

# Introduction: Development and the environment: issues to be discussed : 2. New developments in environmental law in East Asia

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# 2

## New Developments in Environmental Law in East Asia

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Major developments are now in the making with regard to the passage of environmental laws in the countries and areas of East Asia: Existing environmental laws are being substantially revised, new basic environmental laws are being passed, and related laws are in the process of legislation. By way of an introduction, I would like to briefly discuss how environmental laws in East Asian countries and areas are undergoing new developments.<sup>1</sup>

### I. CHARACTERISTICS OF ENVIRONMENTAL PROBLEMS IN EAST ASIA

A look in the broad sense at environmental problems in East Asian countries and areas allows one to generally note the following three characteristics.

First are problems related to industrial pollution-induced environmental problems, which are shared in this region. As one can see from each chapters of the latest publication on *Environmental Law of Developing Countries-East Asia* by IDE (1993), environmental problems in East Asian countries and areas on the whole have very great diversity. South Korea, Taiwan, and other so-called NIEs, which have economically achieved a certain level of development, are concentrated in East Asia. For that reason the environmental problems arising in this region are often related by nature to industrial pollution, and we are seeing the occurrence of many instances of environmental damage similar to the industrial pollution or environmental damage like that in the developed nations. In particular, almost all the countries and areas represented by the Asian NIEs share conditions such as small land areas, high population densities, and rapid industrialization, because of which they are characterized by urban-type environmental problems and industrial pollution. And it is not coincidental that many of these countries and areas are troubled with critical social issues caused by the opposition of citizens affected especially by the problem of securing land for hazardous waste disposal sites. Both the types and amounts of hazardous waste generated in these countries and areas are growing, and recently grave concern is being directed at the contamination of soil and groundwater by the PCBs, dioxins, and other substances discharged by hi-tech industries, and at the heavy metal contamination by lead and other metals. Additionally, from the perspective of global environmental problems, Taiwan and other NIEs are showing great concern for matters such as ways to deal with CFCs, which for technical and economic reasons are still difficult to substitute.

Second is the fact that in these countries and areas environmental problems have not been addressed adequately in terms of government administration and legal systems. Already environmental disputes have arisen here and there as social issues, and we see instances in which these disputes take the form of civil suits. It is safe to say that solving these problems requires policies including effective administrative initiatives, legal responses, the establishment of systems for settling disputes, improvements in environmental awareness, environmental education, and the development of pollution abatement technologies. These too can be seen as environmental problems in a broad sense.

Third are the characteristics when observing environmental issues as the aforementioned on a regional level. These we can observe in view of two problems.

The first is transboundary pollution. Many instances of transboundary pollution have heretofore found their causes mainly in natural conditions, such as international rivers, international straits, and marine pollution. For example, the possibility that China's acid rain will cause damage as far away as South Korea and Japan has been recognized, and this has become the object of Sino-Japanese joint surveys and environmental cooperation. Another problem that is currently a matter of increasing concern is the movement of anthropogenic pollutants and wastes stemming principally from economic activities in these areas. Although countries have signed the Basel Convention, which controls the transfrontier shipment of wastes, environmental problems have come to arise in ways that involve multiple countries in conjunction with the more increasingly energetic transboundary economic activities in this region, including international trade, aid, and overseas investment.

The other problem is the inadequate legal framework for regional cooperation on the environment. Taiwan in particular is not qualified to sign and ratify environment-related international conventions, which is a major obstacle to pursuing international environmental cooperation in this region overall.<sup>2</sup>

## **II. CHARACTERISTICS OF ENVIRONMENTAL LAW IN EAST ASIA**

### **1. Forms of Environmental Laws and How They Are Enacted**

In general the forms of environmental laws in East Asian countries and areas are as follows. In content they are mainly: (1) constitutions, (2) treaties, (3) laws, (4) regulations, orders, and guidelines issued by administrative bodies, and the like. There are also local government ordinances ("ordinances" go under different names according to the country), judicial precedents, and customary law.

