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“Legal and Political History of the 1997 ASEAN Memorandum of Understanding on Sea Turtle Conservation and Protection”

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Concluded before the ASEAN Charter, the 1997 Memorandum of Understanding [MOU] on ASEAN Sea Turtle Conservation and Protection [ASEAN MOU on Sea Turtle] is one of the first ASEAN instruments aimed at protecting the marine environment in Southeast Asia. ASEAN member states, except Cambodia who joined ASEAN in 1999, signed this MOU in 1997 to promote the protection, conservation, replenishing and recovery of sea turtles and their habitats.¹ The MOU entered into force on the date of its signature. Under its so-called ‘proposed mechanism,’ it recognised that all matters or issues concerning sea turtles conservation and protection shall be subjected to national laws and regulations, but when necessary, parties would harmonise their existing national laws and regulations, and enact new laws.² It also established a Technical Expert Working Group [TEWG] consisting of designated experts from each contracting party.³ It entrusted Malaysia, whom it considered experienced and a role model on sea turtle conservation, to coordinate and implement the proposed mechanism.⁴ In this appointment, Malaysia was to report directly to the ASEAN Sectoral Working Group on Fisheries [ASWGF].⁵ The TEWG held a critical role to prepare a programme and work plan on sea turtle conservation and protection for the endorsement of the ASWGF and approval of the Senior Officials Meeting of the ASEAN Ministers on Agriculture and Forestry [SOM-AMAF].⁶ Contracting States were also required to seek close cooperation and collaboration with the Southeast Asia Fisheries Development Centre [SEAFDEC] as the MOU’s recognised competent technical regional organisation on marine issues in ASEAN.⁷

This paper narrates a brief legal and political history behind the regional efforts in advancing the development of the ASEAN MOU on Sea Turtle. It discusses the protracted adoption process of the MOU and the cross-sectoral dynamics between the ASEAN Ministerial Meeting on Agriculture and Forestry [AMAF] and the ASEAN Working Group on Nature

¹ ‘Memorandum of Understanding on ASEAN Sea Turtle Conservation and Protection’ (signed and entered into force 12 Sept 1997), Art. 2.

² *Ibid.*, Art. 4.

³ *Ibid.*, Art. 5(3).

⁴ *Ibid.*, Art. 5(1) and (2).

⁵ *Ibid.*, Art. 5(2).

⁶ *Ibid.*, Art. 5(1).

⁷ *Ibid.*, Art. 5(4).

Conservation [AWGNC] surrounding the adoption of the MOU. It aims to do so by primarily investigating ASEAN documents, especially publicly available meeting reports and statements. At the end, it also reviews some developments following the adoption of the MOU.

1990-1995: Early Regional Efforts to Protect Sea Turtles in Southeast Asia

Although the ASEAN MOU on Sea Turtle was signed in 1997, but the issue of sea turtles was first tabled in ASEAN in 1990 under the AWGNC, not AMAF where the MOU was conceived. It started with the Philippines' proposition to engineer a 'Regional Symposium on Marine Turtle' at the second meeting of the AWGNC (now ASEAN Working Group on Nature Conservation and Biodiversity/AWGNCB) in 1991.⁸ As a result, the first ASEAN Symposium on Marine Turtle was convened on 6–7 December 1993 in Manila. Part of the issues ventilated during the Symposium was the conceptualisation of the 'ASEAN Regional Marine Turtle Conservation Programme' [ASEAN Marine Turtle Programme]⁹ and the establishment of some ASEAN natural heritage conservation areas.¹⁰ The AWGNC endorsed the programme a year later for submission to the ASEAN Senior Officials on the Environment [ASOEN].¹¹ One of the undertakings called for was the setting up of an 'ASEAN Marine Turtle Specialist Network.'¹² Around the same time, the Philippines became the first ASEAN member state to ratify the Convention on the Conservation of Migratory Species of Wild Animals [CMS], an international treaty devoted to protect migratory species throughout their ranges, including sea turtles.¹³

In 1995, the AWGNC approved the creation of an ASEAN Marine Turtle Specialist Network as it considered the network as a prerequisite towards the implementation of the ASEAN Marine Turtle Program.¹⁴ The Philippines then presented a Draft "Agreement."¹⁵

⁸ Evangeline MICLAT and Enrique NUNEZ, "The Philippines-Sabah Turtle Islands Heritage Protected Area (TIHPA)" in Peter MACKLEWORTH, ed., *Marine Transboundary Conservation and Protected Areas*, (New York: Routledge, 2016), at 140.

