

Evolution of the ASEAN Way: Approach to Regional Environmental Governance and its Effectiveness

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APPROACH TO REGIONAL ENVIRONMENTAL GOVERNANCE

Abstract

The Association of Southeast Asian Nations (ASEAN) possesses a burgeoning identity as more developed member states such as Singapore, Thailand, and Malaysia take on leadership roles in defining local and regional regulations. While the conglomeration of nations in the region are organized in a similar fashion to that of the European Union, the environmental policies of the two regions are drastically different in applicability and enforcement. Recently, ASEAN sprung into prominence as foreign and local investment helped develop these nations, enabling the region to successfully claim a seat in the congregation of significant economic powers in the Asia Pacific region. This effect is even more amplified as the economies of some of the more developed nations in Asia, such as Japan, Taiwan, Hong Kong and China, are seeing slower growth. How is the ASEAN contributing to environmental preservation as an ecologically significant region? Where does the ASEAN currently stand in terms of regulatory stringency and legal system framework? How is the ASEAN enforcing policies created for environmental protection?

Keywords: ASEAN, environmental governance, regulatory, enforcement, effectiveness, regional governance

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Approach to Regional Environmental Governance: Evolution of the ASEAN Way and Its Influence on Asia Sustainability

Significance of Environmental Sustainability in the ASEAN

Part of the purpose of the ASEAN is “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” (Secretary-General of ASEAN, 2007).

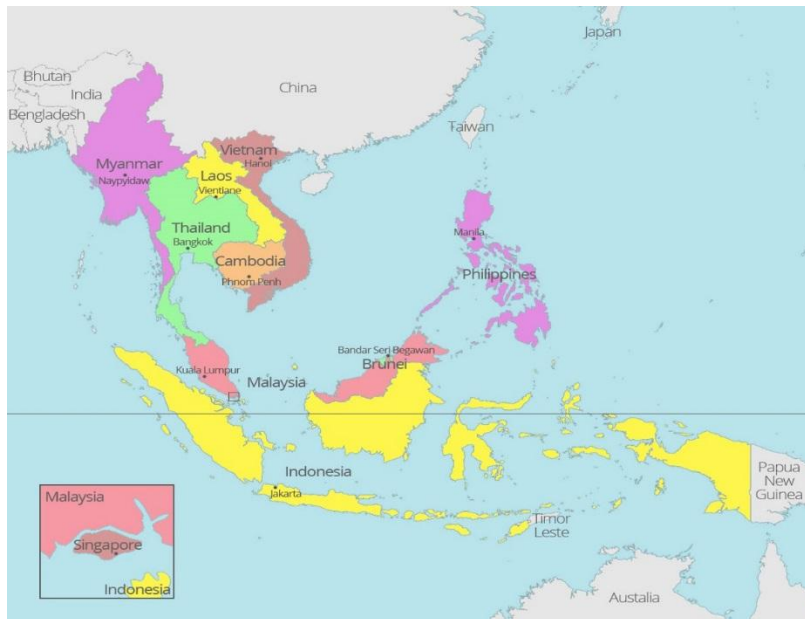


Figure 1. Location of ASEAN countries (Findlow, 2016)

amounting to about 3% of the world’s total land area (HV, Thompson, & Tonby, 2014; Glover & Lee, 2008). These ten nations, specifically Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam, come from a variety of historical backgrounds, with Thailand being the only state that was never colonized by a western country. A disproportionately high biodiversity is found in ASEAN land and sea, which is comprised of expansive, lush virgin rainforests, as well as mangroves, coral reefs and costal ecosystems (Elliot, 2012). It is estimated that approximately 25% of the world’s forests are found within ASEAN

Encompassing the entire Indochina Peninsula as well as the Philippine and Indonesian archipelagoes, collectively, the ten ASEAN member states have roughly 4.4 million km² in land mass, approximately half the size of continental U.S.A. and

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borders (Glover & Lee, 2008). Member states Malaysia, Indonesia, and the Philippines are three of the world's seventeen mega-diversity countries (Glover & Lee, 2008). As a result, the ASEAN is home to 20% of all known species in the world (Glover & Lee, 2008). Conservation of this ecologically important region is crucial not only to ASEAN's vicinity, but to the entire planet. With that said, in the past 25 years, the rate of deforestation per year in the ASEAN shot up from 1.35% in 2008 to 1.8% in 2012 and increasingly more rapidly than ever, while that of the rest of the world remained at 0.2% - 0.23% in the same time frame (Glover & Lee, 2008; Elliot, 2012). Four of the ten nations most endangered by climate change, measured by the number of people presumed to be affected, are located in the ASEAN region, specifically the Philippines, Vietnam, Indonesia, and Thailand (Elliot, 2012).

