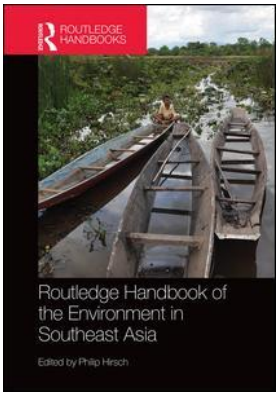

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ENVIRONMENTAL LAW IN SOUTHEAST ASIA

Ben Boer

Introduction

In recent decades, environmental law has become a field of fundamental importance in the management of natural and cultural resources and the protection of human and environmental health. This is particularly so since the passing of the US National Environmental Policy Act and the catalytic Stockholm Conference on the Human Environment in the early 1970s. Since then, there has been a growing awareness that all regions of the world suffer from similar environmental problems, especially of pollution, the loss of biodiversity and the effects of climate change. However, from one region and country to another, there are significant differences in approach with respect to legal, policy and institutional arrangements to address these issues. In general terms, the seriousness with which individual countries take their environmental responsibilities is reflected in the quality and sophistication of the national and sub-national laws, policies and institutions that they host.

This chapter explores the international and regional environmental legal frameworks that apply in the Southeast Asian region and briefly sketches the development of the environmental laws that currently operate in each country. It focuses on several regional instruments and selected jurisdictions to demonstrate progress in some areas, as well as significant continuing barriers to adequate implementation.

For the purposes of this chapter, Southeast Asia is constituted by 11 jurisdictions: the ten Association of Southeast Asian Nations (ASEAN) countries and the newly emerged nation of Timor Leste, which applied to join ASEAN in 2011 and is preparing to meet the various requirements for membership (ASEAN, 2014; *Jakarta Post*, 2015).

The development of environmental law over the past 40 years since ASEAN was established has seen the signing and ratification of many of the major multilateral environmental agreements (MEAs) by most of the region's nations. However, there has been a fragmentation of approach with regard to the legislative implementation of the obligations demanded by those MEAs. This reflects in part that while there are socio-cultural, economic, political and linguistic similarities between many Southeast Asian countries, there are some major differences in their legal systems. The differences are a result of their political histories; the fact that most were colonized; varying rates of economic, cultural and social development; variations in the understanding of the concept of law; and strictness of adherence to the rule of law. Legal systems in

Southeast Asia, as in much of the rest of the developing world, are examples of legal pluralism (Tay and Tan, 1997, p. 390) because of the existence of pre-colonial traditional forms of law, colonial regulatory systems and post-colonial developments, which produce mixed and often confusing legal fabrics both within national jurisdictions and from one jurisdiction to another.

The less-than-robust legal approaches at the national level find some correspondence at a regional level by the preference for non-legally binding 'soft law' (rather than 'hard law', which creates legally binding and often enforceable obligations). This includes unenforceable declarations, statements and charters concerning matters of environmental management and conservation, heritage parks, climate change, human rights, sustainable development and so on (see Koh, 2009; 2013).

Within ASEAN, this phenomenon of the use of 'soft law' is often described as the 'ASEAN way', which is premised primarily on the principles of non-interference and national sovereignty. The use of these concepts can also be found in other parts of the world, especially where there has been a history of conflict, but in Southeast Asia a somewhat stronger form of it appears to apply at both regional and national levels. This is reflected in the lack of robust legal and institutional frameworks for regional environmental management and for resolving transboundary environmental disputes.

The rule of law, sovereignty and the ASEAN way

In many countries around the world, the concept of the rule of law is applied with various levels of seriousness. In the Southeast Asian context, we see that ASEAN's Vision 2020, agreed in 1997, encourages 'abiding respect for justice and the rule of law' (ASEAN, 1997). Despite this apparent commitment, the reality for many ASEAN countries has been that while lip service is paid to the rule of law, its actual application is diluted considerably as part of the phenomenon of the ASEAN way. Koh and Robinson (2002, p. 4) summarize the ASEAN way as non-interference or non-intervention in other member states' domestic affairs, with an emphasis on consensus building and cooperative programmes as opposed to legally binding treaties, and a preference for national implementation of programmes rather than reliance on a strong region-wide bureaucracy.

The formulation of international instruments, including those in Southeast Asia, often reflects the lowest common denominator of agreement between parties. Certainly, it would appear that making headway in the negotiation of environmental policy, as expressed in ASEAN official declarations and statements, is a manifestation of the 'politics of the possible' in the region.

The commitment to the actual implementation of obligations and guidelines is also variable, with some nations putting solid legal frameworks in place and others finding this more difficult, whether because of domestic politics or for reason of lack of institutional capacity, or both.

Nevertheless, it needs to be understood that the soft law approach is often used in the development of international and regional law more generally. This seems to be particularly so in the context of the development of environmental law. As many analysts 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 become the basis of hard law instruments in due course (Anton and Shelton, 2011, pp. 63–64; see also Shelton, 2003, *passim*, and Brown Weiss, 2003, pp. 546ff).

