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# ASEAN Path

## A Delicate Balance - ASEAN, Development and Environmental Regulation

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ASEAN Path is a series of white papers prepared by DFDL's experts aiming to assess, in more depth, compelling issues arising from the regional economic integration under the auspices of the Association of Southeast Asian Nations (ASEAN) Economic Community Blueprint. The articles are based on an in-depth legal analysis of the local and ASEAN legal framework from the perspective of practitioners assisting foreign and ASEAN investors in their investments and operations throughout various ASEAN Member States. All articles are accessible on our website: [www.dfdl.com](http://www.dfdl.com).

# A Delicate Balance - ASEAN, Development and Environmental Regulation

## Introduction

Each ASEAN member state has gone through a period of rapid development which has resulted in creation of wealth often at the cost of the environment, with over-exploitation of natural resources leading to environmental degradation and decline in many of the region's economies. Increasingly, this is being recognized as a key threat to future development. As ASEAN itself has characterized the problem, development is at risk due to "population growth, demographics, trade pressures, instability, perverse incentives, economic performance, poverty, inadequate law enforcement, poor protection standards and lack of awareness". The increasing awareness of these risks has resulted, in many cases, in a move towards Western-style environmental regulation models in a region that may not be quite ready for them.

Sustainable development is certainly a point of focus for the region. In fact, one of ASEAN's stated purposes 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". This statement adopts the terms used by the World Commission

on Environment and Sustainable Development, to refer to "development which meets the needs of the present without compromising the ability of future generation to meet their own needs"<sup>1</sup>. What does this mean for ASEAN economies, many of which are on the cusp of acquiring developed status? And what is the likely business impact of the sustainable development policies that are becoming more prevalent across the region?

This edition of ASEAN Path looks at how domestic environmental laws have evolved across the region to foster development that is ecologically, economically and socially sustainable. We focus specifically on the trends that are apparent in the lower Mekong region (Vietnam, Myanmar, Thailand and the Lao PDR) and examine when and why environmental practices became a priority for governments. We also take a look at the likely business impact of these trends and, ahead of the establishment of the ASEAN Economic Community, discuss the potential for integrating the current policies to achieve a balanced approach to social and economic development as well as environmental and natural resource management.



<sup>1</sup> World Commission on Environment and Development, "Our Common Future" (Oxford 1987) 43.

## The challenge of protection

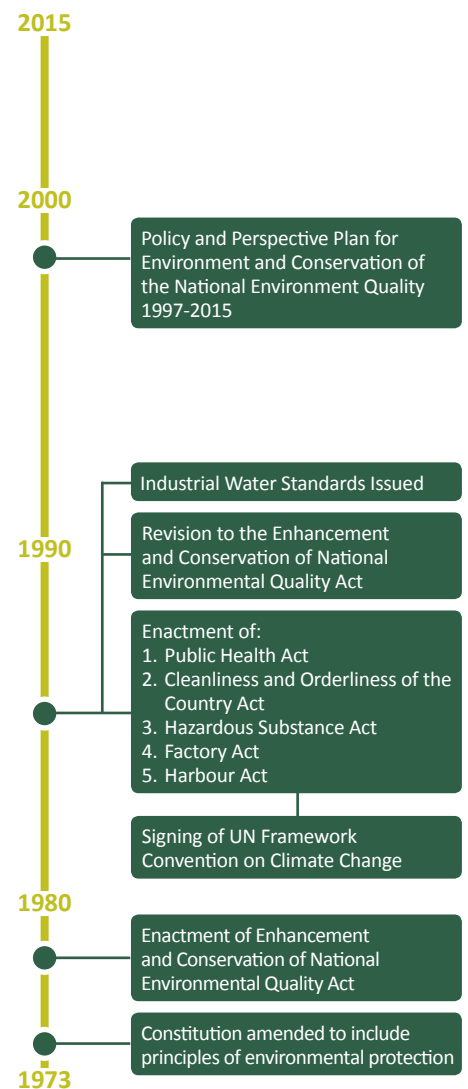
For developing economies across the world, the first step towards environmental regulation is a growing government awareness of the scarcity of natural resources and the consequent need to protect them. In the lower Mekong region, Thailand was the first country to come to this realization, with others following step much later.

### Thailand

Thailand began its journey towards addressing environmental concerns as early as 1973. Shortly after the military coup of that year, a new Constitution was drafted and subsequently promulgated in 1974. The new Constitution contained a clause stating that the exploitation of natural resources must not overrun conservation principles. Never before had Thailand's Constitution contained such a clause – and it marked the beginning of Thailand's ongoing aspiration to balance environmental protection with the achievement of its social and economic development goals.

In 1975, the Improvement and Conservation of National Environmental Quality Act was passed. This marked the first attempt at a national level to address environmental issues in an organized manner. The focus of the Act was fairly straightforward and, compared with modern-day environmental regulation, relatively minimalist. The Ministry of Science, Technology and Environment was charged with setting and monitoring national environmental quality standards and monitoring methods. Simple Environmental Impact Assessments (EIAs) were required for certain types of projects, and the Prime Minister was given the power to act in an environmental emergency.

As with many early examples of environmental legislation in developing countries, the success of the 1975 Act in addressing environmental issues was limited. This was partly due to the failure to pass supporting laws and regulations, but also due to the priority given to promoting foreign direct investment for the rapid industrialization of the Kingdom. This naturally resulted in a much lower priority being given to addressing environmental problems. As the diagram adjacent shows, very few other environment laws were passed between 1975 and the early 1990s.



**Diagram:**  
Thailand Development of  
Environmental Policy  
timeline

## Vietnam

The next lower Mekong country to begin developing a basic environmental protection framework was Vietnam. Due to the war and post-war context of the 1970s, these early steps happened much later than they did in Thailand and it was not until 1993 that Vietnam enacted the Law on Environmental Protection. This law introduced protocols for environmental standards, pollution abatement procedures, EIAs, export and import criteria and limited systems for addressing non-compliance.

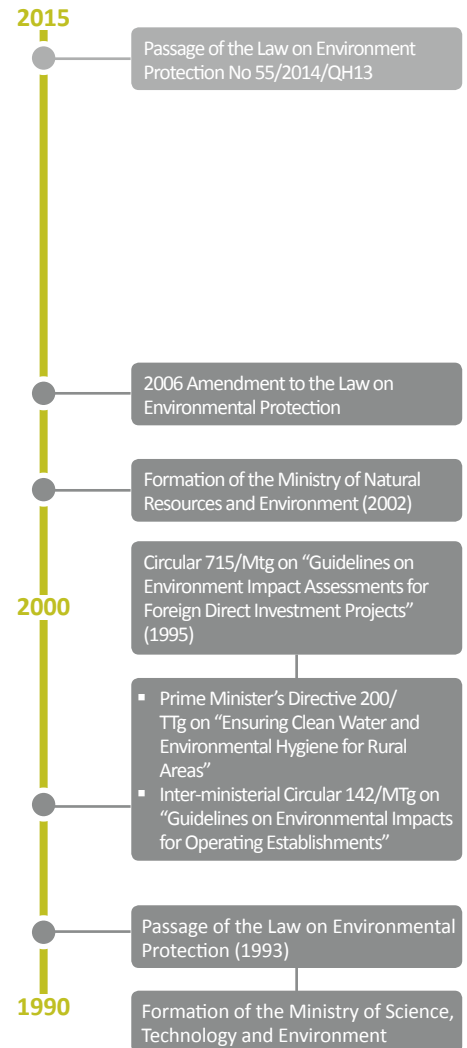
Similar to provisions in Thailand's 1975 Constitution, the Article 29 of the Vietnamese Constitution establishes environmental protection as a national priority. State offices, the armed forces, economic establishments, organizations and citizens all have a duty to observe state regulations on the appropriate utilization of natural resources and environmental protection, and all acts resulting in the depletion and destruction of the environment are strictly prohibited. Article 112 further states that the government's duties and powers include taking measures to protect property and the interests of the state and society to protect the environment.