Economic advantage as a sizable region has been one of the key contributors to the founding of the ASEAN (ASEAN Cooperation on Environment, 2015). With massive economic powers such as India and China consistently pressuring the rest of Asia with their tremendous development, it is critical for their neighboring ASEAN region to experience comparable growth. Collectively, most member states of the ASEAN depend largely on agriculture and harvesting of natural resources as their propellers of economic development (Basi, 2015; Anbumozhi & Intal, 2015). Environmental regulatory framework is needed to accommodate a booming agriculture industry in virtually every ASEAN member state aside from the sole city-state of Singapore, encompassing topics such as irrigation using ground and river water, top-soil runoff, chemical pesticide and fertilizer use, and more (Anbumozhi & Intal, 2015). Moreover, industries rely largely on the well-being of the environment, and have already been immensely impacted by detrimental effects of increasing turbulent natural disasters due to climate change (Anbumozhi &

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Intal, 2015). Hence it is in the ASEAN's vital interest to establish long-term, holistic measures to protect the environment.

Evolution of ASEAN environmental regulatory administration

To the determination of its constituent countries, the ASEAN's multilateral efforts to handle environmental issues are arguably closely linked to a common goal to present the group as a "coherent and authoritative regional unit, rather than simply a sub-region of the Asian Pacific" (Elliot, 2012). Southeast Asia is home to a myriad of environmental challenges that are more and more difficult for the regions' constituent countries to address effectively as individual nations. The problems faced by each country of the ASEAN are characterized not only by their geological uniqueness, but more so by their advancement in economic development. Project proponents of major infrastructure construction have been moderating the severity of ecological issues in the region (Wells-Dang, 2015). Aside from economic development gaps, language barriers also render enforcement standards in each of the ASEAN member states difficult to homogenize. No member state shares any official language with the exception of Singapore and Malaysia sharing one of Singapore's four official languages (Secretary-General of ASEAN, 2007). The working language of regulatory proceedings in the ASEAN is therefore set as English (Secretary-General of ASEAN, 2007).

Examples of environmental subjects of investigation by local regulatory authorities in the ASEAN vary from Thailand's biosafety law banning genetically modified crops in 2005 (Endo, 2009), to Laos' milestone debut participation in a major infrastructure environmental assessment following the Mekong River waterworks inauguration (Koh, 2009). Transboundary problems, including haze pollution and marine water quality degradation, continue to be recurring topics of discussion at the ASEAN environmental regulatory meetings (Elliot, 2012). The multi-decade-

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long haze problem originating from Indonesia and to a lesser extent, Malaysia, was known internationally as possibly the highest profile transboundary environment crisis (Heilmann, 2015). Also notable are the environmental effects of major infrastructure projects such as the constructions of the two Mekong River dams, Don Sahong and Xayaburi, as these projects have been observed to be threatening local ecosystems and resulting in detrimental effects on local fisheries in the lower Mekong basin (Wells-Dang, 2015). On the other hand, mass mining of metals such as gold and iron ore creates local waste storage and chemical pollution problems within individual states (Wells-Dang, 2015).

Administration with regards to the environment in the ASEAN began in 1978 as the ASEAN Expert Group on the Environment (AEGE) reporting to the ASEAN Committee was founded (Sunchindah, n.d.). In 1978, the first policy on the environment of the region was adopted in the form of a sub-regional environment program (Elliot, 2012). From 1981, the ASEAN Ministerial Meeting on the Environment (AMME) was established for all formal decision-making on matters related to the environment (Elliot, 2012). Then in 1989, the AEGE proceeded to become the ASEAN Senior Officials on the Environment (ASOEN), which held annual meetings to review the reports of the ASEAN Working Groups, and also followed a similar routine meeting pattern (Elliot, 2012; Sunchindah, n.d.). In charge of providing operational policy guidance regarding the environmental programs in place, the Working Groups advise the ASOEN on environmental matters that arise (Sunchindah, n.d.). The ASEAN Standing Committee would then in turn adopt the meeting outcomes from the ASOEN meetings, and report them to the ASEAN Foreign Ministers from each of the member states (Sunchindah, n.d.).

