PART III

Association of Southeast Asian Nations (ASEAN)

9. Introduction to ASEAN regional environmental law

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1. INTRODUCTION

This chapter explores the legal, institutional and policy framework that underpins environmental management and sustainable development in Southeast Asia. It focuses particularly on the work of Association of Southeast Asian Nations (ASEAN). ASEAN is seen as the main regional driver of environmental policy, as well as an important platform for interaction with global institutions. The chapter also looks at the Mekong region, of which five ASEAN member states are part. It also briefly discusses the main environmental legislation and policy of the member countries. It will be seen that there are significant differences in regulatory frameworks from one jurisdiction to another. The principle or concept of sustainable development, which is a focus of this chapter, has permeated regional policy, as evidenced in the various regional legal instruments, and non-legally binding charters and declarations that have been generated in the past four decades since ASEAN was established. However, the substantive incorporation of sustainable development law and policy at a national level varies from one jurisdiction to another, despite the regional instruments that promote it. It cannot yet be said to have acquired a normative content in the region, either at the level of legislative development or in judicial decisions.[1] In passing, we can note that the notion of sustainability is ethically more satisfactory than the

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[1] Francesco Francioni, maintains that sustainable development 'in spite of its initial indeterminacy, is increasingly acquiring a normative content', as evidenced in recent arbitral and adjudicatory practice: 'Realism, Utopia and the Future of International Environmental Law', in Antonio Cassese (ed.), *Realizing Utopia: the Future of International Law* (Oxford University Press 2012) at 446.

concept of sustainable development, but the latter term is the one that has taken hold in most policy documents and legislative enactments that deal with it.[2]

The ASEAN region is host to high rates of endemic biodiversity,[3] unacceptable levels of deforestation,[4] high population growth in some countries, increasing wealth generation, high production rates and consumer consumption with a concomitant rise in natural resource use and energy demand, dangerous levels of transboundary pollution, depletion of marine fisheries and the potentially devastating impacts of climate change, particularly on islands and deltas. These factors, in combination, form the basis for analysis of legislative and policy initiatives in the context of sustainable development.

2. A BRIEF HISTORY OF ASEAN

ASEAN was established in 1967, originally constituted by five countries: Indonesia, Malaysia, the Philippines, Singapore and Thailand. In 1984 Brunei joined the grouping, followed by Vietnam in 1995, Laos and

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While this is demonstrably true in other regions, it is not yet the case in the ASEAN region.

[2] See generally, Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008); R.E. Kim, and Klaus Bosselmann, K. 2013, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements', *Transnational Environmental Law*, 2(2): 285-309.

[3] 'ASEAN is biologically rich, with over 20 percent of all known species of plants, animals and marine organisms found in the region. The region is also home to three mega-diverse countries – Indonesia, Malaysia and the Philippines. The latter, for instance, holds the world's fifth highest number of endemic mammals and birds. As of 2008, Malaysia, Indonesia and the Philippines each have about 1,000 recorded endangered species'; see *ASEAN Cooperation on Environment*, at http://environment.asean.org/asean-working-group-on-nature-conservation-and-biodiversity/

[4] The rate of deforestation is perhaps worst in Indonesia; see Belinda Arunarwati Margono, Peter V Potapov, Svetlana Turubanova, Fred Stolle and Matthew C Hansen 'Primary Forest Cover Loss in Indonesia over 2000–2012' *Nature Climate Change*, at http://www.nature.com/nclimate/journal/v4/n8/full/nclimate2277.html#auth-1; see also Samuel Oakford, 'Indonesia Is Killing the Planet for Palm Oil', *Vice News*, July 4, 2014 at https://news.vice.com/article/indonesia-is-killing-the-planet-for-palm-oil

Myanmar/Burma in 1997 and Cambodia in 1999.[5] In the future, it is expected that the newest country in the region, Timor-Leste, will also join ASEAN.[6] The regional organisation came into existence during a period of continuing political unrest and armed conflict in various parts of the region. Globally the environmental debate was still in its infancy, with the 1972 Stockholm Conference on the Human Environment in the early planning stages. The main focus was on maintaining and strengthening peace, security and stability in the region. The 1967 ASEAN Declaration,[7] as the constituent document of the organization, did not provide it with any legal personality. It represented an important, but nevertheless informal political arrangement, and which set the tenor of what became a relatively loose legal approach to the manner in which the organization conducted its affairs for 40 years.[8] The 1967 Declaration reflects a politically careful regional approach across the organization, the flavour of which is reflected in the following paragraphs of its preamble:

> Mindful of the existence of mutual interests and common problems among countries of South-East Asia and convinced of the need to strengthen further the existing bonds of regional solidarity and cooperation;
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> Desiring to establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region;
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> Conscious that in an increasingly interdependent world, the cherished ideals of peace, freedom, social justice and economic well-being are best attained by fostering good understanding, good neighbourliness and meaningful cooperation among the countries of the region already bound together by ties of history and culture;

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[5] The ASEAN Secretariat is based in Jakarta; see http://www.asean.org/asean/asean-secretariat

[6] See Asian Development Bank, 'Timor Leste Prepares for Benefits of ASEAN Membership', at http://dangcongsan.vn/cpv/Modules/News_English/News_Detail_E.aspx?CN_ID=651106&CO_ID=30128; for the sake of completeness, an outline of Timor Leste's environmental law is nevertheless included in section 11.10 below.

[7] ASEAN Declaration 1967 (Bangkok Declaration) at http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration

[8] The 2007 ASEAN Charter (http://www.asean.org/archive/publications/ASEAN-Charter.pdf) set the organisation on a firm legal footing; see further section 3 below.

> Considering that the countries of South-East Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples;
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> Affirming that all foreign bases are temporary and remain only with the expressed concurrence of the countries concerned and are not intended to be used directly or indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development …[9]

While ASEAN necessarily deals with a wide range of regional political and economic issues, as manifested in the 1967 Declaration, it has nevertheless invested a great deal of time and effort in environmental management, and has developed a long-lasting institutional framework for cooperation between its member states.

Thus despite the main focus being on peace, security and stability over the life of ASEAN, there has also been a long-term political commitment to environmental management across the ASEAN region. Successive meetings of ASEAN Ministers have clearly recognized ASEAN's role in addressing regional environmental issues. The earliest environmental initiative, the ASEAN Sub-regional Environment Programme, developed in cooperation with the United Nations Environment Programme, covered the years 1978 to 1982 and set the framework for regional cooperation in three phases. Subsequent programmes and strategic plans of action have been formulated on a regular basis and are administered by the ASEAN Senior Officials on the Environment (ASOEN). ASOEN, established in 1990, includes officials from each ASEAN country. The group meets annually to discuss major environmental and natural resource issues in the region. Working groups on various environmental topics in the ASEAN region continue to interact. It produces regular ASEAN State of the Environment Reports[10] and hosts the ASEAN Regional Center for Biodiversity Conservation.[11]

Despite ASEAN's environmental cooperation arrangements, and with the increased emphasis on the rule of law, as set out in the 2007 ASEAN

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[9] Preamble, ASEAN Declaration 1967, at http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration

[10] The latest Report was released in 2009; see http://www.asean.org/resources/publications/asean-publications/item/fourth-asean-state-of-the-environment-report-2009-2

[11] http://www.arcbc.org.ph

Charter, there is as yet no over-arching binding legal agreement to underpin its regional environmental management. The conflict between the need to maintain a strong sense of sovereignty and the need to cooperate on a regional basis and to promote harmony has meant that regional cooperative approaches have resulted in only a few legally binding instruments being agreed among member countries. This conflict has also exposed a number of fundamental difficulties in relation to the management of shared natural resources in the region. These difficulties have been particularly manifested in the issue of transboundary air pollution, and the need to address the reduction of incidence and effect of forest fires in Indonesia. Problems with shared natural resource issues are also evident in the Mekong region, especially with regard to the development of hydropower dams on the tributaries and the mainstream of the Mekong River.

