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978-1-316-60431-1 - Asean Environmental Legal Integration: Sustainable Goals?

Koh Kheng-Lian, Nicholas A. Robinson and Lye Lin-Heng

Excerpt

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Introduction: exploring environmental law in Southeast Asia

The environmental performance of most ASEAN Member States, as assessed by reputable studies, is above the world average, and the ecological footprint is much lower than that of many nations. However, ASEAN will continue to face growing environmental challenges given the need to lift a third of its population earning less than \$2 a day out of poverty, and the many other pressures exerted on the environment such as population growth, urbanization and industrialization.

Dr. Surin Pitsuwan, ASEAN Secretary-General¹

Environment is *sans frontières*. Many of the current or emerging environmental problems are transnational and trans-boundary, necessitating legal integration, whether in the form of hard or soft laws, programs, policies or governance innovations, such as ASEAN Dialogue Partners, or the United Nations Environment Programme consultations. All these are crucial to ASEAN.²

¹ S. Pitsuwan, "Foreword" in Fourth ASEAN State of the Environment Report, 2009.

² Throughout this volume, the law is as stated on April 30, 2015, but some parts were updated while the manuscript was in press. Web

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[More information](#)

INTRODUCTION

ASEAN is part of the global order for environmental sustainability. It is a partner of the United Nations in the field of development. As the 1971 Stockholm Conference on the Human Environment and the 1992 “Earth Summit” at Rio De Janeiro have made clear, we the peoples of the United Nations and of ASEAN alike, share one world, one atmosphere, one stratosphere. ASEAN’s economic pillar requires integration to move Southeast Asia forward, and environment must move *in tandem* to prevent degradation of ecosystems for development to be sustainable regionally and globally.

This monograph examines the phenomenon of “integration through law” (ITL), or more particularly how the member states of ASEAN employ law as a means of regional integration, focusing in particular on how this process functions in the context of environmental conservation and sustainable development. The several chapters trace ASEAN’s struggles to integrate environment within its own community and also with the global community. There are many concerns, not only in terms of the lack of institutional capacity and funding, but in the very nature of environmental problems. The environmental sciences have taught nations how complicated and interrelated human impacts are on the climate or ecosystems. States are left grappling with solutions. The search for environmentally sustainable progress is an ongoing, adaptive process, often without clear, immediate answers. This complexity is compounded by too many inputs

addresses were correct at the date of submission of the manuscript to the publisher on April 30, 2015.

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[More information](#)

INTRODUCTION

that national sectors receive from diverse interdisciplinary studies, without any governance system to connect them.

As ASEAN member states seek ways to cooperate on environmental problems, moreover, the sought-for integration must begin with a mindset shared by all ASEAN member states: that regional cooperation must not be an interference with domestic affairs. When ASEAN was established in 1967, regionalism was being developed side by side with nationalism within each of the then founder members, which had just gained independence from their colonial masters. Hence, there was a clinging to the Westphalian principles of sovereignty and non-interference with domestic affairs. Even years later when regional integration was first mooted, it was regarded as a “dirty word” by some ASEAN members, which regarded it as wresting from them their hard-earned sovereignty. Even today, over forty years on, the ASEAN Charter 2007 embodies this principle and that of non-interference, although much debate has modified the concepts and reshaped their calibration.

In 2015, ASEAN is caught on the horns of its own dilemma. It seeks both the benefits of regional trade and environmental sustainability, while jealously protecting national (or sub-national) prerogatives. This is evident when ASEAN introduced the concept of “non-traditional security” in its political-security pillar, which covers transnational crimes and transboundary challenges. The scope of non-traditional security can include illegal trade in endangered species. This inconsistency in approach has, as yet, not been widely recognized. What ASEAN requires today is a robust interpretation of the non-traditional security approach that would facilitate

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Excerpt

[More information](#)

INTRODUCTION

an evolution of the understanding of the traditional ASEAN Way. Some recommendations to foster environmental sustainability within ASEAN are set forth in Chapter 5 of this monograph.

Southeast Asia is one of the richest regions in biodiversity in the world. It includes three mega-diverse countries (Indonesia, Malaysia and the Philippines); five mainland riverine systems within the states of Cambodia, Lao PDR, Myanmar, Thailand and Vietnam; and one-third of the world's coral reefs. It is a pathway for international migration of many species of birds and fish. Its member states have some of the longest coastlines in the world, each facing the problems of rising sea levels. Indonesia has counted some 1,500 islands that are now threatened with submersion by rising sea levels.³ The environment is of extreme importance to the ten nation states of Southeast Asia that are ASEAN members. Their regional cooperation can enhance environmental adaptation toward a robust socio-economic future. The environmental pillar is essential for sustainable development, as all nations observed in the United Nations 2002 Johannesburg Plan of Implementation. This monograph explores the pathways ASEAN is forging to build its environmental pillar for its members' collective and individual sustainable development.

