>
<td>Kiribati</td>
<td>Draft Freedom of Information Bill</td>
</tr>
<tr>
<td>Palau</td>
<td>Open Government Act 2014</td>
</tr>
<tr>
<td>Papua New Guinea</td>
<td>Proposed Freedom of Information Bill</td>
</tr>
<tr>
<td>Solomon Islands</td>
<td>Draft Freedom of Information Bill</td>
</tr>
<tr>
<td>Tonga</td>
<td>Information Disclosure Policy 2010</td>
</tr>
<tr>
<td>Vanuatu</td>
<td>Right to Information Act 2016</td>
</tr>
</tbody>
</table>

Vanuatu

In 2013, Vanuatu’s government approved the National Right to Information Policy in 2013, and Vanuatu adopted its Right to Information Act in 2016. In 2011, a National Media Policy and RTI Committee was established by the Office of the Prime Minister following a workshop on Access to Information. The Committee developed a framework that aims to articulate a clear strategic vision and plan for developing information access in Vanuatu. Before the drafting of the Act, Transparency International Vanuatu (TIV) conducted nationwide community consultations to inform citizens of the Act and how it would impact society as a law.  

The National Media Policy and RTI Committee led the RTI policy. Committee members include representatives from the Ministry of Justice, the Office of the Ombudsman, Parliament, the media and civil society, and the Committee secretariat has been provided by the Media Association of Vanuatu (MAV). The work has been supported by the UNDP. The MAV described the RTI as “a ‘home-grown’ RTI – a major development and achievement not only for Vanuatu’s growing media industry but for the Vanuatu government also.”

42 UN-PRAC, (2020). 
43 UN-PRAC, (2020). 
44 International Federation of Journalists, (2016). 
UN-PRAC finds that whilst the RTI prevents denial of access based on a person’s reasons for applying, government officials do take into account the reason when determining whether or not to disclose the information. It also is unclear about the sanctions for public authorities who do not disclose information or underperform. Additionally, the report finds that there is no explicit mention of public authorities having to make lists or registers of documents in their possession.

• Palau

Palau’s Open Government Act (OGA) is the weakest out of the RTI legislation discussed. While the act exists on paper, it does not include any of the key legislative elements required for RTI and to facilitate its implementation. Its weakest point is that there is no requesting procedure for information and has no information on assistance to applicants, transfers and details on the grants of access. There is no procedure for appeals or an oversight body to which appeals are made. Like the other RTIs, it is silent on sanctions. There is no procedure for the appointment of public officers to implement the law, no rhetoric on records management or reporting obligations of agencies. However, in 2020, the Palau Trial Court issued a ruling in support of Palau’s OGA. In a Civil Action Appeal No 18-155, Jackson R. Ngiraingas sued defendant Peleliu Governor Temmy Shmull for violation of the OGA. The Plaintiff had requested information about the cost estimations for certain public projects, information of sections of state public laws documents and records pertaining to state programs and projects, procurement documents for certain buildings, invoices, receipts, bank statements of Peleliu Pan Site and documents and reports on trips taken by the defendant. The judge ruled in favour of the plaintiff, and the defendant was ordered to pay a fine of $500 and make the requested documents available in compliance with OGA (Reklai, 2020).

• Cook Islands

In 2008, the Cook Islands’ Official Information Act came into force. The Cook Islands were the first PIC to enact a freedom of information law. Like Fiji’s RTI, the right to request information is limited to only residents. However, the procedure for requesting information is unclear. Some exceptions are overly broad and vague, for example, at section 8 (2), where information requested may be withheld to protect ministers from “improper harassment”; and at section 18, where requests may be refused if the information requested is “trivial” or will “soon be made available” (Official Information Act).

Additionally, there is a provision for sanctions for the person who undermine the law or for the protection of whistleblowers and persons who release information in good faith. There is no procedure for the appointment of public officers to implement the law, no rhetoric on records management or reporting obligations of agencies.