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Since this initial inauguration of the ASOEN meetings, there have been several noteworthy occurrences that demonstrate the ASEAN's resolution to harmonize environmental policies, namely the *Kuala Lumpur Accord on Environment and Development 1990*, the *Singapore Resolution on Environment and Development 1992* and the *Bandar Seri Begawan Resolution on Environment and Development 1994* (Nurhidayah, Lipman, & Alam, 2014). Highlighting forest fire countermeasures and an anti-tropical timber campaign, the *Singapore Resolution on Environment and Development 1992* further elaborated on the modes of regional cooperation by harmonizing quality standards and setting long-term quantifiable goals with respect to air and river quality (Nurhidayah, Lipman, & Alam, 2014). Moreover, the *Singapore Resolution* prescribed the synchronization of policy directions and the creation of operational and technical cooperation for the environmental issues mentioned (Nurhidayah, Lipman, & Alam, 2014). The *Singapore Resolution* was effectively the first of the many declarations signed by all ASEAN member states that contains operational guidance framework facilitating harmonization (Nurhidayah, Lipman, & Alam, 2014). Despite being a pioneering accord, the *Singapore Resolution* remains a "soft law". Passive, highly diplomatic, and unobtrusive to all member states' sovereignty, the ASEAN environmental approach encompasses what are officially binding and non-binding regulations, often called "hard laws" and "soft laws" respectively, with preference over "soft laws" (Nurhidayah, Lipman, & Alam, 2014). In the next section, the effectiveness of "hard laws" and "soft laws" will be further examined.

More emphasis on the convergence of environmental policies has been brought to light with the development of the *ASEAN Socio-Cultural Community Blue Print*, which outlined the member states' determination to harmonize environmental policies and databases gradually (Nurhidayah, Lipman, & Alam, 2014). Another point of significance in the *Blue Print* is the

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harmonization of monitoring, measurement and reporting for specific environmental parameters (Nurhidayah, Lipman, & Alam, 2014). The sharing of intelligence and research outcomes are fundamental to tackling environmental problems, especially for issues revolving around boundary-indistinguishable facets of the environment, including the Mekong River's water quality, haze pollution and marine conservation.

There was increasing recognition of eco-efficiency and a necessity for a macroscopically held ethic of stewardship for the environment by the year 1995 (Elliot, 2012). Policies emerged to encase economic concerns alongside environmental ones as these policies were then already deemed inseparable and interlinked (Elliot, 2012). Drastically different than the 1987 *Jakarta Resolution on Sustainable Development*, which referred to individual states' ownership of the environment that merely share one common goal, the 1995 *Cooperation Plan on Transboundary Pollution* referred to the entire Southeast Asia region as one indivisible ecosystem (Elliot, 2012). The 1995 plan was iconic of regional cooperation in the 1990's – it served to define and address three transboundary pollution sources, including atmospheric, shipborne and hazardous waste pollution (Nurhidayah, Lipman, & Alam, 2014), and more importantly, to impose change by recognizing how environmental issues are linked. This plan created a general shift in the perspectives of relevance of regional environmental stewardship that can be seen as time progressed from the 1980's to the 1990's. According to Elliot, the installment of this plan achieved two political agendas – providing the environment ministers a legitimate reason for “joint action and for the institutionalization of transboundary responsibility” and declaring the region's unified identity, which fortifies the concept of one Southeast Asia (Elliot, 2012).

Subsequently in 1997, the *Regional Haze Action Plan* inherited a similar mission from the 1995 plan, and later on became the foundation for the most influential ASEAN

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environmental declaration of all, the *ASEAN Agreement on Transboundary Haze Pollution*, which will be closely examined in the following section.

