

# **ASEAN'S GRADUAL EVOLUTION: CHALLENGES AND OPPORTUNITIES FOR INTEGRATING PARTICIPATORY PROCEDURAL REFORMS FOR THE ENVIRONMENT IN AN EVOLVING RIGHTS-BASED FRAMEWORK**

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## **ABSTRACT:**

*The Association of South East Asian Nations (ASEAN) is entering an interesting and important new phase in its evolution. Having survived the cold war and Asian financial crisis of 1997, the Association remains a uniquely successful, yet enigmatic organization comprised of ten major Southeast Asian countries. ASEAN nations have successfully obtained rapid levels of economic and human development in the face of the region's political difficulties, yet at the risk of causing significant environmental degradation. Now, ASEAN is implementing two new structures that have major implications for the state of civil society among its member nations—the ASEAN Charter and the ASEAN Intergovernmental Commission on Human Rights (AICHR). This Article examines ASEAN's overarching framework for environmental governance, its normative culture of decision-making, and how the Charter and AICHR could potentially offer significantly divergent paths for the Association in light of its environmental and human rights challenges. It particularly examines how the limitations of ASEAN's elite governing and decision-making norms constrain the possibilities for an expansive civil society under the Charter and AICHR in these areas, and the challenges of integrating environmental and human rights paradigms within this context. Finally, this Article outlines some procedural reforms that ASEAN should adopt that might address its developmental concerns from a participatory standpoint in light of the parameters that constrain the Association's normative realities.*

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## I. INTRODUCTION

The Association of Southeast Asian Nations (“ASEAN” or “the Association” ) is entering its fifth decade. Widely perceived as both an uncommon success and uniquely anomalous regional association, ASEAN survived decades of revolution and Cold War conflict to emerge as one of the world’s leading economic powers. Currently comprised of ten widely divergent economies and governments, the Association continues to have significant relevance as the common regional entity for Southeast Asia. As ASEAN consolidates its standing among both its member-states and its regional and global peers, the Association has arrived at a crossroads. The recently created ASEAN Charter and ASEAN Intergovernmental Commission on Human Rights (AICHR) provide significant opportunities for the Association to strengthen both its environmental and human rights governance approach—two areas that are both interrelated and in great need of attention. As ASEAN’s member-states continue to develop at high rates of growth and integrate their domestic economies into a wider market, environmental degradation remains a pressing issue, particularly because of the relatively weak institutional and civil society capacity of ASEAN nations. This article examines the overall context of ASEAN’s environmental governance framework, and both the barriers and opportunities to potentially integrate new mechanisms for addressing environmental is-

sues within a rights-based framework. Close attention is paid to the normative space which has been developed by ASEAN's customary governance practices and principles, and how opportunities for establishing new practices would comport with such boundaries. Finally, modest proposals are made that would further ASEAN progress on environmental matters within its evolving governance and rights framework using a participatory approach.

This article proceeds as follows: Part II provides an overview of ASEAN's overall development since its inception. It outlines the major instruments created by the Association, and the wider trends that have characterized its economic evolution. It also summarizes the general social and environmental concerns that have arisen as a consequence of ASEAN's rapid economic development. Part III reviews the major components of ASEAN's environmental governance framework. This section provides an overview of the soft law approach that ASEAN has developed towards environmental affairs, particularly with respect to how the Association's policymaking process draws from a wider culture of consensus and accommodation. It also outlines the Association's few hard law environmental treaties, such as the Transboundary Haze Agreement, and how these protocols potentially limit significant normative interventions. Part IV outlines the parameters of the recently established ASEAN Charter and ASEAN Intergovernmental Commission on Human Rights ("AICHR"). This section discusses the limitations of these two bodies both within the wider context of international environmental and human rights discourse, and within the policymaking and diplomatic norms which characterize ASEAN's political culture. Specific attention is focused on the 1998 Aarhus Convention on Environmental Matters as a model for recognizing participatory procedural rights that span environmental and human rights concerns. Finally, Part V of this article examines the AICHR both as a protective and promotion entity for addressing environmental concerns within a rights-based context. Again drawing from parameters established by the policymaking norms of ASEAN, a series of modest procedural-based reforms to expand participatory practices are suggested for ASEAN as a realistic step towards strengthening its approach towards the environment and human rights.

## II. ECONOMIC DEVELOPMENT AND THE ENVIRONMENT IN ASEAN

The Association of Southeast Asian Nations was founded in 1967, originally comprised of Indonesia, Malaysia, the Philip-

pires, Singapore, and Thailand.<sup>1</sup> There were numerous reasons supporting the formation of ASEAN. The five founding members shared security concerns over both communist Vietnam and domestic communist insurgencies within their own borders.<sup>2</sup> There was fear among the founding states that communist China might rise as an ascendant power and eclipse the smaller nations of the region.<sup>3</sup> The formation of ASEAN also allayed security tensions between members. The mid-1960s had seen several years of Indonesia's *konfrontasi* (confrontation) with the British-backed Federation of Malaysia,<sup>4</sup> and the competing claims by Malaysia and the Philippines for Sabah also threatened regional security.<sup>5</sup> The formation of the five nations into ASEAN stabilized relations between member-states, and facilitated connections between the non-communist countries of the region against the perceived threats of North Vietnam and China.<sup>6</sup>

A shared objective of economic development was a fundamental tenant of ASEAN. As noted in the first paragraph of the 1967 Bangkok Declaration establishing ASEAN:

[T]he aims and purposes of the Association shall be:

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations.<sup>7</sup>

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1. See MICHAEL ANTOLIK, *ASEAN AND THE DIPLOMACY OF ACCOMMODATION* 3-5 (1990) (describing early history and meaning of ASEAN).

2. See Russell H. Fifield, *ASEAN: Image and Reality*, 19 *ASIAN SURV.* 1199, 1199-1200 (1979) (outlining security concerns of ASEAN nations during the Indochina war).

3. See AMITAV ACHARYA, *THE QUEST FOR IDENTITY: INTERNATIONAL RELATIONS OF SOUTHEAST ASIA* 83-86 (2000) (noting the security concerns of ASEAN partners and apprehension over China's possible dominance of Southeast Asian nations).

4. See Ralf Emmers, *Regional Hegemonies and the Exercise of Power in Southeast Asia: A Study of Indonesian and Vietnam*, 45 *ASIAN SURV.* 645, 649-650 (2005) (outlining the years of *Konfrontasi* under President Sukarno and President Suharto's intention that ASEAN might "reassure his partners and diminish the fears of a coercive Indonesian hegemony").

5. See Paridah Abd. Samad & Darusalam Abu Bakar, *Malaysia-Philippines Relations: The Issue of Sabah*, 32 *ASIAN SURV.* 554, 554-558 (1992) (outlining the historical tensions between Malaysia and the Philippines over Sabah).

6. See Shaun Narine, *ASEAN and the Management of Regional Security*, 71 *PAC. AFF.* 195, 196 (1998) (outlining ASEAN's implications for security among member-states); Sheldon Simon, *ASEAN and Multilateralism: The Long, Bumpy Road to Community*, 30 *CONTEMP. SE. ASIA* 264, 268-69 (2008) (outlining both intra-member and regional security tensions which served to rationalize ASEAN).

7. The ASEAN Declaration (Bangkok Declaration), Aug. 8, 1967 (last visited July 25, 2012), available at <http://www.aseansec.org/1212.htm>.

The focus on economic development among member-states was directly linked to the Association's security concerns.<sup>8</sup> From the perspective of the founding nations, economic development and prosperity would undermine the fomenting communist insurgencies within their borders, a priority given the fact that very hot wars with communists were engulfing North and South Vietnam, Laos, and Cambodia.<sup>9</sup> Thailand in particular perceived itself as a frontline state against Vietnamese forces in Cambodia and Laos, and was also facing a domestic communist insurgency.<sup>10</sup> Both the Philippines<sup>11</sup> and Malaysia<sup>12</sup> were also experiencing sizable threats from armed communist movements.

When it became increasingly clear that the United States would extract itself from the region in the waning years of the Vietnam War, the need to address both security and development within ASEAN became more pronounced. In 1969, ASEAN commissioned a United Nations study to recommend a regional economic cooperation and development strategy. The study—called the Kansu report after its lead author Professor G. Kansu of Turkey—was released in 1972 and published in 1974.<sup>13</sup> The Kansu report recommended the adoption of regional trade liberalization and import-substituting industrialization in the region.<sup>14</sup> Within the context of ASEAN's early regional economic

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8. See AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER* 55-77 (2001) (providing an overview of the regional security context that drove the formation of the ASEAN in Southeast Asia).

9. See Shaun Narine, *ASEAN and the Management of Regional Security*, 71 *PAC. AFF.* 195, 196 (1998) (noting that economic development in ASEAN would undermine domestic communist insurgencies among member-states).

10. See DAVID WYATT, *THAILAND: A SHORT HISTORY* 287-90 (1982) (discussing Thailand's involvement in the Indochina War and communist movements within the country).

11. See generally Justus van der Kroef, *Communism and Reform in the Philippines*, 46 *PAC. AFF.* 29, 29-58 (1973) (providing an overview of communist movements in the Philippines).

12. See generally Karl Hack, *The Long March to Peace of the Malayan Communist Party in Southern Thailand*, in *THAI SOUTH AND MALAY NORTH* 173, 173-83 (Michael Montesana & Patrick Jory ed., 2008) (providing an overview of the Malay Communist Party and its strategies along the Malay/Thai border); M. Ladd Thomas, *The Malayan Communist Insurgency*, 4 *ASIAN AFF.* 306, 306-316 (1977) (outlining history of the Communist Party of Malaysia and its activities in both Malaysia and Southern Thailand during the Cold War).

13. See DEWI FORTUNA ANWAR, *INDONESIA IN ASEAN: FOREIGN POLICY AND REGIONALISM* 65 (1994) (outlining the background of the Kansu report).

14. See Stuart Drummond, *ASEAN: The Growth of an Economic Dimension*, 35 *THE WORLD TODAY* 31, 32-33 (1979) (describing the basic components of the Kansu report); Hal Hill & Jayant Menon, *ASEAN Economic Integration: Driven by Markets, Bureaucrats or Both?* 4 (Australian Nat'l University, Working Papers in Trade and Development, Paper No. 2010/11, 2010) (stating that the Kansu report "proposed trade liberalization through selective, or product-by-product tariff negoti-

cooperation initiatives, the report's recommendations for cooperative industrial policies and trade liberalization was an early iteration of thinking towards an ASEAN Free Trade Area.<sup>15</sup>

Yet, in a pattern that would continue to hold sway throughout the 1970s, much of the economic growth among ASEAN nations resulted from policies enacted by individual member-states. Indonesia began implementing a series of state-directed five year development plans which led to an average growth of nearly 8% per year from 1968-1981.<sup>16</sup> Malaysia, Singapore, and Thailand enacted policies moving away from import-substituting industrialization and towards export-oriented industrialization, capitalizing on comparative advantages in labor costs and geographic proximity to international sea lanes.<sup>17</sup> Member-states also leveraged natural resources to enhance their economic productivity. Thailand implemented infrastructure development plans which greatly enhanced its abilities to produce and export cash crops such as pineapples or sugar cane as well as manufactured goods.<sup>18</sup> Indonesian agricultural development strategies to subsidize the use of high-yield rice varieties and fertilizer saw a 32% increase in rice yields in the 1970s.<sup>19</sup>

ASEAN continued a path towards greater regional cooperation in economic activities when it convened its first summit of leaders in 1976—the Bali Summit. The meeting reflected a conscious willingness to strengthen ties in the face of communist governance in a reunified Vietnam, a similar takeover in Laos, and the Khmer Rouge regime in Cambodia.<sup>20</sup> Member-states at

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ations, package deal arrangements for large industrial projects, and financial cooperation”).

15. See Teofilo C. Daquila & Le Huu Huy, *Singapore and ASEAN in the Global Economy: The Case of Free Trade Agreements*, 43 *ASIAN SURV.* 908, 921-922 (2003) (discussing the Kansu report and early ASEAN moves towards regional economic initiatives and AFTA).

16. See Siang Ng, *Indonesia*, in *ASEAN BUSINESS TRADE & DEVELOPMENT* 54, 56-58 (Ron Edwards & Michael Skully ed., 1996) (outlining the history of economic development in Indonesia following the inception of ASEAN).

17. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION* 80-85 (1996) (outlining the adaption of export-oriented industrial strategies in ASEAN nations). See also DAVID ANTHONY HOLLINGSWORTH, *THE RISE, THE FALL, AND THE RECOVERY OF SOUTHEAST ASIA'S MINIDRAGONS* 6-7 (2007) (discussing policy shifts towards export-oriented industrialization).

18. See Julie Edwards, *Thailand*, in *ASEAN BUS. TRADE & DEV.* 155, 160-61 (Ron Edwards & Michael Skully ed., 1996) (discussing Thailand's early government development plans and its growth implications).

19. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION* 53-54 (1996) (outlining Indonesian performance in rice yields as a result of government policies).

20. See Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?* 53 *INT'L & COMP. L. Q.* 935, 935-36 (2004) (noting the prelude to the first ASEAN Summit of leaders in Bali and the regional security context).

the Summit signed the Declaration of ASEAN Concord, and the Treaty of Amity and Cooperation, broad frameworks which recognized the organization's original principles and restated objectives to cooperate along political, economic, and cultural lines.<sup>21</sup> The Summit also saw the adoption of a program of action to increase regional economic cooperation based upon the Kansu report.<sup>22</sup> A series of preferential tariff schemes and joint industrial ventures were implemented regionally by ASEAN shortly thereafter.<sup>23</sup>

Growth strategies based on export-oriented industrialization became the primary means of development for the ASEAN nations, supported by deregulation and policies which promoted direct investment from foreign corporations.<sup>24</sup> The success of Southeast Asia as a manufacturing base was clearly related to Japan's economic ascension in particular. Export-oriented Japanese firms moved manufacturing bases to Southeast Asia due to regional proximity, cheap labor costs, and openness to foreign investment.<sup>25</sup> Within this regional division of labor, Japan—at the center of East Asia's economy—both produced the most advanced products and financed the capital for neighboring nations' exports. In turn, the "Newly Industrialized Countries" (NICs) of East Asia (Hong Kong, South Korea, and Taiwan) pro-

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21. See Rodolfo Severino, *ASEAN Beyond Forty: Towards Political and Economic Integration*, 29 CONTEMP. SE. ASIA 406, 409 (2007) (outlining products of the Bali Summit and noting that the agreements "laid down the basic norms for interstate relations in the region").

22. See GERALD TAN, ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION 10 (1996) ("Of these, perhaps the most important was the programme of action to implement the recommendations of the United Nations team of experts, which, in their 1972 report, urged the establishment of preferential trading arrangements as a means of increasing intra-regional trade.").

23. See Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?* 53 INT'L & COMP. L. Q. 935, 936-38 (2004) (outlining the implementation of the ASEAN Industrial Projects Scheme, ASEAN Industrial Completion Scheme, and Preferential Trading Arrangements).

24. See DAVID ANTHONY HOLLINGSWORTH, THE RISE, THE FALL, AND THE RECOVERY OF SOUTHEAST ASIA'S MINIDRAGONS 6-8 (2007) (discussing the importance to Southeast Asian economies of export-oriented manufacturing and foreign direct investment). See also GERALD TAN, ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION 80-81 (1996) (discussing the adoption of export-oriented manufacturing strategies by ASEAN nations and deregulation policies).