A recurring theme with regard to the ASEAN way is the question of sovereignty, whereby ASEAN nations tend to reject any direct interference in their domestic affairs. Of course, this occurs in some other regions as well, but in Southeast Asia it is rather more explicitly followed, and expressed in various instruments. In the environmental field this is a particularly important issue, given the interconnectedness of environmental media. In Principle 21 of the 1972 Stockholm

Declaration on the Human Environment and the similarly worded Principle Two of the 1992 Rio Declaration on Environment and Development, the world's nations addressed the question of the sovereign right to exploit their own resources but also recognized that the sovereign right was limited to their own political boundaries. A commonly recognized example of non-interference is the issue of forest fires in the region, dealt with further below.

The apparent bifurcation in attitude concerning international and regional environmental obligations has been explored by Roda Mushkat in her book *International Environmental Law and Asian Values* (2004). Mushkat makes a number of incisive observations regarding the influence of Asian values on the implementation of international environmental law. Her argument is that most Asian countries are willing to fully engage in the negotiation of multilateral environmental agreements, and to sign on to the obligations inherent in those agreements. In her conclusion, she states that 'the study provides sufficient evidence to argue that globally shaped norms that are seemingly at variance with culturally entrenched short-term economic imperatives are generally accepted by the politico-bureaucratic establishment in the Asia-Pacific region' (Mushkat, 2004, p. 127). However, she indicates that there is a good deal of variation between jurisdictions in relation to the implementation of those obligations. This is certainly clear from a consideration of the legislation and policy on environment and natural resource matters in the Southeast Asian jurisdictions briefly discussed below.

While the use of the concept of the 'ASEAN way' in Southeast Asia can be understood in terms of cultural and political sensitivities, the question is whether it can any longer excuse the slow progress in achievement of satisfactory long-term environmental and social outcomes that do not accord with developments at the international level. This is particularly the case with regard to the need for all nations to address the mitigation of greenhouse gases and the effects of climate change, as well as biodiversity loss and species decline. Nations will also be under increasing pressure to align themselves with the demand for new and more sophisticated legal norms likely to be expected by the 17 Sustainable Development Goals and their 169 associated targets agreed in September 2015. These cover virtually every major aspect of human activity and will dominate global environmental policymaking for at least the next 15 years (United Nations, 2015). There are some indications that the approaches to legal norms are changing in Southeast Asia. These indications include the introduction of the ASEAN Charter in 2007, recognition of the need to take stronger regional action with regard to climate change and biodiversity conservation, more focus on the need for environmental security (K.-L. Koh, 2012), the establishment of the ASEAN Commission on Human Rights in 2010 and the 2012 agreement on the ASEAN Human Rights Declaration, which includes recognition of an environmental right (Boer, 2015, pp. 152–156). They also include the establishment of specialized environmental courts in several ASEAN jurisdictions (see further below), as an indication of the increased determination to implement environmental law at a national level across the region.

Regional environmental initiatives

When ASEAN was established in 1967, little thought was given to environmental issues in the region, with the main focus being on peace, security and stability. While the environment was not part of the original agenda (see Koh and Bullar, 2015, p. 284), there has nevertheless been a long-term political commitment to environmental management across the region. From 1978, the ASEAN Sub-regional Environment Programme set the framework of regional cooperation, with strategic Plans of Action being formulated (as outlined by Koh Kheng-Lian and Md. Saiful Karim in chapter 19 of this volume). The ASEAN Senior Officials on the Environment

(ASOEN) was established in 1990, comprising environmental officials from each of the ASEAN countries. This group meets annually to discuss major environmental and natural resource issues in the region, and working groups on various environmental topics interact on a regular basis.

The completion of the 2007 ASEAN Charter has meant a significant bolstering of the legal status of ASEAN as a regional political organization, with ASEAN recognizing the importance of being able to interact more broadly on the world stage in a wide range of matters. At the same time, an ASEAN Socio-Cultural Community Blueprint, including environmental sustainability, was introduced, along with the Economic Community Blueprint and the Political Community Blueprint, as part of the 2009–2015 Roadmap for an ASEAN Community (see ASEAN, 2009, pp. 67, 80; ASEAN, 2013; and Koh and Karim, who trace these institutional developments concerning the environment in chapter 19 of this volume).

Multilateral environmental agreements in Southeast Asia

Most Southeast Asian countries became parties to a range of MEAs and instruments – such as the Rio Declaration on Environment and Development and Agenda 21, as well as major MEAs – in the 1990s (see, generally, Boer *et al.*, 1998). However, Brunei Darussalam and Timor Leste have acceded only to a few of them to date. The MEAs include:

- the 1985 Vienna Convention on 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;
- the 1979 Convention on Migratory Species;
- the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes;
- the 1992 Framework Convention on Climate Change;
- the 1992 Convention on Biological Diversity and its 2010 Nagoya Protocol on Access and Benefit-Sharing.