A long-standing tradition of burning unused parts of crops primarily in Indonesia and Malaysia is the primary reason attributed to the region's haze pollution. The 1997 *Regional Haze Action Plan* contained the three components of the backbone to haze prevention – prevention of forest fires, surveillance, and “fire-fighting” capabilities and mitigation (Nurhidayah, Lipman, & Alam, 2014). The plan was essentially a comprehensive toolkit complete with the precursors to “legislation relating to open burning; enforcement of legislation; reports and monitoring schemes for air quality; a national task force; establishment of biomass markets; and appropriate means for disposing of agricultural waste”, ready to be deployed in member states (Nurhidayah, Lipman, & Alam, 2014). A continuation of this plan took place in 1999, when the *Sixth ASEAN Ministerial Meeting on Haze* adopted a “zero burning policy” that was formulated to be applicable to plantations and timber concessions, but exempted smallholders who were presumed to not have the means to implement other non-burning clearing techniques (Nurhidayah, Lipman, & Alam, 2014). In spite of efforts to strongly advise member states to adopt the policy, reports indicated that the enforcement of the policy was too difficult and unrealistic. Hence in 2003 during the *10th ASEAN Ministerial Meeting on Haze*, the assembly acknowledged the need to develop guidelines for controlled burning, a big step down but towards facing the reality from the original “zero burning policy” (Nurhidayah, Lipman, & Alam, 2014). This new focus became one of the first actions taken to look into the feasibility and enforceability of ASEAN policies by cross-examining actual practices and environmental assessments (Nguiragool, 2011).

Two pivotal declarations, the *ASEAN Declaration on Environmental Sustainability* and the *ASEAN Declaration on the 13th Session of the Conference of the Parties to the United*

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Nations Framework Convention on Climate Change (UNFCCC) and the 3rd Session of the CMP to the Kyoto Protocol, were signed in 2007 by all member states (Glover & Lee, 2008). The ASEAN Declaration on Environmental Sustainability incorporated the details of the initiatives that all constituent countries would be implementing to resolve environmental problems such as water and air pollution, forest management, and to alleviate climate change related issues (ASEAN Cooperation on Environment, 2015). On the other hand, the ASEAN Declaration on the 13th Session of the Conference of the Parties to the UNFCCC and the 3rd Session of the CMP to the Kyoto Protocol emphasized the pledge of the member states' support for the UNFCCC and the Kyoto Protocol (Glover & Lee, 2008). The two pivotal ASEAN declarations, together, reinstated ASEAN's joint commitment to combat climate change and conserve the natural abundance in the jurisdiction (Glover & Lee, 2008).

In the same year at the East Asia Summit, the *Singapore Declaration on Climate Change, Energy and the Environment* was signed by all member states of the ASEAN, as well as by Australia, New Zealand, Japan, China, India and South Korea (Glover & Lee, 2008). This non-binding declaration was still significant in the history of regional effort in environmental conservation as it encompassed the accord of China and India, both of which remained silent to calls for emission cuts (Glover & Lee, 2008). Nevertheless, the declaration did not consist of any quantifiable goals for carbon emission reductions, and therefore faced criticism of the effectiveness of the declaration overall (Glover & Lee, 2008)

More recently in the end of 2015, the ASEAN Economic Community (AEC) was formed to enhance the multilateral cooperation targeted for development and sustainability improvements (Basu, 2015). Although the AEC takes into account the "development gap" between the more developed member states and those with slower development, namely

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Cambodia, Laos, and Myanmar, the AEC has devoted effort specifically raise regulatory standards in these three nations (Wells-Dang, 2015). However, the tackling of environmental issues is still rarely seen as the target of any further integration of these member states to-date (Wells-Dang, 2015).

Enforcement of regulations and effectiveness of environmental regulatory control

Regional governance achieved more prominence in global environmental regulatory discussions, especially after the inception of the European Union (EU), which is likely the most remarkable integration of countries. The signing of the Lisbon Treaty in 2007 served as a declaration of the commitment of EU member states to achieve integration in environmental matters (Nurhidayah, Lipman, & Alam, 2014). Decision making power for policymaking effectively shifted from individual member states of the EU to the collective Union level (Nurhidayah, Lipman, & Alam, 2014). In turn, the EU possessed direct authority over constituent countries when it comes to environmental matters, and the development of the EU Directives are supplementary facilitating tools (Nurhidayah, Lipman, & Alam, 2014). This model, however, was vastly dissimilar to the one employed by the ASEAN.