On the positive side, a range of non-legally binding instruments has been generated in the last three decades, providing an environmental policy framework for the region.[12] While the arrangements are not legally robust, they present a rather more coherent and environmental policy framework in comparison with the Asian sub-regions of South Asia and Northeast Asia)[13]. On the other hand, the neighbouring region of the Pacific hosts a vigorous institutional framework with well-developed region-wide policies administered by the Pacific Regional Environment Programme.[14]

3. RECENT REGIONAL ENVIRONMENTAL INITIATIVES

In the last few years there has been a number of significant political and policy shifts in the ASEAN region. The ASEAN 2020 Vision, agreed in 1997,[15] envisioned 'a clean and green ASEAN with fully established mechanisms for sustainable development to ensure the protection of the

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[12] Apichai Sunchindah 'The ASEAN Approach to Regional Environmental Management', http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan011412.pdf

[13] See further, Ben Boer, 'Environmental Law and Human Rights in the Asia-Pacific', (Ch. 5) in Ben Boer (ed.), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015).

[14] See Pacific Regional Environment Programme, at http://www.sprep.org

[15] ASEAN 2020 Vision at: http://www.asean.org/news/item/asean-vision-2020

region's environment, the sustainability of its natural resources, and the high quality of life of its peoples' (Preamble). The ASEAN Charter of 2007[16] introduced for the first time a legal and institutional framework for ASEAN, and committed it to adherence to 'the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms'. It set out one of the purposes of ASEAN as the promotion of 'sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples' (Article 9). The Roadmap for an ASEAN Community 2009–2015 was also introduced.[17]

While the focus on security, peace and economic cooperation characteristic of the 1967 ASEAN Declaration was largely maintained, the ASEAN Socio-Cultural Community Blueprint, developed as part of the ASEAN Community approach emphasizes the ASEAN commitment to sustainability concepts. The Blueprint states:

> 30. ASEAN shall work towards achieving sustainable development as well as promoting clean and green environment by protecting the natural resource base for economic and social development including the sustainable management and conservation of soil, water, mineral, energy, biodiversity, forest, coastal and marine resources as well as the improvement in water and air quality for the ASEAN region. ASEAN will actively participate in global efforts towards addressing global environmental challenges, including climate change and the ozone layer protection, as well as developing and adapting environmentally-sound technology for development needs and environmental sustainability.[18]

4. SOVEREIGNTY AND NON-INTERFERENCE

One of the challenges faced by ASEAN and its member countries is how to resolve the apparently inherent conflicts between the need to act collectively to address common and national regional challenges on the one hand, and to maintain the principle of non-interference with respect to sovereignty on the other.

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[16] See note 8, above.

[17] ASEAN 2009, Roadmap for an ASEAN Community 2009–2015, at http://www.asean.org/resources/publications/asean-publications/item/roadmap-for-an-asean-community-2009-2015

[18] Article 30, ASEAN Socio-Cultural Community Blueprint, at http://www.asean.org/archive/5187-19.pdf

While ASEAN is generally seen as a successful regional organization in the developing world, it manifests some severe limitations because of its generally strict adherence to the concept of sovereignty and non-interference with domestic policy of individual ASEAN nations or the 'ASEAN Way'[19] and described as follows:

> Regional cooperation to build stable relations in Southeast Asia has become known as the 'ASEAN Way,' a collaborative approach emphasizing three fundamental standards:
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> - Non-interference or non-intervention in other member states' domestic affairs, as underscored in the United Nations Charter, Article 2(7);
> - Consensus building and cooperative programs rather than legally binding treaties (but in an exceptional situation, a binding agreement may be possible);
> - Preference for national implementation of programs rather than reliance on a strong region-wide bureaucracy.[20]

These concepts are said to arise from the historical experience of member states with Western and Japanese colonialism, in particular the need to counteract the vestiges of the exercise of blunt power by previously dominant colonial states, as well as with the concerns of ASEAN states with regard to interference in each other's domestic affairs prior to the formation of ASEAN.[21] They also include the tradition of solving problems by negotiation and consensus decision-making, referred to as

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[19] See Helen ES Nesadurai, 'Imagining the ASEAN Community', address to the University of Sydney Southeast Asia Studies Centre, available at http://freepdfs.net/imagining-the-asean-community-university-of-sydney/ace476a87480dc5b2ae2ba1fdfb54db8/; see also Laeley Nurhidaya, Zada Lipmann and Shawcat Alam, and 'Regional Environmental Governance: An Evaluation of the ASEAN Legal Framework for Addressing Transboundary Haze Pollution', *Australian Journal of Asian Law* (2014) 15(1) at 17.

[20] Koh Kheng-Lian and Nicholas N Robinson, 'Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model', in Daniel C Esty and Maria H Ivanova (eds), *Global Environmental Governance: Options & Opportunities* (Yale Center for Environmental Law & Policy, 2002) available at http://environment.research.yale.edu/publication-series/law_and_policy/782

[21] Shaun Narine, 'Asia, ASEAN and the Question of Sovereignty: The Persistence of Non-intervention in the Asia-Pacific', in Mark Beeson and Richard Stubbs (eds), *Routledge Handbook of Asian Regionalism* (Routledge, 2012) at 155.

'*musjawarah dan mufakat*'.[22] The concepts are inherent in the fourth preambular paragraph of the 2007 ASEAN Charter:

> Considering that the countries of Southeast Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples.[23]

Thus despite the commitment in ASEAN's Vision 2020 to encourage 'abiding respect for justice and the "rule of law"',[24] the reality for many ASEAN countries has been that while lip-service is paid to the 'rule of law', its actual application is less than robust at both the regional and national levels. Nesadurai argues that:

> ASEAN was, and remains, essentially a regional organization committed to the Westphalian principles of state sovereignty and non-interference. Despite acknowledging the need to address new challenges in the post-Cold War era that require some degree of intruding into countries' internal affairs, despite ASEAN's own move in embracing liberal principles of democracy, human rights and rule of law in the ASEAN Charter, the principles of sovereignty and non-interference in the internal affairs of states remain central to the design of regional governance as do the 'ASEAN Way' procedural norms that prescribe non-confrontational negotiating styles, closed door consultations, and the practice of consensus. Although these norms have been relaxed to differing extents in some areas of cooperation, particularly in the area of economic integration, ASEAN member states continue to uphold them as a set of foundational ASEAN norms against which departures are carefully considered, and usually resisted. Member states value these norms, which have helped them forge unity among a group of very diverse states … By committing ASEAN members to respect the domestic autonomy of other members, these norms create shared expectations that none will be pressured to adopt positions and take actions that may be detrimental to domestic interests, including that of domestic regime security, still a core desideratum of all ASEAN members. Although these norms limit the effectiveness of ASEAN regional governance in some areas of cooperation, they are nonetheless embraced by national governments who value these other political benefits that come with adhering to the sovereignty/non-interference norms.[25]

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[22] Koh Kheng-Lian, 'The Role of ASEAN in Shaping Regional Environmental Protection', in P Hirsch (ed.) *Routledge Handbook on Environment of Southeast Asia* (forthcoming 2015).