While many of the countries in the region have ratified these MEAs, and the ASEAN Socio-Cultural Community Blueprint (see below) includes reference to mechanisms for the implementation of several of them at the national level, a common characteristic of the national environmental legislation is that most of the pertinent laws do not specifically reflect the international obligations undertaken. Further, in contrast to their membership of the MEAs, Southeast Asian nations have been reluctant to enter into regional legally binding instruments in the environmental field, as discussed below.

Regional declarations, statements and resolutions

Part of the history of environmental policy's development in the region over the past three decades has been the negotiation of a range of declarations, accords, resolutions and statements on the environment and related issues, ranging from the Manila Declaration on the ASEAN Environment in 1981 to the ASEAN Joint Statement on Climate Change in 2014. (For a listing of all of the main instruments, see K.-L. Koh, 2009; 2013.) The instruments are a formal record of achievement developed through successive meetings as part of the building of common understandings on the environment, natural resources and heritage in the region. As they are

not legally binding, there is no particular pressure on ASEAN to establish mechanisms to check on and enforce compliance, and the obligations, such as they are, contained in the instruments remain at the level of soft law. The first one, the 1981 Manila Declaration mentioned above, showed some promise to the contrary. It contained policy guidelines to '[e]ncourage the enactment and enforcement of environmental protection measures in the ASEAN countries'. It also recommended the establishment of an ASEAN Committee on the Environment 'in the context of restructuring ASEAN'. These were early and positive signs of recognition that it was important to build a strong regional cooperative framework for environmental conservation based on legal mechanisms. However, except for a couple of agreements mentioned below, such enactment and enforcement measures have not been included in subsequent instruments, and they continue in much the same vein of encouraging regional cooperative approaches to environmental and resource conservation matters.

Thus, while the declarations and like instruments may have an influence in policy development at the national level, specific outcomes with respect to national regulatory mechanisms are not obvious. For example, looking at the 2012 Bangkok Resolution on ASEAN Environmental Cooperation, its non-mandatory language indicates its soft law status, with its preambular paragraphs setting out the undertakings of the ASEAN ministers, using phrases such as: '*continue the efforts* to establish a balance among economic growth, social development and environmental sustainability', '*enhance efforts* to protect, conserve and sustainably utilise ASEAN's biodiversity' and '*promote* sustainable development through environmental education and public participation' (emphasis added). Given the vastly increased environmental pressures manifest in the region, one question is whether the use of such language continues to be appropriate, or whether future instruments need to employ stronger language that promotes specific legal obligations at the national level.

Legally binding instruments in the Southeast Asian region

The regional environment-related instruments that are intended to be legally binding include the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, the 1995 South East Asia Nuclear-Weapon-Free Zone Treaty (not dealt with here), the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (see below and chapter 20 of this volume) and the 2002 ASEAN Agreement on Transboundary Haze Pollution.

ASEAN Agreement on the Conservation of Nature and Natural Resources

After several years of negotiation in the early 1980s, the ASEAN Agreement was agreed by the original six ASEAN members: Brunei Darussalam, Malaysia, Thailand, Indonesia, the Philippines and Singapore. Since it requires ratification by the six original parties, but has been ratified only by Thailand, Indonesia and the Philippines, it is not in force. While a fragmentary approach had developed in the 1970s and 80s around the world with regard to the legally binding implementation of early MEAs, the Agreement was an attempt to take a comprehensive regional approach. Its initial preparation was carried out by legal officers from the International Union for Conservation of Nature. A history of the drafting of the Agreement (Lausche, 2008, pp. 189–192) records that it was seen 'as the first effort to make a comprehensive treaty for sustainable development, which for the 1980s was revolutionary and far-reaching', and as a forerunner of the 1992 Convention on Biological Diversity (Lausche, 2008, p. 192). Legal drafter Françoise Burhenne-Guilmin recalled

> that a reason advanced for lack of ratification was indeed that the conclusion of a binding Agreement was not the way ASEAN nations wished and used to conduct their affairs: 'In 1998, in Singapore, we heard that the ASEAN Agreement was not the ASEAN way'.
> *(Lausche, 2008, p. 191)*

If the Agreement had come into force, it would have laid a solid legal foundation for every area of environmental management in the region, as evidenced by Article 1, entitled 'Fundamental Principle', in which 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 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.

While this and subsequent provisions are certainly expressed in legally robust terms, as the Agreement has not come into force it is, at best, soft law. As part of the preparations for implementation of the draft agreement, a review was completed of the state of environmental law in the then six ASEAN countries in 1993 (Lausche, 2008, p. 190). The national legislative frameworks found in the Southeast Asian jurisdictions three decades later have not improved markedly in the meantime.

There is clearly a need for a strong legally based regional environmental management framework. A significant step would be obtaining the remaining three ratifications to the 1995 ASEAN Agreement (from Malaysia, Singapore and Brunei; the newer ASEAN nations of Cambodia, Myanmar and Vietnam have acceded to the agreement, but these accessions do not function to bring the agreement into force). However, in the light of the above analysis, one is left to wonder whether, if the 1985 ASEAN Agreement was ratified and came into force, it would actually have much effect, or whether, because of the lack of a specific ASEAN environmental organization or targeted regional compliance mechanisms, combined with cultural and political considerations, it would remain largely dormant.

