



International Trend of Access to Justice in Environmental Matters and EIA Litigation

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Why is EIA important?

- 1 Basic tool to reduce as much as possible the environmental load
- 2 one of the most important opportunities for public participation in many countries



Trend in Asia

- 1 Many countries have EIA system which requires PP.
- 2 Guidelines on Public Participation in Environmental Impact Assessment (EIA) in the Mekong Region (2017)
- 3 PP in EIA is relatively similar at first sight, in terms of detail, it varies from country to country.
- 4 Some common and significant challenges, such as insufficient public notice and improper consideration of public comments.
- 5 Access to justice has contributed to ensuring that the obligations of EIA law are attained and public concerned exercises rights.



Research Topic

Comparative study of seven Asian countries: China, India, Indonesia, Japan, Philippines, Taiwan and Thailand

1 To develop the PP indicator and the A2J indicator in EIA

2 To evaluate the current situation of each country based on the indicators



Research Objectives

- 1 Sharing the good practices
- 2 Discussing what are the current challenges and how to overcome them
- 3 Contributing to developing the better indicators for Goal 16 of SDGs



What is Green Access project II?

<http://greenaccess.law.osaka-u.ac.jp/>

- To investigate application of Principle 10 in different regions in comparison with Asia
- To promote environmental democracy

Core members

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Special thanks to national collaborators,
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International Collaborators for EIA survey

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- Indonesia: Rika Fajrini,
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- Taiwan: Thomas Shun-Kuei CHAN,
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- Thailand: Chacrit Sitdhiwej, Thammasat University



International Standards Developments on P10

1998

Aarhus Convention

47 Parties

2010

Bali Guidelines

2018

New regional
agreement in ECLAC





How to make indicators?

1 Legal indicators based on Principle 10 and Aarhus Convention

- Main indicators + Sub-indicators

2 Referred to EDI (Environmental Democracy Index), but more focused on EIA

3 Referred also to the findings of Aarhus Compliance Committee, ECJ case law and Commission Notice on access to justice in environmental matters (2017)



Main indicators for PP in EIA

- 1 Object of EIA
- 2 Range of participants
- 3 **Identification** of stakeholders
- 4 Adequate **notice**
- 5 Timing: **Early** participation + reasonable timeframe
- 6 PP methods
 - Organizer and rule on public hearing
- 7 **Informed** participation
- 8 **Due consideration**
- 9 **Publication of decision and its reasoning**



Opportunities to participate?

- 1 Required in all 7 countries by laws and/or regulations
- 2 Early participation?
 - No PP at screening in 5 countries
 - **Taiwan: 4 times for Phase I EIA**
 - Philippines: Encouraged to be initiated early and in all stages
 - Japan: Primary Environmental Impact Consideration obligation to strive to initiate PP
- * New developments
 - China: revised in 2017
 - Thailand: new legislation soon in 2018



How many times?

1 ~ 8 times

1 One time:

- India
- Thailand: at least one time, more at discretion

2 Two times

- Indonesia (scoping + EIS)
- China (construction PJ) (draft EIS + EIS)

3 Three times

- Japan (before scoping + scoping + draft EIS)

4 4 times for Phase I + II respectively=8: Taiwan

5 All stages: Philippines (encourage)



Range of Participants

Type A Public: Japan, Thailand

Type B Affected people: India, Philippines

Type C Public + affected people/public concerned
China, Indonesia, Taiwan

1 Wide meaning of public and affected people
including community, environmentalist and NGOs

2 Three countries distinguish public and affected
people (different way to participate)

China: Selection of representative for public hearing

Indonesia: Affected community has priority.



Methods for PP

1 Submission in writing

- 6 countries except for Philippines

2 Public hearing: 6 countries

- Japan: only explanation meeting

Public hearing based on ordinance in big cities

- China: exhibition

*Obligation for minutes/record: 6 countries

Video record: India

3 Participation of community as committee member

- Indonesia: EIA Appraisal Committee



Due consideration of opinions

1 Publication of submitted opinions
and/or summary?

China, Japan, Taiwan, Thailand

2 Publication of result of consideration?

China, India, Taiwan, Thailand

* Japan: feedback only from project operator

3 Publication of decision?

India, Indonesia, Taiwan



Indicators for Access to Justice

- 1 **Wide/liberal/active legal standing**
- 2 Scope of judicial review
 - (1) Possible grounds of judicial review
 - (2) **Intensity**
- 3 Effective remedies
 - (1) Remedies in case of procedural defects in EIA
 - (2) Suspension, revocation of unlawful decision
 - (3) Remedies in case of omission
 - (4) **Interim measures**
- 4 Costs
 - (1) Not prohibitive
 - (2) Legal aid
- 5 Timelines and efficiency of procedures
- 6 **Practical information**



Legal standing

- 1 Land owners: 6 countries
- 2 Local residents other in the affected area: all 7 countries
- 3 **Community**: 4 countries
- 4 **Local government**: at least 4 countries
- 5 **ENGO**: All except Japan



Public interest litigation

1 Public interest litigation

Admitted in 6 countries except for Japan

- * Wide possibility for community and ENGOs in **India, Indonesia, Philippines**
- * Citizen's suit, writ of Kalikasan, suo moto

2 Japan

- legally-protected interest
legally protected interest must be concrete and individualistic (case law).



Early access to justice

1 Possibility to challenge SEA

- Indonesia, Philippines

2 Possibility to challenge any **action** **during EIA**

- Philippines
- Indonesia: possible to challenge at
EIA Appraisal Forum



Types of litigation

1 Typical

- (1) Revocation/injunction of admin. decision
- (2) Injunction of public works and/or project
- (3) Claim for damages

*Claim for ecological damage:
possible in Southeast Asian countries

2 Rare

- Action for re-implementation of EIA
possible in Philippines and Thailand
- * Action for seeking implementation of EIA is
admitted in more than half countries surveyed.

3 Provisional relief is admitted in all countries.

Philippines: Temporary Environmental protection Order



Cost and scope

1 Cost

(1) Looser pays principle is dominant.

- No fee for administrative case: Thailand

(2) Financial support for vulnerable people:
all countries

2 Scope of judicial review

- To challenge substantive and procedural legality:
possible in all countries
- Difficult to compare intense of review
Further survey about concrete cases is
necessary.



Review court and principles

1 Review organization

(1) Environmental court or bench

- 5 countries
- Japan and Taiwan: Specialized ADR system
- Utilization of experts: in all countries

(2) Ombudsman: in more than half countries

2 Special principle / standard

(1) Sustainable development: India, Thailand etc.

(2) Precautionary principle: India, Indonesia, Philippines etc.

(3) Strict liability: India, Japan (partially), Thailand etc.

(4) PPP: India, Indonesia etc.



Easy access to Justice

1 Use of local language and/or several languages

All countries except Japan

2 **On-site hearing**: Indonesia, Thailand

3 Teleconference: Indonesia, Thailand

4 Practical information?

5 Capacity building?



Recent challenge

- Obvious increase of **SLAPP** plus various harassment
- **How to protect environmental defender?**



Remarkable!!

Article 9 of new ECLAC PP Agreement

Similar provision in Indonesia

Anti-SLAPP clause in Philippines