• Other Pacific Island Countries

Most other Pacific countries have some component in their constitutions enshrining freedom of information. However, different countries provide protections for RTI to varying degrees. For example, Section 12 of the Solomon Islands’ Constitution enshrines freedom of the press and the freedom to receive and communicate ideas and information without interference. Additionally, RTI was specifically included as a stand-alone provision in the 2009 draft revised Constitution, which has not been brought into effect.

Niue does not guarantee freedom of expression or RTI in its constitution. Its National Strategic Plan 2009-2013 contains strategies in the line of good governance, including the establishment of an Ombudsman Office by 2013. However, this has not yet been actioned.

On the other hand, Papua New Guinea does not have any explicit mention of RTI law. However, the constitutional right to official documents has been practised and proved in the past by civil society. For example, members of communities represented by the Centre for Environmental Law and Community Rights Inc. sought documents for Nautilus Minerals Inc., a deep-sea mining company seeking to conduct experimental deep-sea mining in the Bismarck Sea. These documents include the original permit, environment management plan, independent reviews, oceanographic data on the site, and any studies or modelling of the environmental, social, health, cultural, and economic impacts.

The Marshall Islands and Kiribati also do not explicitly protect RTI in their constitutions. While enshrined in most constitutions, countries such as Nauru have laws that could compromise the effectiveness of access to information. Nauru’s Official Information Act of 1976 protects government information rather than facilitating disclosure. It ‘prohibits the unauthorized communication of certain official information and the use of official information for private gain, and for matters related thereto’ (Official Information Act).

46 UN-PRAC, (2020).
Access to Remedies

In the Pacific region, there are some jurisdictions that have effective Environmental Courts and Tribunals (ECTs) that address environmental legal issues, including access to remedies. Pring and Pring categorize ECTs in two groups: ‘operationally dependent’ ECTs that adhere to the State’s administrative bodies and ‘independent’ ECTs that are a body of the court system. There are Courts across the Pacific that provide access to remedies.

· Australia

In Australia, independent environmental courts have been created, such as the Planning and Environment Court (Queensland), the Environment, Resources and Development Court (South Australia), and the Land and Environment Court (New South Wales). The Land and Environment Court of NSW, established in 1979, is generally viewed as one of the most effective courts in the world. However, the appeals court and State Supreme Court review its decision.

· New Zealand

In New Zealand, the New Zealand Environment Court was established as an independent environmental court. Two approaches, namely training the judges and commissioneraires in many scientific and technical topics and visiting the places where the dispute are located (to better reach out to indigenous peoples), are used to increase its effectiveness. However, the decisions are submitted to the court for a final court order. New Zealand also has enacted one of the more advanced legal personality legislations in the World to give people or things the standing to sue in courts. For example, the Maori tribe of Whanganui has received legal recognition for 140 years for the Whanganui River that was owned by their ancestors. As far as non-human beings, the Taranaki volcano, was the first mountain to be given the legal personality in New Zealand.

Environmental legal issues are addressed at the Environment Court and the national human rights institutions. For example, in Fiji, the Human Rights and Anti-Discrimination Commission is able to address the violation of environmental rights and grant remedies.

Potential Rules and Practices of Environmental Courts and Tribunals in the Pacific

The following elements are identified as key for the successful operations of ECTs in the Pacific:

1. Independence. The ECT should be operationally independent, if not free–standing. Judges and adjudicators must also be specialized and independent. They should be proven to be free of undue influence from the authorities.

2. Inclusiveness. It should have a clear mandate for non-state actors to participate in the adjudication process as parties to its compulsory jurisdiction.

3. Relaxed legal standing. To encourage participation and engagement in environmental matters, the legal system must enable claimants to enforce environmental rights through liberalized standing requirements.

4. Provisional measures. Such measures should focus on the prevention of damage, especially if there is a serious chance of significant environmental harm or if there is a continuing threat.

5. Use of experts. Experts and conducive evidentiary rules are essential to decide environmental cases, which often involve complex social, economic and scientific considerations

6. Pacific methods of dispute resolution. ECTs can deploy pacific methods or alternative dispute resolution (ADR) through consultations, mediation, and conciliation.