⁹ 'Report of the 1st ASEAN Symposium Workshop on Marine Turtle Conservation' (Manila, 6-10 Dec 1993) <http://www.oneocean.org/ambassadors/track_a_turtle/tihpa/symposium.html> accessed 3 May 2019.

¹⁰ The Proposed ASEAN Regional Marine Turtle Conservation Programme in Annex Y of the 'Report of the Fourth Meeting of the ASEAN Working Group on Nature Conservation (AWGNC)' (Melaka, 12-13 April 1994), p. 7. The initial recommendation hoped to declare not only the Turtle Islands, but also Sipadan Island, Berau Islands, and Pantai Utara Kepala Burung Irian Jaya in Indonesia as ASEAN natural heritage conservation area.

¹¹ ASEAN, 'Report of the Fourth Meeting of the ASEAN Working Group on Nature Conservation' (Melaka, Malaysia, 12-13 April 1994).

¹² *Ibid.*

¹³ Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 Nov 1983) 1651 U.N.T.S. 333 [CMS],

¹⁴ ASEAN, 'Report of the Fifth Meeting of the ASEAN Working Group on Nature Conservation' (Manila, Philippines, 3-4 May 1995).

¹⁵ *Ibid.*

However, the AWGNC later adopted the Philippines' suggestion not to use the word "Agreement" due to its legal implications.¹⁶ It is also worth noting that the Draft "Agreement" also encouraged ASEAN countries to accede to international conventions such as CMS and Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES].¹⁷

1996-1998: Heightened Efforts Post-Embargo on Shrimps

Practically, from 1990 to 1995, the discussion on marine turtle only occurred in the AWGNC; it was likely not discussed in other working groups. Things began to change direction in 1996 when AMAF noted a recently imposed embargo by the United States on shrimps caught by trawlers not using a Turtle Excluder Device.¹⁸ This embargo affected two ASEAN member states: Malaysia and Thailand. It is unclear whether AWGNC was aware at the time that AMAF started to eye the same subject because the AWGNC went ahead and approved the Philippines-led ASEAN Marine Turtle Programme in its 1996 meeting.¹⁹ In the meantime, following the recommendation of the first ASEAN Symposium Workshop on Marine Turtle Conservation in 1993, Philippines and Malaysia signed a Memorandum of Agreement establishing the Turtle Islands Heritage Protected Area [TIHPA] in 1996 to protect the islands straddling the two countries in the Sulu Sea as a sanctuary for green turtles and hawksbill turtles.²⁰

While AWGNC worked on promoting marine turtle conservation, AMAF, at least in the beginning, appeared to do otherwise. In its statement released to the public, AMAF asserted that they would support Thailand's bid on the principle that "environmental issues should not be used to restrict trade."²¹ Later that year, Malaysia and Thailand, together with India and Pakistan, filed a joint complaint against the United States to the World Trade Organization [WTO].²²

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ ASEAN, 'Joint Press Statement the 18th Meeting of the ASEAN Ministers on Agriculture and Forestry (AMAF)' (Manila, 26-27 August 1996) <https://asean.org/?static_post=joint-press-statement-the-18th-meeting-of-the-asean-ministers-on-agriculture-and-forestry-amaf-manila-26-27-august-1996> accessed 3 May 2019 [hereinafter referred as "18th AMAF Joint Press Statement"].

¹⁹ ASEAN, 'Report of the Sixth Meeting of the ASEAN Working Group on Nature Conservation' (Cisarua, Indonesia, 20-22 May 1996).