[23] See n 16, above.

[24] See n 15, above.

[25] See n 19, above.

The formulation of regional environmental instruments thus often appears to result in the 'lowest common denominator' being put forward. The negotiation of environmental policy and law, as expressed in ASEAN official declarations and statements, as well as in the legally binding agreements mentioned below, may simply reflect the 'politics of the possible'. The commitment to the effective implementation of obligations and guidelines also varies, with some nations putting solid legal frameworks in place, while others find this more difficult, whether because of domestic politics or for lack of institutional capacity.

Nevertheless, it must be remembered that the 'soft law' approach is often used in the development of international law, and this is particularly so in the context of development of international and regional environmental law. As many scholars have pointed out, it is considerably easier to negotiate a soft law text than one that involves formal treaty negotiations and contains solid legal obligations. Often such texts are expected to, and do, become the basis of hard law instruments.[26]

In summary, many ASEAN countries are willing to engage in the negotiation and development of *international* environmental legal instruments, but there is less inclination to promote *regional* legally binding environmental instruments.

5. NON-LEGALLY BINDING INSTRUMENTS IN ASEAN

In light of the above analysis, it is hardly surprising that from the earliest period that ASEAN started to pay attention to the environment, it has issued a wide range of declarations, accords, resolutions and charters and statements relating to environmental issues, none of which are legally binding. These instruments are commonly prepared and published as a result of regional meetings of environment ministers and relevant officials.

The main instruments are:[27]

- Manila Declaration on the ASEAN Environment 1981
- ASEAN Declaration on Heritage Parks and Reserves 1984

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[26] See, for example, Donald A Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge, 2011) at 63–64.

[27] Complete records of the environmental instruments can be found in Koh Kheng-Lian 2009, *ASEAN Environmental Law, Policy and Governance, Selected Documents*, Volume I, 2009 and Volume II.

- Bangkok Declaration on the ASEAN Environment 1984
- Jakarta Resolution on Sustainable Development 1987
- Manila Declaration of 1987
- Kuala Lumpur Accord on the Environment and Development 1990
- Singapore Resolution on Environment and Development and its Annex, the ASEAN Common Stand on the United Nations Conference on Environment and Development 1992
- Bandar Seri Begawan Resolution on Environment and Development 1994
- Kota Kinabalu Statement on the Environment 2000
- Yangon Resolution on Sustainable Development, 2003
- Cebu Resolution on Sustainable Development 2006
- ASEAN Declaration on Environmental Sustainability 2007
- Singapore Declaration on Climate Change, Energy and the Environment 2007
- Joint Declaration on the Attainment of the Millennium Development Goals 2009
- Bangkok Declaration on ASEAN Environmental Cooperation 2012.

While these instruments can, at most, be characterized as 'soft law', they nevertheless constitute a formal record of achievement and awareness-building in the region, and act a basis for the setting of national policy on a voluntary basis. In this sense, they are evidence of an increasingly integrated approach to the development of environmental policy and regional environmental management. Several of the instruments explicitly include sustainable development in their titles, while others (and in particular the 2012 Bangkok Declaration listed above) include the concept as an inherent part of their provisions However, there is considerable variation in the extent to which sustainable development is taken as a solid imperative with substantive aims leading to positive environmental outcomes at national level.

Because of their largely aspirational quality, the influence of these instruments at the regional and national level is not as great as might be expected, as there is neither a specific framework for implementation of the instruments, nor any rigorous monitoring or reporting process or follow-up as to compliance. By way of illustration, the objective of the first document, the 1981 Manila Declaration on the ASEAN Environment, is:

> To ensure the protection of the ASEAN environment and the sustainability of its natural resources so that it can sustain continued development with the main aim of eradicating poverty and attaining the highest possible quality of life for the people of the ASEAN countries.

The instrumental language of this paragraph is important to note, notwithstanding the fact that the Declaration is an early one. The aspiration to ensure protection of the environment and natural resource sustainability is subservient to sustaining 'continued development'. This linguistic obfuscation is not untypical of subsequent documents.

Article 1of 1981 Declaration contains policy guidelines that encourage the enactment and enforcement of environmental protection measures in the ASEAN countries. It also recommended the establishment of an ASEAN Committee on the Environment. The early signs were thus positive in terms of building a strong framework for environmental conservation, with some prospect of legislative action at a national level.

The subsequent instruments have continued to emphasize the idea of regional, cooperative and harmonized approaches to environmental and resource conservation policy. From the point of view of sustainable development, the ASEAN Declaration on Environmental Sustainability of 2007 is perhaps the most pertinent to canvass here. The Declaration is divided into three parts: Environmental Protection and Management, Responding to Climate Change, and Conservation of Natural Resources. It recognized the 'mounting global concern over the environment and ASEAN's obligations to its people in fulfilling the aims of the World Summit on Sustainable Development (WSSD) and to achieve the UN Millennium Development Goals (MDGs), in particular to ensure environmental sustainability in the context of sustainable development' and lists the efforts to address global and regional environmental issues through formal instruments as well as two previous ASEAN declarations on sustainable development.[28] The Declaration emphasizes implementation and commitment to 'multilateral and regional sustainable development and environmental agreements, so as to achieve the common goal of a clean and green ASEAN'. However, no particular mechanisms are mentioned to actually achieve all of the stated aims.

Thus, while such instruments have an influence in policy development at the national level, specific implementation through hard legal obligations is more difficult to find. Taking the 2012 Bangkok Resolution on ASEAN Environmental Cooperation as the most recent example of the genre, reference is made in the preamble to the ASEAN Charter and the Roadmap for an ASEAN Community and to the Socio-Cultural Community; it also reaffirms commitments to implementation of the most significant global MEAs, and to the outcome of the Rio+20 United

[28] Yangon Resolution on Sustainable Development, 2003 and Cebu Resolution on Sustainable Development 2006.

Nations Conference on Sustainable Development. It further acknowledges the significance of ASEAN's role in addressing climate change, biodiversity conservation and transboundary pollution. There then follow 26 paragraphs whereby the ASEAN nations agree to a wide range of endeavours. The use of non-mandatory language in these provisions indicates the typically weak nature of the Resolution. The following selected preambular paragraphs illustrate the point. In summary the ASEAN Ministers undertake to:

- *continue the efforts* to establish a balance among economic growth, social development and environmental sustainability
- *work* to eliminate transboundary pollution
- *encourage* Member States to address climate change in line with their respective policies
- *enhance efforts* to protect, conserve and sustainably utilise ASEAN's biodiversity
- *intensify* regional cooperation to enhance capacity to fully implement MEA commitments
- *promote* mainstreaming of sustainable development,
- *promote* sustainable water resources management
- *promote* sustainable forest management
- *enhance* coordination and collaboration on sharing and exchanging and knowledge on sustainable cities
- *promote* sustainable development through environmental education and public participation [emphasis added].

The soft character of these paragraphs and the lack of substantive environmental guidelines might have been appropriate several decades ago when environmental awareness was at a low level, but today the approach is rather at odds with the seriousness of the issues facing the region, and its constituent countries.

It is also pertinent to mention in passing the 2012 ASEAN Human Rights Declaration in the context of non-legally binding instruments in ASEAN pertaining to sustainable development. Article 28 of the Declaration relates to a range of human rights, including food, shelter, water and sustainable development, and includes specific reference to the concept in Article 28(f), which recognizes the right to a safe, clean and sustainable environment.[29]

[29] See further, Ben Boer, 'Environmental Law and Human Rights in the Asia-Pacific', (Ch. 5) in Ben Boer (ed.), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2014).