7. Anti-Strategic Lawsuits Against Public Participation (SLAPPs). “SLAPP” suits are harassment lawsuits filed to intimidate advocates protecting the environment. As such, they must be adequately shielded through anti-SLAPP provisions.
Public Participation in Decision-making

Environmental Impact Assessment (EIA) constitutes a significant opportunity in ensuring that the right to 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”. These guidelines give a detailed overview of EIA processes in the region and provide tools 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 to implement EIA in a holistic manner.

The Noumea Convention (1986) prescribes in Article 16:

Environmental Impact Assessment. The Parties agree to develop and maintain, with the assistance of competent global, regional and subregional organizations 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 minimize harmful impacts on the Convention area.

The 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 understandable 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 training and workshops.

Enabling Environment and Recognition of the Right to a Healthy Environment

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 authorize 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.

54 See Secretariat of the Pacific Regional Environment Programme (SPREP), Coastal Tourism Development in Pacific Island Countries and Territories
55 In the regional EIA Guidelines, the four objectives of stakeholder engagement are: familiarize 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.
56 See http://pnea.sprep.org
Only Fiji recognizes an explicit right to environment in their bill of rights. Palau’s and Papua New Guinea’s constitutions contain directive principles regarding the conservation of the environment. Papua New Guinea’s constitution expressly references both intergenerational and intragenerational equity and responsibility. Vanuatu’s constitution imposes a fundamental duty on each citizen “To safeguard the national wealth, resources and environment in the interests of the present generation and of future generations.”

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Table 5. Status of the right to a healthy environment in the constitutions, legislation, and regional treaties of the Pacific

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>NATIONAL CONSTITUTION</th>
<th>INTERNATIONAL TREATY</th>
<th>NATIONAL LEGISLATION</th>
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</tr>
<tr>
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<tr>
<td>Vanuatu</td>
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</table>

The Asian Development Bank (ADB) has completed a review of climate change litigation which include a volume examining the constitutional and legal frameworks in the Pacific. The following tables map out the constitutional provisions in determining which countries have equivalent constitutional rights and potentially comparative constitutional jurisprudence. The Table highlights explicit and inferred environmental and related rights, obligations, and state directives in the constitutions of the Pacific. The tables also make it easier to discern the environmental and climate dimensions of national constitutions.
<table>
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</tbody>
</table>

**Legend:**

- ✓ Indicated there is an express constitutional right that (i) is found under the bill of rights, and (ii) may not need implementing legislation.
- □ Indicates there is an express directive principle or state policy
- ○ Indicates there has been a court decision inferring the right.
- ▲ Indicates there is an express citizen obligation that the constitution characterizes as fundamental.

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NATIONAL FRAMEWORKS IN SUPPORT OF A REGIONAL FRAMEWORK

Despite the lack of clear constitutional recognition, there still exists a promising environmental law regime in 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 in complying with environmental commitments and is considered to be one of the most active among regional environment programmes in the Asia-Pacific. The environment and human rights framework has been raised as essential for sustainable development in the Pacific. This statement from the Pacific Islands Forum Secretariat encapsulates this position: "...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. ...".62

The environmental law of each country provides the most direct way to protect the environment of each country and regulate the activities that affect it. Such a national framework can help to lay the foundation and preconditions for the formation of a regional convention in the Pacific region.

National Laws and Policies

National environmental legislation in the South Pacific states can help support the formation of regional conventions in the Pacific region, including:

- RTI laws provide a legal framework for individuals to request access to documents held by public bodies. Currently, nine countries in the Pacific have enacted or are in the process of enacting an RTI law.43
  
  1. Separate legislation on topics such as fisheries, forestry, land development and pollution control;
  2. Laws that enforce certain international conventions; and a relatively new and broader environment and planning regulations.