Throughout the 1990s and into the early 2000s, the Vietnamese government considered development, poverty reduction and environmental management to be all distinct issues. As a result, separate institutions, policies, budgets and programs emerged, each with the specific task of addressing a single issue alone. As was the case in Thailand, however, economic development was given the highest priority. While this resulted in major benefits to Vietnam's economy, it became increasingly clear that rapid development and environmental degradation came hand-in-hand. Gradually, the government came to the realization that pollution, soil infertility, and natural resource depletion were all likely to have a negative impact on the country's long term development and poverty reduction goals.

With this realization came the 2006 Law on Environmental Protection, passed in anticipation of Vietnam's accession to the World Trade Organization. While, the Law brought Vietnam's environmental protection legislation into line with international standards, it was a number of years before several key principles of environmental law were addressed by supporting regulations, including:

- Decree 81/2006/NC-CP sanctioning administrative violations in environmental protection;
- Decree 29/2011/ND-CP regulating the strategic evaluation on environmental protection;
- Circular 08/2006/TT-BTNMT implementing strategic environmental assessments, EIA reports and environmental protection undertakings;
- Decree 59/2007/ND-CP on the management of solid waste; and
- Circular 12/2006/TT-BTNMT guiding the implementation of regulations on organizations and individuals which release hazardous waste.

This groundwork, though gradual and often poorly implemented and enforced, ensured that Vietnam was prepared for the next phase of environmental regulation and was moving towards policies in line with ASEAN's sustainable development goals. However, it was not until 2014 that more comprehensive amendments were passed.



**Diagram:**  
Vietnam Development  
of Environmental Policy  
timeline

## The Lao PDR

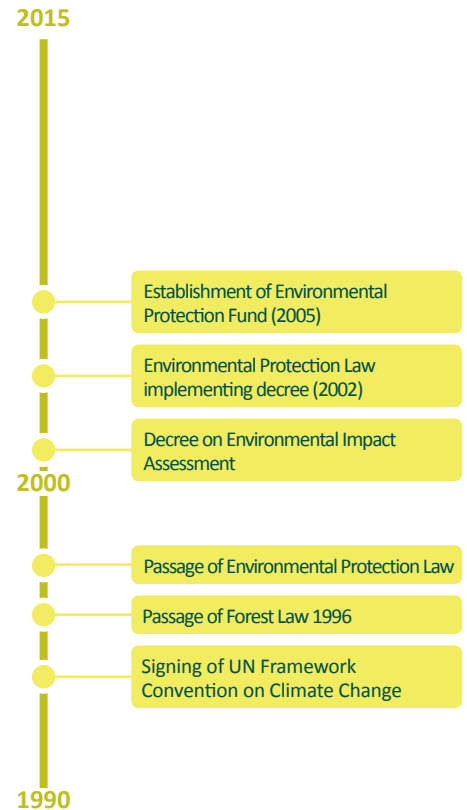
As with many ASEAN countries, economic growth in the Lao PDR has largely been driven by the development of its natural resources, particularly in the hydroelectric and mining sectors, but increasingly also from large scale agriculture and plantations. As has been the case with other ASEAN countries, the emphasis on natural resource exploitation has given rise to numerous environmental challenges that the Lao government has gradually sought to redress.

The key difference between the approach taken in the Lao PDR and that taken in Thailand and Vietnam is that rather than beginning with overarching legislation, environmental concerns were initially taken up in a number of separate laws and decrees. These have included:

- The Law on the Water and Water Resources (No. 02/96, 11 October 1996) (currently being revised with a draft amendment circulated late in 2014);
- The Law on Minerals (No. 02/NA, 20 December 2011);
- The Law on Electricity (No. 03/NA, 20 December 2011); and
- The Decree on Environmental Impact Assessments (No. 112/PM, 16 February 2010) and its most recent implementing Decision (No. 8056/MONRE, 17 December 2013) and Instructions (No. 8029/MONRE and No. 8030/MONRE dated 17 December 2013).

To a significant extent, the government has also relied on concession agreements for major projects to establish environmental protection standards for investors in Lao projects. In most cases, these agreements set out specific environmental and social requirements that go over and above those set out in the regulations, and call for compliance with various international standards and guidelines.

One further difference that distinguishes the early Lao approach from that of its neighbors is the Environment Protection Fund established by the government in 2005 (before any general law on environment protection was introduced). With allocations from the State budget, contributions from investment projects, funding from domestic and foreign entities such as the World Bank and Asian Development Bank (ADB), and revenue from fines for environmental damage, the fund was established with the purpose of ensuring sustainable natural resources management and supporting both biodiversity conservation and community development as well as funding research and capacity building activities.



*Diagram:*  
The Lao PDR Development  
of Environmental Policy  
timeline

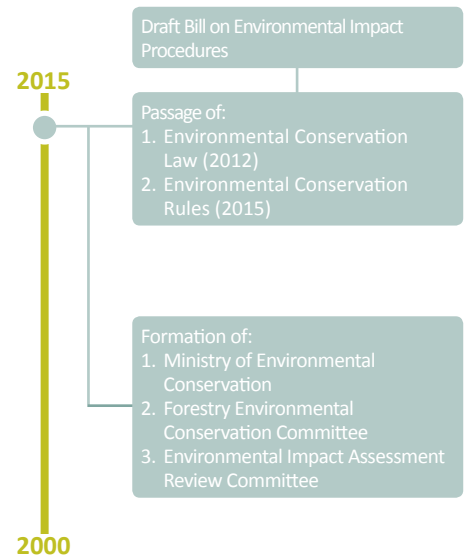


## Myanmar

Myanmar is undergoing a period of rapid and comprehensive reform across its social, economic, political and legal sectors. Until 2012, Myanmar's environmental legislation was scattered across more than 30 different laws and directives creating a cumbersome environmental regulation framework. Many of these laws are still in place. For example, both the Forest Law 1992 and the Freshwater Fisheries Law 1991 specifically articulate environmental offences.

In practice, however, the lack of interest in environmental protection shown by the military government meant that Myanmar had very few restrictions and regulations relating to the environment and natural resources until very recently. The turning point appears to have come in September 2011 when President Thein Sein suspended the construction of the Myitsone Dam in Myanmar's northern Kachin State<sup>2</sup>. This decision was applauded by environmentalists and human rights supporters worldwide<sup>3</sup>. Since then, environmental groups have challenged a number of other development projects<sup>4</sup> and public opinion has frequently been cited as the main reason for halting construction.