25. See Ron Edwards & Kevin Wong, *Regional Co-operation: ASEAN, AFTA and APEC*, in ASEAN BUS. TRADE & DEV. 1, 2 (Ron Edwards & Michael Skully ed., 1996) (discussing the link between Japanese investment and ASEAN economic growth in export-oriented manufacturing). See also DAVID ANTHONY HOLLINGSWORTH, THE RISE, THE FALL, AND THE RECOVERY OF SOUTHEAST ASIA'S MINIDRAGONS 8 (2007) (noting the importance of foreign direct investment to the Southeast Asian economies); Hal Hill, *ASEAN Economic Development: An Analytical Survey—The State of the Field*, 53 J. OF ASIAN STUD. 832, 840-42 (1994) (discussing the role of foreign direct investment in ASEAN manufacturing and industrialization).

duced skilled-labor intensive products, and—at the periphery—the Southeast Asian nations produced labor-intensive products.<sup>26</sup> The average annual percentage rate of real gross domestic product growth from 1978-1987 for Indonesia, Malaysia, and Thailand, respectively, was 5.2%, 5.5%, and 6.4%, compared to only 4.5% for all developing nations in that same time frame.<sup>27</sup> From 1988-1995, those average annual growth rates only increased, respectively, to 7.9%, 8.9%, and 9.9% for those three ASEAN nations.<sup>28</sup>

Economic development in ASEAN remains a priority for the foreseeable future.<sup>29</sup> In 1992, the original six ASEAN nations declared the creation of the ASEAN Free Trade Area (AFTA).<sup>30</sup> Under the AFTA agreement, member-states will gradually reduce all tariffs from qualified manufactured goods produced within ASEAN to rates of 0-5%.<sup>31</sup> The agreement stipulated a pre-determined schedule for tariffs of qualifying goods to be reduced to target dates within a fifteen-year time frame.<sup>32</sup> AFTA's creation reflected a desire among regional elites to further liberalize trade internally,<sup>33</sup> while maintaining a focus on external, export-driven trade, and to aggregate its market resources in the face of other regional economic communi-

26. See Paul Bowles, *ASEAN, AFTA and the "New Regionalism"*, 70 PAC. AFF. 219, 222-23 (1997) (outlining the "flying geese" pattern of development used to describe East Asian regional patterns of direct investment and export-oriented manufacturing). See also Rajah Rasiah, *Manufacturing export growth in Indonesia, Malaysia and Thailand*, in *SOUTHEAST ASIAN PAPER TIGERS? FROM MIRACLE TO DEBACLE AND BEYOND* 19, 41-45 (Jomo K.S. ed., 2003) (discussing the confluence of foreign direct investment and state-directed policies to promote export-oriented manufacturing strategies in Indonesia, Malaysia and Thailand).

27. See Martin Hart-Landsberg & Paul Burkett, *Contradictions of Capitalist Industrialization in East Asia: A Critique of "Flying Geese" Theories of Development*, 74 ECON. GEOGRAPHY 87, 89 tbl. 1 (1998) (citing International Monetary Fund statistics on comparative GDP growth).

28. *Id.*

29. See Mely Caballero-Anthony, *Bridging Development Gaps in Southeast Asia: Towards an ASEAN Community* 37-38 (UNISCI Discussion Papers, Paper No. 11, 2006) (outlining ASEAN initiatives to obtain regional cooperation and economic integration among members states).

30. See Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, Jan. 28, 1992 (last visited July 25, 2012), available at <http://www.aseansec.org/5124.htm>.

31. See *id.* at art. 2 ¶¶ 1-7 (outlining provisions of the Common Effective Preferential Tariff scheme for member-states).

32. See Narongchai Akrasanee & David Stifel, *The Political Economy of the ASEAN Free Trade Area*, in *AFTA: THE WAY AHEAD* 27, 38-40 (Pearl Imada & Seiji Naya ed., 1992) (discussing the preferential tariff schedule under the AFTA agreement).

33. See Richard Stubbs, *Signing on to Liberalization: AFTA and the Politics of Regional Economic Cooperation*, 13 THE PAC. REV. 297, 298-300 (2000) (outlining economic policy stances among elite decision makers in ASEAN member-states that were related to the formation of AFTA).

ties.<sup>34</sup> The 1997 financial crisis, which first struck in Thailand and quickly spread to neighboring nations,<sup>35</sup> revealed a number of structural vulnerabilities behind ASEAN's high growth levels. The most notable factors associated with the crisis included inadequate financial regulation,<sup>36</sup> and excessive lending followed by rapid outflows of finance from foreign institutional investors.<sup>37</sup> Yet despite the significant financial, economic, and social impact that immediately followed the crisis, in December of 1998 the ASEAN heads of state regrouped and reaffirmed an economic development-centered platform called the ASEAN Vision 2020, which sought to further accelerate economic cooperation and development among members and fully implement the AFTA objective.<sup>38</sup> ASEAN has also continued to partner with other Asian nations to create regional trading schemes, such as China, Japan, and South Korea.<sup>39</sup> The expansion of the regional block to include the formerly excluded communist nations of Indochina and Myanmar, have increased ASEAN's size to ten nations with a combined population of over 580 million people.<sup>40</sup>

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34. See Seiji Naya & Pearl Imada, *The Long and Winding Road Ahead for AFTA*, in *AFTA: THE WAY AHEAD* 53, 56-58 (Pearl Imada & Seiji Naya ed., 1992) (discussing the creation of AFTA as a response to global trends or regional economic cooperation such as the European Community and North American Free Trade Area); Paul Bowles, *ASEAN, AFTA and the "New Regionalism"*, 70 *PAC. AFF.* 219, 223-24 (noting concern among ASEAN policymakers that the region remain strong in the face of other regional economic groupings); Alfredo Robles, *The ASEAN Free Trade Area and the Construction of a Southeast Asian Economic Community in East Asia*, 12 *ASIAN J. OF POL. SCI.* 78, 91 (2004) (discussing the global context in which ASEAN moved to develop the AFTA scheme).

35. See Takashi Shiraishi, *Introduction: States, Markets and Societies after the Asian Crisis*, in *AFTER THE CRISIS: HEGEMONY, TECHNOCRACY AND GOVERNANCE IN SOUTHEAST ASIA* 1, 1 (Shiraishi Takashi & Patricio N. Abinales eds. 2005) (outlining the basic course of the 1997 Asian financial crisis).

36. See DAVID ANTHONY HOLLINGSWORTH, *THE RISE, THE FALL, AND THE RECOVERY OF SOUTHEAST ASIA'S MINIDRAGONS* 12-18 (2007) (discussing regulatory failures and moral hazard among investors and lenders that triggered the crisis); Aseem Prakash, *The East Asian Crisis and the Globalization Discourse*, 8 *REV. OF INT'L POL. ECON.* 119, 122-25 (2001) (discussing causes of the financial crisis, including rapid flows of capital, lack of oversight, and poorly made investments).

37. See Michael R. King, *Who Triggered the Asian Financial Crisis?* 8 *REV. OF INT'L POL. ECON.* 438, 445-46 (2001) (asserting that the risky behavior of Japanese lenders were a major factor behind the Asian financial crisis); Jeong Yeon Lee, *Foreign Portfolio Investors and Financial Sector Stability in Asia*, 47 *ASIAN SURV.* 850, 863-68 (2007) (analyzing the role of institutional investors and international banks in capital outflows that triggered the financial crisis).

38. See Kuala Lumpur, *ASEAN Vision 2020*, ASEAN (Dec. 15, 1997) (last visited July 25, 2012), <http://www.aseansec.org/1814.htm>.

39. See generally Richard Stubbs, *ASEAN Plus Three: Emerging East Asian Regionalism?*, 42 *ASIAN SURV.* 440, 440-455 (2002) (outlining the history of ASEAN relationships and trade agreements with other powerful Asian economies).

40. See ASEAN Secretariat, *Fourth ASEAN State of the Environment Report 2009, Executive Summary*, at 7 ASEAN (Oct. 2009) (providing an overview of

In 2003, the ten ASEAN member-states re-affirmed the ASEAN Vision 2020 and declared the creation of an ASEAN Community by 2020, resting on “three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region.”<sup>41</sup> The Community will consist of a single market and production base with the free flow of goods, services, investment, capital, and skilled labor<sup>42</sup> — an integrated economy that could compete against China and India.<sup>43</sup> Currently, three ASEAN nations are in the top forty largest world economies by gross domestic product: Indonesia, Thailand, and Malaysia.<sup>44</sup> Altogether, ASEAN’s gross domestic product is 1,496,341 million US dollars,<sup>45</sup> making it the ninth largest economy in the world according to World Bank statistics.

ASEAN’s economic expansion has led to considerable socio-economic progress in many sectors. The combination of high GDP growth, high rates of foreign investment, and high domestic savings rates<sup>46</sup> has set the foundation for a human development revolution.<sup>47</sup> Considerable state resources have been directed towards education, health, and poverty reduction throughout the member-states. From 1970 to 1984/85, poverty incidence in Indonesia, Malaysia and Thailand, decreased respec-

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“ASEAN facts and figures”) (last visited July 25, 2012), [www.aseansec.org/publications/SoER4-Sum.pdf](http://www.aseansec.org/publications/SoER4-Sum.pdf).

41. *Declaration of ASEAN Concord II (Bali Concord II)*, ASEAN (Oct. 7, 2003) (last visited July 25, 2012), available at <http://www.aseansec.org/15159.htm>.

42. See ASEAN Secretariat, *Roadmap for an ASEAN Community 2009-2015*, at 22-30, ASEAN (Apr. 2009) (outlining the fundamental principles of the ASEAN Economic Community) (last visited July 25, 2012), [www.aseansec.org/publications/RoadmapASEANCommunity.pdf](http://www.aseansec.org/publications/RoadmapASEANCommunity.pdf).

43. See DAVID ANTHONY HOLLINGSWORTH, *THE RISE, THE FALL, AND THE RECOVERY OF SOUTHEAST ASIA’S MINIDRAGONS 194-97* (2007) (discussing the creation of the ASEAN Community as a response to the growing power of China and India); MICHAEL R.J. VATIKIOTIS, *POLITICAL CHANGE IN SOUTHEAST ASIA: TRIMMING THE BANYAN TREE 184-87* (1996) (discussing the dynamics of the China-Southeast Asia relationship).

44. See *Gross Domestic Product 2010*, WORLD BANK (July 1, 2011) (last visited July 25, 2012), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

45. See *Selected Basic ASEAN Indicators*, ASEAN (Feb. 15, 2011) (last visited July 25, 2012), available at <http://www.aseansec.org/stat/Table1.pdf>.

46. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION 29-30* (1996) (discussing high savings and investment ratios of ASEAN nations).

47. See Richard J. Estes, *Social Development Trends in Asia, 1970-1994: “The Challenges of a New Century”*, 37 SOC. INDICATORS RES. 119, 137-38 (1996) (discussing the high performance of Southeast Asia in social development indicators in relation to other Asian sub-regions).

tively from 57%, 52%, and 39% to 22%, 21%, and 30%.<sup>48</sup> There have been profound advances in adult literacy rates<sup>49</sup> and high rates of enrollment in secondary education.<sup>50</sup> Higher education enrollment increased thirteen times in the region since 1960.<sup>51</sup> Educational access for girls and women has amounted to much greater labor force participation in ASEAN economies.<sup>52</sup> The number of persons per physician decreased in almost all ASEAN nations from 1975-1990 with the exception of the Philippines.<sup>53</sup> There have been corresponding increases in life expectancy throughout the region,<sup>54</sup> and decreases of at least 50% in regional infant mortality rates.<sup>55</sup>

Numerous commentators also have pointed to unfavorable aspects within Southeast Asia's development experience. The gist of this criticism is that accelerated economic growth has led to profoundly damaging socio-economic trends.<sup>56</sup> Critics have asserted that economic growth in the region has been socially uneven or inequitable,<sup>57</sup> driven the creation of overcrowded and poorly managed urban megalopolises,<sup>58</sup> undermined indigenous

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48. See Jomo K.S., *Growth with equity in East Asia?*, in *SOUTHEAST ASIAN PAPER TIGERS? FROM MIRACLE TO DEBACLE AND BEYOND* 196, 198 (Jomo K.S. ed., 2003) (summarizing historical poverty incidence rates for various high performing Asian economies from 1970 to 1993).

49. See Mohan Singh, *Whither ASEAN? Convergence and Divergence of the Region's Socioeconomic Dynamics*, in *DEVELOPMENT AND CHALLENGE: SOUTHEAST ASIA IN THE NEW MILLENNIUM* 75, 78-80 (Wong Tai-Chee & Mohan Singh eds. 1999) (discussing adult literacy rates in ASEAN nations).

50. See *id.* at 81 (discussing secondary school enrollment rates in ASEAN nations).

51. See Gavin Jones, *The Role of Education in ASEAN Economic Growth: Past and Future*, in *DEVELOPMENT AND CHALLENGE: SOUTHEAST ASIA IN THE NEW MILLENNIUM* 215, 221-22 (Wong Tai-Chee & Mohan Singh eds. 1999) (discussing tertiary enrollment rates in ASEAN nations and noting that "tertiary enrolments in Southeast Asia have increased 13-fold since 1960").

52. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION* 92-112 (1996) (outlining ASEAN member-states' experiences with the inclusion of women in domestic labor forces).

53. See Singh, *supra* note 49, at 81-82 (discussing access to health-related issues in ASEAN nations).

54. See *id.* at 84-85 (discussing life expectancy changes among ASEAN nations).

55. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION* 45-46 (1996) (outlining changes in general social development indicators among ASEAN nations).

56. See JONATHAN RIGG, *SOUTHEAST ASIA: THE HUMAN LANDSCAPE OF MODERNIZATION AND DEVELOPMENT* 23 (1997) (summarizing criticisms of rapid capitalist development in Southeast Asia).

57. See Jomo K.S., *supra* note 48, 198-216 (discussing income and wealth distribution in East Asian nations as a result of development).

58. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION* 198-200 (1996) (outlining common development-related criticisms directed at ASEAN nations).

Asian values for rampant material consumerism,<sup>59</sup> and spawned a "race to the bottom" phenomenon in labor costs that has led to sweatshops or other forms of labor abuses.<sup>60</sup> A related line of criticism is that excessive development related pathologies that have emerged in some Southeast Asian nations can be traced to the influence of international financial institutions such as the World Bank or IMF.<sup>61</sup> In the wake of the 1997 Asian financial crisis, the implementation of IMF policies aimed at liberalizing certain sectors of the affected domestic markets furthered this argument because of their perceived negative impacts.<sup>62</sup>

The fast pace of development in Southeast Asia raises questions about its impact on the natural environment. Development economists generally acknowledge that environmental degradation is an inevitable result of development and industrialization,<sup>63</sup> which can be particularly harmful in nations with less regulatory or institutional capacity to manage it.<sup>64</sup> In theory, environmental degradation is mitigated at later stages of development as regulatory frameworks strengthen with the support of

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59. See Sulak Sivaraksa, *Economic Aspects of Social and Environmental Violence from a Buddhist Perspective*, 22 *BUDDHIST-CHRISTIAN STUD.* 47, 52-55 (2002) (arguing that corporate-driven capitalism has led to human and spiritual destructive effects).