#### **(1) Constitutions**

There is a broadening trend in the developing countries to establish constitutional provisions relating to environmental protection. In many instances they establish environmentally-related rights and obligations of the citizens, in addition to defining the responsibilities of the national government for environmental protection. In this region, China and South Korea have included provisions for environmental protection in their Constitutions (1988 and 1980, respectively). China's Constitution has four articles—26, 9, 10, and 22—with provisions relating to environmental protection. While constitutionally the national government's responsibilities for environmental protection are spelled out in Article 26, there are no provisions for environmental rights. The obligations of individuals and other entities for environmental protection are established in the 1989 Environmental Protection Law. In

South Korea Article 33 of the Constitution provides for environmental rights, but on the realization of such rights these constitutional provisions are very much like a program that puts laws on hold; provisions are lacking for procedures to ensure these rights, and there are limitations on the specific actualization of legal objectives.

## **(2) Treaties**

There are both bilateral and multilateral international treaties. These take the forms of conventions, agreements, arrangements, and the like, and especially the bilateral treaties in this region include agreements for cooperation in science and technology, environmental cooperation agreements, and treaties for the protection of migratory birds.<sup>3</sup> Multilateral treaties in the process of being ratified or concluded include environmentally related international conventions on marine oil pollution, nuclear power, and the Convention on International Trade in Endangered Species of Flora and Fauna (CITES). However, there are as yet no environmentally related treaties covering this whole region.

## **(3) Laws**

There are two groups of laws. One is the basic environmental laws that are by nature comprehensive and fundamental. These include China's Environmental Protection Law and South Korea's Basic Environmental Policy Law, which determine fundamental matters such as basic principles on the environment, items shared by the individual fields covered by environmental law, the responsibilities of the national government and other administrative bodies, and the environment-related rights and obligations of individuals.

The other group of laws comprises those dealing individually with environmental protection and controls. Representative of these are water pollution control laws, air pollution control laws, industrial effluent laws, laws dealing with wastes, noise pollution control laws, nature conservation laws, and the like. In increasing cases, these laws include liability without fault systems and the polluter pays principle. Of recent note is the enactment of individual laws dealing with pollution dispute settlements and environmental impact assessment systems. However, there are still no discernible moves to pass laws for the redress of pollution victims.

In general, laws in areas such as civil law, criminal law, legal procedure laws, forest laws, river laws, factory laws, and labor laws often include environmentally related provisions. In this sense, one must certainly say that it is difficult to establish in advance a certain domain, common to these countries and areas, to be covered by "environmental laws."

Incidentally, the ranges of things subject to "environmental" protection and controls are broader in some countries and areas than in others, but on the whole there is a tendency for these ranges to broaden. For example, China's former 1979 Environmental Protection Law defines "the environment" as "the environmental elements of air, water, land, and the like, and these items themselves," but the 1989 Environmental Protection Law says, "air, water, the oceans, land, minerals, forests, grasslands, wildlife, natural history sites, cultural ruins, nature protection zones, scenery, scenic zones, cities, farming villages, and the like," thereby broadening the range of things to be protected.

## **(4) Regulations and orders issued by administrative bodies**

Although there are differences in the regulations, orders, and other edicts issued by administrative bodies, in many cases laws have express provisions showing the grounds for authorization. Because they can be revised with relative ease in accordance with administra-

tive discretion, they often include technical matters such as discharge standards and the means of control by administrative bodies.

Forms of controls such as guidelines and manuals are also used. For example, Singapore has not yet performed legislation relating to environmental impact assessments; instead, the administrators make certain administrative judgments on the basis of the government's very own manual. Sometimes there are explicit legal grounds, and sometimes not.

A brief look at the ways in which environmental laws are created shows that here as well it is possible to discern differences in terms of country and region. Categorizing by type we find that the first form, as was formerly the case in South Korea, is constituted solely by a basic law on the environment (the Environmental Conservation Law), and that this basic law covers almost everything involved.