Myanmar's environment is rich in biodiversity and remains relatively pristine. The government of Myanmar and the population is now seeking to preserve its natural resources without sacrificing social and economic development goals. This desire is reflected in various policies and laws being considered by the Myanmar government – a phase Thailand entered more than 20 years ago.



**Diagram:**  
Myanmar Development of  
Environmental Policy  
timeline



<sup>2</sup> "Myanmar Rises to Challenge of Environmental Conservation", Priscilla Clapp, *Asia Society*, 8 March 2013, Available at: <http://asiasociety.org/blog/asia/myanmar-rises-challenge-environmental-conservation> [Last accessed: 12/5/2015]

<sup>3</sup> Paul G. Harris and Graeme Lang, "*Routledge Handbook of Environment and Society in Asia*", Routledge 2015; and Anna Riddell, "*Human Rights and the Environment: Making the Connections*", Routledge 2015.

<sup>4</sup> Notably the Dawei Special Economic Zone and the Letpadaung Copper Mine.

## The era of policies and regulation

While the first phase of environmental legislative development in the region was marked by a focus on establishing general principles for environmental and resource management as well as penalties for causing environmental harm, the second phase focused on creating

obligations on businesses and moving, sometimes slowly, towards ensuring compliance. As we will see, for many of the countries in the lower Mekong region, this move has been quite swift as they try to balance international environmental obligations with the need to pursue development goals.

### Thailand

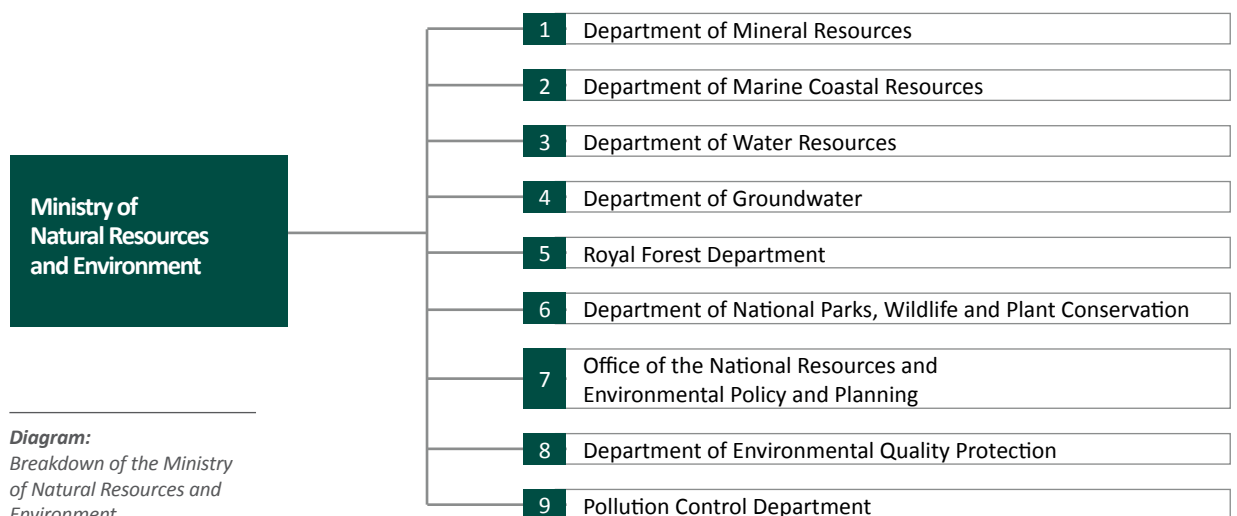
From 1975 through to the early 1990s, Thailand saw unprecedented growth. In 1992, in the face of rising public awareness of environmental issues, the government repealed the 1975 Act and replaced it with the Enhancement and Conservation of National Environmental Quality Act BE 2535 (1992), which remains in force today. The 1992 Act is unique in that it recognizes the rights and duties of Thai citizens to participate in government efforts to protect the environment. It further stimulated public participation by allowing environmental citizens' groups organized as juristic persons under Thai or foreign law to register as an environmental non-governmental organization and be eligible for government assistance and support.

The 1992 Act took a significant step further than the previous legislation. It provides individuals with a number of rights, including the right to compensation for environmental damage caused by the government and the right to commence a criminal action against any person alleged to be in violation of environment laws. In addition to those rights, the act also imposes a number of duties on Thai citizens, including the duty to cooperate with and assist the government in protecting the environment and to observe the Act's requirements. However, as the Act states that "any person may have the aforesaid rights and duties" (Section 6), it is questionable whether the recognition in this section has truly been affirmed by the government as it has never been tested in practice.

Prior to the 1992 Act, the government had rarely allocated significant budgetary resources towards environmental protection. This changed with the 1992 Act, which established the "Environmental Fund" within the Ministry of Finance. The primary objective of the fund is to support government agencies and local administrative agencies to invest in pollution control facilities, in the form of aid or loans.

While the governing law was issued by the central government, Thailand adopted an approach very different from that of its neighbors. The 1992 Act gave local authorities autonomy and self-sufficiency in dealing with environmental issues arising within their specific provincial jurisdictions. This concept of decentralizing power allowed each province to prepare its own environmental action plan, albeit with the oversight of the Pollution Control Department within the Ministry of Science, Technology and Environment.

The EIA processes under the 1992 Act were also significantly improved over its 1975 predecessor. The law went so far as to formally define EIAs: "analysis of the potential impacts, both positive and negative, of different types of projects or activities on the environment, conditions or circumstances that may affect those projects or activities, and the necessary measures for prevention, control and rectification before commencement of the projects or activities". While this may have been regarded as a minor advancement in more developed countries, it firmly established the



*Diagram:*  
Breakdown of the Ministry of Natural Resources and Environment



role of EIAs in preventing environmental problems from major development projects and ensuring sustainable development. Further progress in this area, however, was still to come.

The 1992 Act by itself does not give the complete picture of the advances in environmental regulation in Thailand during the 1990s. A number of other laws closely related to environmental policies were also substantially revised to

address growing environmental concerns. These include the Factory Act BE 2535 (1992), the Public Health Act BE 2535 (1992), the Hazardous Substance Act BE 2535 (1992) and the Energy Conservation Promotion Act BE 2535. These revisions demonstrated a more comprehensive and wide-ranging approach to the delicate balance between economic and social development and environmental protection, which would continue into the 21<sup>st</sup> century and right up until the present day.

## Vietnam

Vietnam's 2006 Law remained in force for only eight years, before it was revised significantly in 2014. In the interim, however, another important piece of environmental legislation was introduced in 2008. Although the 2006 Law remained the principle law regulating environmental issues in Vietnam, the Biodiversity Act focused specifically on the conservation and protection of Vietnam's biodiversity and the establishment of protected areas. However, the ongoing tension between environmental protection and development continued.