60. See WALDEN BELLO, SHEAN CUNNINGHAM & LI KHENG POH, *A SIAMESE TRAGEDY: DEVELOPMENT & DISINTEGRATION IN MODERN THAILAND* 88-90 (1998) (criticizing labor practices in Thailand).

61. See Ooi Giok-Ling, *Trade and the Environment in Southeast Asia*, in *DEVELOPMENT AND CHALLENGE: SOUTHEAST ASIA IN THE NEW MILLENNIUM* 127, 133 (Wong Tai-Chee & Mohan Singh eds., 1999) (discussing the impact of World Bank adjustment lending on the environment); James Petras & Tienchai Wongchaisuan, *Free Markets, AIDS and Child Prostitution*, 28 *ECON. & POL. WKLY.* 440, 440 (1993) (asserting that the World Bank's encouragement of the tourism sector in Thailand is at least partially responsible for the existence of child prostitution in Thailand).

62. See LIM CHONG YAH, *SOUTHEAST ASIA: THE LONG ROAD AHEAD* 318-21 (2001) (outlining IMF policies in Thailand, Indonesia, and South Korea following the financial crisis); Nicola Bullard, Walden Bello & Kamal Mallhotra, *Taming the Tigers: The IMF and the Asian Crisis*, 19 *THIRD WORLD Q.* 505, 505-556 (1998) (criticizing IMF policies and their impact among Asian nations receiving IMF loans in the wake of the Asian crisis).

63. See John M. Antle & Gregg Heidebrink, *Environment and Development: Theory and International Evidence*, 43 *ECON. DEV. & CULTURAL CHANGE* 603, 605 (1995) (outlining the environmental transition hypothesis and the existence of environmental degradation at early periods of economic development); Thomas M. Selden & Daqing Song, *Environmental Quality and Development: Is There a Kuznets Curve for Air Pollution Emissions?*, 27 *J. ENVTL. ECON. & MGMT.* 147, 147-48 (1994) (noting a consensus in economic discourse about the generation of pollution in early stages of economic development).

64. See Larry Karp, Sandeep Sacheti & Jinhua Zhao, *Common Ground Between Free-Traders and Environmentalists*, 42 *INT'L ECON. REV.* 617, 617-18 (2001) (discussing wide-held concerns about the impact of trade and development on the environment).

middle classes.<sup>65</sup> Outside the formal regulatory arena, it is also possible for communities to pursue forms of environmental protectionism, though that might be dependent on the existence of accessibility to legal or political avenues, and media and civil society activity.<sup>66</sup> The fact that Southeast Asian nations in general are still developing regulatory and civil society assets thus heightens the importance of the environmental question.

Environmental degradation is implicated by a number of trends. The flight to urban areas for employment opportunities has caused many of Southeast Asia's major cities to become sprawling population centers with impoverished urban ghettos, high air and water pollution rates, and formidable traffic congestion.<sup>67</sup> At peak commute times, the average speed of traffic in Bangkok was once measured to be eight kilometers an hour.<sup>68</sup> Excessive lead intake levels in blood have been reported to cause 400 deaths a year in Bangkok.<sup>69</sup> Between 1975 and 1998, the amount of pollution caused by auto emissions increased five times in Indonesia and ten times in Thailand.<sup>70</sup> As ASEAN na-

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65. See generally Hemamala Hettige, Muthukumara Mani & David Wheeler, *Industrial Pollution in Economic Development: The Environmental Kuznets Curve Revisited*, 62 J. DEV. ECON. 445, 445-47 (2000) (outlining the theory of an inverse relationship between increasing wealth and pollution); Ramón López & Siddhartha Mitra, *Corruption, Pollution, and the Kuznets Environment Curve*, 40 J. ENVTL. ECON. & MGMT. 137, 137-38 (2000) (discussing the "inverted-U-shaped relationship between pollution and per capita income" in studies of developing economies).

66. See Sheoli Pargal & David Wheeler, *Informal Regulation of Industrial Pollution in Developing Countries: Evidence from Indonesia*, 104 J. POL. ECON. 1314, 1316 (1996) (discussing community capacities to address environmental concerns as a function of "income, education, level of civic activity, legal or political recourse, media coverage, presence of a nongovernmental organization").

67. See Jim Glassman & Chris Sneddon, *Chiang Mai and Khon Kaen as Growth Poles: Regional Industrial Development in Thailand and its Implications for Urban Sustainability*, 590 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 96-98 (2003) (outlining the urban problems facing Bangkok as a result of rapid growth); Nuntavarn Vichit-Vadakan, Nitaya Vajanapoom & Bart Ostro, *The Public Health and Air Pollution in Asia (PAPA) Project: Estimating the Mortality Effects of Particulate Matter in Bangkok, Thailand*, 116 ENVTL. HEALTH PERSP. 1179, 1180-82 (2008) (showing a significant association between mortality rates and excessive air pollution in Bangkok, Thailand).

68. See Antonia Hussey, *Rapid Industrialization in Thailand 1986-1991*, 83 GEOGRAPHICAL REV. 14, 23 (1993) (discussing traffic congestion in Bangkok and air pollution).

69. See BELLO, CUNNINGHAM & POH, *supra* note 60, at 120 (discussing air pollution and blood lead level studies conducted in Thailand).

70. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION 199* (1996) ("Between 1975 and 1998, the amount of sulphur dioxide, nitrogen dioxide and total suspended particulates in the air increased by ten times in Thailand, eight times in the Philippines and five times in Indonesia, much faster than the growth rate of GDP.").

tions have moved towards export-driven industrialization,<sup>71</sup> the presence of industrial estates which generate hazardous waste has increased.<sup>72</sup> This has led to a heightened prevalence of harmful exposures to workers and communities at or near such heavy industrial sites, such as the metal and chemical refining complex of Map Ta Phut in Thailand.<sup>73</sup> In Jakarta, city authorities determined that over 70% of the rivers are heavily polluted, with over 850 companies dumping waste in rivers without permission.<sup>74</sup> Deforestation caused by logging for hardwood timber or crop cultivation has been profound throughout the region.<sup>75</sup> In some years, over 3% of the natural forest in ASEAN nations has been lost to development.<sup>76</sup> Forest clearing has contributed to soil erosion and aggregation of polluted runoff into rivers.<sup>77</sup> Mismanagement and development of forest assets has also negatively impacted isolated indigenous peoples in areas such as Sabah and Sarawak in Malaysia, whose livelihoods were intertwined with the ecosystems.<sup>78</sup>

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71. See generally Walden Bello, *Trouble in Paradise: The Tension of Economic Integration in the Asia-Pacific*, 10 *WORLD POL'Y J.* 33, 33-39 (1993) (offering a critical commentary on the impact of rapid industrialization and development in Southeast Asia as a consequence of foreign direct investment).

72. See Hussey, *supra* note 68, at 24-25 (discussing increasing pollution and rapid industrialization in Thailand).

73. See Marco Peluso ET AL., *Malondialdehyde-Deoxyguanosine Adducts Among Workers of a Thai Industrial Estate and Nearby Residents*, 118 *ENVTL. HEALTH PERSP.* 55, 56-59 (2010) (finding significantly higher levels of air pollution exposure to workers and community members near the Map Ta Phut industrial estate in Rayong, Thailand).

74. See *Jakarta Rivers Still Filthy*, *JAKARTA POST* (last visited July 25, 2012), <http://www.thejakartapost.com/news/2011/05/14/jakarta-rivers-still-filthy.html>.

75. See Edward B. Barbier, *Economic Aspects of Tropical Deforestation in Southeast Asia*, 3 *GLOBAL ECOLOGY & BIOGEOGRAPHY LETTERS* 215, 219-224 (1993) (outlining causes of deforestation in Southeast Asian nations as a consequence of demand for timber or farmland). See generally PASUK PHONGPAICHT, SUNGSIDH PIRIYARANGSAN & NUALNOI TREERAT, *GUNS, GIRLS, GAMBLING, GANJA* 142-45 (1998) (discussing illegal logging activities in Cambodia and the involvement of the Khmer Rouge).

76. See GERALD TAN, *ASEAN ECONOMIC DEVELOPMENT AND CO-OPERATION* 200 (1996) (outlining annual rates of forest depletion in ASEAN nations).

77. See Charunee Normita Thongtham, *Monitoring the Mekong*, 16 *AMBIO* 362, 362-63 (1987) (discussing water pollution and water quality issues affecting the Mekong river); Karl J. Pelzer, *Man's Role in Changing the Landscape of Southeast Asia*, 27 *J. ASIAN STUD.* 269, 277 (1968) (noting the effects of deforestation on soil erosion in Java).

78. See Giok-Ling, *supra* note 61, at 136 (discussing deforestation in Sabah and Sarawak).

### III. ASEAN'S SOFT LAW FRAMEWORK FOR ENVIRONMENTAL GOVERNANCE

As a regional entity, ASEAN has conceptually linked environmental management and protection to its wider economic development aims. The ASEAN approach thus rejects the environment versus development dichotomy by assuming that greater economic development will contribute to environmental sustainability and preservation. As stated in the 2009 ASEAN State of the Environment Report:

Economic development is the key for achieving various social and environmental goals. For instance, economic growth can lead to improvement in health and education and can contribute to the increase in the people's standard of living. . . . The improved standard of living can lead to better care for the environment through reduced reliance on natural resources and increased awareness and capacity for environmental protection.<sup>79</sup>

This ASEAN view is informed by a recognition that poverty and underdevelopment can lead to harmful environmental practices, as well as the region's own histories and struggles with poverty.<sup>80</sup> This is certainly not to say that ASEAN spurns the natural environment in favor of development. Rather, it is a recognition that poverty is linked to harmful environmental practices such as rapid deforestation, soil erosion or exhaustion, poor environmental education and stewardship generally, and absence in environmental regulation.<sup>81</sup> Additionally, introducing market-oriented factors that promote more efficient processing in natural resource-related sectors can both create value and lead to more sustainable practices.<sup>82</sup> ASEAN nations recognize that a significant portion of their domestic and export economies depend on natural resource sectors.<sup>83</sup> The region's large tourism industry is

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79. ASEAN Secretariat, *supra* note 40, at 10.

80. See Mark A. McDowell, *Development and the Environment in ASEAN*, 62 PAC. AFF. 307, 308-09 (1989) ("In fact, the environmental problems of underdevelopment, of poverty, are no less acute and are just as widespread as the environmental problems caused by affluence.").

81. See *id.* (discussing the connection between poverty, development, and the natural environment in Southeast Asia).

82. See Stephen Tyler & Liz Fajber, *Land and Water Resource Management in Asia*, at 8 (January 2009) (discussing improved agriculture practices that promote sustainability in Asian nations) (last visited July 25, 2012), [www.iisd.org/pdf/2009/asia\\_background\\_landwater.pdf](http://www.iisd.org/pdf/2009/asia_background_landwater.pdf).

83. See Giok-Ling, *supra* note 61, at 133 ("In Indonesia for example, over 40 percent of the gross domestic product and 50 percent of employment are derived from primary industries attributable to the downstream processing of natural resources or tourism . . .").

also dependent on preservation of natural environments.<sup>84</sup> Thus, ASEAN considers obtaining environmental sustainability a strategic objective of economic development.

ASEAN's current environmental governance framework can be best described as a soft law approach.<sup>85</sup> Its environmental policy formulation process is derived from the Association's wider decision-making culture, which is based on principles of consensus among leaders and accommodating differences through quiet diplomacy.<sup>86</sup> Unlike the European regional approach, ASEAN has not created a regional political body with legally enforceable mandates, but instead opts to identify general policy directions with voluntary national compliance among members.<sup>87</sup> This decision-making norm is sometimes referred to as the "ASEAN way," and places an emphasis on informal, personal relationships between heads of state, and reaching consensus through avoidance of direct conflict.<sup>88</sup> Group decision-making is typically regarded as occurring almost exclusively at high-levels of diplomacy.<sup>89</sup> Non-interference in the domestic af-

84. See generally Glen T. Hvenegaard & Philip Dearden, *Linking Ecotourism and Biodiversity Conservation: A Case Study of Doi Inthanon National Park, Thailand*, 19 SINGAPORE JOURNAL OF TROPICAL GEOGRAPHY 193, (1998) (outlining the development of ecotourism in Northern Thailand); Amat Ramsa Yaman & Abdullah Mohd, *Community-based Ecotourism: A New Proposition for Sustainable Development and Environmental Conservation in Malaysia*, 4 JOURNAL OF APPLIED SCIENCES 583 (2004) (discussing the potential benefits of ecotourism projects in Malaysian communities).

85. See Koh Kheng Lian & Nicholas A. Robinson, *Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model*, in GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS & OPPORTUNITIES 101, 101-105 (Daniel C. Esty & Maria H. Ivanova eds., 2002) (outlining the ASEAN approach to environmental governance); Yoichiro Usui, *An Evolving Path of Regionalism: The Construction of an Environmental Acqui in the EEC and ASEAN*, at 12-14, ASEAN (2006) (outlining the overall ASEAN environmental governance framework) (last visited July 25, 2012), available at [http://www.ne.jp/asahi/usui/yoichiro/Paper\\_2006\\_Crep.pdf](http://www.ne.jp/asahi/usui/yoichiro/Paper_2006_Crep.pdf).

86. See generally MICHAEL ANTOLIK, ASEAN AND THE DIPLOMACY OF ACCOMMODATION 3-10 (1990) (describing the accommodationist and consensus-based principles that drive inter-ASEAN diplomacy); Robin Ramcharan, *ASEAN and Non-Interference: A Principle Maintained*, 22 CONTEMPORARY SOUTHEAST ASIA 61 (2000) (discussing the history of ASEAN's diplomatic approach and recent challenges with integration of Burma, Cambodia, and Vietnam).

87. See Lian & Robinson, *supra* note 85, at 104 (outlining the principles of ASEAN diplomacy).

88. See generally Paul Davidson, *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 SINGAPORE Y.B. INT'L L. AND CONTRIBUTORS 165 (2004) (discussing the "ASEAN way" in the context of ASEAN's economic integration policies); Hiro Katsumata, *Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"*, 25 CONTEMP. SOUTHEAST ASIA 104 (2003) (describing the development of the "ASEAN way" and its continual relevance in diplomatic affairs among members).

89. See Marlene Ramirez, *ASIADHRRRA and ASEAN: A Case Study on the Process of Civil Society Engagement with a Regional Intergovernmental Organization*

fairs of member-states is regarded as the foundation of the ASEAN way.<sup>90</sup> The flexibility inherent in this approach facilitates consensus building among ten member-states with widely varying governing approaches (e.g. communism in Vietnam, democracies in the Philippines and Indonesia), starkly different levels of development (e.g. 2011 Gross National Income per capita in Laos - \$880, versus in Singapore - \$37,220<sup>91</sup>), recent histories of military conflict among member-states, and relatively poor domestic human rights records. Refraining from confrontation about domestic affairs preserves harmonious relationships among the organization's member-states. Although norms of non-interference have generally preserved good relations among ASEAN states, there is a lack of meaningful regional dialogue for improving human rights in the area. Additionally, this overall diplomatic and decision-making milieu has left regional environmental governance largely devoid of strong enforcement mechanisms, despite regular pronouncements or declarations by ASEAN leadership.