National laws and national initiatives of the Pacific region that can support and act as foundations for a potential region environmental convention include the following examples:

- Fiji Environmental Management Law of 2005

The Fiji Environmental Management Law of 2005 established a National Environmental Committee to oversee the implementation of the national environmental strategy, ensure that the commitments made in regional and international forums are implemented, and discuss international and regional treaties related to the environment. Certain environmental reports and plans need to be prepared, including national environmental status reports, natural resource inventories, and national resource management plans. It also establishes procedures for environmental impact assessment of certain proposed development projects and stipulates certain waste management and pollution control measures, including permit plans, improvement and prohibition notices, and shutdown orders. It provides for the investigation and prosecution of environmental violations and sets up an environmental court to hear appeals based.
The Kiribati Environmental Law of 1999 establishes a comprehensive development control, environmental impact assessment and pollution control system; prevents, controls and monitors pollution; reduces risks to human health and prevents the environment in all practical ways Degradation; protection and conservation of natural resources threatened by human activities. The Minister acts on the recommendations of the cabinet and be responsible for the management and implementation of the law, and may appoint environmental inspectors. Anyone who proposes to develop certain regulations in Kiribati must apply to the Minister. Kiribati’s law establishes a crime in terms of pollution and permits. Discharge of waste in prescribed places and emit noise, odour or electromagnetic radiation may result in a pollution reduction notice or stop notice.

The Samoa Land, Survey and Environment Act of 1989 established the Ministry of Land, Investigation and Environment to advise on all aspects of environmental management and protection; promote the conservation and protection of natural resources and the environment; promote environmental management to other government agencies; control pollution and garbage; make recommendations on national parks and protected areas; and raise people’s awareness of the environment. It also authorizes the Minister to undertake a series of environmental management functions, including evaluating development proposals, monitoring and formulating environmental management guidelines.

The Act establishes an environmental committee to review matters submitted to it by the Minister, including notifying the Minister of development projects that have adverse effects on the environment. It gives the director of land the authority to draft a management plan, which is approved by the Minister. These management plans may involve pollution, waste, national parks, coastal areas, water and water resources, and “Any other matters related to the environment. The Act also prohibits illegal activities related to front beaches, coastal waters, water pollution and littering.

Customary and Traditional Law

In addition to regional and national environmental legislation, national frameworks such as customary and traditional legal systems also play a key role in Pacific natural resource management and biodiversity conservation to support the formation of regional conventions. The Pacific is home to a wide variety of ethnic groups, and as a result, there are a large number of customs and traditional rules that are diverse, scattered, dynamic and largely unwritten. Although each is a unique indigenous ethnic group, traditional societies may not have strong personal rights culture. Through compulsory culture, it keeps its structure and continuity through social groups typically consisting of a family, which members have the obligation of loyalty, support and social protection.

In many countries in the region, extended families are still often made up of one person -- mainly male elders or leaders (usually inherited positions, but sometimes earned through personal merit). Many communities in the region had a hierarchical structure, with chiefs having authority over commoners, men over women, and elders over young people. The basis of identity is usually the family unit or clan. Traditional legal systems are often robust in remote areas.

Throughout the region, land has traditionally been collectively owned. Land directly adjacent to the family may be owned by an individual, but most of the land, including forests, lagoons and coral reefs, remains owned by the clan or clan, with the chief or clan head deciding on the deployment and use of the land for personal use for the benefit of the whole clan or community. In the Pacific, the land is often seen as more than just a basis for survival or a mere factor of production. The traditional land ownership system affects the country’s pursuit of resource exploitation, biodiversity protection and sustainable development. Therefore, for national frameworks to support the regional convention, framers must consider the unwritten customs of different groups.
THIRD PART: Stakeholder Mapping and Recommendations
STAKEHOLDER MAPPING IN THE PACIFIC

Key lessons for the development of a regional access rights agreement can be gained from the development of other regional agreements. One lesson has been to recognize the essential role of networks of champions for the initiative. These champions may include stakeholders from government, civil society, academia, donors, etc. Champions may also come from different backgrounds such as environment, human rights, labour, etc. The Escazú experience highlights the key role of facilitating strategic partnerships by the Secretariat in supporting the process. Countries played a central role, but the process benefited from the strong academic and technical support from the Secretariat. It was also acknowledged that Civil Society Organizations (CSOs) play an essential role in negotiations, and so it was important to strengthen the capacity of CSOs to be engaged through the so-called “public mechanism”. In past experiences, CSOs worked well to develop a clear civil society pressure to advance the process.

In a prospective regional agreement, it is crucial to have a strategic vision, but the growth must come organically from negotiating governments. Proponents and expert advisors need to be cautious on how to drive the process.