²⁰ Memorandum of Agreement between the Government of the Republic of the Philippines and the Government of Malaysia on the Establishment of the Turtle Island Heritage Protected Area (signed on 31 May 1996 in Manila) [hereinafter referred to as 'TIHPA MOU'], Art. 2.

²¹ '18th AMAF Joint Press Statement, *Op. Cit.*

²² WTO, 'United States – Import Prohibition of Certain Shrimp and Shrimp Products' (Report of the Panel, WT/DS58/R, 15 May 1998), <https://www.wto.org/english/tratop_e/dispu_e/58r00.pdf> accessed 3 May 2019.

Meanwhile, less than a year after AMAF took an interest in sea turtles, Thailand tabled the idea of negotiating an agreement on sea turtles during the 1997 ASWGF meeting.²³ The meeting then authorised Thailand to draft an MOU.²⁴ Not long after that, a Special SOM-AMAF approved the Draft MOU and agreed to finalise it during the 19th AMAF in Bangkok, Thailand.²⁵ It should be noted that a special meeting is generally held to address pressing issues with some sense of urgency. The fact that there was a Special SOM-AMAF following the shrimp embargo signalled strong stressors that were able to compel member states to cooperate.

Only at this stage did the ASEAN Secretariat inform the AWGNC that “there are other ASEAN bodies addressing the issues [of] marine turtle conservation such as the Senior Officials on Agriculture and Forestry which have proposed that [ASEAN countries] sign the MOU on ASEAN Sea Turtle.”²⁶ Despite this information, the 1997 meeting of the AWGNC—which was also held in Bangkok, Thailand—endorsed the merger of the ASEAN Marine Turtle Programme and the Workshop on the Creation of the ASEAN Marine Turtle Specialist Network as one project, based on the appraisal of the ASEAN Cooperation Unit of the ASEAN Secretariat.²⁷ It should also be noted that the Thai Ministry of Agriculture and Cooperatives made its first appearance at the AWGNC meeting that year. They also made another appearance at the signing of the ASEAN MOU on Sea Turtle, which was held under the auspices of AMAF.²⁸

In a Joint Press Statement, AMAF asserted that the ASEAN MOU on Sea Turtle formed a part of ASEAN’s efforts to show the world its efforts to protect and conserve sea turtle *vis-à-vis* its endeavour to expand the region’s shrimp export to the global market.²⁹ Shortly after that, they organised a Workshop on ASEAN Sea Turtle Conservation and Protection Programme in Jakarta, Indonesia [Jakarta Workshop], which was chaired by Malaysia, the designated Coordinator of the MOU.³⁰ The Jakarta Workshop also marked the first meeting of

²³ *Ibid.*, at 13, para. 42.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ ASEAN, ‘Report of the Seventh Meeting of the ASEAN Working Group on Nature Conservation’ (Bangkok, Thailand, 19-22 June 1997).

²⁷ *Ibid.* Initially, the 7th ASOEN meeting in 1996 endorsed the two programmes as separate proposals.

²⁸ ASEAN, ‘Joint Press Statement the 19th Meeting of the ASEAN Ministers on Agriculture and Forestry (AMAF)’ (Bangkok, Thailand, 12 Sept 1997) <https://asean.org/?static_post=joint-press-statement-the-19th-meeting-of-the-asean-ministers-on-agriculture-and-forestry-amaf-bangkok-thailand-12-september-1997> accessed 3 May 2019.