ASEAN's first formal introduction into regional environmental management was the 1977 ASEAN Sub-regional Environment Program (ASEP).<sup>92</sup> Under the ASEP—a program of action drafted with the assistance of the United Nations—environmental priority areas were identified, and a series of initiatives led to preliminary activities such as the development of impact assessments and strengthening of environmental monitoring capacities.<sup>93</sup> This was followed in 1981 by the initiation of regular ASEAN Ministerial Meetings on the Environment, and the adoption of the Manila Declaration on the ASEAN Environment to “ensure the protection of the ASEAN environment and the sustainability of its natural resources so that it can sustain

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2, paper presented at Forum International de Montreal (2008) (last visited July 25, 2012), available at <http://www.fimcivilsociety.org/en/library/MRamirez2008.pdf> (noting that ASEAN is primarily state-centric and has had a weak history of interacting with non-governmental organizations).

90. See Ramcharan, *supra* note 86.

91. WORLD BANK, WORLD DEVELOPMENT INDICATORS 2011 11-12 (2011) (last visited July 25, 2012), available at <http://data.worldbank.org/data-catalog/world-development-indicators>. See also Lian & Robinson, *supra* note 85, at 104 (“Members agree on common measures, decide how to implement them, and contribute according to their capabilities, acknowledging that ASEAN member states have achieved different levels of development and therefore have different capacities for action.”).

92. See Giok-Ling, *supra* note 61, at 128-30 (describing ASEAN efforts in regional environmental management).

93. See Wakana Takahashi, *Environmental Cooperation in Southeast Asia*, in REGIONAL/SUBREGIONAL ENVIRONMENTAL COOPERATION IN ASIA 31, 32 (February 2001) (describing activities undertaken by ASEAN member-states under the ASEP).

continued development with the aim of eradicating poverty and attaining the highest possible quality of life for the people of the ASEAN countries.”<sup>94</sup> The Declaration mandated no specific actions but called for adoption of “policy guidelines” among member-states to foster environmental education and encourage sustainability practices.<sup>95</sup>

The ASEP and Manila Declaration set a direction for ASEAN. A number of additional declarations of consensus followed, but were similarly characterized by broad policy language without enforcement capacities. The 1982 Bangkok Declaration on the ASEAN Environment furthered support for cooperative activities, particularly in developing environmental action plans, increasing the use of environmental impact assessments, and integrating environmental planning in major development projects.<sup>96</sup> The 1987 Jakarta Resolution on Sustainable Development called on member-states to “adopt the principle of sustainable development to guide and to serve as an integrating factor in their common efforts.”<sup>97</sup> Second and third ASEAN Sub-regional Environment Programs were adopted, in 1983 and 1988 respectively, which continued furtherance of cooperative technical and educational initiatives in the environment.<sup>98</sup> Additionally, ASEAN Ministerial Meetings on the Environment continue to occur every three years, and ASEAN Senior Officials on the Environment meet on an annual basis to continue cooperative talks and review operational performance of environmental management projects.<sup>99</sup> Cooperative endeavors have been developed by the ASEAN Working Groups on the environment. These are expert technical and policy units with responsibility for developing capacity and furthering cooperation in specific environmental sectors<sup>100</sup> which are regularly reviewed by the Senior Officials. In its strategic ASEAN Vision 2020 declaration in 1997, ASEAN continued to affirm a broad commitment to a “clean and green ASEAN with fully established mechanisms for sustainable devel-

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94. Manila Declaration on the ASEAN Environment 1(a), Apr. 30, 1981.

95. *Id.*

96. Bangkok Declaration on the ASEAN Environment (1)(i)-(vii), Nov. 29, 1984 (last visited July 25, 2012), available at <http://www.asean.org/6079.htm>.

97. Jakarta Resolution on Sustainable Development I, Oct. 30, 1987.

98. See Takahashi, *supra* note 93, at 33-35 (describing the ASEP II and III programs for environmental cooperation).

99. See Usui, *supra* note 85, at 13-14 (describing the ministerial and senior official level meetings).

100. See generally ASEAN Working Groups, (Current Working Groups are established for Nature Conservation and Biodiversity, Coastal and Marine Environment, Multilateral Environmental Agreements, Environmentally Sustainable Cities, Water Resources Management, Environmental Education, and Climate Change) (last visited July 25, 2012), available at <http://www.aseansec.org/8967.htm>.

opment to ensure the protection of the region's environment,"<sup>101</sup> which was also reiterated in the Roadmap for an ASEAN Community, 2009-2015, an agreement which binds ASEAN members to a framework for further political, economic, and social integration.<sup>102</sup>

Despite the soft law approach which composes the bulk of ASEAN's environmental governance corpus, hard law instruments do exist, but with clear limitations. One of ASEAN's few treaty documents on the environment was developed in 1985, the Agreement on the Conservation of Nature and Natural Resources.<sup>103</sup> The Agreement requires member-states to adopt national conservation strategies,<sup>104</sup> maintain "maximum genetic diversity" in conservation of species and ecosystems,<sup>105</sup> protect habitat of endangered species,<sup>106</sup> prevent environmental degradation generally,<sup>107</sup> and commit sufficient funds and resources to implementing the Agreement.<sup>108</sup> The treaty was viewed as being particularly progressive in its scope and strength.<sup>109</sup> However, three ASEAN nations—Brunei, Malaysia and Singapore—have

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101. Lumpur, *supra* note 38.

102. ASEAN, ROADMAP FOR AN ASEAN COMMUNITY, 81, (ASEAN Secretariat, 2009) (noting the strategic objective of establishing a "clean and green ASEAN" as part of its sustainable development program) (last visited July 25, 2012), available at <http://www.asean.org/publications/RoadmapASEANCommunity.pdf>.

103. ASEAN, *ASEAN Agreement on the Conservation of Nature and Natural Resources*, July 9, 1985 (last visited July 25, 2012), available at <http://www.aseansec.org/1490.htm>.

104. *See id.* at art. 1(1)-(2) ("To this end they shall develop national conservation strategies, and shall co-ordinate such strategies within the framework of a conservation strategy for the Region").

105. *See id.* at art. 3(1) ("The Contracting Parties shall, wherever possible, maintain maximum genetic diversity by taking action aimed at ensuring the survival and promoting the conservation of all species under their jurisdiction and control.").

106. *See id.* at art. 5(1) (a-d) ("Contracting Parties shall, wherever possible. . . prohibit the taking of these species. . . protect habitat of those species.").

107. *See id.* at art. 10 ("The Contracting Parties, with a view to maintaining the proper functioning of ecological processes, undertake, wherever possible, to prevent, reduce and control degradation of the natural environment").

108. *See id.* at art. 17 (2) ("They shall endeavor to allocate sufficient funds to the task necessary for the implementation of this Agreement, as well as sufficient qualified personnel with adequate enforcement powers").

109. Kheng Lian Koh, *ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985: A Study in Environmental Governance*, 3 (last visited July 25, 2012), [http://www.earthlore.ca/clients/WPC/English/grfx/sessions/PDFs/session\\_3/Koh.pdf](http://www.earthlore.ca/clients/WPC/English/grfx/sessions/PDFs/session_3/Koh.pdf) (discussing commentary about the Agreement); Simon S. C. Tay, *Fires and Haze in Southeast Asia*, in *CROSS-SECTORAL PARTNERSHIPS IN ENHANCING HUMAN SECURITY* 53, 58-59 (Pamela J. Noda ed. 2002) (discussing critical reception of the Agreement and potential reasons for why it was not ratified by all member-states) [hereinafter Tay].

not ratified the treaty, and thus the Agreement has not been activated.<sup>110</sup>

ASEAN's second environmental treaty instrument came into being as a reaction to the region's 1997 haze catastrophe. Emanating principally from Indonesia, excessive and poorly managed clearing of forest for timber and palm oil production, combined with El Niño-related weather effects, led to uncontrolled fires covering an estimated four million hectares of forest.<sup>111</sup> Prolonged haze caused by the smoke spread to neighboring nations. Air pollution indexes soared, leading to numerous respiratory illnesses and deaths.<sup>112</sup> Travel, agriculture, tourism, and business were all significantly affected within the area, leading to almost \$10 billion in damages.<sup>113</sup> ASEAN first responded by developing its Regional Haze Action Plan<sup>114</sup> in 1997, aimed at strengthening cooperation in prevention, monitoring, and fire suppression activities.<sup>115</sup> In 2002, ASEAN developed the ASEAN Agreement on Transboundary Haze Pollution—the first such regional, transboundary haze mitigation treaty in the region and world.<sup>116</sup> The Agreement codified many of the Action Plan's components: it created a regional haze pollution control center,<sup>117</sup> mandated development of national legislation to stop unregulated burning,<sup>118</sup> and formed a voluntary

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110. Takahashi, *supra* note 93, at 35 (describing the Agreement on the Conservation of Nature and Natural Resources and noting its lack of ratification by member-states of ASEAN).

111. James Cotton, *The "Haze" over Southeast Asia: Challenging the ASEAN Mode of Regional Engagement*, 72 *PACIFIC AFFAIRS* 331, 332-335 (1999) (discussing the scope and causes of the 1997-98 haze disaster).

112. Simon S.C. Tay, *Southeast Asian Forest Fires: Haze over ASEAN and International Environmental Law*, 7 *REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW* 202, 202-203 (1998) (discussing the effects of the haze on the region) [hereinafter S.C. Tay].

113. S. Robert Aiken, *Runaway Fires, Smoke-Haze Pollution, and Unnatural Disasters in Indonesia*, 94 *GEOGRAPHICAL REVIEW* 55, 63-64 (2004) (outlining the natural and social effects of the 1997 haze crisis on the region).

114. Regional Haze Action Plan, December 1997 (last visited July 25, 2012), <http://www.aseansec.org/9059.htm>.

115. Tay, *supra* note 109, at 60-61 (outlining the parameters and policy guidelines of the Regional Haze Action Plan).

116. ASEAN, *ASEAN Agreement on Transboundary Haze Pollution*, June 10, 2002 (last visited July 25, 2012), available at [http://www.jus.uio.no/english/services/library/treaties/06/6-03/asean\\_transboundary\\_pollution.xml](http://www.jus.uio.no/english/services/library/treaties/06/6-03/asean_transboundary_pollution.xml).

117. *See id.* at art. 5(1) ("The ASEAN Coordinating Centre for Transboundary Haze Pollution Control, hereinafter referred to as "the ASEAN Centre," is hereby established for the purposes of facilitating co-operation and co-ordination among the Parties.").

118. *See id.* at art. 9(a) ("Developing and implementing legislative and other regulatory measures, as well as programmes and strategies to promote zero burning policy to deal with land and/or forest fires resulting in transboundary haze pollution.").

haze pollution control fund to finance implementation of the Agreement's requirements.<sup>119</sup> The treaty, unfortunately, lacks internal mechanisms for dispute resolution, compliance, and punitive measures for transgressions.<sup>120</sup> The major limitation to the Agreement, however, is that it required ratification from only six member-states to enter into force.<sup>121</sup> Nine of the ten ASEAN member-states have since ratified the Agreement,<sup>122</sup> with the exception of Indonesia, the nation which historically has been the principal country of origin for the haze-creating forest fires. Although Indonesia may ratify the instrument in the future,<sup>123</sup> it is unclear if there are sufficient enforcement mechanisms within the Agreement itself or support among Indonesian policymakers to effectively implement its obligations.<sup>124</sup>

ASEAN's soft law approach has succeeded in identifying a general consensus on environmental preservation, and recognizing the importance of a common regional ecosystem to continued development—an impressive result for such a diverse association of nations. It has also developed historical precedents for regular discussions and cooperative endeavors on a regional level in line with overall ASEAN activities. Additionally, the adoption of hard law instruments such as the Haze Agreement indicate that the Association is willing to move on a second track towards strengthening its' environmental protection mechanisms.<sup>125</sup> However, continued adherence to a policy consensus norm that seeks voluntary member-state compliance with broad strategic

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119. See *id.* at art. 20(1 – 4) (“A Fund is hereby established for the implementation of this Agreement. . . . The Parties shall, in accordance with the decisions of the Conference of the Parties, make voluntary contributions to the Fund.”).

120. See generally Alan Khee-Jin Tan, *The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia*, 13 N.Y.U. ENVTL. L.J. 647, 647 (2005) (discussing the Haze Agreement and internal and external weaknesses that lead to non-compliance).

121. ASEAN, *ASEAN Agreement on Transboundary Haze Pollution*, at art. 29, June 10, 2002 (last visited July 25, 2012), available at [http://www.jus.uio.no/english/services/library/treaties/06/6-03/asean\\_transboundary\\_pollution.xml](http://www.jus.uio.no/english/services/library/treaties/06/6-03/asean_transboundary_pollution.xml) (“This Agreement shall enter into force on the sixtieth day after the deposit of the sixth instrument of ratification, acceptance, approval or accession.”).

122. ASEAN, *ASEAN Haze Agreement Ratification Status* (last visited July 25, 2012), <http://haze.asean.org/hazeagreement/status>.

123. *Indonesian government seeks passage of ASEAN Haze Agreement*, PHILSTAR.COM, (last visited July 25, 2012), <http://www.philstar.com/Article.aspx?articleId=650694&publicationSubCategoryId=200> (“Indonesia is the only Asean nation that has not yet ratified the pact, with the House stating in 2008 that it threatened the country's sovereignty.”).

124. S.C. Tay, *supra* note 112, at 203-204 (1998) (discussing the lack of enforcement of domestic Indonesian laws to prevent fire clearing).

125. See Takahashi, *supra* note 93, at 48-49 (discussing the potential implications of the Transboundary Haze Agreement for ASEAN).

objectives reveals clear weaknesses.<sup>126</sup> Translating ASEAN's numerous declarations on regional environmental policy into national law enforced on a local level implicate institutional capacities, domestic political will, and wider concerns over national sovereignty.

#### IV. THE ASEAN CHARTER AND INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS

After over forty years of existence, ASEAN is now entering a new era of governance with significant potential to elevate environmental and development concerns from a soft-law approach into a rights-based framework. Two institutional developments have precipitated this possibility: the ratification of the ASEAN Charter in 2008,<sup>127</sup> and the creation of the ASEAN Intergovernmental Commission on Human Rights ("AICHR") in 2009<sup>128</sup>—the Association's first human rights body. Both the Charter and AICHR are milestones for ASEAN, and could serve to set the parameters for strengthening human rights and environmental protections within a rules-based community. There are, however, significant questions that remain unresolved. First, there is the issue of what international environmental rights might be integrated into an ASEAN regimen. Second, and more important, is whether ASEAN—given both these new institutional developments and its normative practices—is ready and willing to embrace a strong framework for environmental rights. The focus here should be on the potential role of the AICHR as a forum for protecting such rights. Co-equal in importance with the last question posed is, if ASEAN is unable or unwilling to fully integrate such protections into a rights-framework, what path should it take in regards to environmental rights?

Explicating a connection between environmental protection and human rights reveals some important limitations, irrespective of forum. Clearly, environmental conditions impact human well-being, and social justice initiatives meant to improve human communities often have an environmental component.<sup>129</sup> Inter-

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126. See Lian & Robinson, *supra* note 85, at 110-113 (discussing strengths and weaknesses of the ASEAN approach to environmental governance).

127. ASEAN Charter, Preamble, Nov. 20, 2007 (last visited July 25, 2012), *available at* <http://www.asean.org/publications/ASEAN-Charter.pdf>.

128. Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights, Oct. 23, 2009 (last visited July 25, 2012), *available at* <http://www.asean.org/documents/Declaration-AICHR.pdf> [hereinafter Charter].

129. Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?* 35 DENVER J. INT'L L. & POL'Y 129, 169 (2006) ("The interrelationship between human rights and environmental protection

national law developments recognize the link between human well-being and the environment. The 1972 Stockholm Declaration on the Human Environment recognized that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”<sup>130</sup> The 1992 Rio Declaration on Environment and Development reaffirmed this connection, with its opening principle stating that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”<sup>131</sup> Yet beyond soft declarations, incorporating environmental concerns into a normative and binding rights-based paradigm has remained at least partially elusive. A distinct, universal, and unalienable human right to a healthy natural environment has not been recognized in any global human rights treaty.<sup>132</sup> The principal problem is one of definition. Should there be a human right to a healthy environment, or just to a “satisfactory” environment?<sup>133</sup> Identifying the substantive parameters of a healthy environment and accompanying environmental standards is a highly subjective determination for international policy makers.<sup>134</sup> Enforcing such a right and developing the associated standards would prove complex and difficult, and likely more suited to an administrative body with a legislative mandate, and not a judicial one.<sup>135</sup> With the exception of the 2002 *Ogoniland* ruling

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is undeniable. Human rights depend upon environmental protection, and environmental protection depends upon the exercise of existing human rights such as the right to information and the right to political participation”).

130. Declaration of the United Nations Conference on the Human Environment, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

131. Declaration of the United Nations Conference on Environment and Development, Principle 1, U.N. Doc. A/CONF.151/5/Rev.1 (June 14, 1992).

132. Shelton, *supra* note 129, at 166 (“At present no global human rights treaty proclaims a general right to environment”).

133. Alan Boyle, *Human Rights and the Environment: A Reassessment* 33 (last visited July 25, 2012), available at [http://www.law.ed.ac.uk/file\\_download/publications/0\\_1221\\_humanrightsorenvironmentalrightsareasses.pdf](http://www.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf) (High Level Experts Meeting on the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nairobi, Kenya November 2009, and noting differences in proposed and existing standards for an environmental human right).

134. Michael Burger, *Bi-Polar and Polycentric Approaches to Human Rights and the Environment*, 28 COLUMBIA J. ENVTL. L. 371, 381-82 (2003) (“What constitutes a clean, healthy, satisfactory, decent, viable or ecologically sound environment is a difficult question”); Boyle, *supra* note 133, at 12 (High Level Experts Meeting on the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nairobi, Kenya November 2009, and asserting that an international right to a healthy environment is “too uncertain a concept to be of normative value”).

135. Gunther Handl, *Human Rights and Protection of the Environment: A Mildly ‘Revisionist’ View*, in HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION 117, 137-38 (Antonio Augusto Cançado Trindade ed. 1992) (discussing the appropriate forum for consideration of environmental issues as rights).

by the African Commission on Human and Peoples Rights,<sup>136</sup> there are few examples of a recognized, distinct, and justiciable international human right to a healthy environment derived from a human rights instrument.

There are, however, instances of regional courts considering human rights violations that arose as consequences of an act or omission with an environmental nexus. However, these are cases in which the alleged violations were of more traditional human rights, and not a substantive human right to a healthy environment. Typical fact patterns in such cases are when the natural environment becomes so degraded or damaged that it threatens human health, and the alleged human rights violation, for instance, is a violation of a plaintiff's right to life, and not a violation of an individual's right to a satisfactory or healthy environmental right.<sup>137</sup> An example of such a case would be *Öneryildiz v. Turkey*,<sup>138</sup> in which the European Court of Human Rights found Turkey in violation of the European Convention's Article 2 Right to Life following the deaths of several people living near a garbage dump after a methane gas explosion. A similar case was that of *López Ostra v. Spain*,<sup>139</sup> in which the European Court found Spain in violation of the Convention's Article 8—the Right to private and family life—because industrial pollution from a waste treatment plant was interfering with the plaintiff's overall well-being, who lived nearby the plant.<sup>140</sup> These examples illustrate the argument that there may not need to be a distinct human right to the environment when any purported acts or omissions that lead to actual human harm can be adjudicated as violations of already existing human rights.<sup>141</sup>

Although a *substantive* human right to a satisfactory or healthy environment remains evasive in the international human rights canon, there are recognized *procedural* rights to environmental information and participation in policy matters. These

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136. Dinah Shelton, *Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria)*. Case No. ACHPR/COMM/A044/1, 96 AM. J. INT'L L. 937, 937 (2002).

137. See Boyle, *supra* note 133, at 1 (discussing the anthropocentric nature of human rights and traditional approaches to human rights violations).

138. *Öneryildiz v. Turkey*, App. No. 48939/99, 2004-XII Eur. Ct. H.R. (2004).

139. *López Ostra v. Spain*, App. No. 16798/90, 303-C Eur. Ct. H.R. (1994).

140. For an overview of European Court of Human Rights cases regarding the environment, see generally Ole Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming*, 21 GEO. INT'L ENVTL. L. REV. 73 (2008).

141. Boyle, *supra* note 137, at 30 (discussing European Convention on Human Rights case law and asserting that it "clearly demonstrates how much environmental protection can be extracted from existing human rights law without creating specifically environmental rights").

procedural rights are codified in the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, otherwise known as the Aarhus Convention.<sup>142</sup> The Aarhus Convention—whose signatories include forty-four mainly European nations including the European Union<sup>143</sup>—clearly recognizes three distinct types of procedural rights for persons in environmental decision-making: a right of access to information, a right to public participation in decision-making, and a right of access to justice in environmental matters.<sup>144</sup> The right to information requires state parties to provide information about the environment if requested from the public,<sup>145</sup> subject to certain exemptions, and immediate dissemination of information if imminent human or environmental harm is possible.<sup>146</sup> The right to participation requires state parties to provide opportunities for fair and transparent public participation in decision-making regarding plans and programs related to the environment.<sup>147</sup> Finally, the right of access to justice mandates the guarantee of judicial review procedures for individuals to challenge decisions.<sup>148</sup> The Convention's provisions are by no means radical. The Rio Declaration's Principle 10<sup>149</sup> recognized that “[e]nvironmental issues are best handled with participation of all concerned citizens”<sup>150</sup> and called on states to provide “the

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142. Convention on Access to Information, Public Information in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

143. See *Status of Ratification for Aarhus Convention* UNECE, (last visited July 25, 2012), <http://live.unece.org/env/pp/ratification.html>.

144. Aarhus Convention, *supra* note 142, art. 1 (stating as its objective the guaranteeing of rights to information, participation, and justice).

145. *Id.* art. 4.

146. *Id.* art. 5, ¶ 1(c). The Aarhus Convention's recognition of informational rights draws from now common transparency-related regimens that exist in a number of developed nations' law or rule-making processes. For instance, informational rights in administrative procedures were first established in the United States through the Freedom of Information Act in 1966. See Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966). Similar legislation followed in other common law and European nations, before its recognition in both soft and hard international environmental law through the Rio Declaration and Aarhus Convention. See Peter H. Sand, *The Right to Know: Environmental Information Disclosure by Government and Industry*, 2-3, paper delivered to the Human Dimensions of Global Environmental Change: Knowledge for the Sustainability Transition, Berlin, Institute of International Law, University of Munich, (Dec. 2002) (discussing the history and development of informational rights).

147. Aarhus Convention, *supra* note 142, art. 7.

148. *Id.* art. 9.

149. Declaration of the United Nations Conference on Environment and Development, Principle 1 (June 14, 1992), U.N. Doc. A/CONF.151/5/Rev.1 (1992).

150. Declaration of the United Nations Conference on Environment and Development, Principle 10 (June 14, 1992), U.N. Doc. A/CONF.151/5/Rev.1 (1992). Declaration of the United Nations Conference on Environment and Development, Principle 10 (June 14, 1992), U.N. Doc. A/CONF.151/5/Rev.1 (1992).

opportunity to participate in decision-making processes . . . . [and] facilitate and encourage public awareness and participation by making information widely available.” The general principle that environmental decision-making should require public participation is well-entrenched as a legislative guarantee in many nations, including the United States, which has an extensive modern history of requiring public involvement activities in federal environmental laws.<sup>151</sup>

How might such procedural environmental processes be incorporated into ASEAN's new rights-based machinery? The ASEAN Charter codified ASEAN's policymaking norms and established the AICHR. It thus provides an important context for examining the challenges and possibilities of integrating procedural environmental rights into ASEAN's environmental governance framework. The Charter essentially serves as a constitution-like text for the Association.<sup>152</sup> The Charter was first proposed by Malaysia in 2004, and the initiative to develop the Charter was adopted by ASEAN at its 2005 ASEAN Summit.<sup>153</sup> After nearly four decades of existence, the Charter codifies the prevailing normative framework of ASEAN relations and practices into a binding document among member-states, particularly the principles of non-interference in domestic affairs and peaceful relations among states.<sup>154</sup> Many of the Charter's principles reflect the various treaties, protocols, and declarations generated by ASEAN over the years, alongside foundational texts such as the original 1967 Bangkok Declaration and the Treaty of Amity and Cooperation signed at the 1976 Bali Summit.<sup>155</sup> The stated purposes of the Charter in Article 1 (“Purposes”) are to continue ASEAN's original missions to maintain peace and security in the region,<sup>156</sup> promote greater political, economic, and social cooperation among members;<sup>157</sup> create a sin-

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151. See Benjamin W. Cramer, *The Human Right to Information, the Environment and Information About the Environment: From the Universal Declaration to the Aarhus Convention*, 14 COMM. L. & POL'Y 73, 90-91 (2009) (noting statutory requirements for public involvement in environmental matters in the United States).

152. Charter, *supra* note 127.

153. See Mely Caballero-Anthony, *The ASEAN Charter: An Opportunity Missed or One that Cannot Be Missed?* SOUTHEAST ASIAN AFF., 2008, at 71, 71-72 (2008) (outlining the birth and development of the ASEAN Charter).

154. See Rodolfo C. Severino, *ASEAN at Forty: A Balance Sheet*, SOUTHEAST ASIAN AFF., 2008, at 61, 61-65 (discussing the development of the Charter as a reflection of ASEAN practices).

155. See Diane A. Desierto, *ASEAN's Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter*, 49 COLUM. J. TRANS-NAT'L. L. 268, 282-288 (2011) (outlining the pre-Charter years of ASEAN and the emergence of the Charter).

156. Charter, *supra* note 127, at art. 1, ¶1.

157. See *id.* at art. 1, ¶2.

gular regional market of goods, services, and investment;<sup>158</sup> and further economic development and poverty reduction.<sup>159</sup>

Yet in addition to codifying ASEAN's core principles, the Charter serves as the textual foundation for a regional community based on principles of civil society and democracy. In its development, non-governmental associations throughout the region participated in a series of dialogues about the Charter with an official consultative body selected by member-state governments.<sup>160</sup> Upon its release, the Association declared that "ASEAN is moving from being State-centric to be more people-oriented. At least 10 of the 15 stated purposes of ASEAN in Chapter I concern the livelihood and well-being of peoples in ASEAN."<sup>161</sup> Particular statements of interest in Article 1 reflecting this purported mission include the Charter's declared intent "to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms,"<sup>162</sup> "to ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment,"<sup>163</sup> "to enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice,"<sup>164</sup> and "to promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building."<sup>165</sup> Additionally, Article 2 of the Charter reaffirms ASEAN's "respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice,"<sup>166</sup> and recognizes its commitment to "the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States."<sup>167</sup> This is particularly relevant because all ASEAN nations are parties to two major international human rights treaties: the Convention on the Elimination of All

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158. *See id.* at art. 1, ¶5.

159. *See id.* at art. 1, ¶2(i).

160. *See* Caballero-Anthony, *supra* note 153, at 71-75 (outlining civil society participation and expectations in the development of the ASEAN Charter).

161. *Media Release: ASEAN Leaders Sign ASEAN Charter* (last visited July 25, 2012), <http://www.asean.org/21085.htm>.

162. Charter, *supra* note 127, at art. 1, ¶7.

163. *See id.* at art. 1, ¶4.

164. *See id.* at art. 1, ¶11.

165. *See id.* at art. 1, ¶13.

166. *See id.* at art. 2, ¶2(i).

167. *See id.* at art. 2, ¶2(j).

Forms of Discrimination against Women (“CEDAW”),<sup>168</sup> and the Convention on the Rights of the Child (“CRC”).<sup>169</sup>

Because the Charter serves as a foundational text for the Association and is a binding legal instrument among all members, there is reason for optimism in such declarations. But both a holistic and contextual analysis of the Charter leaves room for doubt. The principle concern is that the Charter codifies ASEAN’s longstanding practice of non-interference in the domestic activities of its member-states, a pattern of behavior that has effectively allowed member-states to engage in a variety of practices deemed antithetical to democratic norms and human rights.<sup>170</sup>

ASEAN has long been criticized as a regime that has generally disregarded human rights violations because of its adherence to principles of non-interference.<sup>171</sup> Although Myanmar is widely acknowledged as the most notorious state perpetrator of human rights violations,<sup>172</sup> criticism is due for almost all members of ASEAN. In recent years, high profile criticism has resounded internationally regarding Thailand’s crackdown of street

168. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. For a list of nations party to the Convention, see ratification/accession/succession list available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

169. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. For a list of nations party to the Convention, see 8. *Convention on the Elimination of All Forms of Discrimination against Women*, UNITED NATIONS TREATY COLLECTIONS.

170. See Severino, *supra* note 154, at 64-65 (discussing the lack of clarity as to whether the Charter’s ideals will be realized in actual behavior among member-states). See also Yuval Ginbar, *Human Rights in ASEAN: Setting Sail or Treading Water?* 10 HUM. RTS. L. REV. 504, 513 (2010) (discussing the overall language of the Charter and noting that “[t]he one ‘principle’ referring to human rights . . . is flanked by three others emphasising [sic] ‘independence, sovereignty . . . non-interference in . . . internal affairs’ and ‘respect for the right of every Member State to lead its [national] existence free from external interference. . .’”).

171. See generally Lee Jones, *ASEAN and the Norm of Non-Interference in Southeast Asia: A Quest for Social Order* 2-5 (Nuffield College Politics Group, Working Paper, March 2009) (discussing the practice of non-interference in ASEAN and its overall implications); Li-ann Thio, *Implementing Human Rights in ASEAN Countries: ‘Promises to Keep and Miles to go Before I Sleep,’* 2 YALE HUM. RTS. & DEV. L. J. 1 (discussing the overall human rights situation in ASEAN nations).

172. See generally John Arendshorst, *The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter*, 8 NW. J. INTL. HUM. RTS. 102 (2009) (discussing Myanmar’s history of human rights violations and the lack of strong ASEAN response); Mann Bunyanunda, *Burma, ASEAN, and Human Rights: The Decade of Constructive Engagement, 1991-2001*, 2 STAN. J. EAST ASIAN AFF. 118 (2002) (discussing ASEAN relations with Myanmar and human rights); Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. J. INTL. HUM. RTS. 153 (2007) (discussing the international response to Myanmar’s history of human rights violations).

protesters in 2010,<sup>173</sup> accounts of state torture and impunity related to the Muslim insurgency in its southern provinces,<sup>174</sup> and the ongoing Anwar debacle in Malaysia's courts.<sup>175</sup> Lesser known but equally egregious violations of human rights have long occurred in other ASEAN nations, including Laos' treatment of the Hmong and other minorities,<sup>176</sup> and the repression of Christians in Vietnam.<sup>177</sup> Non-interference effectively shields all members of ASEAN from the deserved criticism that is due.

