Session 6: Domestic and Transboundary Environmental Issues

ASEAN Chief Justices Roundtable – Siem Reap Cambodia

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Outline

- ASEAN Regional Declarations
- Hard and soft law in ASEAN
- Links between national and transboundary issues in ASEAN
- Human rights and environment
- Two examples:
  1. Conservation and exploitation of transboundary rivers: the Mekong
  2. Forest fires and transboundary air pollution (‘haze’)
Main ASEAN Declarations and Accords

- Jakarta Declaration on Environment and Development (18 September 1997)
- Bandar Seri Begawan Resolution on Environment and Development (1994)
- Singapore Resolution on Environment and Development (1992)
- The Kuala Lumpur Accord on Environment and Development (1990)
- Jakarta Resolution on Sustainable Development (1987)
- Bangkok Declaration on the ASEAN Environment (1984)
- ASEAN Declaration on Heritage Parks and Reserves (1984)

- Singapore Declaration on Climate Change, Energy and Environment 2007

“Hard Law”: 1985 ASEAN Agreement on Conservation of Nature and Natural Resources

- A far-sighted instrument, regional precursor to Biodiversity Convention; not in force, as only ratified by 3 of 6 original signatories, thus not in force.
- Legal drafter from IUCN Environmental Law Centre, 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 to conduct their affairs: “In 1998, in Singapore, we heard that the ASEAN Agreement was not the ASEAN way”’ (Lausche, Weaving a Web of Environmental Law 2008:192)
1. Conservation and exploitation of transboundary resources: the Mekong River
Cascade of dams on the Mekong River
Mekong hydro development

- Significant projected increases in electricity demand, combined with new private sector sources of capital within the region, are driving a rapid expansion of hydropower development in the Mekong River Basin.
- Hydropower development of the Upper Mekong mainstream in Yunnan Province, China
- Recent revival of plans for hydropower projects on the Lower Mekong mainstream
- Controversial Xayaburi dam has begun construction on mainstream
- Don Sahong also in development

Source: MRC Secretariat, 2009
Dams on the Mekong tributaries

• Mainstream hydropower development compounded by about tributary dam projects existing, under construction or proposed

• Resulting in:
  • Increase in regional dry season flows and reduction in peak wet season flows affecting seasonal floodplains
  • Sediment trapping and reduction in mainstream sediment loads
  • Adverse impacts on fish spawning and migration and resulting depletion of fish stocks
  • Displacement of large numbers of people
  • Consequent effects of these impacts on human rights

Source: MRC Secretariat, State of the Basin Report 2010
“A spectacular illustration of why all legal scholars need to think about legal pluralism and inter-legality in their work, even when ostensibly studying local domestic law.”
—Eve Darian-Smith, University of California Santa Barbara, USA and Author of Laws and Societies in Global Contexts: Contemporary Approaches

“The immensely important and timely book that offers new ways of thinking about transboundary water governance ... it fills a critical gap to explain how conflict over this mighty river has unfolded.”
—Carl Middleton, Chulalongkorn University, Thailand

“For researchers, policy-makers, NGOs and others within the Mekong River Basin, this book offers compelling insights ... it is perhaps as a pioneer in the socio-legal analysis of transboundary river basins that the book should be most commended.”
—Allan Milne, Centre for Water Law, Policy and Science (under the auspices of UNESCO), University of Dundee, UK

An international river basin is an ecological system, an economic thoroughfare, a geographical area, a font of life and livelihoods, a geopolitical network and, often, a cultural icon. It is also a socio-legal phenomenon. This book is the first detailed study of an international river basin from a socio-legal perspective. The Mekong River Basin, which sustains approximately 70 million people across Cambodia, China, Laos, Myanmar, Thailand and Vietnam, provides a prime example of the socio-legal complexities of governing a transboundary river and its tributaries.

The book applies its socio-legal analysis to bring a fresh approach to understanding conflicts surrounding water governance in the Mekong River Basin. The authors describe the wide range of uses being made of legal doctrine and legal argument in ongoing disputes surrounding hydropower development in the basin, putting to rest lingering caricatures of a single, “ASEAN” way of navigating conflict. They call into question some of the common assumptions concerning the relationship between law and development. The book also sheds light on important questions concerning the global hybridization or crossover of public and private power and its ramifications for water governance. With current debates and looming conflicts over water governance globally, and over shared rivers in particular, these issues could not be more pressing.

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ENVIRONMENT & SUSTAINABILITY / LAW

Cover image from left to right: TBA
Environmental and human rights issues of dam construction

- Environmental issues and human rights issues are closely related:
  - decreases in biodiversity: *loss of food sources*
  - reduction of land available for agriculture: *food security*
  - loss of fish production
  - loss of cultural heritage
  - loss of traditional livelihoods
  - displacement of millions of people.

- How will these issues play out in the courts in the Mekong Region?
Summary of conflicting issues in the Mekong River Basin

1. China controls upstream flows, but is not a member of the Mekong Agreement
2. The Thais want more water, and more electricity, so more dams
3. The Laotians want capital and expertise to develop hydropower for export to Thailand and Vietnam
4. The Cambodians need capital and infrastructure and to secure sustainable fishery resources in the Tonle Sap (Great Lake), thus more water required
5. The Vietnamese do not want any upstream development to exacerbate salt water intrusion in the Mekong delta during the dry season, but they also want more hydropower development,
Xayaburi Dam Case (Laos/Thailand)

*Niwat v. Electricity Generation Authority of Thailand (EGAT)* April 2014 (Supreme Court of Thailand)
- **challenged the Xayaburi Dam Power Purchase Agreement (PPA) on the part of Thailand**