²⁹ *Ibid.*

³⁰ ‘ASEAN, Report of the Workshop on ASEAN Sea Turtle Conservation and Protection Programme’ (Jakarta, 4-5 Dec 1997) in Annex J of the ‘Report of the Eighth Meeting of the ASEAN Working Group on Nature Conservation (AWGNC)’ (Singapore, 1-3 July 1998).

the TEWG established under the ASEAN MOU on Sea Turtle.³¹ For the first time, they finally noted the existing ASEAN marine turtle programme by the AWGNC, which was, at that time, still being considered by the ASEAN Cooperation Unit of the ASEAN Secretariat.³² They were also aware of the ASEAN Marine Turtle Specialist Network proposed under the AWGNC and agreed to recommend to the SOM-AMAF and ASOEN that the national delegations to the Jakarta Workshop be designated as the members of the TEWG.³³ For this instance, Malaysia prepared a Draft Programme and would finalise it for consideration by both SOM-AMAF and ASOEN.³⁴

At the 1998 AWGNC meeting, the Philippines lodged an information paper addressing the overlapping works on sea turtle between the two pillars. As the lead country of the initial ASEAN Marine Turtle Programme, they raised concerns on the AMAF's ASEAN MOU on Sea Turtle and the follow-up Jakarta Workshop. They deemed that the MOU was signed "without due consideration" on the ASEAN Marine Turtle Programme under the auspices of the AWGNC.³⁵ They further contended that the programme presented in Jakarta was "an edited version of the Philippine proposal for ASEAN Marine Turtle Programme."³⁶ They, thus, proposed that the implementation of the ASEAN Marine Turtle Programme should be vested upon the AWGNC where it originated.³⁷

Moreover, the Philippines considered that the Jakarta Workshop's participants were not a Turtle Specialist Group in its truest sense; they were thus preparing a different list.³⁸ They also suggested that in order to avoid other duplication of functions, all efforts by different bodies should take into account existing programmes and agreements.³⁹ This raised concerns over how this overlap could have happened in the first place, especially when the other ASEAN body had been working on the issue for at least six years, and the Functional Cooperation Bureau of the ASEAN Secretariat were present in all of the meetings. It might have been an issue of institutional memory. The national delegates who attended the AWGNC meetings might not have come from the same ministry or agency as those attending the AMAF meetings.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ 'ASEAN Marine Turtle Conservation Programme and SOM-AMAF Regional Workshop for Marine Turtle Conservation (Information Paper)' in Annex I of the 'Report of the Eighth Meeting of the ASEAN Working Group on Nature Conservation (AWGNC)' (Singapore, 1-3 July 1998).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

Different focal points could attend different meetings but may not encounter this issue so long as their internal mechanisms allow for cross-bodies communication and coordination.

Taking into account the Philippines' concerns, the AWGNC agreed to follow-up closely on the development of the AMAF's ASEAN Marine Turtle Conservation Work Plan.⁴⁰ It further requested ASOEN to collaborate with the SOM-AMAF for the marine turtle conservation programmes.⁴¹ There is limited information as to the extent of this collaboration, but shortly after that, the AMAF endorsed the Programme and Work Plan for ASEAN Sea Turtle Conservation and Protection,⁴² while the WTO Appellate Body ruled in favour of India, Malaysia, Pakistan and the Philippines.⁴³ A critical piece of this case is likely to be the report of the 1999 AWGNC meeting as it might contain information on the institutional responses towards the Philippines' concerns as well as the form of cooperative measures between ASOEN and SOM-AMAF. However, there seems to be no publicly available report of the meeting. One thing for sure is that after the friction between the two pillars, sea turtles were no longer on the agenda of the AWGNCB. Thailand also did not send any representative to the AWGNCB meetings in 2001 and 2002.⁴⁴

1998-2013: Follow-Up Activities under the ASEAN-SEAFDEC Partnership

On first observation, it may appear that the ASEAN MOU on Sea Turtle has died down as it was barely mentioned in the subsequent ASEAN instruments. Although AMAF has endorsed a Programme and Work Plan for ASEAN Sea Turtle Conservation and Protection,⁴⁵ resulted from the first TEWG meeting, no public record can be found. Consequently, this can raise doubts as to whether they were even put in place. They could either be not publicly available or do not generate a long-term plan that would be carried forward into the post-ASEAN Charter scene.