The Charter's principles state that member-states shall have "respect for the independence, sovereignty, equality, territorial integrity and national identity"<sup>178</sup> of other Association members, and "non-interference in the internal affairs of ASEAN Member States."<sup>179</sup> Additionally, the ASEAN Summits—the periodic meetings among Association heads of state—are recognized as the supreme decision making body for ASEAN,<sup>180</sup> and the principal mode of decision making being "consultation and consensus"<sup>181</sup> among members. This structure has created significant concern because it is unclear how heads of state would resolve difficult issues regarding member-states' behavior. Informal "consultation and consensus" among heads of state and the lack of any specifically defined enforcement mechanism for Charter principles are inadequate mechanisms for protecting human rights.<sup>182</sup> Historically, ASEAN heads of state have strictly adhered to principles of non-interference in the activities of member-states.<sup>183</sup> Indeed, when the Charter was adopted in 2007, one

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173. See Seth Mydans, *Rights Group Urges Prosecutions in Thai Violence*, N.Y. TIMES, May 4, 2011, at A16 (discussing the violent crackdown of pro-Thaksin Shinawatra street protesters who occupied central Bangkok in 2010).

174. See Thomas Fuller, *Southern Thailand's Turmoil Grows*, N.Y. TIMES, Sept. 5, 2009, at A4 (discussing the violent insurgency in Thailand's southern provinces and purported human rights violations by state security forces).

175. See Liz Gooch, *As Clinton Visits, Malaysia Promises Fair Trial for Dissident*, N.Y. TIMES, Nov. 3, 2010, at A12 (discussing the treatment of Malaysian opposition figure Anwar Ibrahim).

176. *Laos: Cease Arbitrary Detention of Deported Hmong*, HUMAN RIGHTS WATCH, (last visited July 25, 2012) available at <http://www.hrw.org/news/2008/10/28/laos-cease-arbitrary-detention-deported-hmong> (discussing treatment by Laotian authorities of deported Hmong refugees).

177. See Seth Mydans, *Vietnam Persecutes Christian Minority, Report Says*, N.Y. TIMES, April 1, 2011, at A11 (discussing the situation of Christian minorities in the central highlands of Vietnam).

178. Charter, *supra* note 127, at art. 2, ¶2(a).

179. See *id.* at art. 2, ¶2(e).

180. See *id.* at art. 7, ¶2(a).

181. See *id.* at art. 20, ¶1.

182. Caballero-Anthony, *supra* note 153, at 77-80 (discussing how the lack of an appropriate enforcement mechanism undermines the Charter's declarations).

183. See Desierto, *supra* note 155, at 286-287 ("Noting that in over forty years as a regional cooperation, ASEAN has stood by this principle of non-interference by refraining from openly criticizing Member States' human rights records, refusing

of its member-states, Myanmar—arguably the worst state violator of human rights in the region—engaged in a brutal crackdown of peaceful popular protests led largely by Buddhist monks.<sup>184</sup> Like the other member-states, Myanmar's military government was a signatory to the Charter.<sup>185</sup>

In addition to the discord between those sections of the Charter that declare a commitment to democracy and human rights, and the continued norm of non-interference in domestic activities of member-states, the Charter's creation of the ASEAN Intergovernmental Commission on Human Rights ("AICHR") has generated considerable attention and scrutiny. The AICHR was created by Article 14 of the Charter, which simply called for the creation of a human rights body which would operate in accordance with parameters to be determined at a later date.<sup>186</sup> The lead-up to the creation of the AICHR was characterized with a great amount of anticipation, particularly by international and regional human rights advocates and civil society organizations.<sup>187</sup> The body's formal Terms of Reference were adopted by ASEAN in 2009, and the AICHR was formally presented as "the overarching institution responsible for the promotion and protection of human rights in ASEAN."<sup>188</sup>

Similar to the ASEAN Charter, the AICHR's Terms of Reference contain incongruous language which creates disparate understandings of the commission's parameters, much of it derived literally from Charter clauses. The stated purposes of the commission are to "promote and protect human rights and fundamental freedoms of the peoples of ASEAN,"<sup>189</sup> "uphold the rights of the peoples of ASEAN to live in peace, dignity and prosperity,"<sup>190</sup> and promote the "well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community

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support to any opposition movements, insisting on consensus voting and resorting to informal (and often privately brokered) settlement of differences at the ministerial level").

184. See Caballero-Anthony, *supra* note 153, at 75 (discussing Myanmar's sharp and violent repression of protest but continued participation in the 2007 Summit).

185. Charter, *supra* note 127, at art. 39 (containing signature of General Thein Sein, Prime Minister of the Union of Myanmar).

186. See *id.* art. 14, ¶¶1-2.

187. See Catherine Drummond, *The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Development and Potential* 11-23 (Asia-Pacific Centre for the Responsibility to Protect, Working Paper on ASEAN and R2P No. 1, Nov. 2010) (discussing momentum towards stronger human rights initiatives in Southeast Asia generally and anticipation of the AICHR).

188. Charter, *supra* note 128.

189. ASEAN Intergovernmental Commission on Human Rights, Terms of Reference, ¶1.1 [hereinafter AICHR, Terms of Reference].

190. *Id.* ¶1.2.

building process.”<sup>191</sup> However, its human rights mission should occur “within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.”<sup>192</sup> Additionally, the AICHR “shall be guided by . . . respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; non-interference in the internal affairs of ASEAN Member States; [and] respect for the right of every Member State to lead its national existence free from external interference.”<sup>193</sup> The conditioning of the commission’s mission on these principles suggest that ASEAN norms of non-interference in domestic activities will constrain any role it may have in terms of enforcing compliance among members. The AICHR’s perceived adherence to the norm of non-interference thus spoiled the immediate hopes of regional civil society activists who hoped it would serve as a marked departure from ASEAN’s troubled history of human rights violations.<sup>194</sup> Additionally, the commission’s members are composed entirely of officially appointed representatives from the governments of member-states,<sup>195</sup> as opposed to civil society representatives or individuals who would retain impartial independence from member governments. This heightens the sense that the commission might lack the teeth that are arguably necessary for a strong and independent human rights mechanism.

#### A. THE AICHR AS A HUMAN RIGHTS PROTECTION ENTITY

Taken together, both the ASEAN Charter and the AICHR’s Terms of Reference appear to bifurcate the commission’s mandate into two distinct lines, as expressly reflected in its opening statement of purpose to “promote and protect human rights and fundamental freedoms of the peoples of ASEAN.”<sup>196</sup> Arguably, the AICHR’s mission to protect human rights serves as its more important function, and is thus more important than its promotional mandate. A protection and enforcement role for the AICHR would comport with expectations that it develop into a

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191. *Id.* ¶1.3.

192. *Id.* ¶1.4.

193. *Id.* ¶¶2-2.1(a)(b)(c).

194. See Ginbar, *supra* note 170, at 504-18 (outlining the AICHR and overall context of human rights in ASEAN, its reception, and potential for further evolution). See also Vitit Muntarbhorn, *Towards an ASEAN Human Rights Mechanism: A Concept Paper*, in *TOWARDS AND ASEAN HUMAN RIGHTS MECHANISM* 6, 20-22 (discussing civil society visions for a Southeast Asian human rights mechanism as stated in the 1993 Bangkok Nongovernmental Human Rights Declaration).

195. AICHR, Terms of Reference *supra* note 189, ¶5.

196. *Id.* ¶1.1.

regional human rights mechanism with independence, powers of judicial review, and enforcement capabilities. One potential trajectory of evolution for the AICHR to pursue its protection mandate—and arguably the ideal scenario hoped for by regional human rights activists—would be for it to develop into a human rights regime akin to that in Europe: a strong regional court that effectively acts as an appellate level judicial body to enforce a regional human rights convention among all member-states.<sup>197</sup>

However, the commission's protection mandate rests on relatively weak textual support. At the outset, the very fact that the body is a commission as opposed to a court with judicial review powers supports the notion that the AICHR might amount to a significantly weak body for protection of human rights. A major problem is the lack of a binding instrument with substantive rights. The commission is scheduled to draft and release an ASEAN Human Rights Declaration<sup>198</sup> that will not be a binding document, but will later serve as the basis for a Convention that ostensibly will have binding force among members.<sup>199</sup> Yet the development of such an agreement into a strong instrument seems fraught with a number of significant challenges. First, it is unclear if a binding document for ASEAN would have the same or similar substantive and procedural rights as, for example, the European Convention for Human Rights does. Both explicit language in the AICHR Terms of Reference and long-standing normative practices of ASEAN indicate that it will likely pursue development of any human rights instrument through a consensus approach<sup>200</sup> that will be “constructive and non-confronta-

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197. See European Convention on Human Rights art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”); *Id.* art. 32 (“The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto . . .”). See also D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION* 702 (1st. ed, 1995) (noting that compliance with the judgments of the European Court of Human Rights by member-states “is generally recognised to be exemplary”); Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 69, 78 (1999) (describing the history of the European Convention and noting that of its approximately 800 or more judgments, “[a]ll its decisions have been respected, though sometimes grudgingly, by the States concerned”).

198. AICHR, Terms of Reference *supra* note 189, ¶4.2.

199. See Desy Nurhayati, *States Should be Responsible to Citizens*, THE JAKARTA POST, (last visited July 25, 2012), <http://www.thejakartapost.com/news/2011/07/20/rights-declaration-states-should-be-responsible-citizens.html>.

200. See AICHR, Terms of Reference, *supra* note 189, ¶6.1 (“Decision-making in the AICHR shall be based on consultation and consensus in accordance with Article 20 of the ASEAN Charter.”).

tional.”<sup>201</sup> Given the domestic human rights records of individual ASEAN nations such as Myanmar and others, it is difficult to imagine that a consensus-seeking process among member-states would allow for the development of a particularly strong binding instrument.

One possibility is that the human rights declaration currently being drafted—and any subsequent instrument based on it—would amount to an inadequate or insubstantial statement of human rights norms purportedly based on “Asian values.”<sup>202</sup> Such a development would comport with the “Asian values” narrative that was embraced and promoted by former Southeast Asian heads of state such as Dr. Mahathir Mohamad<sup>203</sup> and Lee Kuan Yew<sup>204</sup> to marginalize human rights criticism as a variant of western domination. Another possibility is that ASEAN could adopt an “ASEAN minus X” model to an instrument, allowing for a multi-stage accession to a binding treaty in which, for example, some of the more democratically mature ASEAN nations ratify the convention early, and other member-states such as Cambodia, Laos, Myanmar, and Vietnam, are given more time to accede.<sup>205</sup> This type of framework has been used previously by ASEAN in the adoption of various regulatory frameworks.<sup>206</sup>

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201. AICHR, Terms of Reference *supra* note 189, ¶2.4.

202. See Michelle Staggs Kelsall, *The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step*, (ANALYSIS FROM THE EAST-WEST CENTER), Sept. 2009, at 5-6 (last visited July 25, 2012), available at <http://www.eastwestcenter.org/fileadmin/stored/pdfs/api090.pdf> (discussing the “Asian values” debate and its possible re-emergence vis-à-vis the AICHR). See also Muntarbhorn, *supra* note 194, at 9-11 (discussing the history of human rights within ASEAN and noting its inclination towards a regional, and not universal, conception of human rights).

203. See Jack Donnelly, *Human Rights and Asian Values: A Defense of “Western” Universalism*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 60, 70-71, 76 (Joanne R. Bauer & Daniel A. Bell eds. 1999) (noting examples of Mahathir’s defense of the “Asian values” narrative). See also KHOO BOO TEIK, PARADOXES OF MAHATHIRISM 65-74 (1995) (discussing Mahathir’s “look east” philosophy and emulation of the economic development experiences of other East Asian nations).

204. See Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, 73 FOREIGN AFFAIRS 109, 113-14 (1994) (presenting Lee Kuan Yew’s narrative on differences between eastern and western values and societies).

205. Charter, *supra* note 127, at art. 21, ¶2.

206. See Caballero-Anthony, *supra* note 153, at 78-79 (discussing use of a staggered accession system to agreements by some but not all ASEAN member-states); Muntarbhorn, *supra* note 194, at 28 (“A step-by-step approach may require that those ASEAN countries which are ready to concretise an ASEAN human rights instrument and related mechanism would do so, while leaving the others to join later. This would be based upon the “X minus Y” approach already used by ASEAN . . .”).

However, that is unlikely as the ASEAN Charter seemingly limits such a flexible arrangement to economic agreements.<sup>207</sup>

The other significant unsettled issue is the absence of judicial review and enforcement. There are no express powers of judicial review for alleged human rights violations identified in the AICHR's Terms of Reference, or detailed guidelines for penalties or repercussions to be assessed on parties in violation of human rights.<sup>208</sup> The commission itself is explicitly defined as a "consultative body" to ASEAN,<sup>209</sup> and that decision-making be made through "consultation and consensus."<sup>210</sup> There is no formal procedure for consultation and consensus, but if consensus is not obtained about an issue, the ASEAN Charter dictates that matter should then be referred to the heads of state at the ASEAN Summit.<sup>211</sup> The Charter states that a "serious breach" or "non-compliance" with its provisions is also referred to the ASEAN Summit,<sup>212</sup> but there is no further guidance on how such a matter would be handled, or what penalties or consequences would be assessed on a member-state in breach of the Charter.<sup>213</sup>

Reading both the ASEAN Charter and AICHR Terms of Reference within the context of ASEAN's normative history, seems to suggest that the commission's protective powers will—

207. See SC Tay, *Human Rights: ASEAN's Way Forward*, SINGAPORE INSTITUTE OF INTERNATIONAL AFFAIRS (June 18, 2008), <http://www.siaonline.org/?q=programmes/commentary/human-rights-asean%E2%80%99s-way-forward> ("Consensus is the basic principle for the group. While the Charter does allow for an "Asean minus X" formula, this is expressly limited to economic agreements. Maintaining Asean unity is key, especially on high-profile issues like human rights").

208. See Ginbar, *supra* note 170, at 514-15 (discussing the emphasis placed on promotion by the AICHR's Terms of Reference, but no express language on a protection or enforcement mechanism for the body); Kelsall, *supra* note 202, at 3-4 (noting the ambiguity within the ASEAN Charter and AICHR Terms of Reference in regards to review and enforcement).

209. AICHR, Terms of Reference *supra* note 189, ¶3.

210. *Id.* ¶6.1.

211. Charter, *supra* note 127, at art. 20, ¶¶1-4 (The process of consensus as practiced by ASEAN originates from long-held practices that emphasize discussion and agreement, as opposed to conflict); AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER 77-79* (2001) (discussing the informal consensus process used by ASEAN leaders that has evolved over time); Davidson, *supra* note 88 (discussing the predominant forms of decision-making within ASEAN). Arguably, such a practice might be well-suited as a protocol for building relationships among heads of state or other diplomatic activities among nations with histories of tension, such as in ASEAN, but is not an appropriately formal or transparent mechanism for a body with judicial review responsibilities.

