

# ASEAN's soft law on marine environmental pollution

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Received 10 June 2023; revised 4 July 2023; accepted 22 September 2023

## **Abstract:**

The sea-bound development of humankind is the most pronounced and significant feature of the 21st century, which is expected to be the ocean's century. The United Nations' Sustainable Development Goals (SDGs) recognise the conservation and sustainable use of seas and oceans as an indicator of a country's development level. Humankind faces grave challenges associated with marine environmental pollution due to the accelerated pace of maritime resource extraction. Owing to the uniformity and the transboundary nature of the marine environment, preventing and reducing marine environmental pollution is not only a national concern but also a regional and global priority. As a region with diverse ecosystems and abundant marine resources, The Association of Southeast Asian Nations (ASEAN) has long viewed marine environmental preservation as a cornerstone of its environmental protection strategy. This paper posits the effectiveness of ASEAN's "soft law" and discusses member states' cooperation through the establishment of regional documents and mechanisms to address environmental pollution. On that foundation, the study underscores the role of ASEAN's "soft law" and projects its trajectory concerning the regional legal framework for protecting the marine environment.

**Keywords:** ASEAN, marine environment, marine environmental pollution, regional cooperation, soft law.

**Classification number:** 6

## **1. Introduction**

In December 2017, the United Nations General Assembly (UNGA) approved the Decade of Ocean Science for Sustainable Development (2021-2030). There are two Ocean Decade Outcomes describing "The Ocean We Want" that member states aspire to achieve: (i) A clean ocean where sources of pollution are identified and reduced or removed. (ii) A healthy and resilient ocean where marine ecosystems are understood, protected, restored, and managed.

Marine pollution is mentioned as the foremost challenge to be addressed in the Ocean Decade strategy. The degradation of marine ecosystems, stemming from pollutants and contaminants, is accelerating due to unsustainable activities on land and at sea [1]. Nowadays, safeguarding the marine environment has become a prevalent human concern. In an increasingly intricate world where many relationships extend beyond national

boundaries, states have adopted a series of soft law instruments to manage regional marine environmental issues [2].

Southeast Asia boasts a strategic location and an extensive coastline, courtesy of its borders with the Pacific and Indian Oceans. As a result, environmental pollution prevention, ecosystem preservation, and resource safeguarding are perpetual matters of concern. The coastal regions of Southeast Asia account for approximately 34% and between one-quarter to one-third of the world's coral reefs and mangrove forests, respectively [3]. The biodiversity centre - the triangle connecting the Malay Peninsula, the Philippines, and New Guinea - is the most significant marine diversity area. It is home to around 500 types of corals (approximately 75% of coral species known to humans) and 3,000 types of coral reef fish (nearly 40% of fish species known to humans) [4]. However, over 80% of the coral reefs are on the brink of extinction due to various sources of marine pollution [5].

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The organisation of ASEAN that utilises “soft law” reflects an aspect of the law governing the protection of the marine environment. Although no centralised regional legally binding framework exists, ASEAN nations persist in collaborating and striving to promote “soft law” that would address the region’s issues with maritime environmental contamination.

Research purpose: a common interest among ASEAN member states is rooted in the fact that the region is blessed with abundant and diverse natural resources. Consequently, various challenges have emerged surrounding environmental conservation and sustainable development. This article delves into the use of soft law in addressing marine pollution in ASEAN. It charts the evolution and role of soft law in regulating environmental pollution, especially in the absence of specialised agencies and legal frameworks. This assessment examines the effectiveness and forecasts the trajectory of ASEAN soft law in tackling the challenges posed by marine pollution.

## 2. Results

### 2.1. Overview

While the International Convention for the Prevention of Pollution of the Sea by Oil symbolised the international community’s inaugural effort to grapple with this issue, it did not provide a clear definition of “marine pollution.” As per the Joint Group of Experts on Scientific Aspects of Marine Pollution - GESAMP, marine pollution is defined as the “introduction by man of substances into the marine environment resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of the quality of use of seawater and reduction of amenities” [6]. This definition was subsequently incorporated into Article 1(4) of the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982). Notably, Article 1(4) includes preventive measures as it oversees activities that could potentially lead to pollution.