⁴⁰ ASEAN, 'Report of the Eighth Meeting of the ASEAN Working Group on Nature Conservation (AWGNC)' (Singapore, 1-3 July 1998), para. 10.2.2.

⁴¹ *Ibid.*

⁴² ASEAN, 'The 20th Meeting of the ASEAN Ministers on Agriculture and Forestry (AMAF)' (Hanoi, Vietnam, 17-18 Sept 1998).

⁴³ WTO, 'United States – Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body' (WT/DS58/AB/R, 12 Oct 1998).

⁴⁴ See 'Report of the Eleventh Meeting of the ASEAN Working Group on Nature Conservation and Biodiversity (AWGNCB)' (Melaka, Malaysia, 17-18 July 2001), Annex 1; 'Report of the Twelfth Meeting of the ASEAN Working Group on Nature Conservation and Biodiversity (AWGNCB)' (Yangon, Myanmar, 17-18 June 2002), Annex 1.

⁴⁵ ASEAN, 'The 20th Meeting of the ASEAN Ministers on Agriculture and Forestry (AMAF)' (Hanoi, Vietnam, 17-18 Sept 1998) <https://asean.org/?static_post=the-20th-meeting-of-the-asean-ministers-on-agriculture-and-forestry-amaf-ha-noi-viet-nam-17-18-september-1998> accessed 4 Dec 2019.

As it turned out, the ASEAN MOU on Sea Turtle may have actually been implemented through activities conducted under the aegis of a long-term SEAFDEC project.⁴⁶ In fact, sea turtle conservation was one of the first topics approved under the ASEAN-SEAFDEC Strategic Partnership [ASSP].⁴⁷ Between 1998 and 2014, ASEAN and SEAFDEC collaborated in three series of research programmes relating to the conservation and management of sea turtles in Southeast Asia. The first two programmes were on “Conservation and Management of Sea Turtles in Southeast Asia,” which ran between 1998 and 2004, and “Research for Stock Enhancement of Sea Turtles,” which ran from 2005 to 2008.⁴⁸ At the end of these programmes, ASEAN member states asserted that they remain committed to implement the ASEAN MOU on Sea Turtle.⁴⁹ They even suggested to raising the issue of poaching of sea turtles at the ASWGF_i for consideration to bring the matter to AMAF and AMAF Plus Three in order to seek support or agreement by ASEAN high-level authorities.⁵⁰ They also asked SEAFDEC to formulate a regional programme to deal with the issue.⁵¹

The final programme, “Promotion of Sustainable Aquaculture and Resource Enhancement in Southeast Asia,” which ran from 2009 to 2012, included a project on “Research and Management of Sea Turtles in Foraging Habitats in the South Asian Waters.” This has led to the adoption of the Regional Plan of Action of Sea Turtle Foraging Habitats in South East Asian Waters [RPOA Sea Turtle] at the Regional Meeting on Conservation and Management of Sea Turtle Foraging Habitats in Southeast Asian Waters in 2013 [2013 Regional Meeting].⁵² The RPOA Sea Turtle appears to be in line with the member states’ commitment to implement the ASEAN MOU on Sea Turtle. The Fisheries Consultative Group [FCG], which serves as a mechanism for ASEAN to assess and endorse SEAFDEC’s outputs

⁴⁶ IOSEA, ‘Report of the Sixth Meeting of IOSEA Signatory States’ (Bangkok, Thailand, 23-27 Jan 2012) <https://www.cms.int/iosea-turtles/sites/default/files/document/SS6_IOSEA_REPORT_complete.pdf> accessed 18 June 2019, p. 88, para. 3.

⁴⁷ At the first Fisheries Consultative Group [FCG] meeting in 1999, one of the projects approved was on “Conservation and Management of Sea Turtles in Southeast Asian Countries,” which was then endorsed by the SEAFDEC Council, ASWGF_i and the SOM-AMAF (See “ASEAN Sea Turtle Conservation and Management Programme and Collaboration with SEAFDEC,” (SEAFDEC-ASEAN Regional Workshop on Sea Turtle Conservation and Management, 26-28 July 1999), in the *ASEAN Secretariat Information Paper*, p. 193).

