

Legal Cooperation in the ASEAN Maritime Environment in the Free Trade Era: Its Implication for Indonesia

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Abstract: For the past 30 years, an estimated 50 percent of the coral reef population has declined as a result of overfishing, pollution, coastal development, and climate change. Such decline risks jeopardizing livelihoods and the capacity for disaster risk reduction, as well as endangering marine biodiversity. With the emergence of free trade and the high mobility of modern ships, trade goods all over the world are increasingly affected by marine pollution. Since 1992, at least 600,000 tons of oil have entered the oceans each year, primarily from normal shipping operations, accidents, and illegal discharges, which contribute to more pollution than does offshore oil and gas exploitation. Recognizing the differentiation of circumstances in each maritime area, current international law, including that in Southeast Asia, regulates the framework of marine environment protection in cooperation with other states and other international organizations. Unfortunately, because the Association of Southeast Asian Nations framework does not wield binding power, its declarations have yet to create significant improvements to the region's marine environment. This paper discusses the urgency to create a new binding regulation within Association of Southeast Asian Nations that would obligate its Member States to actively protect the region's marine environment.

Keywords: ASEAN; Environment; Free Trade; Maritime

1. Introduction

The Association of Southeast Asian Nations (ASEAN) is one of the regions with the highest level of marine biodiversity on earth. Of the approximately 800 species of coral reefs on the earth, more than 600 species can be found in the ASEAN region. Moreover, four ASEAN states are included among the top ten largest fish producers: Indonesia, Viet Nam, Thailand, and the Philippines. Cumulatively, ASEAN countries account for a quarter of global fish production. This condition is certainly beneficial for ASEAN states to enjoy the right for exploration and exploitation;¹ concomitantly, it puts a burden on them to enact and uphold the highest standard of protection of their marine environment.

¹ Park, Donghyun. "The prospects of the ASEAN–China Free Trade Area (ACFTA): A qualitative overview." *Journal of the Asia Pacific Economy* 12, no. 4 (2007): 485-503.

Despite several international law instruments in place with the object and purpose to protect the sea and its environment, the level of coral-reefs exploitation and overfishing has increased rapidly for the last 10 years. These activities were also done with harmful methods such as bombing and using poison, which pollute the sea and destroy the species, the environment, and the ecosystem. Furthermore, the fast pace of trading activities has added more pollution of the marine environment. When the concept of free trade in ASEAN emerged, many debates and questions arose as to whether it would decrease or instead rapidly increase the pollution of the ASEAN maritime environment.

From an environmental perspective, trade acts as an international movement of goods, carrying potentially hazardous wastes and toxic materials and the possibility of spillage during the shipping process. Some goods may also trigger an increase of demand that in turn leads states to over-exploit a specific species, even up to the point of extinction. Furthermore, goods ending up in countries without proper disposal mechanisms can contribute even more pollution to the land and sea.² A free trade system also increases competition between companies, which causes countries to loosen their environmental policies in order to maintain a certain pace of shipping of goods. More often than not, this loosening of policies also includes at the same time the promulgation of regulations to minimize the cost of environmental protection in order to attract foreign firms.³

The pro-free-trade perspective advocates that trading activities improve the quality of the environment, specifically the quality of air and water; the theory is that a free-trade system will increase the quality of the economy and raise incomes alongside citizens' demand for environment quality. Moreover, if environmental regulations on trade activities are tightened, this could stimulate technological innovation to fit such regulations.⁴ The enactment of such regulations will also increase the transfer of modern and cleaner technologies from developed countries to developing countries.

No matter how detailed a free-trade regulation is, it will never fully cover the protection of the environment and solve problems arising from trade activities; this is because the object and purpose of a free-trade regulation is to increase economy quality and improve economy efficiency, not to create a sustainable ocean environment. With this understanding in place, in addition to environmental policies, the ideal path is to pursue a legal cooperation between states to create a framework to preserve and protect the

² Brian R. Copeland and M. Scoot Taylor, *Trade and the Environment Theory and Evidence* (Princeton: Princeton University Press, 2003) <<https://doi.org/10.1515/9781400850709>>.