The UNCLOS 1982 categorises marine pollution based on its varied sources: pollution from land-based sources, pollution from seabed activities subject to national jurisdiction, pollution from

activities in the Area, pollution from dumping, pollution from vessels, and pollution from or through the atmosphere. Land-based pollution and air pollution are estimated to account for roughly 80 percent of marine pollution [7]. The challenge is that land-based pollution remains a relatively recent phenomenon in the law of the sea, evidenced by the constraints of the global legal framework governing this issue. As of now, the UNCLOS 1982 is the sole treaty stipulating obligations to combat global-scale land-based marine pollution.

According to The United Nations Environment Programme (UNEP), the world produces approximately 400 million tonnes of plastic waste every day. It’s projected that between 75 to 199 million tonnes of plastic currently reside in our oceans. A 2008 study found more than 400 “dead zones” - areas where aquatic life can no longer thrive - exist worldwide. This dire situation necessitates an encompassing global legal framework, predominantly composed, at present, of soft laws [8].

### 2.2. Soft law

There has not been an official definition of “soft law”, and it is ambiguous to determine whether an international agreement, which is not a treaty, constitutes soft law. M.N. Shaw (2017) [9] identifies soft law as particular non-binding instruments or non-binding provisions in treaties. This definition is broad as it only distinguishes soft law from treaties and assumes that, in some circumstances, soft law can be incorporated into treaties as provisions that create no obligation. Shaw emphasises the importance of soft law in the development trend of international law and countries’ political will. However, treaties also contribute to the development tendency of the law and reflect nations’ will collectively. Shaw also suggests that “soft law” can ultimately be converted into legally binding rules via a transformation into a binding treaty or acceptance as a customary rule.

A.T. Guzman, et al. (2010) [7] argued that soft law is simply not law. They highlight the quasi-legal characteristic of soft law, which is not illegal but is obligatory to a country only if they accept it voluntarily. In other words, soft laws are hortatory rather than legally binding [10].

The term “soft law” is both vague and contradictory. While the law is traditionally seen as “hard” due to its obligatory nature, soft law is not legally binding, making it challenging to determine whether it still qualifies as “law”. Furthermore, not every non-binding agreement is categorised as soft law. It is prudent to define soft law in broad terms, describing it as international agreements made by two or more countries or an international organisation that are hortatory and non-binding.

Prime examples of soft law include resolutions, guidelines, recommendations, or codes issued by international organisations. Some areas of international law generate more soft law than others; notably, international economics law and international environmental law stand out [9].

Soft law is gaining increasing traction in the international community due to its flexible features, which will be discussed in subsequent sections. The primary rationale is that, in many scenarios, it may be beneficial for states to enter agreements that are not legally binding and subjected to formal legal implementation. However, these agreements still convey a political intention to act in a specified manner and record states’ intended courses of action on mutual concerns. Such agreements might be more flexible, simpler to establish, and easier to adhere to [9]. In practice, this approach has been acknowledged as an international custom [10]. Additionally, the evolution of soft law mechanisms also encourages the direct and influential participation of non-state entities such as non-governmental organisations, a presence less common in treaty negotiations.

### **2.3. Soft law on marine pollution: features and roles**

Environmental soft law has progressively become more popular as environmental issues have emerged as alarming global problems. The growth of soft law norms regarding environmental protection commenced immediately after the Stockholm Conference, which led to the foundation of UNEP. This stems from the existence and development of a network of permanent international and regional institutions as well as the swift progression of international practice. Soft laws on marine pollution possess several noteworthy features:

As previously mentioned, soft law on marine pollution is hortatory, meaning it creates and outlines goals to be achieved rather than actual duties; it suggests programmes rather than prescriptions, and guidelines rather than strict obligations [11]. As a result, soft law is often found in “soft” instruments, namely recommendations or resolutions of international organisations, declarations or acts concluded after international conferences, and even proposals drafted by groups of highly qualified experts. Notably, there are a number of treaty provisions whose wording is so “soft” that they seem impossible to regard as obligatory for member states [12].