⁴⁸ Bundit CHOKESANGUAN, “Mitigating Interactions and Reducing Mortality of Sea Turtles due to Fishing: SEAFDEC Initiatives,” *Fish for the People Vol. 6(2)*, (2008), p. 12-13.

⁴⁹ Report of the 11th Meeting of Fisheries Consultative Group of the ASEAN-SEAFDEC Strategic Partnership (FCG/ASSP) (Singapore, 6-7 Nov 2008), p. iv, para. 19.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, para. 20.

⁵² SEAFDEC, ‘Regional Plan of Action of Sea Turtle Foraging Habitats in South East Asian Waters’ (Ubon Ratchathani, Thailand, 4-5 Dec 2014) <<http://www.seafdec.org/documents/2014/11/wp065a.pdf>> accessed 14 Feb 2021.

that they consider falling within the ASEAN mandate or scope of work,⁵³ has endorsed it in the following year.⁵⁴ Lao and Singapore appear to be absent in the 2013 Regional Meeting,⁵⁵ but they were both present at the 2014 FCG/ASSP Meeting that endorsed the RPOA Sea Turtle as a ‘Regional Plan of Action.’⁵⁶

Endorsements from higher bodies of ASEAN and SEAFDEC appear to be missing. The FCG/ASSP mechanism provides an entry point for any SEAFDEC-origin output/activity to be adopted as a collaborative ASEAN-SEAFDEC output/activity. In practice, technical documents do not require endorsements from higher bodies of ASEAN and SEAFDEC, which could mean an endorsement from the FCG/ASSP is sufficient to warrant an instrument as an ASEAN-SEAFDEC instrument. However, which instrument can be considered as technical documents seems to fall within a grey area.

In this case, the FCG/ASSP made two contrasting statements relating to whether the RPOA Sea Turtle requires further endorsements from ASEAN and SEAFDEC. Firstly, they stated that the RPOA Sea Turtle does not need an endorsement from the higher bodies of ASEAN and SEAFDEC due to its technical nature.⁵⁷ Secondly, on the same report, they endorsed the RPOA Sea Turtle ‘for submission to the higher authorities of SEAFDEC and ASEAN.’⁵⁸ It might be a drafting error because at the same occasion, the FCG/ASSP was also considering the ‘Guidelines for Conducting Scientific Survey for Sea Turtles Foraging Habitats,’ which they viewed as a technical document. This causes uncertainty and raises questions as to whether the RPOA Sea Turtle may be regarded as an ASEAN-SEAFDEC instrument pending endorsements from higher bodies of ASEAN and SEAFDEC.

⁵³ ASEAN-SEAFDEC, ‘The 18th Meeting of Fisheries Consultative Group of the ASEAN-SEAFDEC Strategic Partnership (FCG/ASSP)’ (Manila, Philippines, 26-27 Nov 2015), <<http://www.seafdec.org/documents/2015/11/18fcgref01.pdf>> accessed 17 Mar 2021.

⁵⁴ SEAFDEC, ‘Regional Plan of Action of Sea Turtle Foraging Habitats in South East Asian Waters’ (Ubon Ratchathani, Thailand, 4-5 Dec 2014) <<http://www.seafdec.org/documents/2014/11/wp065a.pdf>>.

⁵⁵ SEAFDEC, ‘Report of the Seventeenth Meeting of Fisheries Consultative Group of the ASEAN-SEAFDEC Strategic Partnership (FCG/ASSP)’ (Ubon Ratchathani, Thailand, 4-5 Dec 2014) <http://repository.seafdec.org/bitstream/handle/20.500.12066/136/17FCG_Report.pdf?sequence=1&isAllowed=y> accessed 20 June 2019, p. 179.

⁵⁶ *Ibid.*, p. 12-13.

⁵⁷ *Ibid.*, p. iv, para. 19.

⁵⁸ *Ibid.*, p. 9.