INSTITUTIONAL FRAMEWORKS

In the process of forming a potential framework on access rights in the Pacific, institutional arrangements that could be instrumental include the following:

1. Secretariat of the Pacific Community (SPC).
   Initially established in 1947 by Australia, New Zealand, France, and the United States, and reformulated following the independence of members States in the Pacific.

   The SPC targets a wide range of regional issues, with the environment and human rights being important.63 There are 26 member countries and territories in the SPC. Under the SPC are a number of programmes and administrative divisions, including the Human Rights and Social Development (HRSD) Division and the Climate Change and Environmental Sustainability (CCES) Programme.

2. Secretariat of the Pacific Regional Environment Programme (SPREP).
   SPREP is the Pacific region’s primary intergovernmental organization for the environment and sustainable development. SPREP works to promote cooperation in the South Pacific Region and to provide assistance in order to protect and improve the environment and to ensure sustainable development for present and future generations.64

3. The UN has a large number of agencies and programs that focus on and deal with environmental issues.
   For example, the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP), the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and the United Nations Educational, Scientific and South Pacific Islands Cultural Organization (UNESCO) all play a role in issues related to the environment. UNEP and UNDP have regional and national offices in the region and cooperate with many international, regional and local governments and non-governmental organizations.

63 https://www.spc.int/
The initiative should provide the framework for discussion among key stakeholders, especially from civil society. The process should include representatives from a broad number of backgrounds (human rights, environment, labour, environmental defenders, etc.).

Civil society was very involved in the early stages and in the working groups of both Aarhus and Escazú Agreements. In the EU, there is an umbrella process that includes broad outreach to civil society. There are also seats for civil society in the negotiations. A civil society online platform was created as a public mechanism for engagement. A great number of stakeholders from civil society were engaged through the platform (including through the Access Initiative). It also facilitated regular meetings within the sectors and subsectors. Civil society participated in the process on a national scale through the stage of ratification or legislative approval. There is a need to build technical capacity at the national level to engage with civil society more effectively.

4. The World Bank, the Asian Development Bank (ADB), the International Finance Corporation (IFC) and UNDP are the main development partners and project funders in the Pacific Islands.

It attaches great importance to environmental issues, and the ultimate goal is to reduce poverty. These three institutions manage the Global Environment Facility (GEF) established by the international community to provide funding for actions to address major threats to the global environment. GEF funding is the main resource for environmental management activities in the Pacific Islands, especially through its small grant program. Finally, the Asian Development Bank (ADB) is another important funder and partner of environment-related projects in the Pacific Islands.

a. Regional Environment Technical Assistance (RETA) Projects.
ADB has provided technical assistance to develop national environmental management strategies for the Cook Islands, Micronesia, the Marshall Islands and the Solomon Islands

b. NEMS (National Environmental Management Strategy) Project.
UNDP funded the Cook Islands, Micronesia, Kiribati, Marshall Islands, Nauru, Niue, Palau, Solomon Islands, Tokelau, Tonga, Tuvalu and Western Samoa.

National government agencies play a central role in the development and implementation of environmental law in the South Pacific. Aid and development organizations in the South Pacific region often deal with environmental issues in the course of their community development activities. International development organizations are represented by the Australian Council for International Development (ACFID) and New Zealand Council for International Development (CID), and Agence française de développement (AFD).

5. AusAID, NZAID, USAID, AFD and agencies from other countries, particularly Europe.

The EU itself directly provides an important part of foreign aid through initiating and supporting various environment-related projects and programmes.

Ground assistance is usually provided by volunteers embedded in government-funded and supported volunteer programs. National environment ministries, departments and offices often support or complement the activities of foreign aid agencies.

CIVIL SOCIETY FRAMEWORKS

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6. Umbrella NGO group
a. The Pacific Island Association of Non-Governmental Organizations (PIANGO) is a regional secretariat to a network of umbrella organizations or platforms that are registered in 24 countries, territories, and states across the Pacific region.