Furthermore, the paramount feature of soft law on marine pollution is its voluntary nature, with no sanctions in the event of non-compliance. This contrasts with treaties, which, while also voluntary by nature, require states to adhere to specific procedures and face potential sanctions. Nevertheless, states are encouraged to respect soft law as soft norms can help define the standards of “good behaviour” expected of a “well-governed government” [11]. In essence, it signifies a state’s responsibility in the realm of international cooperation, especially on pressing issues like marine pollution. Voluntarily following soft law elevates a state’s prestige within the global community.

Examining the roles of soft law in addressing marine pollution, environmental soft law evolves under the guidance of international environmental regimes, and in turn, it enhances the effectiveness of these organisations in mitigating global-scale marine pollution. Agenda 21, presented by the United Nations (UN) in 1992, called upon UNEP to convene intergovernmental meetings on marine pollution. This call was heeded with the adoption of the 1995 Washington Declaration and the 1995 Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA). Building upon the 1985 Montreal Guideline for the Protection of the Marine Environment against Pollution from Land-based Sources, UNEP has offered guidelines for states to draft national action programmes that protect seas and coasts from land-sourced activities. In the Agenda 2030 for Sustainable Development, the UN integrated oceanic sustainable development as the 14th goal. As a result, numerous countries have made international commitments to combat marine

pollution [13]. According to a 2016 survey, based on the network of national action plans and the integration of GPA's goals into national strategies, 107 countries have established policies to address this urgent concern, and 94% of countries have prioritised and highlighted marine pollution prevention in their national zoning plans. The Global Environment Facility (GEF) has financed over 750 projects with a total of 2,974 million USD, aiming to heighten countries' awareness of international oceanic cooperation and offer a holistic approach for government agencies in tackling marine pollution.

### 3. ASEAN' soft law on marine environmental pollution

#### 3.1. Features of ASEAN's soft law on marine pollution

ASEAN soft law on marine environmental protection is a type of international agreement that is not legally binding. It is crafted by countries or regional organisations that voluntarily agree to implement its provisions. The primary characteristics of ASEAN soft law on marine environmental protection are as follows:

*Formation:* ASEAN soft law is forged through a process of negotiation and agreement between the parties involved. It is not subject to the same legal requirements as a binding international treaty, such as ratification by national governments.

*Essence:* ASEAN soft law operates on the principle of voluntariness. Countries and organisations that consent to enact its provisions are not legally compelled to do so. However, they might confront political or economic pressure to adhere to the agreement.

*Subjects:* The entities of ASEAN soft law on marine environmental protection are countries or regional organisations. These can be bilateral or multilateral agreements. The parties to the agreement are not representing their governments but act as individuals or entities authorised to negotiate and execute the agreement.

*Content:* ASEAN soft law on marine environmental protection embodies commitments to shield the marine environment in the region. These pledges may encompass specific actions that countries or organisations agree upon, or they might be broader statements of intent.

*Form:* ASEAN soft law on marine environmental protection is commonly drafted in the format of a protocol, resolution, declaration, or agenda. It might also be encompassed in a more extensive document, such as a development strategy or environmental plan

Regarding the ratification procedure: International treaties must undergo a specific process at the national level for ratification. Conversely, many countries opt to affirm their membership in these treaties through domestic procedures. Soft law, however, is frequently endorsed via a more straightforward process. Occasionally, the sole requisite for adoption is an address by a national representative vowing to implement its content. Countries often favour the application of soft law agreements as they present a more flexible and less legally binding alternative to international treaties. Furthermore, soft law agreements can typically be endorsed more swiftly and effortlessly, proving advantageous for nations desiring to showcase their allegiance to international cooperation. The adoption of soft law agreements also aids countries in enhancing their image as responsible and esteemed members of the international community. By showcasing their eagerness to collaborate on pivotal matters, countries can secure the trust and regard of other nations, potentially benefiting their economic and political standing.

