Resolving Environmental Issues in ASEAN Through EIAs and Other Tools for Enforcement

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Overview of presentation:

• Introduction – ASEAN Environmental Challenges
• Climate Change Impacts In Myanmar
• Principles of Compliance
• Enforcement of EIA Procedure
• Compliance with EIA Approvals and Permits
• Protection of Rights of Access to Remedies
Environmental Challenges for ASEAN
ASEAN Environmental Challenge 1: Urbanization, Waste and Air Pollution
ASEAN Environmental Law Challenge 2: Deforestation and Illegal Logging
ASEAN Environmental Law Challenge 3: Biodiversity Loss and Illegal Wildlife Trade
Source: ASEAN-WEN Major Enforcement Actions Database 2008-2011
ASEAN Environmental Challenge 4: Oceans, Illegal Fishing, and Marine Pollution
ASEAN Environmental Challenges 5: Infrastructure and Environmental Impact Assessment
ASEAN Environmental Challenge 6: Water Pollution and Access to Clean Water
ASEAN Environmental Law Challenge 7: Climate Change and Disaster Management
ASEAN Environmental Challenges

1. Urbanization, Waste and Air Pollution
2. Deforestation and Illegal Logging
3. Biodiversity Loss and Illegal Wildlife Trade
4. Oceans, Illegal Fishing, and Marine Pollution
5. Infrastructure and Environmental Impact
6. Water Pollution and Access to Clean Water
7. Climate Change and Disaster Management
Climate Change Issues for Myanmar
Myanmar Sustainable Development Plan 2018

• The Government of Myanmar is “committed to a national development framework that enshrines the notion of environmental sustainability for future generations by systematically incorporating environmental consideration into the design and the implementation of its policies and projects.” MSDP, p.3
Myanmar regularly experiences cyclones, storm surges, floods, landslides, earthquakes, drought and forest fires. Over the last 10 years, Myanmar has been impacted by two major earthquakes, three severe cyclones, floods and other smaller-scale hazards. OCHA works closely with the Ministry of Social Welfare, Relief and Resettlement and humanitarian partners to ensure a more systematic, inclusive and coordinated approach to disaster management, preparedness and response.

Myanmar ranks 2nd out of 187 countries in the Global Climate Risk Index.

Myanmar ranks 9th out of 191 countries in the Index of Risk Management (INFORM).

In 2015-2016, the El Niño phenomenon has been one of the strongest since 1950, with a significant influence on weather patterns. This resulted in drought conditions with intermittent ‘very severe’ category cyclones in different parts of Asia and the Pacific.

According to the Myanmar Department of Meteorology and Hydrology, since mid-February 2016, Myanmar has been experiencing a severe impact of El Niño including extreme temperatures, unusual rainfall patterns, dry soil, high risk of fires and acute water shortages. The El Niño impact is expected to end in June 2016.
FUTURE CLIMATE IN MYANMAR AND IMPACTS ON ECOSYSTEMS

Increasing average temperatures, heat extremes and forest fires

- 0.7-1.1°C increase 2011 - 2040
- 1.3-2.7°C increase 2041 - 2070

Erratic rainfall - periods of heavy and intense rains followed by long-lasting dry spells – leading to frequent river and flash flood events, and droughts.

Loss of ecosystems due to natural disasters that are growing more frequent and intense with the global warming.

Reduced ecosystems productivity and carbon storage and sequestration capacity.

Sea level rise

- 2050: 41 cm
- 2080: 83 cm


Note: The provided values for increase in temperatures and sea level refer to projections with base period 1980-2005 and 2000-2004, respectively.

Key Risks for Myanmar

- Increased temperature
- Changing monsoon pattern
- More extreme weather event
- Storm surges
- Sea-level rise
- Salt-water intrusion
- Drought
- Flooding

Flooding (e.g. fluvial and flash floods) and increased precipitation: erosion, landslides, damage to physical assets, people, the environment.

Storms, strong winds, hail, and lightning: physical damages to natural and built assets.

Drought: reduced water availability for human, agriculture, the environment and industry, sedimentation of canal.

Increased temperatures: human health, animal and environmental health impacts.

Heat waves: crop losses, forest fires, damage to physical infrastructure.
Principles of Environmental Compliance
Environmental Compliance Principles

• Principle of Prevention
• Precautionary Principle
• Principle of Intergenerational Equity
• Principle of Public Participation in Environmental Matters
• Principle of Free Prior and Informed Consent for Indigenous People
• Polluter Pays Principle
• The **prevention principle** calls for action to be taken to prevent known risks of environmental harm from happening.