212. Charter, *supra* note 127, at art. 20, ¶4 ("In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision").

213. See Desierto, *supra* note 155, at 314 (discussing the problem of non-compliance with the Charter and noting that "[t]he Charter, however, is silent on what such ASEAN Summit decisions could entail in actual practice.").

at least for the immediate future—remain muted. The lack of a textual foundation for the AICHR as a strong protective body has led many human rights groups and civil society advocates to criticize it for being “toothless” and “ineffective.”<sup>214</sup> This understanding of the AICHR has been acknowledged by none other than ASEAN leaders themselves. Regarding continuing criticism about the AICHR from civil society groups, ASEAN’s Secretary-General Dr. Surin Pitsuwan recently remarked that “some people might have wished for an independent organization or a human rights court to conduct a review, but that’s not what this is.”<sup>215</sup> It should be noted that the AICHR’s Terms of Reference, like the ASEAN Charter, explicitly state that the AICHR does have a mission to uphold “international human rights instruments to which ASEAN Member States are parties.”<sup>216</sup> This clause provides some reason to believe that the AICHR may develop an affirmative agenda around those two treaties.<sup>217</sup> This possibility has been heightened with the creation of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children in 2010.<sup>218</sup> However, this body’s Terms of Reference draw strongly from those of the AICHR,<sup>219</sup> indicating the likelihood that it may retain a similarly soft role without viable protective and enforcement powers.<sup>220</sup>

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214. See *AICHR: ASEAN’s journey to human rights*, *JAKARTA POST* (Indonesia), Jan. 11, 2010, at 11 (discussing criticism of the AICHR for lacking enforcement powers); *Don’t celebrate just yet, many hurdles still ahead*, *STRAITS TIMES* (Singapore), (last visited July 25, 2012), <http://www.iseas.edu.sg/aseanstudiescentre/asco35-09.pdf> (discussing criticism of ASEAN and the AICHR for lacking “teeth” in enforcing human rights violations); Ary Hermawan, *Welcoming a half-baked ASEAN rights body*, *JAKARTA POST*, Dec. 21, 2009, (“As an infantile institution, the first-ever ASEAN human rights body launched in 2009 was not just weak and toothless, it was almost universally decried as defective”).

215. Ismira Lutfia, *Questions Raised About Asean’s Commitment to Human Rights*, *JAKARTA GLOBE*, (last visited July 25, 2012), <http://www.thejakartaglobe.com/news/questions-raised-about-aseans-commitment-to-human-rights/455213>.

216. AICHR, Terms of Reference *supra* note 189, ¶1.6.

217. See Muntarbhorn, *supra* note 194, at 23 (discussing potential options for the development of an ASEAN human rights mechanism and suggesting that the AICHR might develop a scope of responsibility around the CEDAW and CRC).

218. See *Inaugurated: ASEAN Commission on the Promotion and Protection of the Rights of Women and Children*, *ASEAN BULLETIN* (last visited July 25, 2012), <http://www.aseansec.org/24447.htm#Article-2>.

219. *ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC), Terms of Reference*, ASEAN, available at <http://www.asean.org/documents/TOR-ACWC.pdf> (last visited July 25, 2012).

220. See Ginbar, *supra* note 170, at 515-17 (discussing similarities between the AICHR and ACWC).

## B. THE AICHR AS A HUMAN RIGHTS PROMOTION ENTITY

The AICHR's mandate to promote human rights has received less focus and criticism than its purported lack of protective elements. Again, it should be stated that the AICHR developing into a strong, protective mechanism for human rights with powers of judicial review and enforcement remains an ideal objective. However, given the normative constraints noted previously, it is more likely that the AICHR in practice will evolve into a body with much more of a promotional function than a protective one, at least in the immediate future. If so, what might a promotional agenda for the AICHR that would further human rights and have a substantive program for environmental protection look like? The remainder of this article proposes that an agenda which furthers the principles of *procedural* environmental justice—as embodied in the Aarhus Convention—might be of great benefit to ASEAN, specifically in the realm of public participation in environmental decision-making. A program of activities grounded in environmental public participation has important normative potential for ASEAN's environmental policymaking practices, and would create a tangible and substantial role for the AICHR that would maximize its promotional mission. Perhaps most importantly, furthering an agenda of public participation in environmental matters would benefit policymaking communities within ASEAN nations, while simultaneously working towards the wider objectives of good governance and democratic practice without violating ASEAN norms of non-interference.

As previously noted, the ASEAN Charter itself makes express reference to principles of public participation in several sections. Within ASEAN's internal decision-making circles, the Charter was conceived as an instrument that would recognize the importance of public participation to the wider communities of people in member nations. The 2006 report by an internal advisory committee that precluded the actual Charter made explicit recommendations that ASEAN move towards a "people-oriented"<sup>221</sup> direction. The report, drafted by a state-appointed "Eminent Persons Group,"<sup>222</sup> stated that:

ASEAN needs to shed its image of being an elitist organization comprising exclusively diplomats and government officials. More should be done to strengthen people-to-people ties among ASEAN Member States, and to develop channels to consult ASEAN institutions, Parliamentarians in ASEAN

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221. REPORT OF THE EMINENT PERSONS GROUP ON THE ASEAN CHARTER 6 (last visited July 25, 2012), available at <http://www.aseansec.org/19247.pdf>.

222. *Id.* at 2.

Member States (AIPA) and the people of ASEAN in all sectors of society. Their inputs can help strengthen cultural awareness, forge closer common ASEAN identity and improve social development in ASEAN. The EPG recommends: Cultivate ASEAN as a people-centered organization and to strengthen the sense of ownership and belonging among its people, including enhancing the participation of and interaction among Parliamentarians in ASEAN Member States (AIPA), representatives of the civil society organizations, the private business sector, human rights groups, academic institutions and other stakeholders in ASEAN.<sup>223</sup>

This emphasis on the public's role in ASEAN policy manifests in several Charter clauses. In its Preamble, ASEAN stands "resolved to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the center of the ASEAN community building process."<sup>224</sup> Additionally, the Charter states among its list of ASEAN purposes to "enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice"<sup>225</sup> and to "promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building."<sup>226</sup> Thus, there is clear support for public involvement in governance and policy generally in the ASEAN Charter.

## V. INCREASING PARTICIPATORY RIGHTS AND PROCESSES WITHIN THE AICHR AND ASEAN

A substantive commitment to public engagement beyond the Charter's language could be directly achieved through the formal recognition of rights to participation within any instruments developed by the AICHR. This approach would comport with regional and global developments that have led to the recognition of rights to public participation in the Aarhus Convention. In the absence of such a formal recognition, ASEAN could also strengthen participatory processes in its existing protocols or practices, such as it has through its Guidelines for Civil Society Organization participation, or by establishing new practices that augment participation in decision-making. For reasons discussed earlier, it is more likely that the Association will adopt the latter path than the former and pursue a more gradual approach to-

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223. *Id.* at 6.

224. Charter, *supra* note 127.

225. *See id.* at art. 1, ¶11.

226. *See id.* at art. 1, ¶13.

wards expanding public involvement. The advantage of pursuing this strategy is that it would align with an overall ASEAN milieu that values policy directions which can be achieved through the Association's consensus-based approach. It is also a matter of institutional capacity. Because the AICHR—is at least for now—unwilling to evolve into or create a separate adjudicative body, the enunciation of further rights would seem a premature step at this juncture since no regional judicial review body could enforce such a right. Additionally, there are programs that the AICHR could initiate that would strengthen public participation in environmental matters within existing mechanisms that could precede the ultimate or eventual development of a regional human rights court.

There are both general steps that should be considered by ASEAN policymakers, as well as specific changes that the AICHR could implement, that would expand meaningful processes for public participation in issues that span human rights and environmental concerns. Challenges and possible advancements in participatory processes will be discussed in the context of the Aarhus Convention's categorization of procedural rights into three prongs—information, participation, and justice.

#### A. ACCESS TO INFORMATION

Advancing a participatory approach towards information access through the AICHR could be well facilitated through the involvement of Civil Society Organizations (“CSOs”). Civil Society Organizations play an essential role in governance as public interest advocates, watchdogs, and stakeholders with specialized areas of expertise and constituencies.<sup>227</sup> As mediators between states and citizens, CSOs are well-placed to advocate for public interests generally and marginalized sectors that lack the capacity to advocate within traditional bureaucracies. They can also play a critical role in translating complex policy or technical issues into more accessible formats, and increasing overall transparency and capacities for engagement among common citizenry.<sup>228</sup> CSOs have made significant strides in these areas working within the framework of United Nations bodies, particularly in the envi-

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227. See Patrizia Nanz & Jans Steffek, *Global Governance, Participation and the Public Sphere*, 39 *GOVERNMENT AND OPPOSITION: AN INT'L J. OF COMP. POLITICS* 314, 315 (2004) (discussing the important role of civil society entities in public policy and discourse generally).

228. See *id.* at 323 (2004) (“First, civil society organizations can give voice to citizens’ concerns and channel them into the deliberative process of international organizations. Second, they can make the internal decision-making processes of international organizations more transparent to the wider public and formulate technical issues in accessible terms.”).

ronmental arena.<sup>229</sup> In Southeast Asia, CSOs are critical public sphere actors since significant portions of citizenry still lack the capacity to interface with entities such as the AICHR.

Within ASEAN, the Association maintains Guidelines on ASEAN's Relations with Civil Society Organizations<sup>230</sup> that set forth parameters for establishment of relations between CSOs and the Association. These Guidelines set general criteria and allow for procedures in which CSOs may be formally involved in ASEAN activities.<sup>231</sup> Under the Guidelines, qualifying CSOs affiliated with ASEAN may have access to official ASEAN documentation on a selective basis.<sup>232</sup> Documentation such as declarations, policy statements, and other material is available at the ASEAN website.<sup>233</sup> However, the release of information is limited. Transcripts of internal deliberations are not available, and the actual decision-making process that takes place among heads of state at ASEAN Summits remains largely opaque.<sup>234</sup> It is unclear from the Charter's general language how decisions or criteria for the availability of official documentation are made. The Guidelines for participation indicate that for qualifying CSOs, "[f]or purposes of doing research for its [the CSOs] projects, it may be allowed access to the ASEAN documents on a selective basis in consultation with the ASEAN Secretariat and or its link body."<sup>235</sup> The AICHR's Terms of Reference are silent on any aspects of informational access to the public or non-governmental organizations. According to the Terms, the AICHR must submit an annual report to the ASEAN Foreign Minis-

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229. See Barbara Gemmill & Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS & OPPORTUNITIES 1, 5-6 (D. C. Esty & M. H. Ivanova eds., 2002) (discussing the role of NGOs within the United Nations).

230. *Guidelines on ASEAN's Relations with Civil Society Organisations*, ASEAN, (last visited July 25, 2012), <http://www.asean.org/18362.htm>. [hereinafter *CSO Guidelines*].

231. See Yves Bonzon, *Institutionalizing Public Participation in WTO Decision-making: Some Conceptual Hurdles and Avenues*, 11 J. INT'L ECON. L. 751, 766-68 (2008) (discussing the CSO guidelines for ASEAN).

232. See *CSO Guidelines*, *supra* note 230, ¶9 (stating that the qualifying CSO "may be allowed access to the ASEAN documents on a selective basis in consultation with the ASEAN Secretariat and or its link body" but also noting that the "ASEAN Secretariat shall provide CSOs with key ASEAN publications every year").

233. See CRESENCIA MAURER, SUZANNE EHLERS & ANDREW BUCHMAN, *ALIGNING COMMITMENTS: PUBLIC PARTICIPATION, INTERNATIONAL DECISION-MAKING, AND THE ENVIRONMENT* 13-15 (last visited July 25, 2012), available at [http://pdf.wri.org/aligning\\_commitments.pdf](http://pdf.wri.org/aligning_commitments.pdf) (highlighting examples of ASEAN documentation available online).

234. See *id.* at 16 ("ASEAN establishes complete confidentiality over its deliberations").

235. *CSO Guidelines supra* note 230, ¶9.

ters.<sup>236</sup> Since its formation, no reports of activities have been made available to the public. Additionally, the AICHR has also internally developed a 5 year work plan and rules of procedure for the body.<sup>237</sup> However, details have yet to be made public regarding either development.<sup>238</sup> Because internal discussions are kept secret and details only released incrementally in the form of press releases, this has led human rights advocates to criticize the AICHR for maintaining a “shroud of secrecy.”<sup>239</sup>

Both the AICHR and ASEAN generally should move towards releasing more documentation to the public, and clarifying criteria and processes for public release of information. Clarification is needed specifically in the areas of how CSOs or members of the public may formally request documentation that is not readily available online or in paper records, and how decisions regarding access to documentation are made. Requests for such access and corresponding decisions should be recorded and also be made publicly available. A CSO advisory body should be created to recommend processes for access to information.<sup>240</sup> The World Trade Organization’s presentation of documentation online serves as a positive model that the AICHR and ASEAN could aspire to.<sup>241</sup> Following the WTO’s approach, a blanket presumption of access to meeting minutes and other documentation should be created after a reasonable amount of time has passed.<sup>242</sup> A general rule should be established that all relevant

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236. AICHR, Terms of Reference *supra* note 189, ¶4.13.

237. *Press Release of the Fifth ASEAN Intergovernmental Commission on Human Rights*, ASEAN, (last visited July 25, 2012), <http://www.asean.org/26208.htm> (noting discussion of five year work plan and rules of procedure and other progress made by AICHR); *Press Release of the Sixth ASEAN Intergovernmental Commission on Human Rights*, ASEAN (last visited July 25, 2012), available at <http://www.asean.org/26456.htm> (noting further discussion of the five year work plan and budget and rules of procedure).

238. SAPA TASK FORCE ON ASEAN AND HUMAN RIGHTS, HIDING BEHIND ITS LIMITS: A PERFORMANCE REPORT ON THE FIRST YEAR OF THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS (AICHR) 5-6 (2010) (last visited July 25, 2012), available at [http://forum-asia.org/2010/Report%20on%20AICHR%27s%20first%20year%20\\_for\\_dist.pdf](http://forum-asia.org/2010/Report%20on%20AICHR%27s%20first%20year%20_for_dist.pdf) (discussing the secretive nature of internal AICHR deliberations).

239. *Id.* at 5.

240. See UNITED NATIONS ENVIRONMENT PROGRAMME, STRENGTHENING INTERNATIONAL ENVIRONMENTAL GOVERNANCE AND CIVIL SOCIETY LEADERSHIP IN THE ASIA-PACIFIC 29 (2008) (recommending similar strategies for the United Nations’ environment and development programs).

241. See Nanz & Steffek, *supra* note 227, at 327 (“By now, the WTO’s presentation of documents on the internet is regarded to be among the best of all public international organizations in terms of content and user guidance”).

242. See *The General Council’s Crowded Agenda for Last Regular Meeting*, BRIDGES BETWEEN TRADE AND SUSTAINABLE DEVELOPMENT (INTERNATIONAL CENTER FOR TRADE AND SUSTAINABLE DEVELOPMENT, GENEVA, SWITZERLAND), Nov.-Dec. 2000, at 9 (last visited July 25, 2012), available at <http://ictsd.org/>

policy decision-making information should be made publicly available.<sup>243</sup> A presumption in favor of access to information as opposed to restriction would clarify the process to obtaining information and comport with the ASEAN Charter's spirit of public participation.