#### 3.2. The formation of ASEAN's environmental protection programs

ASEAN is a diverse region with pronounced differences in geography, economy, and politics. Nevertheless, mutual interests and shared concerns have unified this disparate group. With its diverse ecosystems and rich natural resources, ASEAN consistently prioritises environmental protection, especially that of the marine environment. The bloc is inclined towards the sustainable use and management of resources to achieve enduring and stable objectives. To date, ASEAN has not had a specific agency dedicated to marine environmental pollution protection. In spite of these limitations, cooperation mechanisms for maritime environment protection in the region continue to flourish, as evidenced by the formulation and evolution of ASEAN soft law documents.

ASEAN has acknowledged the significance of environmental cooperation for sustainable

development and regional integration. Since 1977, ASEAN has actively championed environmental cooperation among its member states. This collaboration has broadened over the years, both in terms of the number of nations participating and the range of issues tackled. Presently, ASEAN's environmental cooperation is steered by the ASEAN Socio-Cultural Community (ASCC Blueprint) 2025, which envisages an ASEAN Community that is inclusive, sustainable, resilient, and dynamic.

In discussing the initiation of environmental protection collaboration within the region, one must reference the ASEAN Sub-Regional Environment Programme I (ASEP 1), conducted under the aegis of UNEP. As ASEAN soft law has evolved, regional documents on marine environmental protection have been crafted and issued, founded upon universally acknowledged principles present in international treaties. Notably among these is the UNCLOS 1982.

### 3.3. Current mechanisms and documents

In spite of the lack of binding agreements or protocols concerning marine environmental pollution in the Southeast Asia region, coastal states and regional organisations have set up various regional initiatives, agencies, and working groups that focus on specific marine environmental issues:

ASEAN has several initiatives concerning marine environmental protection. These include the ASEAN Agreement on the Conservation of Nature and Natural Resources, the ASEAN Agreement on the Management of Vessel-Source Pollution, and the ASEAN Regional Action Plan for Marine Debris.

UNEP manages multiple programmes and projects centred on marine environmental protection in the Eastern Sea (Bien Dong). Notable among these are the Regional Seas Programme, the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, and the Coral Reef Degradation in the Wider Caribbean and Eastern Sea project.

The China-ASEAN Environmental Cooperation Fund has backed several projects relating to marine environmental protection in the Eastern Sea. These initiatives encompass the creation of marine protected areas, the establishment of marine pollution monitoring networks, and training for marine environmental professionals.

These regional endeavours have been instrumental in increasing awareness of marine environmental challenges, developing and implementing policies and regulations, and enhancing capability for marine environmental management in the Southeast Asia region. Moreover, they have played a crucial role in cultivating cooperation and coordination among coastal states and regional organisations, both of which are vital for safeguarding the marine environment in this pivotal region.

*ASEAN Bodies:* Within ASEAN, several bodies and working groups participate in cooperation concerning the regulation of marine environmental pollution and protection. ASEAN comprises 10 member states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam) and is structured under three pillars, with bodies dedicated to marine environmental issues present within all three. The most significant of these is the ASEAN Working Group on the Coastal and Marine Environment (AWGCME). The AWGCME adheres to the Blueprint for the ASCC Blueprint 2025, which outlines commitments to ensure that ASEAN's coastal and marine environments are sustainably managed. This includes the protection of representative ecosystems, pristine areas, species, and ensuring that economic activities are sustainably overseen, whilst also fostering public awareness of these coastal and marine environments [14]. ASEAN also maintains substantial cooperative ties with other states in the region, such as through ASEAN-China and the East Asia Summit, as well as broader engagements like the ASEAN Regional Forum.