But South Korea too passed the Basic Environmental Policy Law in 1990, in conjunction with which it created laws on the basis of "subsidiary legislation." This involved the transition to having a number of subsidiary laws, i.e., the Basic Environment Law and the laws that supplement it. This is the second form.

In the third form, environmental laws are made up of laws covering individual areas of concern. An example of this form is Hong Kong, which has laws covering each item subject to controls, such as air, water, and wastes. Similar systems are places with only individual laws of a fragmentary nature, or places that have hardly any environmental laws at all, but none of the countries and areas discussed here fall into these categories. Another possible distinction is cases where environmentally related provisions are constitutionally established, and cases where they are not, but from the perspective of efficient enforcement and application of the law by administrative bodies, more important is whether or not administrative bodies have adequately enacted regulations, orders, and the like.

## **2. Relationship with the Reception of Law**

The field of environmental law is a fairly new one. Yet, such laws are not necessarily without relation to the existing traditional laws of those countries and areas. Let us examine them from the perspective of the reception of law.

Except for Singapore, many of these East Asian countries and areas belong to what is called the Far East Law Sphere. Although it is problematic whether we should discuss East Asian law apart from that of other regions, law spheres are not the main topic here, so we shall merely touch upon the matter here. At the least, it is possible to point out that this region has a law sphere with certain common cultural elements.

Some of these countries and areas, such as South Korea and Taiwan, were influenced by Japanese law during the days of Japanese colonial rule. While being Japanese law, this was not unique to Japan but rather western European-type law in the sense of continental law that owed much to the tradition of western European law. On the other hand, both Hong Kong and Singapore are influenced by British common law. Having been so influenced, it is possible to discern in the idea of nuisance, and in the British land use system, the influence and shared features of the legal system of their suzerain. Some attributes allow one to conjecture that even after gaining their independence, these countries have been strongly influenced by the laws of their suzerain. This suggests that the influence of a past suzerain's legal system is not necessarily limited to the era of its colonial rule. The fact that Japan's former pollution control laws and ordinances had a powerful influence on the statute laws of post-independence South Korea and Taiwan can be conjectured from the content of their respective basic environment laws and pollution control methods. For example, it is said that

South Korea's 1963 pollution control law was modeled on Osaka City's contemporary ordinance. Another observation is that when China was working on the passage of its Environmental Protection Law, the Chinese had frequent and close exchanges of opinions with Japanese researchers.

At the same time, however, because environmental law is a rather new legal field and involves much technical content, the general tendency is to think that environmental laws have comparatively little connection with legal traditions. As a matter of fact, when laws are being drafted, the drafters often compare or refer to the environmental laws and related laws of countries with little connection to the legal systems of their former suzerains.

### **III. ENVIRONMENTAL LAW: NEW DEVELOPMENTS AND THEIR BACKGROUND**

#### **1. Stages of Development in Environmental Law**

It is perhaps possible to roughly divide the development of environmental law in Asia into four sequential stages: the preliminary stage, the initial stage, the reassessment stage, and the enhancement and stabilization stage.<sup>4</sup>

According to this sequential categorization of law creation, many of these East Asian NIEs are already in the reassessment stage, and Singapore and others have attained the enhancement and stabilization stage.

#### **2. Directions in Environmental Law Developments**

As noted previously, environmental law in East Asian countries and areas is currently entering a period of substantial revision. Developments in the revision of environmental law are proceeding mainly in two directions.

First are reassessments and substantial revisions of the basic environment laws and main individual laws passed to date. As the details are discussed in each chapter in the aforementioned publication by IDE they will not be repeated here, but most of the reassessments and revisions concern: expanded coverage for environmental protection; enhanced roles for administrative bodies; clarification of the rights and responsibilities of the state and individuals vis-a-vis the environment; confirmation of principles such as the polluter pays principle and adoption of the liability without fault doctrine; strengthening of preventive measures for environmental protection; and providing stiffer penalties.