6. IMPLEMENTATION OF GLOBAL ENVIRONMENTAL AGREEMENTS

ASEAN, along with many individual Southeast Asian countries has been actively involved in the negotiation of international legal instruments (MEAs) and documents over the past few decades. These include the Rio Declaration on Environment and Development and Agenda 21, the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol, the 1971 Ramsar Convention on Wetlands of International Importance, the 1972 World Heritage Convention, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1979 Convention on Migratory Species, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the 1992 Framework Convention on Climate Change and the 1992 Convention on Biological Diversity and its 2010 Nagoya Protocol on Access and Benefit-Sharing. Most ASEAN jurisdictions have ratified these MEAs[30] with the exception of Brunei Darussalam, and Timor Leste (which, as noted, is not yet an ASEAN member). The individual ASEAN nations generally send representatives to the regular Meetings of the Parties, and, where required, most governments nominate focal points or similar representatives in order to interact with the Convention Secretariats.

Despite the fact that many of the Southeast Asian countries have ratified the above-mentioned MEAs, the legislation on environmental matters in most of the countries does not specifically reflect those obligations and, as a general rule, the instruments are not adequately implemented.

7. LEGALLY BINDING REGIONAL INSTRUMENTS

In contrast to the globally applicable MEAs, there appears to be a reluctance on the part of some countries to engage in the negotiation of regional binding legal instruments in the environmental field, let alone to accede to and ratify them. While this situation might be considered less than optimal, there are nevertheless several instruments that, if in force,

[30] See ASEAN Cooperation on Global Environmental Issues, at http://environment.asean.org/asean-working-group-on-multilateral-environmental-agreements-awgmea/, and UNESCO Ratified Conventions, Asia and the Pacific, available at http://portal.unesco.org/en/ev.php-URL_ID=23045&URL_DO=DO_TOPIC&URL_SECTION=201.html

are intended to be legally binding. These are the 1985 Agreement on the Conservation of Nature and Natural Resources, the 1995 South East Asia Nuclear-Weapon Free Zone Treaty and the 2002 ASEAN Agreement on Transboundary Haze Pollution, and a sub-regional instrument for four Mekong countries, the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin. Each of these is briefly explored here.

7.1 ASEAN Agreement on the Conservation of Nature and Natural Resources

ASEAN, with the assistance of the IUCN Environmental Law Centre in Germany[31], prepared the ASEAN Agreement on the Conservation of Nature and Natural Resources in 1985. However, the agreement does not yet have a sufficient number of ratifications for it to come into effect.[32] The six countries of ASEAN as at 1985 drew up the ASEAN Agreement (Brunei Darussalam, Indonesia, Malaysia, Thailand, the Philippines and Singapore). The Agreement requires ratification by the six original parties, but to date it has been ratified only by Thailand, Indonesia and the Philippines and is thus not in force. The Agreement was far-sighted for its time, and can be regarded in some respects as a regional precursor to the 1992 Convention on Biological Diversity and the Rio Declaration on Environment and Development. It represents a comprehensive approach to the conservation of the environment and natural resources in Southeast Asia, as evidenced by its far-reaching Article 1:

> *Fundamental Principle*
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> 1. The Contracting Parties, within the framework of their respective national laws, undertake to adopt singly, or where necessary and appropriate through concerted action, the measures necessary to maintain essential ecological processes and life-support systems, to preserve genetic diversity, and to ensure

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[31] See Françoise Burhenne-Guilmin, "Biodiversity & international law: Historical Perspectives & Present Challenges: Where do we come from, Where are we going" in *Biodiversity, Conservation, Law + Livelihoods,* IUCN Academy of Environmental Law Research Studies, 26-42.

[32] For discussion of reasons why the Agreement has not come into effect see K L Koh, 'Asian Environmental Protection in Natural Resources and Sustainable Development: Convergence Versus Divergence?', *Macquarie Journal of International and Comparative Environmental Law* (2007) 4: 43.

> the sustainable utilization of harvested natural resources under their jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development.
>
> 2. To this end they shall develop national conservation strategies, and shall co-ordinate such strategies within the framework of a conservation strategy for the Region.

In terms of the notion of sustainable development, it is significant to note here that although the Agreement has never come into force, this was apparently the first time anywhere in the world that a legal instrument included the phrase.[33]

Article 2 of the Agreement obliges parties to take all necessary measures, within the framework of their respective national laws, to ensure that conservation and management of natural resources are treated as an integral part of development planning at all stages and at all levels, and in the formulation of development plans, give as full consideration to ecological factors as to economic and social ones. This and subsequent provisions are certainly expressed in legally robust terms. However, there is little evidence that it has had any direct effect on the preparation and implementation of environmental laws in the region at a national level. Nevertheless, given the strength and breadth of its provisions, it still has the potential to provide a substantive framework for the development of national environmental legislation and policy.[34]

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[33] The concepts of sustainable development and sustainability of course have ancient roots, as traced by Vice President Weeramantry in the Gabčíkovo–Nagymaros Case in the International Court of Justice; see also Ulrich Grober 'Deep Roots – A Conceptual History of "Sustainable Development" (Nachhaltigkeit)', Wissenschaftszentrum Berlin für Sozialforschung (WZB) February 2007, at http://bibliothek.wzb.eu/pdf/2007/p07-002.pdf. The term became better known with the publication of the *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, International Union for Conservation of Nature (IUCN), in collaboration with the Food and Agriculture Organization and the United Nations Environment Programme 1980.

[34] The agreement includes 'sustainable development' or slight variations of it in several other provisions. For example, preambular paragraph 4 states: 'Conscious also that the interrelationship between conservation and socio-economic development implies both that conservation is necessary to ensure sustainability of development, and that socio-economic development is necessary for the achievement of conservation on a lasting basis'. Article 9, which relates to air, states: 'The Contracting Parties shall, in view of the role of air in the functioning of natural ecosystems, endeavour to take all appropriate measures towards air quality management compatible with sustainable development'. Article 16, which focuses on education, information, public participation and training, refers to the

7.2 Southeast Asia Nuclear-Weapon Free Zone Treaty

The 1995 Southeast Asia Nuclear-Weapon Free Zone Treaty[35] which entered into force in 1997 obliges parties not to develop, manufacture or otherwise acquire, possess or have control over nuclear weapons; station nuclear weapons; test and use nuclear weapons, or to engage in associated activities (Article 3). However, it does not preclude the right of the States Parties to use nuclear energy for peaceful purposes, 'in particular for their economic development and social progress' (Article 5).

7.3 The ASEAN Agreement on Transboundary Haze Pollution

The 2002 Agreement on Transboundary Haze Pollution entails a comprehensive approach to forest fires and haze in order to address their causes, engage in constant monitoring, and to attempt to mitigate effects. In order to assist effective implementation and to carry out operational tasks, the Agreement also established the ASEAN Transboundary Haze Pollution Control Fund and the ASEAN Coordinating Centre for Transboundary Haze Pollution Control. Its Haze Action Online includes daily updates on fire hotspots in the ASEAN region.[36]

With respect to the agreement's name, Koh comments that the use of the word 'haze' is a euphemism 'to play down the impact of the Indonesian fires even though they had wrought disaster on health, transportation, construction, tourism, forestry, and agriculture, not to mention having an economic impact'.[37]

The objective of the Agreement is:

> to prevent and monitor transboundary haze pollution as a result of land and/or forest fires which should be mitigated, through consistent national efforts and intensified regional and international cooperation. This should be pursued in the overall context of sustainable development and in accordance with the provisions of this Agreement.