*The Partnerships in Environmental Management for the Seas of East Asia (PEMSEA):* PEMSEA is an intergovernmental organisation functioning in East Asia with the aim to nurture and sustain healthy and resilient oceans, coasts, communities, and economies across the region. It partners with eleven countries: Cambodia, P.R. China, Indonesia, Japan, DPR Korea, Laos, Philippines, Republic of Korea, Singapore, Timor-Leste, and Vietnam, three of which are not members of the Coordinating Body for the Seas of East Asia (COBSEA). Even though it excludes three Eastern Sea and Gulf of Thailand coastal states, these states have nonetheless adopted the non-binding SDS-SEA regional marine strategy. PEMSEA operates via four main mechanisms: the East

Asian Seas Congress, the EAS Partnership Council, and the PEMSEA Resource Facility. In its journey, PEMSEA has made notable strides in integrated coastal management (ICM) and has endorsed non-binding instruments, such as the Joint Statement on Partnership in Oil Spill Preparedness and Response in the Gulf of Thailand (GOT Programme) which was signed by Cambodia, Thailand, and Vietnam in 2006 [15]. The organisation receives sponsorship from the United Nations Development Programme (UNDP) and GEF.

Currently, PEMSEA is the most viable contender for regional institutional building. It has solidified commitments through documents like the Sustainable Development Strategy for the East Asian Seas (SDS-SEA), the Haikou Agreement, and the Declaration of Malina. Administrative entities such as the East Asian Seas Conference (EASC) and the East Asian Seas Partnership Council (EAS-PC) have been instituted to make decisions and supervise the progression. Even though a regional institution seems to be materialising, it remains nascent, and the commitments thus far are primarily geared towards integrated coastal zone management (ICZM).

Of late, PEMSEA has persistently pursued sustainable development in the region, broadening its remit to address other marine and coastal concerns like marine pollution and climate change. New tools and resources have been introduced to aid countries in the region with SDS-SEA implementation. Notably, PEMSEA has crafted a Coastal Management Toolkit and a Marine Litter Action Guide. Concurrently, the UNDP has endeavoured to amplify the execution of the Sustainable Development Strategy for the Seas of East Asia, invigorating multistate collaboration to restore marine fisheries and diminish the pollution affecting coasts and Large Marine Ecosystems [16].

COBSEA: In 1981, the Action Plan for the Development of the Marine Environment and Coastal Areas of the East Asian Seas Region (East Asian Seas Action Plan) was adopted [17]. This culminated in the formation of COBSEA in 1983. COBSEA is a non-binding, voluntary organisation that encourages compliance with existing environmental treaties [18]. It currently boasts 9 members, encompassing all Eastern Sea and Gulf of Thailand coastal states original members are Indonesia, Malaysia, Philippines, Singapore, and

Thailand. It was expanded in 1994 and now also includes Cambodia, P.R. China, The Republic of Korea, and Vietnam... COBSEA's current remit is to steer member countries towards the enhancement and conservation of the marine environment and coastal areas of the East Asian Seas [19]. The 2018-2022 Strategic Directions of COBSEA accentuate land-based and marine pollution, marine and coastal planning and management, and governance. COBSEA operates under the aegis of UNEP.

COBSEA, leading the UNEP Regional Seas Programme in the East Asian Seas, was founded on the principles of the East Asian Seas Action Plan. Not being a legally binding agreement, COBSEA has functioned within the realm of soft law for over three decades. Consequently, member states might encounter difficulties negotiating a fresh regional agreement on marine environment protection, with current political will not yet veering towards such a convention. Nevertheless, this does not preclude the potential for brokering and enacting specific regional conventions dedicated to marine environmental safeguarding. The continuous endeavours to synchronise regional practices could be viewed as a consensus-driven procedure that may usher in formal multilateral legislation in the future.