³ BBC, "Rising sea 'threatens 1,500 islands,'" February 25, 2014, www.bbc.co.uk/news/blogs-news-from-elsewhere-26337723; Sanskrity Sinha, "Indonesia Losing 1,500 Islands to Rising Sea," *International Business Times*, February 26, 2014, www.ibtimes.co.uk/indonesia-losing-1500-islands-rising-sea-1438000.

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Excerpt

[More information](#)

INTRODUCTION

ASEAN was first established on August 8, 1967, with the signing of the Bangkok Declaration, “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.” There were then only five parties (Indonesia, Malaysia, Philippines, Thailand and Singapore). The focus then was on “the cherished ideals of peace, freedom, social justice and economic well-being.” This was before the 1972 UN Conference on the Human Environment held in Stockholm. The environment was not yet a geo-political or diplomatic concern. Since then ASEAN added to its list of members and now has ten members, with the addition of Brunei (January 7, 1984), Vietnam (July 28, 1995), Lao PDR and Myanmar (July 23, 1997) and Cambodia (November 30, 1999). As ASEAN membership increased, the environment loomed as an even more important rationale for regional cooperation.

When the UN Conference in Stockholm in 1972 agreed on the Stockholm Declaration, it drew the attention of ASEAN to examining the common environmental problems on a regional as well as national level. This focus led to the ASEAN Sub-Regional Environment Programme (ASEP), Phase I (1978–82), which subsequently entered into Phase II (1983–87) and Phase III (1988–92). When in 1992 the UN Conference on Environment and Development (UNCED, or the “Earth Summit”) held at Rio de Janeiro adopted the Rio Declaration on Environment and Development and Agenda 21, ASEAN took many steps forward. UNCED compelled each state to take stock of its environment and

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Excerpt

[More information](#)

INTRODUCTION

develop its own green plan to work toward sustainable development in the spirit of Agenda 21 (“Earth’s Action Plan”). ASEAN started its ASEAN Strategic Plan of Action on the Environment, 1994–1998. This was followed by the Hanoi Plan of Action, 1999–2004 (Strategy 6 was to Protect the Environment and Promote Sustainable Development); and the Vientiane Action Programme, 2004–2010, which sought to realize an “ASEAN Socio-Cultural Community” and to promote “Environmental Sustainability.” These progressive and reiterative measures are building ASEAN’s regional environmental cooperation, as this monograph discusses for the first time.

In 2007, all parties agreed to and signed the ASEAN Charter, which provided ASEAN with a much-needed legal personality. This heralded a new chapter in ASEAN’s history. It has restructured ASEAN’s institutional framework so as to enable ASEAN’s Vision 2020 – “One vision, One Identity, One Caring and Sharing Society.” ASEAN’s Vision 2020 has mechanisms for strengthening compliance in all areas including the environment. The Charter resolves “to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process.” ASEAN’s Vision 2020 was succeeded by the ASEAN Socio-Cultural Community Blueprint (ASCC) (2009–2015), as part of the Roadmap for an ASEAN Community from 2009 to 2015. The Roadmap also includes the ASEAN Political-Security Community Blueprint, the ASEAN Economic Community Blueprint and the Initiative for ASEAN Integration Work Plan II (2009–2015). These

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Excerpt

[More information](#)

INTRODUCTION

measures will be examined in this monograph, in the course of addressing the issue of ASEAN's integration through environmental law.

The ASEAN Way as a foundation for regional cooperation involves decision by consensus, non-confrontational resolution of disputes, respect for the principles of sovereignty and non-intervention. This admirable framework for decision-making does pose challenges to resolving environmental problems. Such decision-making takes time, and meanwhile many environmental trends accelerate. There have been many initiatives to address environmental issues at the ASEAN level, including the formal meetings of the Ministers for the Environment, or meetings of senior officials on the environment, or collaboration through specific programs on the environment as mentioned above. ASEAN has also adopted numerous soft-law instruments on the environment, which take the form of Declarations, Resolutions, Statements and Accords, as well as hard-law instruments, notably the ASEAN Agreement on Nature and Natural Resources (1985) and the ASEAN Agreement on Transboundary Haze Pollution (2002). More recently, ASEAN has added a few more hard-law agreements.