The language of this objective is not untypical of other ASEAN instruments relating to the environment. It emphasizes both national efforts and

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significance of conservation measures and their relationship with sustainable development objectives.

[35] Treaty on the Southeast Asia Nuclear-Weapon Free Zone 1995, 35 ILM 635 (1996).

[36] Haze Action Online, http://haze.asean.org

[37] Koh Kheng-Lian, 'A Breakthrough in Solving the Indonesian Haze?' https://portals.iucn.org/library/efiles/html/EPLP-072/section12.html

regional and international cooperation. There is, however, very little guidance as to the extent of these aspirations, or as to the meaning of 'sustainable development' found in the above objective with respect to this cooperation.

Nine ASEAN countries signed and ratified the agreement (Malaysia, Singapore, Brunei, Myanmar, Vietnam, Thailand, Laos, Cambodia and the Philippines) and it entered into force in November 2003. Controversially, Indonesia, the country primarily responsible for the haze problem, signed the agreement but the Indonesian Parliament did not ratify it until September 2014.[38] The ostensible reason for Indonesian delaying ratification was that it wanted to obtain guarantees from the other ASEAN states that they will not purchase illegally imported timber from Indonesia.[39]

8. THE LOWER MEKONG REGION

The Lower Mekong Region is comprised of Cambodia, Lao PDR, Myanmar, Thailand and Vietnam. All of them are members of ASEAN, and an ASEAN Mekong Basin Development Cooperation Agreement was put into place in 1996. The latest annual meeting records 'progress made in implementing the identified projects for sustainable development of the Mekong Basin. Twenty-two projects have been initiated, covering eight areas including infrastructure, trade and investment, agriculture, forestry and minerals, industry, tourism, human resource development as well as science and technology, with estimated aggregated cost of US$338.8 million'.[40] In this report, and others like it, sustainable development is generally mentioned, but there is no actual analysis of the sustainability of any particular project. It might be speculated here that the term 'sustainable development' is used as a ritualised mantra, when merely 'development' would suffice. This is confirmed by statements of meetings of the relevant ministers and health officials pursuant to the

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[38] 'Indonesia's parliament agrees to ratify Asean haze pact' September 16, 2014, *Sunday Times*, http://www.straitstimes.com/news/asia/south-east-asia/story/indonesias-parliament-agrees-ratify-asean-haze-pact-20140916

[39] See David B Jerger Jr, 'Indonesia's Role in Realizing the Goals of ASEAN's Agreement on Transboundary Haze Pollution', *Sustainable Development Law & Policy* (2014) 14(1): 35–45, 70–74, at 35.

[40] Sixteenth Ministerial Meeting of the ASEAN-Mekong Basin Development Cooperation (AMBDC) August 28, 2014 Myanmar, at http://www.asean.org/images/Statement/2014/aug/JMS_16th_AMBDC_Ministerial_Meeting_final.pdf

Lower Mekong Initiative, which is described as 'a US-led partnership with the five Lower Mekong countries … and serves as a platform to address transnational development and policy challenges in the six pillars of Agriculture and Food Security; Connectivity; Education; Energy Security; Environment and Water; and Health, and in cross-cutting areas such as gender issues'.[41]

The 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin was the result of negotiations and arrangements which began in 1957, but which were disrupted by political and armed conflict for some decades.[42] The Agreement is primarily focused on the sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin. It includes obligations to cooperate, support, promote and coordinate projects, programmes and activities. However, the provisions do not contain robust legal language, and can be seen merely to exhort or urge member states to work together for the sustainable development of the river, using the mechanism of a Basin Development Plan. Article 4 of the Agreement emphasizes cooperation on the basis of sovereign equality and territorial integrity in the use and protection of the river's water resources. Article 5 sets out the principle of 'reasonable and equitable utilisation', with obligations for notification of intra-basin uses (i.e. within one country) and inter-basin diversions (i.e. involving effects on more than one country), as well as prior consultation in relation to proposed inter-basin diversions on the mainstream of the river. The Rules for Water Utilisation and Inter-basin Diversion have not taken a form that can be subject to legal enforcement, and they remain at the level of guidelines.[43] The agreement also includes the principle of state responsibility for damage from the use or discharge of waters by any riparian state (Article 8).

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[41] 'Lower Mekong Initiative Ministerial Meetings to Accelerate Economic Growth in the Sub-region', at http://www.asean.org/news/asean-secretariat-news/item/lower-mekong-initiative-ministerial-meetings-to-accelerate-economic-growth-in-the-sub-region

[42] Philip Hirsch and Kurt Mørck Jensen, with Ben Boer, Naomi Carrard, Stephen FitzGerald and Rosemary Lyster, *National Interests and Transboundary Water Governance in the Mekong*, Australian Mekong Resource Centre, University of Sydney, in collaboration with Danish International Development Assistance (Danida), 2006.

[43] Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement, at http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf; see further, n 46,

The Agreement established the Mekong River Commission, which consists of a Council, the Joint Committee and a Secretariat. According to Article 18, the Council consists of one member from each riparian state, and convenes at least once per year. The functions of the Council include making policies and decisions as well as providing necessary guidance 'concerning the promotion, support, cooperation and coordination in joint activities and projects in a constructive and mutually beneficial manner for the sustainable development, utilization and conservation of the basin'. It also has the responsibility to resolve disputes. The Commission has generated important policies and guidelines, as well as valuable scientific, economic and social research. These include detailed technical guidelines on transboundary environmental impact assessment.

Some of the main environmental and social issues with regard to hydro development involve barriers to navigation, sustainability of fishing because of blocking of fish migration routes, interruption of water flow in the downstream countries, resulting in insufficient water supply, particularly for the Tonle Sap lake in Cambodia and saltwater intrusion of rice growing areas in the Mekong Delta region in Vietnam.

China, with eight mainstream hydro dams planned or being built on the Mekong in the province of Yunnan, is not a member of the Mekong River Agreement, although it is a 'dialogue partner' (along with Myanmar/Burma, also not a member) at the meetings of the Mekong River Commission. The Lower Mekong countries therefore have no direct avenue to limit hydro development activities in China, and they hold different views on how the river should be used and developed. In addition to the mainstream hydro dams on the Mekong in China, each of the Lower Mekong countries is intending to enhance their hydropower infrastructure through dams on subsidiaries in their own jurisdictions, and on the Mekong mainstream.[44] The People's Republic of Laos has begun to build a major 'run of the river' dam[45] in its section of the river, known

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especially Ch 3, 'Legal and Institutional Framework for Mekong Water Governance' at http://sydney.edu.au/mekong/documents/mekwatgov_mainreport.pdf

[44] Over 70 hydro dam projects expected to be operational by 2030; see International Centre for Environmental Management, *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream*, 2010 at 8.

[45] Run of the river dams are hydro dams in which no or little water storage is provided. They are intended to allow for the least possible interruption to the flow of a river and to the migration of fish and other environmental and social impacts while allowing electricity to be generated at the same time.

as the Xayaburi dam, and is actively planning another one.[46] The Government of Laos has stated that it wishes to become the 'battery' of Southeast Asia through the sale of hydropower to its neighbours as an economic driver and to alleviate peoples' poverty.[47] The decision-making process for the planning and construction of the Xayaburi dam has created great deal of controversy in the region, and around the world.[48]

Apart from hydro development, there are of course many other sustainability issues that affect the Mekong. Among these is the effect of climate change, which raises a wide range of issues for the basin, including food security, flood mitigation, fisheries, aquaculture, forest and habitat loss, and threats to protected natural areas.[49] All of these have implications for the further development of environmental law and policy in the Mekong region.