Agreement on Transboundary Haze Pollution

The phenomenon of forest fires has occurred primarily in Indonesia, but also in Malaysia and Thailand in the past 20 years. The fires are allegedly often lit deliberately for the purposes of land clearing and the conversion of woodlands to palm oil plantations and agriculture, resulting in widespread air pollution affecting a number of ASEAN countries, as well as, on occasion, Papua New Guinea and Australia. The phenomenon has continued on an annual basis despite awareness that the burning is contrary to Indonesian, Thai and Malaysian law (Law of the Republic of Indonesia No. 41 of 1999, s 50; Protection and Management of the Environment, Law No. 32 of 2009, Forest Reserve Act, s 14, Thailand; National Forestry Act 1984, s 82, Malaysia).

The issue is the subject of the 2002 ASEAN Agreement on Transboundary Haze Pollution, a legally binding instrument primarily aimed at the prevention of forest fires. A previous attempt to address the issue was the strongly worded, but nevertheless legally non-binding, ASEAN Cooperation Plan on Transboundary Pollution, agreed in 1995. As Simon Tay argued in that period,

> ASEAN may have to consider and adapt the 'ASEAN way' if it is to be relevant and effective in situations of transboundary harm. Non-interference cannot be maintained as an icon in the face of ecological disaster that knows no border.
>
> *(Tay, 1998, p. 205)*

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.

Nine ASEAN countries originally signed and ratified the agreement (Brunei, Cambodia, Laos, the Philippines, Malaysia, Myanmar, Singapore, Thailand and Vietnam), and it entered into force in November 2003. However, Indonesia – the country primarily responsible for the air pollution – took more than 12 years to ratify the agreement, rendering it largely ineffective over that period. After a good deal of pressure, Indonesia finally ratified in September 2014 (ASEAN Haze Action Online, 2015; see also Nurhidayah *et al.*, 2014). The agreement includes a general obligation to 'take legislative, administrative and/or other measures to implement the obligations under this agreement'. The Singaporean government has now enacted a specific legislative measure, as discussed below.

Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin

In the Mekong Region, an Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin was agreed among four of the five Mekong countries that are part of ASEAN (Cambodia, Laos, Thailand and Vietnam) in 1995. Although this is not an ASEAN-generated agreement, it is nevertheless an important instrument in the Southeast Asian context in terms of attempting to manage a range of values related to transboundary water resources that support agriculture, fisheries, aquaculture and hydropower generation. However, for regional political reasons and because of uneven access to resources between the four Mekong countries that are part of the Agreement, the current arrangements cannot be regarded as being as effective as they could be in managing the exploitation and conservation of the river, particularly concerning the building of hydropower dams. This situation is exacerbated by the fact that the upstream Mekong nation of China is not part of the Agreement but merely participates in Mekong River Commission meetings as an observer (Hirsch *et al.*, 2006; Boer *et al.*, 2016), even though it has built or planned 11 hydropower dams on the Mekong mainstream. With regard to international agreements, it is noted that Vietnam is the only nation in the Mekong to have become a member of the globally applicable Convention on the Non-Navigational Uses of International Watercourses, its accession having had the effect of bringing the Convention into force in 2014. While it is commendable that Vietnam has become a member, the effect is likely to be minimal in the region, as it does not assist in management of the river in any practical sense. The Mekong Agreement and related issues are examined in more detail in chapter 20.

Institutional development: legal aspects of the ASEAN Charter

The ASEAN Charter was completed in 2007 and ratified by each ASEAN state, entering into force in 2008. It can be characterized as something of a game-changer in the context of legal

development in the region. It invests ASEAN with permanent legal personality and thus provides a more formal legal and institutional foundation for ASEAN decision-making. It commits ASEAN countries to the principles of democracy, the rule of law and good governance, as well as respect for and protection of human rights and fundamental freedoms. It also resolves to ensure sustainable development for the benefit of present and future generations, and places the well-being, livelihood and welfare of the people at the centre of the ASEAN community-building process. It commits to intensifying community building, in particular by establishing enhanced regional cooperation and integration through the 'ASEAN Community'. The Charter also established the ASEAN Political Security Community Council, the ASEAN Economic Community Council and the ASEAN Socio-Cultural Community Council, each of which operates under a 'Blueprint' and reports to the ASEAN Coordinating Council.

The introduction to the Charter on the ASEAN website (ASEAN, 2008) states: 'The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance.' The reference to codification of 'ASEAN norms, rules and values' is intriguing, since it would be unlikely that the Charter could by itself transform any of the soft obligations in many of the declarations and other instruments into more robust undertakings.

Article 1 of the Charter notes the purposes of ASEAN, some of which are relevant to the question of bolstering legal frameworks on environmental protection.