On 23 June 2014 the National Assembly passed what is now the principle law regulating environmental issues in Vietnam - the Law on Environmental Protection No. 55/2014/QH13<sup>5</sup>. Coming into effect on 1 January 2015, the Law comprises 20 chapters and 170 articles, making it a far more comprehensive document than either of its predecessors. A key feature of this law is its focus on strategic environmental assessment, clearly indicating that the Vietnamese government is now placing more importance on strategy and planning, rather than merely focusing on the environmental impact of business activities.

The 2014 Law is supported by a raft of governmental regulations, including decrees on environmental protection planning, strategic environmental assessment, EIAs and environmental protection plans, the determination of environmental damage, drainage and treatment of wastewater, and solid waste management along with a host of circulars issued by the Ministry of Natural Resources and Environment. In essence, the 2014 Law demonstrates the tendency of Vietnam, and other countries at a similar level of environmental regulatory development, to build an actively restrictive legal framework at the macro level in

order to compel businesses to adhere to certain minimum environmental obligations.

The 2014 Law and its supporting regulations give the government the power to impose various penalties, environmental protection fees or environmental fines against any entity in breach. The government may also collect environmental deposits from entities exploiting resources in Vietnam and levy environment taxes on certain products. The Law also formalizes a requirement for investors to produce an environmental impact report as a pre-condition to investment approval. However, this requirement has already proven to be quite flexible in practice as once investment approval is obtained, efforts to comply with environmental regulations often substantially diminish.

The Ministry of Natural Resources and Environment is the main government authority in charge of environmental protection and management in Vietnam and is responsible for issuing guidelines, regulations, and standards on environmental protection and management in coordination with other ministries and the Vietnam Environment Administration. Five other ministries and provincial People's Committees are also directly involved in environmental protection activities. Both the Ministry and the Environment Administration impose fines and order businesses to remedy any environmental damage caused and compensate those suffering as a result of the damage. However, in many cases, either the polluters have no financial capacity to invest in clean technology and waste treatment systems or to pay penalties, or the amount of penalty is so small that it has no significant impact on preventing environmental pollution. As Vietnam looks ahead to the next phase of its development, compliance remains a real concern.

<sup>5</sup> Text of "Law on Environmental Protection" <http://url.ie/z05l> [Last Accessed: 5/15/2015]



Type of Project	Required Environmental Report
<b>Hydro Sector</b>	
Hydropower project with capacity of 1-15 MW or water volume of <200 million m <sup>3</sup> ; or reservoir of <1.500 ha	IEE
Hydropower project with capacity of ≥ 15 MW or water volume of ≥ 200 million m <sup>3</sup> ; or reservoir of ≥ 1.500 ha	EIA
Nuclear electricity project, nuclear waste management and removal	EIA
Electric energy project from natural gas with capacity of 5-50 MW	IEE
Electric energy project from natural gas with capacity of > 50 MW	EIA
Wind energy project with capacity of 2-10 wind turbines	IEE
Wind energy project with capacity of > 10 wind turbines	EIA
Thermo-electric energy project with capacity of ≤ 10 MW	IEE
Thermo-electric energy project with capacity of > 10 MW	EIA
<b>Plantation</b>	
Industrial trees plantation area of 20-200 ha	IEE
Industrial trees plantation area of > 200 ha	EIA
Industrial plant cultivation area of 20-400 ha	IEE
Industrial plants cultivation area of > 400 ha	EIA
<b>Mining</b>	
Quarrying and crushing stone ≤ 50,000 tons/day	IEE
Quarrying and crushing stone > 50,000 tons/day	EIA
Exploitation of raw material for use in construction (soil, gravel, sand) ≤ 100,000m <sup>3</sup> /year or area of ≤ 20 ha.	IEE
Exploitation of raw material for use in the construction (soil, gravel, sand) > 100,000m <sup>3</sup> /year or within area of > 20 ha.	EIA
Mineral exploitation – all sizes	EIA
Processing minerals ≤ 50,000tons/year	IEE
Processing minerals > 50,000tons/year	EIA

## The Lao PDR

The development of an environmental regulatory framework continued steadily in 2012 with the aim of moving towards more sustainable development and a “cleaner, greener and beautiful” Lao PDR. The growing regulatory framework has been informed by the government’s broader policy objectives, including the National Environmental Strategy Towards 2020, the National Strategy on Energy and Mining Sector Development Strategy 2006 – 2020 and the National Policy on the Sustainable Hydropower Development (released in early 2015).

Towards the end of 2012, the government enacted the Law on Environmental Protection (No. 29/NA, 18 December 2012). The Law establishes a general framework for the preservation and management of environmental resources throughout the Lao PDR. It placed all organizations, including foreign investors, under a general obligation to control pollution and environmental impacts in line with environmental quality and pollution control standards as well as subsidiary and sector specific regulations and project specific concession agreements.

Continuing the early trend that began with the Environment Protection Fund, investment projects are required to deposit financial guarantees to ensure rehabilitation of the environment that may be affected by operations, with details set out in sector-specific regulations. In addition, individuals or legal entities that violate the environmental regulations can be subject to several types of sanctions, including re-education, warnings, fines, civil remedies, criminal penalties, or suspension or termination of operations, depending on the nature of the violation.

As in neighboring countries, environmental and social impact assessments play a significant role. The Lao authorities have developed a suite of specific regulations detailing the requirements for, and content of, these assessments and their subsequent monitoring and management plans. Development projects that have the potential to affect the environment must conduct either an Initial Environmental Examination or a more detailed EIA and Social Impact Assessment. They are also required to prepare an Environmental and Social Management and Monitoring Plan, which may include resettlement action plans, ethnic minority diversity plans, livelihood restoration plans and health impact assessments. Environmental and Social Management and Monitoring Plans are generally required to be updated during the construction phase of a project and periodically during operation.

The regulations detail the approvals that need to be issued by the Ministry of Natural Resources and Environment, which are all dependent on the size of the investment project. These are set out in the table adjacent.

Table: Required Environmental Reports

## Myanmar

As in the Lao PDR, 2012 saw some significant developments in Myanmar when the government passed the Environmental Conservation Law<sup>6</sup>. The following year, the supporting rules were also passed. Both the law and the rules were drafted in consultation with a range of relevant government ministries and international legal experts. The government also formed the Ministry of Environmental Conservation and Forestry, the National Conservation Committee and the Environmental Impact Assessment Review Committee. The two committees have distinct roles: the National Environmental Conservation Committee is responsible for drafting and developing Myanmar's environmental regulations; the Environmental Impact Assessment Review Committee is, as its name suggests, responsible for managing and approving EIAs.

Progress continued in 2014, when an Environmental Impact Procedures Draft Bill was circulated, and in February 2015, when the government announced further regulations. These were written to address issues such as quality standards, listing of hazardous materials, and responses to environmental incidents. In addition, Myanmar's Foreign Investment Law was further amended to establish the protection and conservation of the environment as a condition for foreign investment into the country.

As a result of these changes, the proponent of a project "likely to have an effect on the environment" is required to produce an EIA and an Environmental Management Plan. These documents are required under both the Environmental Conservation Law and the Foreign Investment Law. The Environmental Impact Assessment must be produced by a third-party provider approved by the Ministry of Environmental Conservation and Forestry. The Ministry publishes a list of such third-party providers and any

EIA produced by a firm not listed will not be considered compliant.