1) the approval of the cabinet and other defendants to sign the Xayaburi PPA is not legitimate; (upheld)
2) the PPA between the EGAT and the Xayaburi Power Co., Ltd. is invalid; and (upheld)
3) the PNPCA process including the legal compliance as provided by domestic laws has not yet been complied with. (reverted to trial court)

4) Not a human rights case as such, but challenged the process because of lack of public consultation according to Thai Law but still very important as first case to challenge a dam approval in the region
Transboundary Air Pollution

- Nine ASEAN countries ratified the ASEAN Haze Agreement immediately, in 2002
- **Indonesia ratified in 2014**
- Agreement sets up a monitoring and cooperation regime
- No direct enforcement mechanisms
- Forest fires continue to be a major yearly hazard for people and environment, affecting Indonesia, Singapore, Malaysia and Thailand
Indonesian President Joko Widodo goes to haze's ground zero

Mr Joko Widodo (second from left) is accompanied by police chief Badrodin Haiti (left) and military chief Gatot Nurmantyo (right) on a visit to an area in the South Sumatra district of Ogan Komering Ilir yesterday where there has been land burning. PHOTO: SULAIMAN NURDIN
Indonesian President Joko Widodo yesterday (Sept 6) visited South Sumatra province for a first-hand look at forest fires that have been causing the worst haze in the past few days, as officials continue water-bombing and cloud-seeding efforts.

He was accompanied by the police chief, military chief, head of the National Disaster Management Agency (BNPB) and a senior Environment and Forestry Ministry official on a last-minute trip aimed at stepping up the urgency of putting out the fires.

"I've ordered the police chief to get very tough on companies that do not comply with the law... and instructed the Forestry Minister to revoke (their) licences once they are found guilty on criminal charges," said Mr Joko, who arrived in Palembang where he was met by the province's governor Alex Noerdin.

"Do not let the widespread burning become difficult to overcome, and so I have said I no longer want to talk about the cause of the problem or what is the solution. Everyone knows what needs to be done."

Mr Joko made a stop to check on the progress of the Trans-Sumatra toll road before heading to areas most affected by land burning.

Environment and Forestry Minister Siti Nurbaya is on her way back after cutting short an official trip to Norway for climate change talks.
Singapore Haze from Forest Fire Smoke Makes Smog Worst In Years

Singapore’s city-state Pollutant Standards Index shot up on Monday as wild forest fires made the smog and haze sitting on the skyscrapers and landscape the worst it has been in the past seven years.

By Maxine Wally | Jun 17, 2013 03:36 PM EDT

Residents of Sampit, Indonesia, bike through smog in Sept. 2012. (Photo: Reuters)
Singapore’s 2015 Haze legislation

Singapore enacted its Transboundary Haze Pollution Act a month before Indonesia ratified the Haze Agreement.

It represents an unusually strong stand in the region, in the light of the doctrine of non-interference.
f. The right to a safe, clean and sustainable environment.

While the ASEAN Declaration on Human Rights is not yet legally binding, it has strong moral force.

Can legal actions be brought in the courts on the basis of Article 28(f)?

How should judges respond if such an action is brought?
The ASEAN Human Rights Declaration

- Adopted by the 10 ASEAN member countries in 2012.
- A landmark in the development of human rights protection for the citizens of these countries.
- Affirms all of the internationally accepted human rights and purports to guarantee enforceable remedies at national level. It lists the civil and political rights as well as the economic, social and cultural rights of the 1948 Universal Declaration of Human Rights and the 1966 Covenants.
- Includes a right to the environment: but does it mean anything in this context?
Article 28 ASEAN Human Rights Declaration

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;

b. 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.
Questions:

• How does the Declaration apply in relation to human displacement by dams?
• Can it apply in the case of transboundary air pollution?
• Can the Declaration be enforced? If so, at what level? Regional? Can it be used in domestic courts? Too early to tell?
• Will there be mechanisms in the future for hearing human rights cases similar to the European Court of Human Rights, the Inter-American Commission on Human Rights and Court and the African Commission on Human and Peoples’ Rights?
Chapter 5: ‘Environmental Law and Human Rights in the Asia-Pacific’
Conclusions

- In the short term, given the pressure for hydropower development in the Mekong, it is unlikely that human rights issues such as displacement will be adequately addressed at the national level.
- Environmental impact assessment requirements do not require human rights issues to be taken into account; EIA still seen more as a technical requirement.
- The Mekong River Commission’s Framework for Transboundary Environmental Impact Assessment for the Lower Mekong Basin needs to be revised to take displacement issues into adequately into account, including human rights issues.
Conclusions on Mekong and Environmental Human Rights in Mekong

- **Formal legal frameworks** in the lower Mekong at regional and national level are ineffective in addressing human rights issues arising from displacement
- Litigation in the Mekong not likely to be used in the short term
- The ASEAN Human Rights Commission needs to be strengthened to allow for human rights abuses to be dealt with directly, whether arising out of hydropower development or otherwise
Environmental rights in national constitutions

For example: Constitution of the Republic of The Philippines

Article 16

The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.
Davide CJ in Oposa v Factoran 1993:

The Supreme Court of the Philippines recognized that:

“... every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology.

Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.”
Objectives are to

- encapsulate the constitutional right to a balanced and healthful ecology;
- provide a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules, and regulations, and international agreements;
- introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and enable the courts to monitor and exact compliance with orders and judgments in environmental cases.

- The writ of kalikasan (literally ‘writ of nature’) have potentially great significance for environmental rights jurisprudence in the Philippines, elsewhere in Asia and possibly globally.
Environmental rights in national constitutions

Constitution of the Republic of Indonesia (as amended)

Article 28H(1)
Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.

Article 28F
Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.