³ Nicolas Korves, Inmaculada Martinez-Zarzoso and Anca Monika Voicu, 'Is Free Trade Good or Bad for the Environment? New Empirical Evidence' in *Climate Change–Socioeconomic Effects* ed. by Houshang Kheradmand and Juan Blanco (London: InTech, 2011) <<https://doi.org/10.5772/23008>>.

⁴ Michael E. Porter and Class van der Linde, "Toward a New Conception of the Environment-Competitiveness Relationship", *Journal of Economic Perspectives*, 9.4 (1995), 97-118 <<https://doi.org/10.1257/jep.9.4.97>>.

marine environment. In order to be effective, said cooperation must address the marine pollution caused by trade activities.

The current state of the ASEAN maritime environment and its high level of utilization means that there is increasing damage every year to the marine environment and its sustainability. Recognizing marine resources as a vital aspect for the livelihoods of the ASEAN people, leaders in the region began focusing on conserving and managing the coastal and marine ecosystem sustainably. This led to several attempts at legal cooperation, one of them being the publication of the ASEAN Socio-Cultural Community Blueprint 2015, which mandated the establishment of the ASEAN Working Group on Coastal and Marine Environment.

2. Research Method

This paper applies the juridical normative approach, which primarily analyzes relevant legal instruments and literature to address the research problem. The paper assesses primarily international law, environmental law literature, and ASEAN regional law. The author furthers the analysis via a qualitative method to address the urgency to create a new binding regulation within the ASEAN.

3. ASEAN Maritime Environment: Problems Caused by Free Trade Activity

3.1. Problems Arising from the Current Utilization in ASEAN Maritime Environment

The causes of marine pollution are both sea- and land-based activities, unsustainable exploitation, human activities on habitats of endangered species, and climate change.⁵ From all the causes listed above, the current sea-based activity is the biggest contributor to marine pollution in ASEAN oceans, in particular, marine pollution caused by plastic waste and marine pollution caused by oil spillage.⁶ One of the primary land-based activities that cause marine pollution is the amount of plastic waste produced in the region. On a global scale, the United Nations Environment Program reports that each year, up to five trillion single-use plastic bags are used and 300 million tons of plastic waste are produced, eight million tons of which end up in the oceans, killing marine life and entering the human food chain.

In 2015, the Ocean Conservancy co-authored a publication that revealed that of the top five countries that throw the most plastic waste into oceans, four are ASEAN Member States: Indonesia, Viet Nam, the Philippines, and Thailand. Accumulatively, those four

⁵ UNEP, 'Regional Oceans Governance: Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together', *UNEP Regional Seas Reports and Studies No. 197, UN Doc. UNEP/WBRS.18/INF12*, (Nairobi: UNEP, 2016), p. 1.

⁶ Basir, Salawati Mat, and Saidatul Nadia Abd Aziz. "Undelimited Maritime Areas: Obligations of States Under Article 74 (3) and 83 (3) of UNCLOS." *Indonesian Journal of International Law*. 18 (2020): 63.

states and China are responsible for at least 60% of marine debris in the world. In 2018, due to Chinese ban on waste imports that year, imports of plastic waste from wealthier nations to ASEAN Member States rose sharply. As reported by the US Census Bureau, half of the plastic waste exported from the United States for recycling in the first six month of 2018 was shipped to Malaysia, Viet Nam, and Thailand. When plastic waste is contaminated and mixed, it is very difficult to recycle, and most of it will end up in rivers and oceans.

In response to this situation, Malaysia issued a permanent ban on importing plastic waste. The ban was also followed in 2019 with reports from Malaysian media stating that the government had begun to send back some waste to their countries of origin. Additionally, Malaysia aimed to phase out the import of other types of plastic by 2021. Similarly, Viet Nam has banned the issuance of licenses for the import of plastic waste, and Thailand has committed to stop importing plastic waste by 2021. If other Member States follow suit, the growth in the amount of plastic waste in the region will be slower. The ASEAN region will then be able to shift its focus towards “cleaning up” and “diminishing” plastic waste on ASEAN oceans, and eventually, plastic waste will no longer be a major cause of ASEAN marine pollution.