Although exactly what constitutes an "effect on the environment" is not defined, a range of social and population impact issues are clearly outlined. To this end, both documents must also include a Social Management Plan to address issues related to ethnic groups, involuntary resettlement approaches as well as climate change impact and mitigation among other factors.

For large projects, the Ministry will also request an Initial Environmental Examination<sup>7</sup>. Based on a review of the examination, the project proponent may be asked to include certain evaluations and address particular issues in the final EIA to be filed for approval.

Once the EIA is submitted, the Environmental Impact Assessment Committee will review it and may request further information, recommend changes, or approve or reject the assessment. Once it is approved, the project will receive an "Environmental Compliance Certificate". Projects that require an Environmental Compliance Certificate but do not yet have one are not able to proceed and will not receive any other licenses and permits. Appeals from an EIA Committee decision are directed to the Environmental Conservation Committee, which is the final administrative avenue for review.

There is still some uncertainty as to who is required to submit an Environmental Impact Assessment. Both the Environmental Conservation Law and the rules define a project proponent as an entity undertaking a project or any aspect of a project. However, the breadth of this definition means that project proponents may also include sub-contractors. Whether this is actually the case is yet to be clarified by the government.



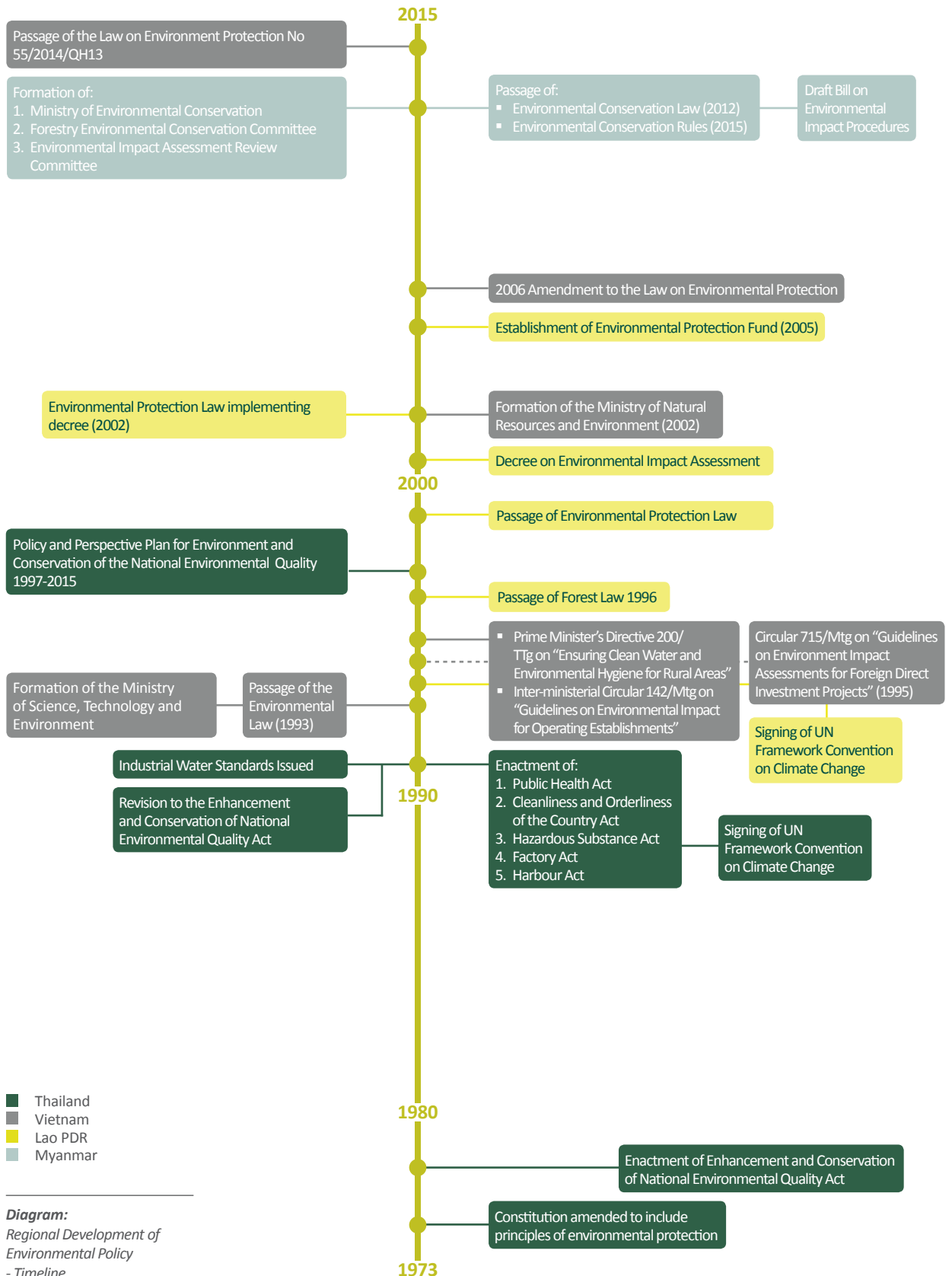
<sup>6</sup> Text of "Environmental Conservation law" <http://faolex.fao.org/docs/pdf/mya139025.pdf> [Last Accessed: 5/15/ 2015]

<sup>7</sup> "Myanmar Rises to Challenge of Environmental Conservation", Priscilla Clapp, Asia Society, 8 March 2013, Available at: <http://asiasociety.org/blog/asia/myanmar-rises-challenge-environmental-conservation> [Last accessed: 12/5/2015]

## Looking to the future

Each country in the Lower Mekong region has made significant, and often quite rapid progress in establishing environmental protection frameworks. However, in all cases, significant challenges still remain in advancing to the next

stage. Those challenges persist, primarily because economic development retains a significant focus, even in the most developed country in the region - Thailand.



**Diagram:**  
Regional Development of Environmental Policy - Timeline

## Thailand

Thailand is now the second largest economy in the Southeast Asian region. But rapid industrialization and economic development over the past four decades has left Thailand's natural environment in a state of disarray. These include:

- climate change (increased frequency of floods and droughts, higher annual temperature changes and rising sea levels);
- water pollution (untreated sewage discharge, urban runoff, acid rain and eutrophication); air pollution (sourced from automobiles, factories, aircrafts, refineries, smog, slash and burn clearing);
- resource depletion (overfishing, deforestation, water scarcity and degradation); and
- waste generation (e-waste, medical waste, household waste, industrial waste, marine debris, river dumping, and landfills).