• The **precautionary principle** requires that where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.
• Principle of **Intergenerational Equity** is concerned with ensuring that the present generation maintains or enhances the health, diversity and productivity of the environment for the benefit of future generations.

• Principle of **Public Participation** in Environmental Matters applies to require access to information and meaningful participation in environmental matter.
• Principle of **Free, Prior and Informed Consent** for Indigenous People, without coercion, based on adequate information and before the action is taken.
Indian Council for Enviro Legal Action v Union of India (1996) 2JT (SC) 196

The ‘Polluter Pays’ principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.
The petitioners filed a petition in the public interest under Article 32 of the Constitution of India, directed against the pollution caused by enormous discharge of untreated effluent by the tanneries and other industries in the State of Tamil Nadu. The Supreme Court of India noted that:

“though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health-hazard”.
Enforcement of EIA Procedure
EIA process

SCREENING

INITIAL ENVIRONMENTAL EXAMINATION
- Investigations & Reporting
- Review & Approval Process
- Environmental Compliance Certificate (ECC)

ENVIRONMENTAL IMPACT ASSESSMENT
- Scoping
- Investigations & Reporting
- Review & Approval Process
- Reject
- ECC

Environment Management Plan
- Approval

OTHER PERMITTING PROCESSES
Procedural Compliance with EIA laws

• Does the EIA comply with the law?
  – Have all the steps been followed.

• Was there meaningful Public Participation
  – Access to Information
    • Full, prior, with sufficient time for Project Affected People to consider the potential impact.
    – Open and transparent decision-making
    – Is resettlement/relocation required?

• Principle of Free, Prior and Informed Consent for Indigenous People
Procedural Compliance with EIA laws

• Remedies
  – Injunction – if the process in ongoing then an injunction can stop consideration of the project by the EIA approval body until the defects have been corrected.
  – If the project has been approved the court can set aside the EIA Approval if the procedural defects are too great.
  – If the EIA approval body has not taken into account the relevant environmental principles then the decision is a flawed decision and the approval should be set aside.
Compliance with EIA Approval and Permits
Compliance with EIA Permits

• Compliance with the EIA Permit and conditions of approval, including any Environmental Management Plan should be during construction and operations.

• The priority should be environmental and community protection and not jobs. EIA conditions are a legal requirement not an option one.

• Injunctions can be used to prevent further environmental harm.
Compliance with EIA Permits

• Polluter Pays Principle
• Prevention Principle
• Liability of Company Directors and senior Management
  – Join the Directors and Management
  – Requirements for undertakings to comply with the conditions of the EIA Permits, including bonds to be cancelled in the event of further pollution or environmental harm
• The punishment must fit the crime
Protection of the Right of Access to Remedies (including for someone acting on behalf of the environment)
Role of the Courts to enhance access to justice

• People and civil society must be able to bring environmental cases to the Courts.

• Courts and judges have a role to facilitate access to justice both in a procedural manner and also to provide substantive protection for litigants, environment defenders and to protect the lawyers who bring cases on behalf of communities and the environment.
Examples of Rules of the Court

• The Philippines
  – Supreme Court Rules in Environmental Cases 2010
    • including citizens suits, Writ of Kalikasan, continuing mandamus, protection from SLAPP suits.

• Thailand
  – Recommendations of Supreme Court and Supreme Administrative Court in Environmental Matters 2011

• China
  – Supreme Peoples’ Court of China
    • Model cases and directions.
Protection of environmental defenders

• UN Declaration of the Rights of Indigenous People
• Constitutional provisions to give citizens the right and duty to protect the environment
• National laws provide legal rights to participate and public participation
  – Environmental Protection and Management Law 2009 (Indonesia)

Article 66 - Everybody struggling for a right to a proper and healthy environment may not be charged with a criminal or civil offense.
Stream flowing into Manila Bay.
Framework Principles on HR and the Environment 2018

Framework principle 4
States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.

Framework principle 5
Framework principle 5 - States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.

Framework principle 10
States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.
Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean

Adopted in Escazú, Costa Rica, on 4 March 2018 (Escazu Agreement).

The agreement, which is now open for signature by the 33 nations of Latin America and the Caribbean, provides a framework for a number of environmental and procedural rights, including the requirement that State provide for a “safe and enabling” environment for environmental and human rights defenders.
Conclusion