Article 1(7) states that the purposes of ASEAN are:

> . . .
>
> 7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;

Article 1(9) states the following objective:

> 9. To promote 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;

Importantly, Article 5(2) provides that member states shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership.

In considering the question of the enforcement of its provisions, the Charter has the same characteristic weakness as other ASEAN declarations and statements. Article 20 states that, as a basic principle, decision-making shall be based on consultation and consensus, and where this cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.

In relation to environmental issues, the Charter lists the ASEAN Ministerial Meeting on the Environment (AMME) and the ASEAN Senior Officials on the Environment (ASOEN), under the auspices of the Socio-Cultural Community. Various working groups relating to environmental matters have been established. These include, inter alia, nature conservation and biodiversity, marine and coastal environment, multilateral environmental agreements, environmentally sustainable cities, water resources management, disaster management and the Haze Technical Task Force.

In considering the lack of mandatory wording and the weak provisions on implementation and enforcement, the ASEAN Charter cannot yet be considered a strong basis for addressing environmental issues in the region. As Koh comments:

> Despite these changes, the ASEAN Charter has not redressed some of the limits to environmental decision-making. In particular, the Charter codified the long-standing ASEAN practice of decision-making by consensus, meaning that decisions reflect the lowest common denominator, and has not deviated from ASEAN's strict adherence to the principle of non-interference. Nevertheless, it is important to remember that the Charter is a living document; it will keep evolving.
>
> *(K.-L. Koh, 2012, p. 229, footnote omitted)*

As evidence of its potential for evolution, Koh mentions the development of the Protocols to the ASEAN Charter on Dispute Settlement Mechanisms, thus addressing the lack of a dispute settlement process in ASEAN (K.-L. Koh, 2012, p. 229).

While the ASEAN Charter manifests some strong steps forward concerning transboundary environmental management in the region, the Charter's potential to be a basis for the development of more consistent environmental legal regulation at a regional level and more robust environmental law regimes at a national level remains elusive.

On a more positive note, there are bodies such as the ASEAN Wildlife Enforcement Network – launched with the assistance of the Secretariat of the Convention on International Trade in Endangered Species – which, while not legally constituted, is intended to provide effective coordination and information-sharing mechanisms among the law enforcement agencies within ASEAN to address illicit harvesting of, and transnational trade in, wild fauna and flora. The fact that such networks exist and that regular meetings take place concerning a wide range of regional environmental matters, with detailed declaratory statements published, indicates a close familiarity with the issues and a common regional concern to address them (ASEAN Wildlife Enforcement Network, 2015).

In summary, many countries in the Southeast Asian region are demonstrably willing to engage in the negotiation and development of globally applicable environmental legal instruments. However, at the regional level there is less inclination to promote legally binding environmental instruments, with most countries being more inclined to agree to soft law instruments.

National environmental law

Each Southeast Asian jurisdiction has enacted environmental legislation, but with little consistency of approach or scope. This can be partly explained by the different histories, legal traditions and cultures of each country, as hinted at in the introduction to this chapter. The political commitment and institutional capacity to implement and enforce the legislation also vary considerably (see further Mushkat, 2004, pp. 47–50).

As noted in *Greening Governance in the Asia-Pacific* (IGES, 2012):

> National environmental governance has been substantially improved as most governments have now created a central environmental authority under a framework environmental law, along with subsidiary laws, decrees and regulations, but still many challenges remain in implementation. 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 many countries across the Asia-Pacific region, it is particularly significant for a number of jurisdictions in the Southeast Asian region.

While some countries have longstanding 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 generally they include lack of political commitment, inadequate institutional development, overlaps in administrative responsibilities and lack of human and financial resources. As indicated above, however, many 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 more as policy guidelines, the environment protection and nature conservation frameworks nevertheless have had modest success. But while some jurisdictions have made progress in this realm, none of the 11 countries can be said to have instituted a complete legal regime to comprehensively cover all issues of environmental protection and natural resource exploitation and conservation.

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 national governments, the obligations under those MEAs are generally not specifically reflected in the national legislative enactments and, even where they are, the international obligations are not always seriously carried out.

Given the range of environmental laws of the Southeast Asian countries, Table 8.1 renders only a snapshot of each jurisdiction. It includes only the most significant environmental laws. A brief commentary follows, focusing mainly on recent initiatives in selected jurisdictions.

Primary legislation

All jurisdictions except Brunei have enacted primary environmental legislation. Given the variance in approach and scope, it is difficult to make more than broad comparisons across the 11 jurisdictions. Generally, the primary legislation includes pollution control, planning mechanisms, management of natural resources, enforcement processes and penalties for breach of the provisions. Most include a basic EIA requirement, with the exceptions of Brunei and Singapore (although there is a requirement to carry out impact analysis studies concerning hazardous installations). Most also provide for varying levels of environmental information and public participation. Provision for enforcement of environmental legislation by members of civil society is limited, with only Indonesia, the Philippines and Timor Leste including specific provisions to bring environment-related actions in the courts.