9. SUSTAINABLE DEVELOPMENT GOALS AND ASEAN

ASEAN countries were involved the preparation of the Millennium Development Goals[50] developed in the early 2000s, and are in regular consultation on the transition from the Millennium Development Goals to the articulation of the new Sustainable Development Goals being drafted

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[46] Xayaburi Hydropower Project Prior Consultation Process http://www.mrcmekong.org/news-and-events/consultations/xayaburi-hydropower-project-prior-consultation-process/ Don Sahong Power Project, Mekong River Commission, http://www.mrcmekong.org/news-and-events/consultations/don-sahong-hydropower-project/

[47] Radio Free Asia, 'Mekong River Commission to Meet on Controversial Lao Dam', available at http://www.rfa.org/english/

[48] For example, D J Barrington, S Dobbs and S I Loden, 'Social and Environmental Justice for Communities of the Mekong River', *International Journal of Engineering, Social Justice and Peace* (2012) 1(1): 31–49; 'No More Dams on the Mekong', *New York Times*, September 3, 2014, at http://www.nytimes.com/2014/09/04/opinion/no-more-dams-on-the-mekong.html?_r=0

[49] See for example, International Centre for Environmental Management and DAI, *USAID Mekong ARCC Climate Change Impact and Adaptation Study: Main Report*, https://drive.google.com/file/d/0B5CkRFcwGxMfVXppc1M4VkhxN2M/edit

[50] 'ASEAN Roadmap for the Attainment of the Millennium Development Goals', at http://www.scribd.com/doc/117192612/ASEAN-Roadmap-for-the-Attainment-of-the-Millennium-Development-Goals

by the United Nations for completion in 2015.[51] The report *Sustainable Development Goals and Indicators for a Small Planet*[52] was prepared as a result of a meeting of Asian and European government leaders on the new Sustainable Development Goals. The report records that 'the project developed and adopted a unique methodology that connects global and national perspectives through an iterative process. This dual-level approach ensured that the SDGs have universal relevance and meet global criteria for sustainability while being grounded in national sustainable development priorities, goals and targets'.[53] The linking of global goals with national perspectives through a cooperative regional process is consistent with the approaches that ASEAN has adopted in the development of its environmental policy positions as expressed in the declarations and charters mentioned above. Many of the SDGs set out in the 2014 proposals are directly relevant to the Southeast Asian region, and no doubt ASEAN environment ministers will issue a declaration with regard to their implementation when the SDGs are finalized.

10. NATIONAL ENVIRONMENTAL LAW

Each ASEAN jurisdiction has enacted environmental legislation, but with little consistency of approach or scope. Given the plethora of environmental laws within many of the countries canvassed here, only a brief sketch of the operative environmental laws is given for each of the jurisdictions. While some countries have long-standing environmental legislation, there are major issues with implementation and enforcement in most of them. The precise reasons for this vary from one jurisdiction to another, but can be partly explained by the different histories, legal traditions and cultures of the respective countries as well as a lack of political commitment, inadequate institutional development, overlaps in administrative responsibilities and lack of human and financial resources. As noted earlier, however, some of them also lack commitment to adherence to modern legal norms, and in particular, application of the rule of law. On the other hand, in some jurisdictions where environmental law is seen less as a strictly applicable set of rules and

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[51] Open Working Group proposal for Sustainable Development Goals 2014, https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf

[52] Asia Europe Environment Forum, *Sustainable Development Goals and Indicators for a Small Planet*, January 2014, Singapore.

[53] Ibid., at 6.

more as policy guidelines, the environment protection and nature conservation frameworks nevertheless have had modest success. However, none of the countries can be said to have a complete environmental law regime.

As noted in *Greening Governance in the Asia-Pacific* (Institute for Global Environmental Strategies 2012), national environmental governance has been substantially improved as most governments in the region have now created a central environmental authority under a framework environmental law, along with subsidiary laws, decrees and regulations, but still many challenges remain. Compliance and enforcement remains weak in most countries and the environmental agencies tend to be under-resourced for the challenges they face. While this is true for the Asia-Pacific region as a whole, it is particularly significant for several ASEAN countries.

As noted above, one common denominator in the region is that most of the jurisdictions have signed and ratified the more important MEAs. While this indicates a broad political commitment on the part of those governments, in general the obligations under those MEAs are not specifically reflected in the national legislative enactments, and even when they are, the international obligations are not always adequately put into action. Some of the legislation referred to specifically mentions MEAs, but generally speaking does not set out detailed provisions to effect their implementation.

This section briefly analyses the more important environmental laws and natural resources in each ASEAN jurisdiction, together with Timor Leste. The analysis also focuses, to the extent possible, on the inclusion of the concept of sustainable development, sustainability or variations of these terms.

10.1 Brunei Darussalam

Brunei has signed a many of the multilateral environmental agreements, but has ratified or acceded to some of them only very recently. These include the Framework Convention on Climate Change in 2007, the Convention on Biological Diversity in 2008, the World Heritage Convention in 2011 and the Basel Convention on Transboundary Movements of Hazardous Wastes at the end of 2012. However, national environmental law has only slowly evolved. Until recently the relevant legislation related only to forest management, water supply and wildlife protection. It was only in 2011 that broad-ranging environmental law was being

prepared.[54] The new law will include an Environmental Pollution Control Order, an Environmental Impact Assessment Order and an order relating to the control of export, and transit of hazardous wastes.[55]

10.2 Cambodia

The development of Cambodia's environmental law dates from the mid-1990s. Article 59 of the Constitution includes a commitment to protect the environment and the balance of natural resources, and to plan for management of land, air, water, wind, geology, ecological system, mines, energy, petrol and gas, rocks and sand, gems, forests and forest products, wildlife, fish and aquatic resources. There are laws on fisheries, forests, protected areas, minerals and water resources. The purposes of the 1996 Law on Environmental Protection and Natural Resource Management include to: protect and promote environmental quality and public health through the prevention, reduction and control of pollution; assess the environmental impact of all proposed projects; ensure the rational and sustainable conservation, development, management and use of the natural resources of the Kingdom of Cambodia; encourage and enable the public to participate in environmental protection and natural resource management and to suppress any acts that cause harm to the environment. National and regional environmental plans are also included. An Environment Endowment Fund was also established for the purposes of environmental protection and natural resource conservation. Substantial civil fines and criminal offences are provided for in relation to the transgression of environmental laws. A comprehensive law on environmental impact assessment is being prepared, in the context of promoting sustainable development.[56]

10.3 Indonesia

The development of Indonesia's environmental law began in 1982, with by the enactment of the Environmental Management Act. The 1982 Act

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[54] *Brunei Times*, June 9, 2011.