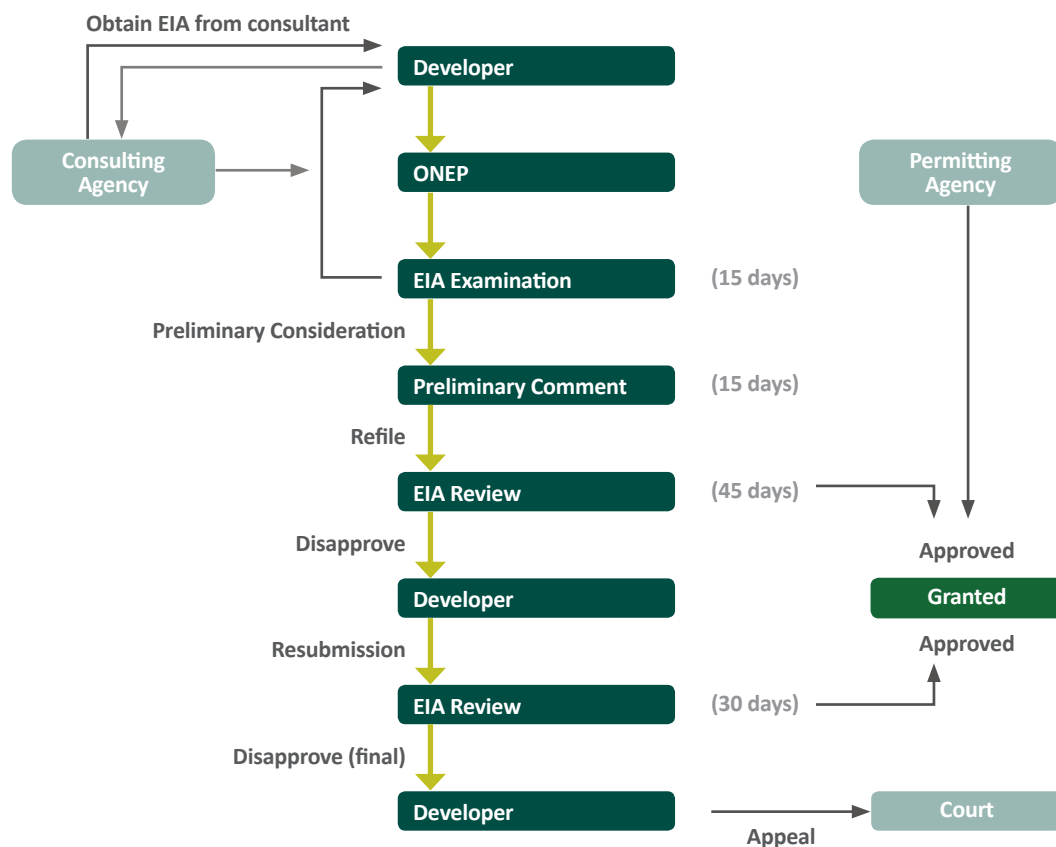
In response, Thailand's regulatory framework has become both tighter and more wide-ranging. In 2012, a Notification of the Ministry of Natural Resources and Environment listed the projects and businesses required to submit an EIA. There are 35 categories of industries listed in the notification, including those with buildings that fall within the scope of the Building Control Act, hotels, residential condominiums, and other land developed for residential or commercial purposes.

The notification also included increased clarity around the EIA requirements, aimed at encouraging investors to take greater responsibility for environmental protection and management issues surrounding their projects or business activities.

The main EIA report shall be structured so as to cover the following matters: an introduction to the project, description of the project site (including photos and a map) highlighting any environmental surroundings affected by the project, project details, description of the present environmental conditions, alternative options for the project site and project implementation methodology, a description of any significant impacts on the environment, as well as mitigation and monitoring measures. The main report must also be accompanied by an executive summary.

Thailand's EIA report process is summarized in the flow chart below.

While enforcement remains a challenge in many areas, Thailand's response to water pollution issues demonstrates that enforcement and progress are both possible and economically beneficial. Traditionally dependent on rice cultivation and other forms of agriculture for its development, Thailand is particularly susceptible to problems arising from water pollution. As such, the government placed a high priority on water quality regulations and produced the most effective regulations in Thailand's environmental protection framework.



*Diagram:*  
Thailand's environmental impact assessment report process



Water quality standards are scientifically determined according to the specific classification of each water basin. Water standards cover 20 different indicators such as color, odor, temperature, dissolved oxygen, biochemical oxygen demands and coliform bacteria counts. A major source of water pollution in Thailand is from “point-sources” such as factories. As a result the government included provisions on water pollution within the Factory Act. While these provisions are helpful, at this stage non-point sources are not considered, indicating a need for further development in this area.

Similar progress has been seen in relation to air pollution problems. Longtime residents of Bangkok will have noticed that the city’s air quality has significantly improved over the last few years. This improvement is a direct result of the various initiatives undertaken by the Thai government over the last two decades to aggressively address air pollution. Initiatives have largely been spearheaded by the Pollution Control Department, which maintains a website that reports on the daily air quality in each district in Bangkok as well as other sites across Thailand. The website also contains a list of air quality and emission standards for point sources and different types of vehicles.

To reduce harmful emissions from vehicles, new fuel quality standards were slowly introduced from the mid-1990s. By early 1996, Thailand had managed to eliminate the sale of lead-based fuels (even before the United States had achieved the same milestone). Eliminating lead-based fuels from the Thai market was in part achieved by increasing the tax on leaded fuels and using a portion of those funds to subsidize the price of unleaded fuels.

Other solutions implemented by the Thai government include the reduction of the number of vehicles on the road and the

introduction of mass transit systems. Although there were a number of other initiatives implemented and progress continues, much more work is still needed.

While the developments surrounding water and air pollution have been encouraging, progress has been much slower on the waste generation front. Thailand has specific regulations to control two types of waste: industrial waste and municipal waste. Industrial waste is subject to the Factory Act BE 2535 (1992) and municipal waste is regulated under a number of different acts, primarily the Public Health Act BE 2535 (1992) and the Cleanliness and Orderliness of the Country Act BE 2535 (1992). There are no dedicated statutes that address recycling, although in recent years there has been some attempt to build a formalized recycling scheme equivalent to those in many western countries. Despite these advances, levels of solid waste in Thailand are increasing annually.

The Pollution Control department has recently become more active on the waste management issue, and has issued a draft regulation on the disposal of electronic appliances and electronic waste. The draft was given a public hearing in June 2014. The next step will be to submit it for Cabinet consideration after which it is expected that it will be implemented into law in late 2015. The most current draft imposes a requirement on producers and importers to take responsibility for their goods throughout the product’s entire life cycle, which includes recycling and disposal. The draft, if implemented into law, will require businesses to register and submit a waste disposal annual report so that the relevant authority can follow up on the company’s performance on waste management.

Also on the waste management front, the Pollution Control Department has issued a National Strategy to achieve



<sup>8</sup> “Thai Environment Law” - Vipon Kititansasorchai & Panat Tasneeyanond, *Singapore Journal of International and Comparative Law* (2000) 4 pp 1-35.

<sup>9</sup> *Panat Tasneeyanong and Others V. The Prime Minister and Others* [Civil Court Case# Por Kor 122/2537]

<sup>10</sup> Kasamesunt Teerasitsathaporn and David Lawrence, “Class actions arrive in Thailand: Will the law of unintended consequences prevail?”, *Lexology*, 2015. Available at: <http://www.lexology.com/library/detail.aspx?g=c05fb1df-b63d-454e-a8b6-125d1c0e80ce> [Last accessed 20/5/2015]



integrated solid waste management targets that focus on the three R's: reduce, reuse, and recycle. The strategy aims to reduce waste generation and enhance waste segregation and recycling in all communities. Based on this strategy, the department has drafted a bill to regulate waste management, recycling and reuse across the country. However, it is yet to be adopted.