7. Environmental NGOs.
Many international and regional non-governmental environmental organizations are active in the South Pacific region.

a. The World Conservation Union (IUCN) initiated an Oceania project and recently opened the IUCN Oceania Regional Office in Suva (Fiji) to coordinate its activities in the region. The work of this regional office will be supplemented by the following activities: IUCN Environmental Law Commission (CEL), Environmental Law Center (ELC) and Environmental Law Program (ELP).
b. The World Wide Fund for Nature (WWF)’s regional secretariat in Suva and eight other country and project offices in the region. The Nature Conservancy (TNC) coordinated its Pacific island country plans from its office in Brisbane, Australia, and established four national planning offices on these islands. In addition to these global organizations, regional NGOs, associations, and networks play an important role.

c. The Pacific Resource Center (PCRC) in Suva, Fiji, serves as the secretariat of a network of more than 100 affiliated NGOs and communities, an organization active in sustainability, human rights and related issues in the Pacific region.

8. Environmental law organizations. Environmental law organizations provide a key role in assisting in the development of environmental law regimes in the Pacific.

a. This includes the IUCN Environmental Law Center (ELC) and the global Environmental Law Alliance (E-LAW). E-LAW provides a platform for nonprofit lawyers and scientists, supported by the Permanent Secretariat (E-LAW US) in Eugene, Oregon, USA.

b. The Center for International Environmental Law (CIEL), also based in the United States, is another active partner in the South Pacific.

c. The Environmental Defenders Office (Australia) provides support and assistance in the Solomon Islands and Samoa. It has supported the creation of the Pacific Network on Environmental Lawyers (PaNEL).

d. The London-based Foundation for International Environmental Law and Development (FIELD) has assisted Pacific island nations in negotiating and implementing international environmental agreements.

9. Human rights organizations. Human rights organizations NGOs also play essential roles in promoting international human rights in the Pacific.

a. Asia Pacific Forum network of National Human Rights Institutions. The Asia Pacific Forum is composed of countries complying with the Paris Principles, aiming at supporting the establishment and development of national human rights institutions (NHRIs). The Forum recommended the national human rights institutions recognize the responsibility of different actors involved to protect the environment and to include a range of procedural rights.
As any prospective agreement centres around the rights of the public, the role of the private sector is more limited to a certain extent. However, the private sector may still be involved in cross-sectoral engagements and will be a key stakeholder. Public-private corporations are intimately linked to public administrations, and frequently, it is difficult to disassociate their practices from State actions.

In many cases in the Escazú Agreement negotiations, the private sector was engaged if an initiative concerned them specifically. It is noted that in Colombia and Peru, the mining industry has been involved in seeking to persuade the governments not to support or ratify the Escazú Agreement.

In the context of the Pacific, the role of the Business and Human Rights (BHR) organizations would be important. Organizations such as the Fiji Commerce and Employers Federation and other business organizations should be included in the early stages of the process.

Given the role of mining within the Pacific, bodies such as the Centre for Sustainable Mining at the University of Queensland and other research bodies may be able to assist the process.

Multilateral development banks (MDBs) have followed the process in past agreements, such as the Inter-American Development Bank (IADB) for the Escazú Agreement. They were invited during negotiations and are considered strategic partners. IADB has included considerations from the Escazu Agreement within their environmental, social, governance (ESG) process and criteria. In the Pacific, the IFC, ADB and AIIB play a highly significant role in public and private sector finance. These are key stakeholders for any Pacific agreement.

The United Nations Global Compact also has a non-binding pact to encourage businesses and firms worldwide to adopt sustainable and socially responsible policies in line with Sustainable Development Goals. Additional regional frameworks include ESCAP’s Sustainable Business Network (ESBN), set up to drive businesses in working towards the 2030 Sustainable Agenda and associated Sustainable Development Goals, which hosts platforms such as the Asia-Pacific Business Forum. These examples show that synergies between the private sector and environmental protection already exist in the region.
WAYS FORWARD AND RECOMMENDATIONS

Making a 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 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 Pacific, there is also a pressing need that 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 can be seen as a guide for other developing countries and regions to emulate. 66

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 a technical secretariat and was a key driver to the development of a regional instrument that was to become the Escazú Agreement. 67

The Plan of Action established the creation of two working groups. The first worked on capacity building and cooperation, while the other focused on 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.