Assessing whether the Action Plan concerning environmental conservation and sustainable progression of the sea and coastal zones of East Asian seas translates into a genuine commitment is intricate. Upon delving into the document, it suggests that such pledges might hold more weight than the proposed actions of the East Sea Project or the confidence-building measures within the Eastern Sea Conference framework, yet possibly not as stringent as the stipulations of the Declaration on Conduct of the Parties in the Eastern Sea (DOC). However, numerous objectives delineated in the Action Plan remain too broad to guarantee robust enactment, such as the envisaged construction of a marine protected area system or amplifying environmental impact assessment proficiency in the region [17]. Similarly, two subsequent documents tackling pollution from land sources and marine debris, comparable to the East Sea Project, merely suggest upcoming endeavours without laying down obligatory protocols for the stakeholders.

It's pivotal to acknowledge that the Action Plan resides within a more expansive framework of regional seas programmes and accords. These initiatives aspire to carve out comprehensive strategies and structures for environmental protection while championing sustainable development in designated regions [20]. A subset of these programmes have ratified legally-binding conventions and protocols, manifesting the resolution of nations to collaboratively address shared environmental dilemmas. Nonetheless, the degree of binding commitment fluctuates amongst these various programmes and treaties.

*The ASEAN Strategic Plan on Environment (ASPEN): ASPEN 2016-2025* is a comprehensive guide for ASEAN cooperation on the environment from 2016 to 2025. The plan is comprised of seven agreed strategic priorities, each with its own corresponding action plan. These priorities encompass:

- Enhancing environmental governance: This priority aims to fortify ASEAN's environmental governance framework and institutions. Actions include formulating a regional environmental law, bolstering the capability of national environmental agencies, and advocating for public participation in environmental decision-making.

- Managing natural resources sustainably: This priority aspires to guarantee the sustainable utilisation of natural resources within ASEAN. It incorporates actions like crafting a regional biodiversity strategy, endorsing sustainable forestry practices, and curtailing pollution from agricultural pursuits.

Addressing climate change: This priority targets both mitigation of and adaptation to climate change within ASEAN. Activities comprise formulating a regional climate change strategy, championing renewable energy, and diminishing greenhouse gas emissions.

Protecting the environment from pollution: This priority seeks to curtail pollution within ASEAN. Actions include developing a regional pollution control strategy, advocating cleaner production techniques, and minimising waste production.

Promoting environmental education and awareness: This priority endeavours to heighten environmental issue awareness in ASEAN. Actions span from creating environmental education resources and orchestrating environmental

consciousness campaigns to endorsing environmental tourism.

Strengthening regional cooperation on environment: This priority is centred on enhancing cooperation on environmental matters amongst ASEAN Member States. Activities encompass formulating regional environmental accords, disseminating information and best practices, and synchronising regional environmental action plans.

The ASPEN derives its foundation from the ASEAN Community Vision 2025, which demarcates ASEAN's aspirations for the upcoming decade. The plan also considers the burgeoning needs of ASEAN Member States and the pledges made by ASEAN to address pertinent topics on the global agenda.

The ASPEN presents a crucial blueprint for steering ASEAN cooperation on environmental matters in the ensuing years. It delineates a lucid action framework and a trajectory for realising the ambitions set out in the ASEAN Community Vision 2025.

Beyond the seven strategic priorities, the ASPEN introduces several cross-cutting themes, such as gender, youth, and disaster risk reduction. These themes hold significance in ensuring the inclusivity of the ASPEN and in catering to the requirements of all ASEAN inhabitants.

The ASPEN stands as a dynamic document, subject to updates as necessary. It remains an invaluable asset for ASEAN Member States, civil society organisations, and other stakeholders committed to preserving the environment in ASEAN.

### **3.4. Assessment of the mechanisms**

The ASEAN's soft law mechanisms regulating marine environmental pollution and protection have achieved certain results in addressing marine environmental issues in Southeast Asia. ASEAN's soft law instruments have helped to raise awareness of the problem of marine environmental pollution and have led to some improvements in national legislation and enforcement.

Despite the successes, many limitations of cooperation in regulating marine environmental pollution in ASEAN remain.