The chief challenges Thailand faces in the years ahead are those of enforcement and internalization. While the 1992 Act allowed for a practical legal framework for the government to solve environmental problems, enforcement and management

has been inconsistent. Lawsuits based directly on provisions of environmental laws have been very limited. However, a trend towards greater enforcement is slowly emerging and as the government continues to develop its environmental laws, we are likely to see more and more government agencies enforce their environmental regulations with stricter penalties for non-compliance.

Developments in other areas of the law are also likely to have an impact on public engagement in enforcing environmental obligations. Generally laws in Thailand aimed at protecting the public interest, such as environmental laws, are currently enforced only by government agencies, and individuals do not have a general right to bring lawsuits directly to the courts. Until recently, the government has appeared unwilling to go beyond the traditional concepts of "standing" to sue on matters which affect the general public, holding that "a citizen who has environmental rights under the Constitution must be directly and obviously injured by the defendant in order to have the standing to sue"<sup>8</sup>, as was the case in the Supreme Court's decision in *Panat Tasneeyanond v The Prime Minister*<sup>9</sup>. This contrasts with many common law countries, where standing is typically to any "interested party" without a requirement to have been "directly and obviously injured". This is likely to change with the possible introduction of "class action" law suits in Thailand later this year. This could well lead to revisions to the Civil and Commercial Code to refine the principles of standing for "laws respecting the environment, consumer protection, labor, securities and stock exchange, and trade competition" and open the door wider for "direct action" lawsuits on environmental matters<sup>10</sup>.

While enforcement of environmental laws and standards is just one issue that continually needs to be addressed, public awareness regarding environmental management issues remains a challenge. But as Thailand continues on its development path, there are early signs that a broad public awareness of the need to preserve and protect the environment is beginning to grow.

## Vietnam

Since the very first enactment of environmental legislation in 1993, Vietnam's legal institutions have coupled compliance impositions on business with measures promoting voluntary management of environmental protection, such as the various tax incentives on eco-friendly projects. The adoption of the Law on Economical and Efficient use of Energy No. 50/2010/QH12 on 17 June 2010 (which came into force on 1 January 2011) illustrates this tendency. While it maintains a strong restrictive approach through the prohibition of various actions detrimental to energy efficiency and conservation, it also establishes a baseline for the creation of measures to encourage businesses to incorporate environmental considerations in their own strategic decision-making processes.

While a legal framework is in place, implementation has, in some cases, proven to be ineffective. Violations are increasingly complex, sophisticated and ongoing, with the development of small to medium hydropower projects, mining projects and large forest land conversion projects often resulting in severe impacts on the environment. Public awareness of the need to protect the local environment remains minimal and the conflict between the goals of sustainable development and the need to earn a living makes

some degree of environmental degradation inevitable.

Recently, though, Vietnam has demonstrated a tendency to strictly apply environmental regulations. It is likely that this trend will continue and that the government will begin closely scrutinizing corporate practices that it considers to be non-compliant. This is most evident by the encouragement given to businesses to develop their own independent environmental processes beyond the minimums required by law. It is also demonstrated by Vietnam's national development strategies for the period to 2020. In preparation for ASEAN integration, the current strategy aims for greater added value, higher productivity and better energy efficiency.

As its neighbors have discovered, the challenge of balancing economic growth and environmental protection in Vietnam can only be solved through a comprehensive approach to environmental management policies. Although the current regulatory framework is still in its infancy, regulations protecting the environment and natural resources in Vietnam have certainly become more comprehensive in recent years and continued expansion is likely. The shift from a "forced compliance model" into a true set of internalized, self-dedicated processes will continue to be an interesting evolution.



## The Lao PDR

The Lao PDR government is continuing to seek a balance between economic growth and sustainable development and is attempting to implement a comprehensive regulatory framework for project development and environmental assessment. To expand upon the existing framework, draft regulations are being circulated, which includes amendments to the Water Resources Law and a new Law on Forest and Natural Resource Inspections.

In addition, various technical assistance programs are currently being implemented across the country to improve the monitoring and evaluation of existing projects as well as the capacity of the implementing organizations. The Ministry of Planning and Investment is also currently undertaking a review of all existing mining, eucalyptus and rubber concessions, with part of the review including environmental compliance.

Although the Lao PDR has an increasing array of environmental laws, regulations and best practice guidelines, there is, in practice, a lack of effective monitoring and enforcement. As is the case for its neighbors, enforcement remains a key issue for the government to address in the future and will require capacity building at a provincial, district and village level to carry out, enforce and monitor project activities.

Various monitoring, enforcement and penalty mechanisms are being built into concession agreements to incentivize compliance with environmental obligations. The onus is not only on the government to provide the regulatory framework but also on investors to ensure that their projects are operated in compliance with the legal framework, both regulatory and contractual, and undertaken in a sustainable manner.

## Myanmar

Myanmar's environmental conservation framework is new, untested and incomplete. The government has not yet scheduled quality standards for environmental impact and pollution, although these are due later in 2015.

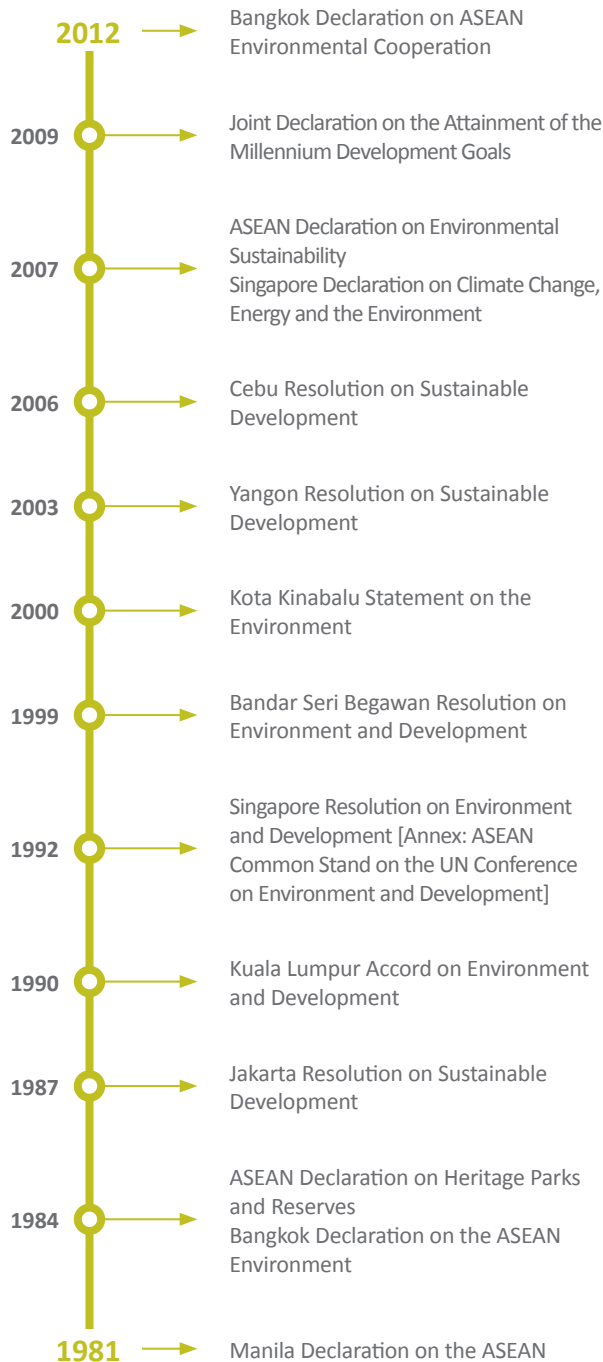
In the meantime, developments continue. For example, the Environmental Conservation Rules require the establishment of a government-controlled environment fund into which polluters will pay penalties. The Environment Law also requires project proponents to report "serious" environmental incidents within 24 hours and environmental incidents that are "likely to have an impact" within seven days. In addition, once a project commences, the proponent is required to submit bi-annual reports on its environmental compliance. Periodic monitoring and investigations of the project and any environmental incidents may also be carried

out, for which the project proponent bears all costs.