[55] 'New Laws Seek Balance Between Environment & Development', at http://bruneiembassy.be/new-laws-seek-balance-between-environment-development-2/

[56] See W. J. Schulte and A. Stetser, 'On the path to sustainable development: An assessment of Cambodia's draft environmental impact assessment law', http://cambodialpj.org/wp-content/uploads/2014/12/DCCAM_CLPJ_Schulte_Stetser.pdf

was revised in 1997, and then rewritten in 2009 and renamed the Environmental Protection and Management Law. The goals of the 2009 law include the protection of Indonesia from environmental pollution and/or damage; ensuring human safety, health and life; assuring the continuation of life of creatures and ecosystem conservation; preserving the conservation of environmental functions; achieving environmental harmony, synchronization and balance; assuring the fulfillment of justice for present and future generations; assuring the fulfillment and protection of right to the environment as part of human rights; controlling the utilization of natural resources to realize sustainable development; and anticipating global environmental issues (Article 3). The legislation includes provisions on environmental impact assessment, environmental management plans and monitoring plans. The precautionary principle is specifically included in the law, as are requirements for the deposit of environmental bonds and the conduct of environmental audits. Importantly, the legislation encourages public participation so as to allow citizens to report on pollution and environmental damage. Further, non-government organizations may bring class actions in the courts so that a number of people affected by the same detrimental environmental activity can be represented as members of a class, instead of having to bring costly individual actions. The 2009 law includes more substantial administrative and criminal penalties than the 1997 law, and includes the imposition of strict liability in relation to companies that pose serious threats to the environment through their activities. However, as only limited regulatory provisions have been introduced for the 2009 law, as one commentator states: '… implementation and enforcement of these measures continues to be a significant problem in the near future for Indonesian authorities'.[57]

There is also a range of other legislation relating to environmental matters including forests, water and mining. While most of the environmental law framework is administered by the central government, the Regional Autonomy Law of 1999 gave authority to the provincial governments over a range of environmental and natural resource issues. This law has produced some inconsistencies in the application of standards and in the implementation of environmental law at national and provincial levels. The comprehensive 2007 Spatial Planning Law includes the concept of sustainability as a basis for decision-making.

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[57] Dewi Savitri Reni, *2011 Indonesian Law Review: Environmental Protection & Management*, SSEK Indonesian legal Consultants, at http://blog.ssek.com/index.php/2012/01/2011-indonesian-law-review-environmental-protection-management/; an Environmental Licences Regulation was introduced in 2012.

10.4 Laos

The environmental laws of Laos continue to be developed. The Constitution provides that all organizations and citizens must protect the environment and natural resources: land surfaces, underground resources, forests, animals, water sources and the atmosphere. The function of the 2009 Environmental Protection Law, as set out in Article 1 'specifies necessary principles, rules and measures for managing, monitoring, restoring and protecting the environment in order to protect public, natural resources and biodiversity, and to ensure the sustainable socioeconomic development of the nation'. The 1996 Law on Water and Water Resources includes as one of its functions the preservation of the sustainability of water and water resources. The 1999 Environmental Protection Framework Law, along with an implementing decree of 2002, provides protection, mitigation and restoration of the environment, and guidelines for environmental management and monitoring. The 2007 Wildlife and Aquatic Law provides for the protection, mitigation and restoration of the environment. It defines 'conservation' as being 'to preserve and utilize wildlife and aquatic in accordance with any regulations and to maintain it for sustainable use'. A Decree on Environmental Impact Assessment was enacted in 2010 and Environmental Impact Assessment Guidelines were released in 2012.[58]

10.5 Malaysia

Consistent with the Constitution, environmental law in Malaysia consists of both federal legislation and the law of Malaysia's 13 states. Article 73 of the Constitution provides that Parliament may make laws for the whole or any part of the federation having effect outside as well as within the federation. However, as is common with federally organized countries, the states that make up the Malaysian federation may only make laws for matters concerning each individual state. The federal government can enact legislation relating to any obligations taken under environmental conventions, as well as trade, commerce and industry, fisheries, marine, communications and transport. The states are able to legislate in relation to matters such as land tenure, mining licences, agriculture, forests, water and fishing in rivers. The federal government is

[58] For a critique of Lao EIA, see Sengdeuane Wayakone and Inoue Makoto Evaluation of the Environmental Impacts Assessment (EIA) System in Lao PDR, *Journal of Environmental Protection,* 2012, 3, 1655-1670, published online December 2012, http://dx.doi.org/10.4236/jep.2012.312182

able to override state law; however, the normal approach is to pursue a policy of cooperative federalism.[59]

The primary federal legislation is the Environmental Quality Act of 1974, which was amended in 2012 to expand of the powers of the Director General with regard to issuing of prohibition orders and stop-work orders, investigation and arrest, as well as the expansion of the Environmental Quality Council. The Act does not, however, mention any concepts relating to sustainable development or sustainability as such. There is a range of environment-related enactments focused on specific sectoral matters, including land conservation, fisheries, national parks, road transport, town and country planning and pesticides. The Wildlife Conservation Act of 2010 refers to the concept only in the sense of sustainable use, where it defines a 'conservation activity' as meaning 'an activity that relates to the protection, management and sustainable use of wildlife' (section 50). In view of these reforms, it can be said that Malaysian environmental law is progressing satisfactorily, although its implementation remains variable.

10.6 Myanmar/Burma

In Myanmar/Burma, environmental law has begun to develop recently, largely as a result of recent democratic initiatives. The Environmental Conservation Law was drafted in consultation with a range of relevant government ministries and the assistance of international legal experts. The law defines the rights and responsibilities of the new Ministry of Environmental Conservation and Forestry, and sets out environmental standards, addresses environmental conservation, management of urban areas, the conservation of natural and cultural resources, as well as licensing arrangements for industries with the potential to damage the environment. Enforcement provisions were also included. In 2012, the Foreign Investment Law was amended, and included the protection and conservation of environment as one of the basic principles under which foreign investment would be allowed. It also requires environmental impact assessment of all new major development projects.[60] While these are positive developments, the lack of institutional capacity of the

[59] Lye Lin Heng, 'Malaysia', in Terri Mottershead (ed.), *Environmental Law and Enforcement in the Asia-Pacific Rim* (Sweet and Maxwell Asia 2002) at 291.

[60] See Priscilla Clapp 'Myanmar Rises to Challenge of Environmental Conservation', *Asia Society*, March 8 2013, http://asiasociety.org/blog/asia/myanmar-rises-challenge-environmental-conservation

government and bureaucracy is likely to mean that progress in effective implementation will be slow.

10.7 Singapore

Singapore has had a long history of development of environmental law and policy. The primary law is the Environmental Protection and Management Act 1999. Although it is reasonably comprehensive, it does not include provisions for environmental impact assessment, except in the case of hazardous installations. Furthermore, public participation in environmental decision-making is limited. However, the National Environment Agency has been very effective in addressing all types of pollution under the Act.[61] A wide range of Codes of Practice has been issued, which Lye has characterized as 'soft law'.[62] With regard to implementation of MEAs on the other hand, Lye argues that: 'As a rule, Singapore takes its international obligations so seriously that implementing legislation at national level usually occurs soon after ratification of or accession to an international agreement'. While Singapore has a minuscule carbon footprint, it nevertheless has issued a Sustainable Singapore Blueprint (SSB) through the Inter-Ministerial Committee on Sustainable Development, which includes a range of measures to reduce the country's energy intensity.[63]

10.8 Thailand

Thailand's environmental policy has developed considerably since the 1970s. An environmental impact assessment process has been in place since 1981. Thailand's 2007 Constitution of provides explicitly for public

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[61] The list of environmental legislation administered by the National Environment Agency can be found at http://app2.nea.gov.sg/corporate-functions/about-nea/legislation

[62] Lye Lin Heng, 'Singapore', in T Mottershead (ed.), *Environmental Law and Enforcement in the Asia-Pacific Rim* (Sweet and Maxwell Asia 2002) n 55, above, at 395–434; see also Lye Lin Heng, 'Recent Developments in Environmental Law and Policy in Singapore', *IUCN Academy of Environmental Law e-Journal*, and Lin Heng Lye, *Environmental Law in Singapore* (Wolters Kluwer 2013).