*Firstly, lack of compliance:* Soft law regimes are often voluntary and non-binding, which can make it difficult to ensure compliance. Although ASEAN member states have had certain common

perceptions regarding marine environmental protection cooperation, the region has not yet reached legally binding commitments. The ASEAN seawater quality standards have been issued, but the solution is still to encourage member states to move towards this standard. The ASEAN mechanism to strengthen supervision against illegal discharge and discharge of sludge from oil tankers at sea was promulgated in 2009. However, in practice, implementation depends on the consciousness of ship owners because of the lack of mechanisms and capacity to monitor and check. The initiatives that are currently being appreciated are PEMSEA and CTI, which still lack specific regulatory mechanisms.

*Secondly, ASEAN lacks a dedicated environmental organization:* The environmental protection functions are spread across various ASEAN institutions. This decentralisation may hinder effective cooperation among ASEAN member states in environmental protection. While ASEAN's current system allows for the development of a neutral regional policy, it also means that environmental protection is only a "part-time" responsibility for all bodies involved. This duality prevents representatives from focusing entirely on ASEAN's environmental performance.

There is a willingness among ASEAN member states to cooperate on regulating marine environmental pollution and protection, at least in terms of creating an institutional framework. Although there is no legally binding instrument, states are establishing bodies to cooperate on marine environmental protection. Furthermore, Southeast Asia is a region with a diverse range of development levels and legal cultures. ASEAN is the primary cooperative mechanism, but not all Southeast Asian states are members. The most notable non-member is China, which borders the Eastern Sea and is thus also obligated under Article 123 UNCLOS 1982 to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment with other Eastern Sea littoral states (which are all ASEAN member states).

*Thirdly, limited capacity for monitoring and control:* Soft law regimes are often difficult to enforce, as there is no supranational authority with the power to do so. Hence, cooperation in regulating marine environmental pollution and protection in Southeast Asia faces many challenges due to the limited

capacity for monitoring and control of countries in the region.

Although hard law binding obligations are the norm in most regions, it's not a mandatory requirement for cooperation. ASEAN member states prefer soft law arrangements, which are also common in other regions where binding agreements exist, but cooperation is still lacking. In ASEAN, several bodies are engaged in marine environmental protection, indicating political will for cooperation. The lack of a binding agreement does not impede effective cooperation in the region. A deeper commitment to the coordination and implementation of international obligations can foster soft commitments and accountability among states. In the future, hard law can emerge without affecting existing soft law arrangements.

ASEAN's soft law regimes regulating marine environmental pollution can play a vital role in protecting the marine environment. They can provide a framework for cooperation and coordination among states, and they can raise awareness of marine environmental issues. Moreover, soft law regimes can be used to build trust and goodwill among states, which can facilitate the negotiation and implementation of hard law agreements in the future.

### **3.5. Assessments of ASEAN's soft law's developing trend**

Despite the advantages and relevance of regulating regional marine pollution, there remain limitations in the region's environmental management mechanism that the development of ASEAN soft law has, temporarily, failed to address:

(i) The consistently expanding environmental cooperation has not been pushed to its fullest potential, evidenced by the bloc's absence of an organisation dedicated solely to environmental issues. This leads to a significant "void" in the management and promotion of the implementation of regional commitments and agreements on marine environmental protection. The function of protecting the environment, including the marine environment, is "scattered" across different institutions of the Association or concurrently performed by member States. This decentralisation of functions reduces the effectiveness of ASEAN cooperation, given that such division does not allow for an undivided focus on ASEAN's environmental performance.



(ii) While the absence of a robust legal framework contributes to the growth and proliferation of ASEAN soft law, it simultaneously complicates the implementation of common environmental policies. Essentially, this weak legal foundation prevents environmental policies from evolving beyond their declaratory and recommendatory nature, creating challenges in the enforcement process. This represents the most significant challenge when applying soft law in regulating marine pollution in the region.