Environmental assessment

Legal regulation of environmental assessment has seen significant improvement in recent years. As noted above, most jurisdictions include environmental assessment requirements in the primary legislation and, as Table 8.1 indicates, all jurisdictions have either a regulation or various kinds of guidelines on environmental assessment. Indonesia has had a specific regulation on environmental assessment since 1991, which includes provision for transparency of information and community involvement in the process. The Philippines introduced its legal requirements in 1978 (see Boer and Martyn, 1994, pp. 221–229) and Malaysia in 1987 (Makmor and Ismail, 2014). In Cambodia, Laos and Vietnam, the environmental assessment frameworks are becoming much more sophisticated. In addition to the basic environmental impact assessment requirements, they include strategic environmental assessment, cumulative impact assessment and

Table 8.1 Environmental laws in Southeast Asia

Jurisdiction	*Primary environmental laws*	*Selected sectoral legislation*		
		EIA	*Biodiversity conservation*	*Forestry*
Brunei	New laws being drafted	Environmental Impact Assessment Order 2012	Wildlife Protection Act 1978 (update pending)	Forestry Act 1951 (revised 2002)
Cambodia	Law on Environmental Protection and Natural Resource Management 1996	Included in 1996 Act; Draft EIA Law 2015 pending	Protected Areas Law 2008	Forestry Law 2002
Indonesia	Environmental Protection and Management Act 2009 (original from 1982)	Included in 2009 Act; Regulation 27/1999 Environmental Impact Assessment	Conservation of Living Resources and Their Ecosystems, Act No. 5 1999	Forestry Act No. 41 of 1999
Laos	Law on Environmental Protection 1999, revised 2012	Environmental Impact Assessment Decree, No.112/PM, 2010 Ministerial Instruction on EIA 2013	Law on National Heritage 2005 Law on Wildlife and Aquatic Animals 2008	Law on Forestry 2007
Malaysia	Environmental Quality Act 1974, amended 2012	Environmental Impact Assessment Order 1987; guidelines revised 2007	National Parks Act 1980 Wildlife Conservation Act 2010	National Forestry Act 1984
Myanmar	Environmental Conservation Law 2012	Environmental Impact Assessment Rules 2012 draft	Wild Bird and Animal Protection Act 1912	Forest Act 1992
Philippines	Environment Code 1988 Clean Air Act 1999 Ecological Solid Waste Management Act 2000 (RA Clean Water Act 2004)	EIA System Decree 1978	Wildlife Resources Conservation and Protection Act 2001	Forestry Reform Code 1975
Singapore	Environmental Protection and Management Act 1999	EIA Procedures (informal)	National Parks Act 1996 Wild Animals and Birds Act 1965 (revised 2000)	Transboundary Haze Pollution Act 2014
Thailand	Enhancement and Conservation of National Environmental Quality Act 1992	EIA in Thailand 2012 (Guidelines)	National Park Act 1961	Forestry Act 1941 National Forest Reserve Act 1964
Timor Leste	Basic Law on Environment 2012	Included in 2012 law; Draft EIA law	Protected Places Regulation 2000	Contemplated
Vietnam	Environmental Protection Law, 2014 (originally enacted 1993)	Environmental Assessment Circular 2008 Decree on environment protection planning, environmental assessment 2015	Biodiversity Act 2008	Forest Protection and Development Law 2004

social impact assessment. These developments are largely a response from investment interests to address the impacts of hydropower development as part of the requirements for the provision of finance from external sources (for the lower Mekong region, see Boer *et al.*, 2016, ch. 5). Thailand, with the oldest environmental law in the Mekong region, introduced new environmental assessment requirements in 2012, but they remain at the level of guidelines. Myanmar's draft environmental impact assessment rules of 2013 can be best described as a work in progress.

Biodiversity conservation

Biodiversity conservation law can be divided into the establishment of terrestrial and marine protected areas established for the purposes of biological diversity conservation on the one hand, and the law relating to the protection of native species of flora and fauna on the other. Some of the legislation is directed at both aspects. All Southeast Asian jurisdictions have legislated for the establishment and maintenance of protected areas, commonly referred to as national parks, reserves or conservation areas, and many jurisdictions have formulated national biodiversity strategies and action plans (Carew-Reid, 2002; Boer, 2002). A number of the nations inherited legislation on protected areas from their colonial forebears. For example, the original Philippines legislation dates from 1903 (the Philippine Commission Act, enacted by the US Congress, and then its own law in 1932). The current scheme is administered under the National Integrated Protected Areas System (NIPAS) Act of 1992. Malaysia's system was set up in the 1890s, and is now administered under the federal National Parks Act of 1980. It is the only Southeast Asian country to enact specific legislation for a particular protected area, Taman Negara, which spans three Malaysian states. The park is jointly managed under three similar state laws enacted in 1938–1939 (see Pakhriazad *et al.*, 2009).