[63] See Lye Lin Heng, Country Reports, 'Singapore', *IUCN Academy of Environmental Law e-Journal* (2011) 1.

participation in environmental decision-making.[64] The National Environmental Board, expanded with the enactment of the Enhancement and Conservation of National Environmental Quality Act 1992, is headed by the Prime Minister and includes a wide range of ministers and ministry officials. There is also an Office of Environmental Planning and Policy situated within the Ministry of Science, Technology and Environment. The legislation deals with environmental protection, air warfare pollution control and civil and criminal liability for breaches. It provides for public participation in environmental management and established an Environment Fund. It also includes provision for environmental quality standards, management planning, conservation of protected areas and national parks. Given the provisions in the National Environmental Quality Act concerning the environment and natural resources, it is not surprising that non-government organizations continue to play a substantial role in the formulation of environmental policy. Nevertheless, environmental law enforcement remains a difficulty.

10.9 The Philippines

The Philippines set up an environmental impact statement system in 1978, and the Environment Code has been in place since 1988. Modern pollution control legislation was enacted from 1999 onwards. The Wildlife Resources Conservation and Protection Act was passed in 2001 and a National Environmental Awareness and Education Act was introduced in 2008. An Environmental Planning Act was passed in 2013. Its definition of 'environmental planning' is aimed at the 'the development of sustainable communities and ecosystems'.

The Philippines has seen some vigorous public interest litigation to ensure the upholding of constitutional rights, the most well-known case being *Oposa v Factoran*, concerning the granting of timber licences, in which the Supreme Court found that the plaintiffs had 'a clear and constitutional right to a balanced and healthful ecology and [were] entitled to protection by the State in its capacity as *parens patriae*'.[65]

In 2010, the Supreme Court introduced comprehensive Rules of Procedure for Environment Cases, which incorporate a number of internationally accepted principles such as the precautionary principle, as well as providing for innovative procedures such as the 'writ of

[64] Note however, that as a result of recent political upheavals, an Interim Constitution was enacted in 2014, which does not contain these provisions.

[65] *Oposa v Factoran*, Supreme Court of the Republic of the Philippines G.R. No. 101083 July 30, 1993.

kalikasan' (writ of nature) and open standing for civil action involving the enforcement or violation of any environmental law.[66]

The Philippines leads the ASEAN jurisdictions in relation to the development and implementation of environmental and natural resources law. While much remains to be done, the Philippines can provide examples of sophisticated legislation and an advanced understanding by the governmental institutions and the judiciary in the sphere of environment.

10.10 Timor Leste

Timor Leste became a nation only in 2002. Article 61 of the 2002 Constitution records that everyone has the right to a humane, healthy and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations. It recognizes the need to preserve and rationalize natural resources and to promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy. The Protected Places Regulation was passed in 2000 and the Fisheries Law was enacted in 2004. The Environmental Licensing Act 2011 recognizes 'the need to develop actions for fostering and protecting the environment as an essential means for the sustainable development of the economy of East Timor'. The country has developed a policy on sustainable development,[67] and a draft national action plan on land degradation.[68] A comprehensive environmental law was drafted in 2012, which contains modern provisions on every major aspect of environment protection and conservation. Significantly in the context of this chapter, it includes a definition of sustainable development, which closely reflect the Brundtland definition:[69] '… development based on

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[66] Supreme Court of the Republic of the Philippines, *Rules of Procedure for Environmental Cases* 2010 at http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html; see also Chief Justice Maria Lourdes P A Sereno, Opening Remarks at the Second Asian Judges Symposium on the Environment, Supreme Court of the Republic of the Philippines, at http://www.asianjudges.org/wp-content/uploads/2014/02/CJ-Sereno_ADB-Opening-Remarks-final-1.pdf

[67] *Sustainable Development in Timor-Leste: National Report to the United Nations Conference on Sustainable Development*, Ministry of Economy and Development, 2012.

[68] *National Action Plan on Land Degradation* 2008, http://www.fao.org/fileadmin/templates/cplpunccd/Biblioteca/bib_TL_/Timor-Leste_NAP_Revised_Draft.pdf

[69] World Commission on Environment and Development, *Our Common Future*, Oxford 1987 (Brundtland Report).

effective environmental management that meets the needs of the present generation without compromising the environmental balance and the ability of future generations to meet their own needs. Until Timor Leste enacts the legislation, relevant Indonesian law, such as that on pollution applicable before Timor Leste's independence, will continue to be in force.

10.11 Vietnam

The Vietnamese Constitution also includes several articles on the environment. Article 29 provides that all State offices, armed forces units, economic establishments, organizations and citizens must observe State regulations on the appropriate utilization of natural resources and environmental protection, and that all acts resulting in depletion and destruction of the environment are strictly prohibited. Article 112 further provides that the government's duties and powers include taking measures to protect property and the interests of the State and society to protect the environment. Vietnam has enacted a range of environmental and natural resources laws, including on water, forests and fisheries. The most important is the Law on Environmental Protection of 2005 (originally enacted in 1993), which has comprehensive provisions on pollution, the setting of environmental standards, strategic environmental assessment, environmental impact assessment and the conservation and rational use of natural resources. Like Timor Leste's draft law, Vietnam's legislation refers to sustainable development, defining it as 'development which satisfies the needs of the present generation without prejudicing the ability to satisfy the needs of future generations on the basis of tight and harmonious coordination between economic growth, guarantee of social progress, and protection of the environment' (Article 3). Vietnam also has a separate comprehensive Biodiversity Act, passed in 2008, which provides for the establishment of protected areas as well as the conservation of components of biological diversity. In 2011, it enacted a comprehensive decree to expand and update provisions on Strategic Environmental Assessment, Environmental Impact Assessment.

11. CONCLUSIONS

This chapter also shows that the development of environmental law has been uneven across the ASEAN region. While there has been strong participation in the development and implementation of international environmental law regimes, the commitment to the development of

regional environmental frameworks is less robust. Nevertheless, there have been many significant advances in the regional arrangements concerning environmental management, with some significant legally binding instruments introduced. However, there has been a distinct preference for preparing soft law instruments, rather than hard law instruments, seen in part by the use of the principle of non-interference and a concomitant insistence on the notion of national sovereignty. This has generally resulted in the weaker application of the rule of law in the environmental sphere, with wide variations between countries, depending on the political, economic and cultural circumstances pertaining in the relevant jurisdictions.

With the introduction of the 2007 ASEAN Charter, there is now a greater commitment in the region to the rule of law, and perhaps there will be less insistence on strict adherence to the principle of non-interference and the doctrine of national sovereignty. While continued development of national environmental legislation is now occurring, and some countries have made great strides, it is unlikely that such developments will be consistent across the region, as there continues to be a distinct disconnect between regional environmental law and policy and national environmental legislation and its implementation. This does not hold much promise for resolving transboundary environmental disputes, for the long-term equitable utilization of shared water resources, or for the serious implementation of national environmental management regimes.[70] If the aim is to develop an integrated, coherent and consistent approach to regional and national environmental management based on modern notions of sustainable development, as expressed, for example in the emerging Sustainable Development Goals, there is a need for much more concerted effort on the part of ASEAN and its associated environmental bodies, as well as by governments at national level.

[70] The exception here is Singapore, which has for many years been something of a regional role model in terms of environmental management in general, and pollution control in particular.