Countermeasures for the notorious haze problem, which received global press coverage, were characteristic of ASEAN environmental regulatory enforcement. Toxic and threatening the lives of tens of millions of Indonesians, Malaysians, and Singaporeans, the recurrent haze phenomenon originated from post-harvest palm tree clearing in Indonesia, and was identified as one of the top ten priorities of regional importance for ASEAN environmental cooperation (Nurhidayah, Lipman, & Alam, 2014). Numerous metropolitan areas reported record-breaking measurements of sulfur dioxide, nitrogen dioxide and other hazardous suspended particulates that were multifold over the World Health Organization's recommended safe limits (Elliot,

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2012). Indonesia, the top country for haze production from crop burning exercises, has adopted the previously mentioned zero burning policy from the *ASEAN Agreement on Transboundary Haze Pollution*, supposedly prohibiting any burning of forest or land (Nurhidayah, Lipman, & Alam, 2014). Despite the adoption, the regulation remained largely unenforced with merely several infringing entities prosecuted due to a multitude of reasons explored later on in this session.

Subsequently in 2015, Indonesia finally joined every other ASEAN member state in depositing its official instrument of ratification of the *ASEAN Agreement on Transboundary Haze Pollution* (Heilmann, 2015). Typical of ASEAN environmental approaches, the agreement is also comprised of non-binding guidelines as well as binding measures agreed on the principles of state sovereignty and non-intervention (Nguitragool, 2011; Heilmann, 2015). Therefore, it contains no enforcement and dispute-resolution mechanisms (Nguitragool, 2011). The *ASEAN Agreement on Transboundary Haze Pollution*, along with most haze-prevention measures, was not expected to be a game changer for the increasingly serious haze problem, which poses serious health threats even to those who reside in neighboring states Singapore and Malaysia (Heilmann, 2015). This non-intervention approach to regulatory installations is so iconic of the region that it is coined as the “ASEAN Way” (Nurhidayah, Lipman, & Alam, 2014).

Critically mocked as being a synonym for unwillingness to directly solve problems, the “ASEAN Way” emphasizes that individual member states still possess full ownership of local enforcement, which is part of each state’s domestic affairs (Nguitragool, 2011; Nurhidayah, Lipman, & Alam, 2014). Lax institutionalism in the form of affinity for non-binding regulations, or “soft laws”, characterizes the behavioral and procedural norm of the “ASEAN way” (Elliot, 2012). In addition, the “ASEAN way” is comprised of full dependence on regulations within

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individual states, as opposed to a regional bureaucracy as seen in the EU, pairing with disinclination to dictate to local governments regarding the environmental practices of member states (Elliot, 2012). To-date, there are merely two “hard laws” on haze, even though it is one of the (if not the most) investigated problem by the ASEAN ruling committee of ministers, in the *ASEAN Agreement on Conservation of Nature and Natural Resources* and the *ASEAN Agreement on Transboundary Haze Pollution* (ASEAN Cooperation on Environment, 2015; Nurhidayah, Lipman, & Alam, 2014). The ASEAN approach on regulatory framework development aims to align incentives, which facilitate collective action (Nguitragool, 2011). Legitimacy, equity and fairness are secondary normative components and are referred to just as guiding principles (Nguitragool, 2011).

Enforcement of agreed environmental policies in the ASEAN are immensely varied amongst the ten member states. Certain member states of the ASEAN with more developed regulatory framework have taken additional steps to enhance their enforcement of regulations for environmental protection. The Philippines, for example, has established the position of an Environmental Ombudsman, which behaves as a task force that monitors and promotes environmental regulatory compliance (Tolentino, 2011). The ombudsman’s office is empowered to file complaints against public officials and employees who breach any environmental regulation (Tolentino, 2011). Furthermore, the ombudsman is fortified with an “Environmental Team of Investigators and Prosecutors” formed by attorneys from across the country, assisting with legal prosecutions against violators of environmental laws (Tolentino, 2011). On the other hand, countries that are in their early stages of outlining their environmental protection regulations, such as Cambodia, Vietnam, and Laos, have their focus on environmental education,

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training and research, and less so on enforcement of policies adopted from ASEAN accords (Tolentino, 2011).