The authors argue that the usage of soft law in ASEAN to regulate marine environmental pollution has been growing for three main reasons:

*First*, the UN has become more intricate and specialised over recent decades. The UN now houses numerous standing agencies that offer guidance on economic, political, and social matters. These agencies have championed the use of soft law by creating forums for discourse and negotiation among nations.

*Second*, global society has diversified since the late 1950s. The number of less developed countries (LDCs) has risen, and these nations frequently have differing interests and priorities than their developed counterparts. Soft law offers a flexible structure for cooperation that can accommodate the interests of LDCs.

*Third*, the world's economy has become markedly interconnected in recent years. Such interdependence presents fresh challenges for environmental protection, including the cross-border migration of pollutants. Soft law can address these issues by establishing a cooperative framework among countries.

The authors conclude that soft law is an invaluable instrument for ASEAN in its efforts to regulate marine environmental pollution. Soft law's adaptability means it can be tailored to the region's unique requirements. Moreover, it provides a relatively expedient and straightforward method for achieving consensus among nations.

Beyond the three reasons outlined by the authors, several other factors have spurred the growth of soft law within ASEAN. For instance, soft law can address subjects not yet ready for binding international

agreements and foster collaboration between countries at different stages of development or with disparate legal systems.

#### 4. Conclusions

Protecting the marine environment is an urgent task. All countries recognise the significance of cooperation in preserving the marine environment. However, due to varied historical, political, economic, technical, and cultural attributes, distinct models have emerged in different regions of the world.

One effective model is the development of regional conventions on the marine environment protection. For instance, the PEMSEA mechanism in East Asia has garnered participation from governments, organisations, businesses, investors, individuals, and partners to collaboratively manage East Asia's coastal regions and seas. Yet, this remains a soft model, not legally binding, and its depth of efficacy is limited.

Environmental concerns have been a focal point for ASEAN from its inception. Nonetheless, ASEAN's environmental management mechanism and its legal basis for execution remain insufficient. To foster cooperation in environmental matters, ASEAN should prioritise the following areas in the near future:

Establishment of a specialized agency in the field of the marine environment: As ASEAN cooperation expands, there is a pressing need for a specialised agency responsible for coordinating, administering, inspecting, and overseeing the execution of the Association's environmental policies, inclusive of the marine environment.

Completion and synchronization of the ASEAN legal framework in environmental protection: The "ASEAN Way" - a consensus mechanism in the Association's decision-making, while ensuring equitable interest for all member states, occasionally hinders the formulation of ASEAN's legal documents. Moving forward, the Association must take innovative steps and employ flexibility in crafting environmental treaties, especially those concerning the marine environment and climate change. To align with international environmental conventions and facilitate the development of novel agreements, like the recent global accord on plastic pollution, ASEAN should proactively contribute to these initiatives.

Regional cooperation to deal with the risk of transboundary marine pollution, rising sea levels, climate change, biodiversity loss, and the construction of nuclear power plants: Countries in the region must intensify their collaborative efforts to address the risks associated with transboundary marine pollution, escalating sea levels, climate change, biodiversity decline, and the establishment of nuclear power plants. ASEAN nations must devise strategies to enhance the efficacy of cooperation in these crucial areas.

Soft law is poised to evolve further, concurrently with the advancement of legal mechanisms. The crux lies in the consensus and voluntary commitment of countries—regardless of whether it's soft law or formal legal mechanisms that dictate effectiveness. From a research standpoint, the drive is still towards more established mechanisms. However, the appeal of soft law remains in its diversity and adaptability.

### CRediT author statement

Hong Anh Do: Reviewing, Formal analysis, Writing, Editing, Data analysis; Thanh Vinh Pham: Data analysis, Writing, Proofreading; Thi Thao Van Le: Data analysis, Writing, Abstract; Tuan Minh Vu, Tuan Luong Truong, Trung Hieu Nguyen, Thi Thuy Lan Le, Van Khanh Do, Thi Sanh Le: Data analysis.

### COMPETING INTERESTS

The authors declare that there is no conflict of interest regarding the publication of this article.

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