One of the best examples of combined protected areas and endangered species legislation is Vietnam's Biodiversity Law of 2008, which corresponds in many of its provisions to the 1992 Biodiversity Convention, although it does not mention it. Similarly, it addresses the concerns of the 1973 Convention on International Trade in Endangered Species, as well as the 1979 Convention on Migratory Species, without specifically referring to either of these Conventions. While the legislation deals with the establishment and conduct of various types of protected area, which are dealt with by the Ministry of Natural Resources and Environment, it is pertinent to note some administrative and legal overlap, since the Ministry of Agriculture and Rural Development also establishes and manages a range of protected areas.

Forestry

The very large areas of forested land in Southeast Asia, as well as the high rate of deforestation, have meant that most jurisdictions have enacted legislation to regulate forestry activities. Forest conservation has attained a new significance in recent years with the development of greenhouse reduction-related endeavours, including Reducing Deforestation and Degradation (REDD) mechanisms, which require dependable legal frameworks for their success (see Lyster *et al.*, 2013; also see chapter 11 of this volume).

While Singapore is the only Southeast Asian jurisdiction without specific forestry management legislation, it is the single jurisdiction to legislate with regard to the issue of transboundary air pollution. Singapore enacted its Transboundary Haze Pollution Act some weeks before Indonesia ratified the Haze Agreement discussed above. It represents an unusually strong legal stand in the region, in light of the doctrine of non-interference canvassed above, and might represent what Koh and Karim have referred to as a 'calibration' of ASEAN decision-making

(see chapter 19 of this volume). Given the fact that Singapore has suffered virtually annual bouts of severe air pollution for more than 20 years as a result of forest fires from Indonesia, the enactment of this legislation is hardly surprising, and some may argue that it was overdue. The legislation is potentially very far reaching. It provides that it 'extends to and in relation to any conduct or thing outside Singapore which causes or contributes to any haze pollution in Singapore' (s 4), and creates offences with substantial penalties concerning haze pollution caused by any entity whether inside or outside Singapore (s 5). It also provides for civil liability for causing haze pollution in Singapore. A number of companies operating forestry concessions in Indonesia are based in Singapore, and the legislation enables the Singapore government to proceed against Singaporean entities that control forestry concessions in Indonesia, as well as entities not based in Singapore (the latter legal actions would be subject to addressing difficult jurisdictional issues). Alan Tan, in an incisive and critical analysis of the new legislation, opines that for a number of reasons, including complex matters concerning the inconsistency of maps, uncertain concession boundaries and problems of extra-territorial application of the new legislation, 'adversarial action before the Singapore courts is not a long-term solution' (Tan, 2015).

Specialized environmental courts

An indicator of growing awareness of the importance of environmental law in the Asian region as a whole is the recognition of the need for specialized environmental courts or tribunals, sometimes referred to as 'green benches' (Pring and Pring, 2009). For example, India has established a National Environmental Tribunal, while China has set up over 370 specialist green benches within the current court structure at various levels (see Asian Development Bank, 2010; Zakaria, 2012; Zhang Chun, 2015).

In Southeast Asia, Thailand has drafted specialized environmental rules for its Administrative Courts, and a specialized environmental court is being contemplated (AECEN, 2009; *The Nation*, 2015). The Supreme Court in Indonesia has pursued the concept of environmental judicial certification (ADB, 2012, p. 2). In the Philippines, Rules of Procedure for Environmental Cases were adopted in April 2010 (Philippines Supreme Court, 2010). In Malaysia in 2012, the Chief Justice announced the commencement of a specialist environmental court within the national court structure (Malaysian Judiciary, 2012, p. 9). The Chief Registrar of the Malaysian Supreme Court subsequently issued a Practice Direction entitled 'Establishment of the Environmental Court'.

An ongoing problem with such initiatives is the need for judges, prosecutors and lawyers to undergo capacity building to give them a greater technical understanding of the scientific and related issues (see IGES, 2012, p. 9). Further, restrictive standing rules in many Southeast Asian jurisdictions place severe limitations on legal actions being brought by non-government organizations and individual citizens. The exceptions include the Philippines and Indonesia, both of which have experienced an increase in environmental litigation in recent years – although, with regard to Indonesia, the floodgates have hardly opened (see Nicholson, 2009, p. 247).

Innovative legal actions

Unlike South Asian jurisdictions, Southeast Asian countries are not known for innovative legal actions to address environmental issues – with the exception of the Philippines, which has seen some vigorous public interest litigation to ensure the upholding of constitutional rights. The most well-known case is *Oposa v Factoran*, 1993, 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*'. More recently, an innovative public interest case (*Segovia v Climate Change Commission,* Supreme Court of the Philippines, February 2014) was filed on the basis of a writ of 'kalikasan', or writ of nature, and a writ of continuing mandamus – actions officially recognized by the Rules of Procedure for Environmental Cases. The causes of action in the case allege 'Failure and refusal to perform an act mandated by environmental rules, and violation of environment laws resulting in damage of such magnitude as to prejudice the life, health and property of all Filipinos', together with specific courses of action against governmental respondents. The main requests put forward by the plaintiffs include division of all roads by at least one-half lengthwise, with one-half to be available for sidewalks and bicycle lanes as well as use for urban gardens, together with the making available of funds to implement what is referred to as the 'Road Sharing Principle'. Although this case is still pending, it is indicative of the kinds of innovative cases that can be taken in the future on the basis of constitutional provisions and the rules of court for environmental cases in the Philippines. On the experience of the *Oposa v Factoran* case mentioned above, there is no doubt that the road-sharing case will be looked at with a great deal of interest in other parts of Asia and indeed around the world.