The law revisions that occurred in recent years or are scheduled are: the passage of South Korea's Basic Environmental Policy Law<sup>5</sup> (1990), the drafting of Taiwan's present Basic Environment Law, and the passage of China's Environmental Protection Law<sup>6</sup> (1989).

The other direction consists in moves to establish pollution dispute settlement laws and to legislate environmental impact assessments in South Korea and Taiwan. With regard to the situation surrounding the establishment of environmental impact assessments, for example, of particular interest are, in China, the 1989 Environmental Protection Law and the 1987 Construction Project Environmental Management Law; in South Korea the 1990 Basic Environmental Policy Law and the 1993 Environmental Impact Assessment Law; in Taiwan the 1994 Environmental Impact Assessment Law; and in Hong Kong the 1988 Land & Work Branch Technical Circular No. 9/88 (for public projects) and the 1990 Advice Note 2/90 (for private projects). There is now discussion in Singapore on whether or not the

country should pass an individual law incorporating environmental impact assessments.<sup>7</sup> While there remain many problems in the institutionalization of environmental impact assessments, such as cost, methods, and extent of application, at the current stage assessments are thought to be the most effective institutional means of measuring and assessing in advance the effects of a project on the environment when such effects are possible. In South Korea the extent to which assessments are applied includes not only private projects, but public ones as well.

These East Asian areas and countries set to work on domestic environmental legislation after the international influence of the 1972 United Nations Conference on the Human Environment in Stockholm. A possible view is that, having arrived at the present stage, these countries and areas revised and codified basic laws that until now had not necessarily been systematic and comprehensive. In this sense one could say that they have arrived at the point at which they reassess their laws to make them conform with their own environmental circumstances.

Such revision of laws perhaps comes at about the same time as the establishment of full-blown agencies that are to carry out environment-related administrative tasks. Examples include the reorganization of Taiwan's Environmental Protection Office, South Korea's Environmental Protection Department, and China's Environmental Protection Office, all around 1990. In other words, these conspicuous actions for establishing administrative bodies, i.e., actions related to the revision of laws and their application, suggest the occurrence of qualitative changes in the role of laws in these East Asian areas and countries. Until now it has been repeatedly said that in general "laws don't work" in the developing countries, but the systematic creation of basic environmental laws and other laws, the establishment of administrative bodies in connection with legal systems such as environmental impact assessments and the application of laws, and the other positive actions we have seen above show that the role of laws in this region is undergoing a major transformation.

### **3. Background of Developments in Environmental Law**

In the main, there are three factors behind the implementation of major law revisions as discussed above. First is the shift from the pollution control approach prevalent until now to environmental management approach. Second is the necessity for legal solutions to environmental problems. Third is the change in the consciousness toward environmental issues among the general populace.

#### **(1) Shift to an environmental management approach**

This shows that it was difficult to sufficiently accomplish the purposes of laws just by using the conventional restrictive means that emphasized pollution control. As the scope of environmental protection expanded and became more complex, such protection was increasingly expected to accomplish its purpose through management and conservation that headed off damage, which in turn necessitated a reassessment of environmental laws' fundamental perspective.

#### **(2) Necessity for legal solutions to environmental problems**

Pollution disputes occurred frequently, which disrupted social stability. Industrial pollution problems have come to be regarded as critical social problems in the NIEs, and there is a rising necessity for the settlement of disputes. There are more and more environmental issues of the type that develop into social disputes, such as the many instances of pollution

damage in South Korea's Ulsan and Onsan factory zones, the death of coastal windbreak trees near power plants in Taiwan, Taiwan's environmental racketeers, and damage to marine products and the like due to marine pollution in Hong Kong. As environmental disputes these sometimes develop into social or political issues, and in more and more cases they require legal resolutions. Some of the specific ways to resolve disputes are pollution dispute settlements in the case of civil disputes, and the appeals, mediation, and arbitration in cases where an administrative agency has enacted a certain measure. Taiwan is about to establish an administrative agency for settling disputes in conjunction with the passage of its Pollution Dispute Settlement Law.