The fact is that the environment today has become of great importance to the Member States of ASEAN. Its people have always relied on the environment for their livelihoods, whether directly or indirectly, and will continue to do so. These valuable natural resources and the region's biodiversity are, however, under extreme threat from human activities, as the region pursues rapid economic development. Industrialization has led to considerable and grave air, water,

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Excerpt

[More information](#)

INTRODUCTION

land and noise pollution. Increased urban settlements present problems in housing, health and food security. Illegal logging and unsustainable forest management have led to the depletion of natural resources and loss of wild flora and fauna. The marine and terrestrial wealth of the region is vanishing. Species have been lost or are on the brink of extinction. Indeed the region is a major hotspot for illegal trade in endangered species. Climate change has also brought extreme storms leading to massive floods in recent years. ASEAN nations are caught between national policies that strive to improve their economic well-being but that may have deleterious effects on the environment, and holistic aspirations to view ASEAN as one eco-system.

How has Southeast Asia as a region coped with these challenges? ASEAN works on consensus and cooperation, as well as through capacity-building. The ASEAN Way – involving decision by consensus, non-confrontational resolution of disputes, respect for the principles of sovereignty, and non-intervention – on the whole fosters informality, quiet diplomacy, face-saving, and an aversion to enforceable new legal instruments (i.e. hard law). Worries exist about whether an inability to comply with a treaty might subject a member state to inference in its domestic affairs. This worry, in turn, often masks a reluctance to tackle tough environmental challenges, especially as new regulations might curb patterns of economic gain or disrupt vested interests. Nonetheless, ASEAN has made notable efforts in regional environmental management, particularly in the realm of biodiversity conservation. Some examples include the establishment of the ASEAN Centre for Biodiversity, the designation of some

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Excerpt

[More information](#)

INTRODUCTION

thirty-five ASEAN Heritage Parks⁴ across the ten ASEAN member states pursuant to the ASEAN Declaration on Heritage Parks and the establishment of the ASEAN Wildlife Enforcement Network (ASEAN-WEN), which is the largest wildlife law enforcement network in the world. A notable recent achievement is Indonesia's ratification of the 2002 ASEAN Agreement on Transboundary Haze Pollution, the last state to do so. Indonesia's adherence to the 2002 Haze Agreement in 2014 took place soon after Singapore passed its Transboundary Haze Pollution Act (September 2014), which was enacted to address air pollution caused by forest fires in neighboring countries, particularly Indonesia. However, the ASEAN Agreement on Nature and Natural Resources, signed in Kuala Lumpur in 1985, is still not in force, because three member states have yet to ratify (Brunei, Malaysia and Singapore). More recently, ASEAN has been more robust in tackling zoonotic diseases and disaster management compared to its tardy actions in other areas.

This monograph provides the first comprehensive review of ASEAN's attempts at legal integration in its environmental laws. Southeast Asia is experiencing rapid economic growth and a growing population. If it is to continue to provide potable water, healthy air and adequate food, and sustain renewable natural resources, it will need to build environmental stewardship and laws into its development practices. This monograph explores how ASEAN endeavors

⁴ As of October 2014 – see http://chm.aseanbiodiversity.org/index.php?option=com_wrapper&view=wrapper&Itemid=110¤t=110.

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[More information](#)

INTRODUCTION

to accomplish these ends. The analysis is provided in six chapters.

Chapter 1 introduces approaches to environmental sustainability in the context of the ASEAN member states, along with a succinct overview of regional collaborative efforts at the ASEAN level. Integration is examined in the context of both institutional integration and integration of laws and policies. Chapter 2 introduces the elements of state practice for sustainability, emphasizing the need for a sound environmental management system, which requires a stable institutional system that is not yet present in some of the ASEAN member states.

Chapter 3 surveys the unique environmental attributes of Southeast Asia. It provides a physical overview of the region, identifying five key priority environmental subjects for which the sufficiency of national and regional laws can be measured. These five are illustrative of the challenges posed for regional cooperation through environmental law by all other environmental problems. They are:

- (i) biodiversity conservation and natural and cultural heritage;
- (ii) freshwater resources and forests;
- (iii) marine and coastal resources;
- (iv) human settlements; and
- (v) the atmosphere.

The monograph's Chapter 4 examines the legal system of each state and evaluates its environmental laws and their efficacy. The constitution of each state is first examined for provisions on the environment. The chapter next ascertains