Crafting a similar plan in preparation for a regional instrument in Asia-Pacific will likely be helpful in moving forward with the initiative. The region, and particularly the Pacific, may see the regional instrument as a more ‘neutral’ space to discuss environmental issues, which some countries may find too contentious or divisive to participate in otherwise. 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. Furthermore, the regional framework could also provide both government and non-government stakeholders both a backdrop and an avenue wherein to call for national-level legislation addressing environmental issues.

Building on the Virtual Environment

With the advent of the virtual environment in inter-country meetings and discussions brought about by the COVID-19 pandemic, this period presents an opportunity to start the process through virtual dialogues. Virtual meetings that allowed negotiating countries, observers and the public were a very cost-effective means to discuss issues during the development of the Escazú Agreement. It was noted that since the groups for the Action Plan were constituted, 10 of the 12 meetings were conducted virtually. 68

68 See Torres, ibid.
As virtual arrangements have become the new normal due to the pandemic, the prospective agreement within the Pacific region will likely see more virtual discussions, workshops and consultations, at least until it will be safe again to conduct them in person.

**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. Such an arrangement is envisaged to bring about the introduction of national legislation specifically institutionalizing access rights and procedures for environmental redress, protecting environmental defenders and providing for the full exercise of environmental rights.

As a necessary consequence of the regional agreement, the focus needs to be drawn on strengthening national systems to implement the resulting binding obligation. These “compliance mechanisms” can be better denominated as an implementation or assistance mechanism to remove the negative connotation of punitive approaches for non-compliance among signatories. This mechanism principally seeks to help parties fulfil their obligations under the agreement. A cooperative forum through a regional framework is expected to help Pacific Island states meet their obligations under various MEAs by strengthening the institutional rule of law.

**Implementing Right to Information and Public Participation Measures**

Access rights to environmental information and public participation should be a foundational aspect of the regional agreement. Through the compliance and implementation mechanisms, provisions highlighting reporting mechanisms or providing for freedom to environmental information should be promoted to all parties. In doing so, the regional agreement must provide for a framework highlighting the benefits of RTI frameworks vis-à-vis other potential issues such as national security. As a guiding post, the rights of access to information enshrined in the Aarhus Convention and the Escazu Agreement are couched broadly and should be interpreted in a restrictive way, taking into account the public interest served by disclosure.

Furthermore, improved information disclosure and transparency among states in the region is instrumental for trust-building in the regime, which would facilitate regional cooperation and law enforcement. This is envisioned to increase accountability and reduce potential illegal activity, thus improving environmental, social and economic outcomes.

**Increasing Access to Environmental Justice through Courts and Tribunals**

Establishing and supporting environmental courts and tribunals (ECTs) as envisaged by a regional framework is essential to achieve the environmental rule of law by giving litigants access to justice and a venue for effective and speedy dispute resolution. ECTs have been proven to be effective in many national and sub-national jurisdictions and are better able to address the pressing and pervasive environmental problems in the Pacific, such as climate change and marine pollution. ECTs have been considered a potent mechanism to safeguard the environmental rule of law and effective settlement of environmental disputes across different jurisdictions. In the context of the Pacific, the rules and remedies of ECTs should be established on the basis of public participation as well as cultural and social principles, particularly among the indigenous peoples.

[Image Source: https://www.scidev.net/asia-pacific/news/south-pacific-islanders-stay-afloat-despite-lasing-tourists/]

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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 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.

A regional approach to safeguard procedural environmental rights paves the way to necessary reforms in policy, regulation and judicial procedure 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. The Aarhus and Escazu Agreements provide the precedents for setting an enabling environment that could be applied in the Pacific region to ensure the full exercise and safeguarding of environmental rights.

Key Steps Towards a Regional Framework on Access Rights

• Making a case for a Regional Agreement
• Building Consensus
• Building on the Virtual Environment
• Setting up Compliance and Assistance Mechanisms
• Implementing Right to Information and Public Participation Measures
• Focusing on Environmental and Human Rights Defenders


REFERENCES


