Editorial

The prospects for a truly regional Asian Pacific environmental law?

1 ENVIRONMENTAL LAW IN THE ASIA PACIFIC REGION

In the Editorial introducing Volume 19 of the *Asia Pacific Journal of Environmental Law*, we identified some of the global pressures that have influenced the direction of environmental law in the Asia Pacific. In particular we focused on the implications of the *2030 Agenda for Sustainable Development* for environmental law in the region, observing that to a significant degree the success or failure of the *2030 Agenda* will turn on whether ecologically sustainable development can be achieved in the dynamic and rapidly developing Asia Pacific region.

There is no question that environmental law developments globally, including goal-setting exercises such as the *2030 Agenda*, have had impacts on Asia Pacific environmental law in many different ways.¹ However, the extent of influence has not been uniform. For instance Pacific island states have often been more open to international influences than have South-East Asian jurisdictions, with the latter having tended to place a greater emphasis on sovereignty and generally to have favoured ‘soft’ rather than ‘hard’ law. This underlines the significant political and legal diversity among states in the region and complicates the task of identifying or describing a distinctive and homogenous Asian Pacific environmental law.

Nonetheless there are a number of common strands in the way in which governments in the region are approaching environmental challenges. In many cases these are the product of a maturing regional coordination and cooperation in response to shared environmental threats.² As Elliott explains, ‘[c]ommon experiences of environmental degradation confirm shared vulnerabilities. States’ interests in mitigating or adapting to environmental degradation are, therefore, increasingly difficult to define or pursue unilaterally’.³ Elliott notes, however, that environmental regionalism in the Asia Pacific has often been patchy and issue-specific rather than all-encompassing and strategic.

Asia Pacific environmental regionalism has therefore often been functionally quite narrow and also has been characterised by a significant degree of sub-regionalism. Hence there have been achievements in relation to some challenges in some areas (eg a commitment to a nuclear-free Pacific⁴); but apparent failures in others (eg the inability to control transboundary haze from forest fires in Indonesia and elsewhere⁵). Given this

1. See generally Ben Boer, Ross Ramsay and Donald R Rothwell, *International Environmental Law in the Asia Pacific* (Kluwer Law International, London 1998).

2. Lorraine Elliott, ‘Environmental Regionalism: Moving in from the Policy Margins’ (2017) *The Pacific Review*, advance online publication <http://dx.doi.org/10.1080/09512748.2017.1303534>, 3.

3. *Ibid.*

4. 1985 South Pacific Nuclear-Free Zone Treaty (Treaty of Rarotonga).

5. Helena Varkkey, ‘Regional Cooperation, Patronage and the ASEAN Agreement on Transboundary Haze Pollution’ (2014) 14 *International Environmental Agreements* 65.

diversity and fragmentation, is it really possible (or even desirable) to speak of an emerging Asia Pacific environmental law that mirrors environmental law regionalism in other parts of the globe such as Europe or North America? And, if there is such an Asia Pacific environmental law regionalism, can we begin to trace patterns of norm production and diffusion, with the Asia Pacific being not merely a receiver of environmental law made elsewhere but an active participant in the formulation of environmental norms? And what have been the main political, institutional and cultural factors that have helped or hindered Asia Pacific environmental law regionalism? Many contributions to *APJEL* over the years have sought in various ways to offer partial answers to these questions. Yet they have had to confront the reality of a highly diverse region with major cultural, economic and political differences between states, even those that are immediate neighbours. If there is to be a productive way forward for an Asia Pacific environmental law, and not merely a disparate collection of Asia Pacific environmental laws, it is likely to be found in the recognition that the pursuit of ecologically sustainable development is a potentially powerful uniting force across the region, and is one that offers opportunities for cooperation where other issues of regional diplomacy offer competition and even conflict.

2 THE ARTICLES IN THIS VOLUME

A number of articles in Volume 20 engage with issues of environmental law regionalism in important ways.

Peter Sand in his article on conservation diplomacy and wildlife trade offers many insights on the effectiveness (or otherwise) of global and regional treaties for protecting endangered species. He explains the often misunderstood nature of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and then explains the development of an enforcement regime for the treaty, despite no provision being made for this in the original text. He then analyses the effectiveness of this, however, and reaches some surprising conclusions about the nature of the states which have been subjected to enforcement measures. Sand uses a Pacific example, the Japanese research whaling programme, to draw attention to gaps and weaknesses in the global conservation regime in which there is arguably sometimes one rule for wealthy states and another for developing countries.