Myanmar is signatory to over two dozen international environmental treaties and protection of the environment is a priority for the current government. While the approach taken by the government so far can be characterized as "baby steps", increased regulation and clarification are likely during 2015 and 2016. Although developments to date have been positive, the lack of institutional capacity in the government and bureaucracy remain impediments to the effective implementation of internationally acceptable environmental laws. The development of new law continues in the meantime, which is likely to include strengthening of the framework to address the needs of foreign investors. Nevertheless, it is encouraging to see the building blocks being put into place.



## The ASEAN Impact



**Diagram:**  
ASEAN Non-binding Instruments

\*For an exhaustive list of environmental instruments, please see: Koh Kheng-Lian, *ASEAN Environmental Law, Policy and Governance: Selected Documents Volume 1* (World Scientific Publishing, 2009) and *Volume 2* (World Scientific Publishing Company, 2013)

The ASEAN 2020 Vision agreed to in 1997 looks to “a clean and green ASEAN with fully established mechanisms for sustainable development to ensure the protection of the region’s environment, the sustainability of its natural resources, and the high quality of life of its peoples”. While ASEAN’s primary focus in recent times has been on regional political and economic cooperation in preparation for the impending ASEAN Economic Community at the end of this year, it has also committed itself to environmental management.

The diagram adjacent reveals that Thailand, Vietnam and the Lao PDR have all enacted new environmental laws over roughly the same period.

While this publication is limited to four countries, it is worth noting that all ASEAN member states have participated in the following multilateral environmental agreements (by either ratification or accession): the Vienna Convention, the Montreal Protocol, the UNFCCC, the Kyoto Protocol, the Convention on Biological Diversity, the Stockholm Convention, the Cartagena Protocol, the Basel Convention, the Ramsar Convention, and the Rotterdam Convention. It is commendable that all ASEAN member states have already met their commitments to most of these conventions.

This compliance is demonstrated by the fact that all ASEAN member states have reduced their use of ozone depleting chlorofluorocarbons to less than 1,000 tons per year down from 9,000 tons in 1995. In terms of other internationally agreed deadlines, ASEAN member states appear to be ahead of schedule in ending the production and consumption of ozone depleting substances. Regular monitoring often shows that the region’s emissions rates are significantly lower than Europe, North America, Middle East, and North Africa.

In addition to international obligations, the ASEAN bloc itself has issued a number of accords, resolutions, declaration, charters, and statements relating to environmental issues and environmental management. The diagram adjacent demonstrates the various instruments to which all ASEAN member states have committed. At this point it is worth noting that none of the instruments shown in the diagram are legally binding and are often derided by critics as “soft laws”<sup>11</sup> as they are merely the result of regional meetings of environmental ministers and government officials rather than a specific legislative response.

Despite the non-binding status of these instruments, they represent a formal and thought-out record of awareness building which represent small steps towards achieving a set of integrated targets. These instruments also provide some evidence of the integrated approach being attempted by ASEAN for the development of environmental laws and management. However, the influence that these instruments have on domestic laws in each ASEAN member state remains almost negligible in the sense that there remains no specific framework for their implementation into domestic law and no rigorous monitoring of each target to ensure compliance by member states.

<sup>11</sup> “Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development” – Werner Scholtz and Jonathan Verschuuren – Edward Elgar Publishing (2015)



The various instruments have also resulted in the creation of five environmental regimes:

- The ASEAN Agreement on the Establishment of the Centre for Biodiversity;
- The ASEAN Agreement on Disaster Management and Emergency Response;
- The ASEAN Agreement on Trans-boundary Haze Pollution;
- The ASEAN Agreement on the Conservation of Nature and Natural Resources; and
- The Mekong River Commission.

While this number may appear low compared to other regional blocs around the world, the creation of these regimes represents a remarkable achievement for a developing region where skills, capacity building and funding remain an issue.

A review of these instruments reveals that the term “sustainable development” is increasingly referenced either in the titles or the preambles. However, despite the various targets in each instrument, there is likely to be significant

variation on how the concept of sustainable development will be applied under the domestic law of each ASEAN country.

An ongoing challenge faced by ASEAN member states also lies in resolving the inherent conflict between the need to act collectively to address common and national regional challenges on the one hand, while maintaining the principle of non-interference with respect to sovereignty on the other. Whilst ASEAN develops its own regional organization model, it manifests some severe limitations because of its generally strict adherence to the concept of sovereignty and non-interference in respect to domestic policy of individual ASEAN states. This is sometimes referred to as the “ASEAN Way”<sup>12</sup>.

While the above issues only represent the tip of the iceberg in terms of the effectiveness of regional cooperation in addressing environmental concerns, ASEAN member states have nevertheless achieved a remarkable feat given the different environmental priorities and differing environmental protection regimes in each state. It is also noteworthy that ASEAN environmental policy acknowledges the impact of development activities on its people.



<sup>12</sup> See generally: Helen E. S. Nesadurai, “Imagining the ASEAN Community”, an address to the University of Sydney Southeast Asia Studies Centre, available at: <http://freepdfs.net/imagining-the-asean-community-university-of-sydney/ace476a87480dc5b2ae2ba1fdfb54db8/>  
See generally also: Laeley Nurhidaya, Zada Lipmann and Shaweat Alam, “Regional Environmental Governance: An Evaluation of the ASEAN Legal Framework for Addressing Transboundary Haze Pollution”, *Australian Journal of Asian Law* (2014) 15(1) at 17.



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Hoang Phong Anh is a fully qualified Vietnamese lawyer who, prior to joining DFDL in 2007, worked for a large international law firm in Vietnam for 12 years. He has an excellent knowledge of corporate, commercial and investment law in Vietnam, having provided legal expertise on several important foreign investment projects in Vietnam as well as working on donor funded technical assistance projects, including projects for the review and analysis of draft Vietnamese legislation. Phong Anh provided legal advice and assistance for several BOT power plant projects for both the sponsor side and the government side. He is the lawyer for the Vietnamese government in an international arbitration in connection to an investment dispute between an overseas Vietnamese investor and the Vietnamese government. Phong Anh also provided technical assistance to several banking reform projects which were financed by World Bank and Asian Development Bank in Vietnam.

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