In addition, before the case was filed, the same NGO group sponsored a Sustainable Transport Act. The long title of the proposed legislation gives a sense of its intent: 'An Act promoting sustainable and alternative modes of transportation and other mobility options to improve air quality, increase efficiency, reduce congestion and contribute to positive health impacts in our society'. This legislation is intended to conform to constitutional provisions concerning 'the right to a balanced and healthful ecology in accord with the rhythm and harmony of nature and to conserve and develop the patrimony of the nation' (s 2). The legislation, introduced into the Filipino Senate in 2013, awaits further consideration.

Human rights and environmental concerns

Discussion on the right to a clean and healthy environment has become an important topic globally in recent times with the appointment by the United Nations Human Rights Council of an Independent Expert on Human Rights and the Environment in 2012, reappointed as Special Rapporteur in 2015. The Human Rights Council passed a resolution in 2014 recognizing that 'human rights law sets out certain procedural and substantive obligations on States in relation to the enjoyment of a safe, clean, healthy and sustainable environment' (UNHRC, 2014). As the Special Rapporteur states, '[t]he exercise of human rights helps to protect the environment, which in turn enables the full enjoyment of human rights' (Knox, 2015). This idea is slowly being realized in the Southeast Asian region. A number of national constitutions have explicitly recognized this link, including those of Indonesia (Article 28H(1)), the Philippines (Article 16) and Timor Leste (Article 61). The adoption in 2012 of the ASEAN Human Rights Declaration can be seen as a milestone with regard to human rights in general in the region, as it recognizes all of the provisions of the 1948 Universal Declaration of Human Rights and the 1966 Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. Article 28 of the Declaration contains a broadly stated set of rights:

> 28. Every person has the right to an adequate standard of living for himself or herself and his or her family including:
> a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
> b. The right to clothing;

c. The right to adequate and affordable housing;
d. The right to medical care and necessary social services;
e. The right to safe drinking water and sanitation;
f. The right to a safe, clean and sustainable environment.

Article 28(a), (c), (e) and most obviously (f) relate directly to environmental rights. However, the status of the instrument as a declaration means that, similar to many of the instruments discussed earlier, it remains non-binding. In addition, the powers of the ASEAN Human Rights Commission are very limited. Its initial task was to draft the ASEAN Human Rights Declaration. Its Terms of Reference specify that it is 'an inter-governmental body and an integral part of the ASEAN organizational structure. It is a consultative body'. Consequently, it advises, consults, raises public awareness, promotes capacity-building and develops strategies and encourages implementation of the global human rights instruments, but has no powers of investigation or collection of evidence. The Commission must submit its annual report and other appropriate reports to the ASEAN Foreign Ministers Meeting 'for its consideration', but nothing more. The Terms of Reference are due to be reviewed after five years, with a view to further enhancing the promotion and protection of human rights within ASEAN. It may thus acquire a stronger mandate and evolve into a body more closely resembling human rights bodies in other regions in due course. When that occurs, the environmental rights found in the Declaration may acquire more teeth. In the meantime, based on Article 5 of the Declaration ('Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law'), it is possible that courts in the region could hear actions in which the specified rights could be used in submissions – although they may be regarded by courts as having no more than moral force (see further Boer, 2015, p. 154).

Conclusion

Environmental law at the regional and national levels has developed unevenly across the Southeast Asian region over the past few decades. There is generally good adherence to multilateral environmental agreements – although, with some exceptions, little specific legislation exists which addresses the particular international environmental obligations. This chapter notes that several significant legally binding regional instruments have been introduced. With the introduction of the ASEAN Charter in 2007, together with roadmaps and associated Community Blueprints, it is clear that there is a greater commitment in the region to the rule of law. There is some evidence, especially with regard to the issue of transboundary air pollution, that the concepts of non-interference and the doctrine of sovereignty may become of lesser importance. However, the wide range of non-binding declarations, charters and resolutions is still not being sufficiently reflected in robust legislative measures at a national level.

Nevertheless, the chapter shows that, in recent years, national environmental legislation is being redrafted and supported by more detailed guidelines (rather than legally binding regulations), particularly in the field of environmental assessment. Despite the increased legislative activity across the region, the actual implementation of environmental law remains problematic, due to issues of lack of supervision, especially at a local level; corruption issues; lack of political will in the face of economic pressures; and legal and financial standing and evidential barriers to public interest actions to enforce the law. There thus remains a great deal for both ASEAN and other regional bodies to do in order to ensure that environmental law lives up to its noble global aspirations within the Southeast Asian region.

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