### (3) Change in the general consciousness toward environmental issues

Additionally, there is the change in the ordinary citizen's environmental consciousness and the rapid change in the legal consciousness regarding the environment. We conducted joint overseas research on this theme during 1991 with the Law Institute of Law of China's Social Sciences Academy and the Law Institute of Taiwan's Fugen University. Research results show that not only is there a change in the general consciousness toward environmental problems, but also that the change is gradually making the transition to the level of a legal consciousness.<sup>8</sup> That is to say, overall the citizens have begun to desire solutions to problems from a preventive perspective rather than resolutions to environmental disputes after the damage has been done.

In some countries and areas in this region environmental NGOs are already playing a vital role. By contrast, in China and Singapore a government-piloted method of problem solving plays a crucial role. A general environmental consciousness-raising makes people become aware that environmental problems are social problems, intentionally encourages people to conceive these problems within formal legal systems, and leads legal systems in a direction that makes them function. One must observe that in order to bring about legal redress for pollution victims and to settle disputes, there is very great significance in fostering a legal consciousness that is supported by this kind of environmental consciousness.

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#### Notes

1. This East Asian region covers the countries and areas of China, South Korea, Hong Kong, Japan, and Taiwan, but this report shall for the sake of convenience include South Korea, Hong Kong, Taiwan, and Singapore in "NIEs," and the range of "East Asia" shall, except when noted otherwise, include Singapore in the discussion. In general, however, Japan is excluded from this discussion.
2. According to a 1992 interview with Councilor Lu of Taiwan's Environmental Protection Office.
3. This much owes to detailed survey by Professor Hidenori Inoue of Meisei University. Works by Naoyuki Sakumoto that make an appeal for the necessity of setting up a legal framework for environmental cooperation in East Asia are: "Let Us Support Environmental Cooperation in East Asia" (*Nikkei Sangyo Shimbun*, April 23, 1992); "Expansion of Environmental Cooperation in All Asia Region" (The Third Pacific Environment Conference, Feb. 13-15, 1992, Japan Environment Association); and "The Earth Summit and Environmental Cooperation in Asia" (*Ajiken News*, Sept. 1992, Institute of Developing Economies).
4. Naoyuki Sakumoto, "Introduction to Environmental Law in Asia," in *Legal Systems for Environmental Cooperation: Current State and Challenges*, ed. Institute of Developing Economies, Economic Cooperation Research Department, 1992, pp. 77 ff.



5. Naoyuki Sakumoto, "Circumstances Surrounding Passage of South Korea's Basic Environment Law," in *Asia Trends*, Institute of Developing Economies, Spring 1991.
6. Naoyuki Sakumoto, "China's Environmental Policy and Law," in *Development and Law in China*, ed. Seikichi Haryu and Nobuyuki Yasuda, Institute of Developing Economies, 1992.
7. *The Sunday Times*, Aug. 16, 1992.
8. The joint overseas research conducted by the Institute of Developing Economies with the Institute of Law of China's Social Sciences Academy and the Law Institute of Taiwan's Fujen University was published respectively in March 1992 by the Institute of Developing Economies as the main text with commentary: Comprehensive Report of Research on Environmental Problems in Developing Countries—Joint Overseas Research (China): Environmental Consciousness and Redress for Pollution-Induced Damage in China and Comprehensive Report of Research on Environmental Problems in Developing Countries—Joint Overseas Research (Taiwan): Environmental Consciousness and Pollution Dispute Settlements in Taiwan. Similar research projects were undertaken by the IDE in 1993 with Chulalongkorn University and University of Indonesia and the respective reports were published in the same series of IDE in 1993.