Kerryn Brent in her article on the International Court of Justice's *Certain Activities Case*⁶ assesses the importance of the case for the development of the no-harm rule in international law. While the case involved disputes between Costa Rica and Nicaragua, the principles developed have global implications and Brent's article provides one of the first considerations of the ICJ's most recent pronouncements on an environmental matter. For further relevance, Brent links her discussion of the no-harm rule specifically to the concerns of Pacific Island Small Island Developing States as to the application of the rule to climate change.

Kathryn McCallum's article concentrates on one increasingly influential jurisdiction in the Asia Pacific: China. McCallum traces the potential for radical change to environmental governance in China thanks to the role of public interest litigation

6. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) & Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica) (Judgment)* (International Court of Justice, General List No 150 and 152, 16 December 2015).

made possible by environmental law reforms in 2014. In this respect China is beginning to follow environmental law developments in other jurisdictions, but in a unique and still evolving manner. China has, in recent years, begun to expand on the space that it allows for non-governmental involvement in the enforcement of environmental laws and McCallum focuses particularly on public interest litigation through a careful consideration of developing case law.

Australia's climate change and energy policies provide the focus for Maureen Papas' article. She first considers recent and developing global initiatives and trends, before assessing the apparent contradiction between Australia's formal commitments to the 2030 Agenda and the 2015 Paris Agreement on Climate Change, on the one hand, and its weak domestic laws and policies to address climate change, on the other. After consideration of various of Australia's policy instruments, Papas suggests ways forward.

David Leary considers the regulation of wind energy production in the coastal zones of key jurisdictions in the Asia Pacific region. Leary argues that China, South Korea and Japan have been moving ahead rapidly in their support for and favourable regulation of renewable energy, indeed much more so than other states in the region, including Australia. Leary explains that all of these states have demonstrated a certain level of policy inconsistency, despite the industry call being for certainty, and explains examples of this before moving to a consideration of trends in the field and the key role of environmental impact assessments.

Sarah Tan Yen Ling then tackles a quintessentially regional problem in which the promises and pitfalls of effective cross-border environmental policy in the Asia Pacific are laid bare – the challenge of making the ASEAN Agreement on Transboundary Haze Pollution effective and more than just a 'paper promise'. She argues that a turn to dispute settlement options, and mediation in particular, offers a possible way forward.

In his contribution, Edward Davey addresses the challenge of sustainable tropical forest management, an issue that is faced by a number of states in the Asia Pacific and connects with broader regional issues because of the linkages with transboundary haze pollution. Considering the role of REDD+ in the protection of forests, Davey focuses particularly on the rights of indigenous peoples, and the valuable role that they might play if their rights are given greater recognition. Davey concludes by proposing a ten-point plan that could be applied to enhance the protection of forests.

Tapas Kumar Sarangi's article also considers forest management issues and indigenous rights, but from the perspective of forest dwellers in India and their entitlements under the Forest Rights Act 2006 (India). Whilst acknowledging that there are numerous practical problems with the implementation of the Act, including conflict between conservation efforts and the livelihoods of local populations, Sarangi explains that proper implementation of the Act could operate not only to provide stable property rights to forest land, but also to enforce the entitlement that forest dwellers have to forest produce – this entitlement having the potential to reduce the levels of conflict inside protected areas.

There are two book reviews included in this volume. Josephine Gillespie reviews *Governing Cambodia's Forests: The International Politics of Policy Reform*, by Andrew Cock, describing the book as an 'incredibly thorough articulation of how, in a Cambodian context, global environmental reforms to protect tropical forests can, in reality, mutate once they are translated into the domestic policy arena'.

In the second review, Ceri Warnock considers *Environmental Justice in India: The National Green Tribunal*, by Gitanjali Nain Gill, describing the book as an 'institutional microanalysis [which] prompts reflection' and as elucidating how the Tribunal

has, through its processes, ‘helped to address complex and at times conflicting scientific evidence and risk evaluation, and enabled the creation of responsive remedies’.

3 CONCLUSION

The present volume is the second under the journal’s new ownership – that of Edward Elgar – and the editors are excited by the quality and the variety of the submissions that we are receiving. It is an exciting time for environmental law in the Asia Pacific region, and it is our hope that the journal (which will be published in two issues annually from 2018) comes to be seen as one of the most important sources of information about environmental law in the region. We look forward to receiving ongoing contributions to understanding the regional dynamics of Asia Pacific environmental law in the years to come.

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