Additionally, although some documentation is available on the ASEAN website in English, the official working language of the Association, greater efforts could be made to translate more material into the regional languages of member-states, particularly its most important texts. Maintaining documentation only in English restricts access of this material to government elites and selective academic or non-governmental entities. ASEAN does maintain a separate webpage for environmental matters, including information on environmental governance within ASEAN, specific reports on the ASEAN environment, and the status of ASEAN member-state ratification of international environmental agreements.<sup>244</sup> However, all documentation is in English only and relatively scant. Developing an online public information center or clearing house in multiple languages would greatly enhance the degree to which the public could access important ASEAN documentation, similar to those maintained by the secretariats of several multilateral environmental agreements.<sup>245</sup>

## B. PARTICIPATION

Participation in ASEAN policymaking follows traditional patterns of multi-track diplomacy.<sup>246</sup> Here again, CSOs play a critical role. The Guidelines on ASEAN's Relations with Civil Society Organizations outline general parameters for Track II

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downloads/bridges/bridges4-9.pdf (discussing external transparency concerns in the WTO and referring to Norway's request to automatically de-restrict documentation about a suitable time frame).

243. ECOLOGIC INSTITUTE, PARTICIPATION OF NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL ENVIRONMENTAL GOVERNANCE: LEGAL BASIS AND PRACTICAL EXPERIENCE 247 (last visited July 25, 2012), available at [http://ecologic.eu/download/projekte/1850-1899/1890/report\\_ngos\\_en.pdf](http://ecologic.eu/download/projekte/1850-1899/1890/report_ngos_en.pdf) (calling for access to all policy-relevant information in environmental governance generally).

244. See Main Page, Our Life, Our Future, Environment (last visited July 25, 2012), available at <http://environment.asean.org/>.

245. See MAURER ET AL., *supra* note 233, at 9-12 (discussing informational access to the public in the context of several existing international conventions for the environment).

246. For overviews of participatory mechanisms in international institutions, see generally Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 IND. J. GLOBAL LEGAL STUD. 45 (2003); Jens Steffek & Ulrike Ehling, Civil Society Participation at the WTO – A Cure for its Democratic Deficit? paper presented at 3rd ECPR General Conference, Budapest (last visited July 25, 2012) (available at [http://www.eu-newgov.org/database/DOCS/P11D01\\_Steffek\\_Ehling\\_Civil\\_Society\\_Participation\\_at\\_the\\_WTO\\_v2.pdf](http://www.eu-newgov.org/database/DOCS/P11D01_Steffek_Ehling_Civil_Society_Participation_at_the_WTO_v2.pdf)).

CSO involvement in ASEAN processes. Officially affiliated organizations may submit written statements or recommendations on policy issues to ASEAN through its secretariat,<sup>247</sup> and participate in meetings of associated ASEAN mechanisms at the discretion of ASEAN.<sup>248</sup> Qualifying CSOs are subject to requirements for affiliation with ASEAN, including an obligation to “advance ASEAN interests and promote the awareness of ASEAN’s principles and activities.”<sup>249</sup> The officially affiliated CSOs are listed in an annex of the ASEAN Charter,<sup>250</sup> and include the Working Group for an ASEAN Human Rights Mechanism—which maintains a dialogue with the AICHR as it continues its development.<sup>251</sup> The Charter’s official designation of these entities as Track II dialogue partners certainly bolsters the legal relevance of these relationships. CSOs undoubtedly play a critical role in ASEAN as watchdogs and advocates for communities and sectors that are excluded from Track I dialogue, particularly because the civil society infrastructure in the region generally is still in the process of development.<sup>252</sup> However, critics have asserted that many of these officially recognized Track II CSOs are largely creations of various member-state governments which have policy goals that align with or accommodate those of ASEAN.<sup>253</sup> Since 2005, there has also been an ASEAN People’s Assembly composed of representatives from various, officially affiliated CSOs that meets on an annual basis in step with ASEAN Summits.<sup>254</sup> People’s Assembly conferences conclude with the reading of a

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247. *CSO Guidelines*, *supra* note 230, ¶9b.

248. *Id.* at ¶9e.

249. *Id.* at ¶11b.

250. ASEAN Charter, Annex 2, Entities Associated with ASEAN.

251. See *Working Group Meets with the AICHR; Discusses Engagements and Activities*, WORKING GROUP FOR AN ASEAN HUMAN RIGHTS MECHANISM, <http://www.aseanhrmech.org/news/working-group-meets-aicHR-engagements-and-activities.htm> (last visited July 25, 2012).

252. See Charnovitz, *supra* note 246, at 58-59 (discussing the relevance of NGOs generally in international governance); DANIEL E. RYAN, INTEGRATING DEVELOPMENT AND PUBLIC PARTICIPATION INTO INTERNATIONAL ENVIRONMENTAL GOVERNANCE: A LATIN AMERICAN PERSPECTIVE ON A WORLD ENVIRONMENTAL ORGANIZATION 7-8 (last visited July 25, 2012), available at <http://www.farn.org.ar/docs/art16.pdf> (discussing NGO involvement and roles as civil society representatives in international governance).

253. See DANG THI THU HUONG, EXAMINING THE ENGAGEMENT BETWEEN CIVIL SOCIETY AND ASEAN IN THE ASEAN CHARTER PROCESS 7-8, 14 (last visited July 25, 2012), available at <http://www.grin.com/en/e-book/120420/examining-the-engagement-between-civil-society-and-asean-in-the-asean-charter> (discussing the dialogue partner process with ASEAN and its overall parameters).

254. See Bonzon, *supra* note 231, at 768 (discussing the ASEAN People’s Assembly).

common civil society statement to ASEAN heads of state.<sup>255</sup> These meetings were produced as a result of Track II dialogues with ASEAN, and thus have official recognition from ASEAN, but have been criticized as largely symbolic exercises.<sup>256</sup> For these reasons, the majority of CSOs that have been excluded from Track II dialogues have coordinated initiatives to develop alternative forums for civil society participation in ASEAN, but lacking consistent support and official recognition from ASEAN.<sup>257</sup>

As the entity charged with promoting and protecting human rights throughout ASEAN, it is critical that the AICHR set a precedent for creating meaningful spaces for participation in human rights and environmental dialogue by civil society. The establishment of direct dialogues with CSOs through the Charter is a positive step, but a number of other approaches should be used to widen the scope and impact of public participation in policy making. First, existing dialogue practices with ASEAN generally should be both expanded and made more transparent. Limiting input of written policy views or recommendations to officially affiliated CSOs which have been selected by ASEAN is too restrictive, and currently excludes the participation of numerous smaller CSOs/NGOs across the region. As a general presumption, any CSO willing to follow established protocols should have a right to be involved in decision and policy making procedures.<sup>258</sup> CSOs have a critical role in providing expert, country-specific information on environmental or human rights information to the AICHR and ASEAN generally. The AICHR should develop and codify formal rules of procedure that allow for the submission of written comment by any member of the public or entity into concerns about practices or policies within member-states that implicate human rights outcomes and/or environmental issues. Formal submissions of information should be documented and made publicly available.<sup>259</sup> A regular reporting mechanism in which national CSOs provide annual reports to the AICHR and ASEAN on human rights and environmental issues

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255. *See Id.* ("It is convened several days ahead of ASEAN Summits and adopts a common statement of civil society organizations, which is then read to the Heads of State during their Summit.").

256. *See* Huong, *supra* note 253, at 16.

257. *See id.* at 16-18 (discussing the formation of the ASEAN Civil Society Conferences); *see generally* Ramirez, *supra* note 89 (discussing civil society development and engagement with ASEAN generally).

258. *See* ECOLOGIC, *supra* note 243, at 246 (recommending wide inclusion among NGOs in environmental governance activities within international bodies).

259. *See* Gemmill & Bamidele-Izu, *supra* note 229, at 15-16 (recommending various civil society participation approaches in international environmental governance).

should be established. Online mechanisms may offer efficient and transparent means for CSOs to provide written input to the AICHR about concerns which involve human rights. The AICHR could also establish national offices or online portals to create a permanent infrastructure for input by domestic CSOs and members of the public. Special forums could be created specifically for formal presentations of information and policy stances by CSOs within the AICHR and ASEAN generally,<sup>260</sup> with protocols codified in organizational rules. Obviously, means to monitor follow-up by the AICHR and ASEAN in environmental and human rights decision-making activities should also be implemented.

Outside of CSO participation in ASEAN decision-making organs, a particularly good model for involving members of the lay public in environmental decision-making are Environmental Impact Assessments.<sup>261</sup> The Impact Assessment Model is aimed at documenting possible consequences of a development project on surrounding communities.<sup>262</sup> Environmental Assessments have already been employed in various Southeast Asian nations, usually for large development projects financed by regional or international development banks, but also for domestic-financed operations.<sup>263</sup> Human Rights Impact Assessments have likewise developed and continue to be used in various contexts, particularly in regards to international trade.<sup>264</sup> The AICHR could de-

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260. See UNITED NATIONS ENVIRONMENT PROGRAMME, *supra* note 240, at 29 (recommending similar strategies for inclusion of NGOs in the United Nations' environment and development programs).

261. For discussions on the environmental impact assessment model and experiences, see generally Ann-Katrin Bäcklund, *Impact Assessment in the European Commission – a System with Multiple Objectives*, 12 ENVTL. SCI. & POL'Y 1077, 1077-1087 (2009); Neil Craik, *Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments*, 38 VICTORIA U. WELLINGTON L. REV. 381, 381-402 (2007); Patricia Fitzpatrick, *Multi-jurisdictional Environmental Impact Assessment: Canadian Experiences*, 29 ENVTL. IMPACT ASSESSMENT REV. 252, 252-60 (2009).

262. See generally JOHN GLASSON, RIKI THÉRIVAL & ANDREW CHADWICK, INTRODUCTION TO ENVIRONMENTAL IMPACT ASSESSMENT 2-25 (3d ed. 2005) (describing overall parameters and objectives of environmental impact assessments).

263. See generally John Stampe, *Lessons Learned from Environmental Impact Assessments: A Look at Two Widely Different Approaches – The USA and Thailand*, 8 J. TRANSDISCIPLINARY ENVTL. STUD. 1 (2009) (discussing the use of environmental assessments in Thailand); Jennifer C. Li, *Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security?* 7-16 (USAID, Working Paper No. 4, 2008) (outlining the use of environmental impact assessments in Mekong River Delta nations).

264. See generally James Harrison, *Human Rights Impact Assessments of Trade Agreements: Reflections on Practice and Principles for Future Assessments*, paper for the Expert Seminar on Human Rights Impact Assessments of Trade and Investment Agreements, Geneva (June 23-24, 2010) (providing an overview of human rights impact assessments in the global trade context); Alessa Goller & James Harrison,

velop a regime for promoting the increased use of such assessments at a domestic level among member-states. This would be particularly warranted because existing impact assessment practices in Southeast Asia are generally perceived to be weaker than in developed nations due to lack of training, minimal commitment by national agencies, and other factors.<sup>265</sup> Regional harmonization of impact assessments and training through the AICHR would help develop local governmental and non-governmental capacities to administer such assessments, provide them with the visibility and credibility they deserve, and would certainly align with the AICHRs mandate to promote human rights regionally.

### C. JUSTICE

The final prong of the Aarhus Convention—access to justice—will be the most difficult of the three procedural rights to obtain within the current AICHR context because it directly implicates the need for a judicial review role, which currently does not exist in the AICHR. Without a regional human rights court, ASEAN would be faced with two significant structural problems. First, any adjudication of regional rights would be restricted to interpretation in national and sub-national contexts only, amounting to a diffuse interpretation and enforcement of regionally-recognized rights. Although it could be argued that the legal systems and cultures of some ASEAN nations might be sufficiently prepared to formally adjudicate such claims, it is difficult to imagine the same happening in member-states like Myanmar or the de jure communist nations like Vietnam or Laos. Secondly, there would be no regional-level appellate body to review either alleged infringements by states, or to adjudicate disputes between member-states. Unless the AICHR does develop itself into an adjudicative body, or ASEAN develops a related entity with such powers, any meaningful provisions related to access to justice will likely remain unfulfilled.

## VI. CONCLUSION

Undoubtedly, the fact that a regional human rights body has been created by ASEAN is significant in itself, and it should be

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*Trade and Human Rights: What Does 'Impact Assessment' Have to Offer?* 8 HUM. RTS. L. REV. 587 (2008) (discussing human rights impact assessments generally and their value).

<sup>265</sup> See generally John Boyle, *Cultural Influences on Implementing Environmental Impact Assessment: Insights from Thailand, Indonesia, and Malaysia*, 18 ENVTL. IMPACT ASSESSMENT REVIEW 95 (1998) (discussing institutional and social factors that undermine the effective use of environmental impact assessments in Thailand, Indonesia and Malaysia).

seen for what it is: a starting point.<sup>266</sup> The Terms of Reference for the AICHR indicate that ASEAN purposively intended that the commission develop and evolve over time by adopting “an evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN.”<sup>267</sup> Given long-standing practices within ASEAN, it can be expected that any path towards evolving a regional human rights regime will be an incremental one. At the same time, the pace of development in Southeast Asia and accompanying environmental concerns will continue to grow. It is therefore critical that a milieu be developed for the communities and peoples of ASEAN to have meaningful opportunities to participate in policy decisions that implicate the environment, within a political context that is viable for the region.

An agenda for growing practices that allow for greater public participation in ASEAN policy reflects the Association's new Charter. Additionally, the recent creation of the AICHR creates opportunities to centralize and develop procedures and practices for public participation in environmental policy as a function of its mission as the region's human rights body. Although it is unclear if the procedural rights in the Aarhus Convention will be recognized by the AICHR, the strengthening of participatory practices would serve to at least be a positive interim development that could set the stage for a more effective human rights enforcement mechanism within ASEAN. Also, fostering participatory practices within ASEAN is a positive end in itself, particularly in the context of promoting sustainable development. Effectively engaging the public promotes informed policy decision-making and can mitigate unequal distributions in both information and power.<sup>268</sup> Participation is a critical component of transparency and accountability.<sup>269</sup> From a pragmatic standpoint, involving the public in environmental policymaking can lead to greater public acceptance of development projects, and pre-empt social conflict, wide-scale protests, lawsuits, or other

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266. See Michelle Staggs Kelsall, *The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step* (Asia Pacific Issues, number 90, Sept. 2009) (discussing the broad issues surrounding the creation of the AICHR); Hao Duy Phan, *The ASEAN Inter-Governmental Commission on Human Rights and Beyond*, ASIA PACIFIC BULLETIN (EAST-WEST CENTER, WASHINGTON, DC), (last visited July 25, 2012), available at [http://www.eastwestcenter.org/sites/default/files/private/apb040\\_1.pdf](http://www.eastwestcenter.org/sites/default/files/private/apb040_1.pdf) (outlining the AICHR and noting its importance as a significant step towards other developments in the area).

267. AICHR, Terms of Reference, *supra* note 189, ¶2.5.

268. See Ryan, *supra* note 252, at 7 (discussing the importance of public participation within the context of sustainable development).

269. See MAURER ET AL., *supra* note 233, at 1-2 (discussing benefits of public participation in multilateral and international governance).

adverse or disruptive developments that can result from not effectively engaging impacted peoples and communities in a meaningful way.<sup>270</sup> Integrating such procedural practices into ASEAN's new human rights machinery may not be the ideal outcome. However, it would amount to a significant step forward in ASEAN's slow march towards strengthening regional human rights, and would offer novel movement in integrating environmental concerns into its new rights-based framework.

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270. EIAs IN PRACTICE: POTENTIAL LESSONS FOR HUMAN RIGHTS IMPACT ASSESSMENT (CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, WASHINGTON, DC), June 2010 at 5 (outlining benefits of public participation in environmental matters).