In multiple ASEAN countries, academics have recognized corruption as well as bureaucratic red tape as barriers to better enforcement of regulations (Aldaba, 2013). In Indonesia and the Philippines, for instance, the processes in place for environmental impact assessment carried out by local authorities upon investors' requests are slow and lacks transparency, aside from the high probability of corruption being involved in altering results (Aldaba, 2013; Tolentino, 2011). Bureaucratic red tape in the form of excessive paperwork and redundant procedures are currently seen still in more developed ASEAN members such as Thailand and Singapore, where the application of permits and licenses require multiple instances of form submission and repetitive approval steps completed in person (Tolentino, 2011).

To compensate for some of the aforementioned inadequacies during the enforcement of environmental policies, several ASEAN states have taken to various measures to fear-monger and thereby dissuade offences. In Thailand, for example, the consequences of violations of certain environmental regulations can amount to 100,000 baht in fines, a harsh penalty that is intended to deter failure to meet environmental standards (Tolentino, 2011). On the other hand, liability scope has also been broadened to government officials as opposed to only private sector managers and directors, and natural persons infringing any law pertaining to the environment in Malaysia (Tolentino, 2011). This extension of liability is a bold attempt to discourage voluntary offences and to strengthen industry self-audits. Although scare tactics may be effective in discouraging offenders and are purported to promote due diligence and self-discipline in the industries, their overall effectiveness is highly questionable, especially in the ASEAN region. Given bribery is recognized to be regionally endemic (Basu, 2015), these tactics with an element

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of fearmongering may merely result in worse corruption problems when would-be offenders resort to buying their way out.

Economic power and education, or the lack thereof, are also generating difficulties in enforcement of environmental regulations in the ASEAN. Simply put, people are engrossed with daily survival such that environmental threats become intangibly distant in the future and irrelevant (Tolentino, 2011). Conservation of the environment is a topic that requires higher level education to comprehend, while the linkage of individual actions to environmental changes is an even more difficult concept to grasp. Natural disasters, albeit undoubtedly perceived to be stronger in the region as time progresses presumably due to climate change, are believed to be acts of divine forces as oppose to an effect of the changing environment (Tolentino, 2011). The scales of the environmental disasters are also unfathomable and rather unreported as victims may reside in remote areas, out of reach of reporting (Tolentino, 2011).

Even when reports of the extent of the disasters surface, the analyses of the causes may not reach locals due to illiteracy (Tolentino, 2011) These locals are also often underrepresented by local politicians, who may be more inclined to be preoccupied with short-term gains from the very projects that are linked to the causation of the disasters in the first place (Tolentino, 2011). This is especially evident in countries where participation in environmental policymaking is only emerging, and the public does not “serve a watchdog role” in vigilance in the first place (Tolentino, 2011).

Conclusion

Ever since the ASEAN’s formation, its heads of states have recognized that regional collaboration on environmental protection is imperative. Harmonization and integration of

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ASEAN-forged regulations into individual member states is difficult with drastically different political and legal systems, as well as a variety of social and environmental objectives (Nurhidayah, Lipman, & Alam, 2014). Unlike the EU, the ASEAN collectively tends to be more dependent on preventive measures, and cooperation amongst the member states remain on a surface level, rendering regimes without liability schemes or rigid legal frameworks on the subject of environmental protection.

The “ASEAN way” denotes the reluctance to disrupt member states’ domestic affairs by enforcing collectively agreed regulatory systems and policies, therefore hampering the association’s effort to combat regional environmental problems. However, policies have evolved from solely addressing singular disruptions on the environment, to also referring to the well-being of the environment as one inter-boundary ecosystem. Many of the newer disaster prevention policies emerged to include toolkits that are composed of an assortment of measures that, when implemented as binding regulations in the relevant member states, would be effective in eradicating practices pertaining to the specific environmental disaster. Emphases of environmental policies have also been shifting from posing limitations on pollution to fostering eco-efficiency and realistic improvements. The development of harmonized policies has gained momentum throughout the years, while the likelihood of adoption of the policies as local regulations remain largely varied amongst the member states. “Soft laws” that serve as mere guidelines without regulatory and binding effects pervade the existing conservation and anti-pollution policies, while “hard laws” that comprise an environmental agreement, on the off-chance of being passed, are rarely enforced.

Difficulty in enforcement come from a plethora of factors attributed to slower economic development, namely the overall failure to establish environmental problems as being man-made,

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archaic bureaucracy in administering polices, and more impactfully, corruption. Some of the ASEAN member states have imposed measures to overcome these enforcement barriers, while the effectiveness of these remains questionable to-date.

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