Oil spillage is widely recognized as one of the major sources for marine pollution in ASEAN oceans. Starting in the early 1980s, the problem had been noted at various regional meetings of East Asian Seas countries. Surprisingly, shipping operations, accidents, and illegal discharges have caused more oil spillage than has offshore oil and gas exploitation. Because it is a major transit route for oil carriers, most of the oil pollution in the East Asian Seas is caused by shipping activities and shipping accidents. In the late 1980s, however, oil pollution and its impact were difficult to assess because the needed research and survey data were scarce and fragmentary.⁷

The launch of various remote sensing satellites has made it easier to conduct oil pollution surveillance and mapping over a very large area of the ocean. For example, the use of space-borne synthetic aperture radar (SAR) is very popular to monitor ocean oil slicks, due to its wide area coverage and cloud-free day and night operations. ERS SAR has been successful in detecting marine oil spills and in some cases in recent history has been applied in near-real-time oil spill monitoring, that is, within 1–2 hours after the data has been acquired.⁸ The same tool was also successfully used in Singapore to detect marine

⁷ UNEP, ‘Oil Pollution and its control in the East Asian Seas Region’, *UNEP Regional Seas Reports and Studies No. 96* (Nairobi: UNEP, 1988), p. 19.

⁸ J. P. Pedersen, Tony Bauna, L. Seljelv, L. Steinbakk, R. Enokssen, ‘Oil Spill Detection by Use of ERS SAR Data: From R&D towards pre-operational early warning detection service’ in *ERS Applications, Proceedings of the Second International Workshop held 6-8 December 1995* ed. by T.D. Guyenne (Paris: ESA SP-383, European Space Agency), 181-185 (p. 182).

oil spills.⁹ A study utilizing ERS SAR data was conducted to map oil pollution in the South East Asian oceans; it showed that areas of intense oil pollution correlate very well with the major shipping routes. Some of the main shipping routes with high incidences of oil spill are the Straits of Malacca, the Singapore-Java route, routes crossing the Straits of South China Sea, the Singapore-Bangkok route, the Jakarta-Manila route, and the Manila-Lombok route. The study also showed areas within the South China Sea and the Gulf of Thailand to be the most polluted, as ships discharge oil in the South China Sea due to its alignment with shipping routes.¹⁰

Oil spillage has severe effects on marine life, from bioaccumulation in marine organisms and carcinogenic effects to the disruption cellular and biochemical functions.¹¹ Along with oil, pollution caused by toxins is also increasing with the rapid development in South East Asia. Countries have not been able to keep accurate data on such pollution, also known as persistent toxic subject substances (PTS), and its health and environmental impact. In addition to the condition of poverty, South East Asian countries have become perpetrators of coastal toxin pollution while in pursuit of development and economic gains. For example, fishermen in Philippines and Indonesia still engaged in cyanide fishing despite its toxicity and unsustainability. And unfortunately, findings of oil and endocrine-disrupting organotin compounds in international shipping routes and harbors within the region were not enough to urge affected countries to enact measures to protect the marine environment.

3.2. Free Trade in ASEAN and its Impact for Maritime Environment

For the last few decades, trading activities in the ASEAN region has increased, and to further promote the growth of ASEAN's economy, the concept of free trade was introduced to the region in the early 1990s. In 1992, ASEAN state leaders agreed to establish the ASEAN Free Trade Area (AFTA) to increase ASEAN competitiveness as a production base geared for the world market. The AFTA is the centerpiece of ASEAN's work toward regional economic integration,¹² strengthening the trade activities between ASEAN states while also expanding connections with other trading partners.

⁹ Jingxuan Lu, 'Marine oil spill surveillance and mapping using remote sensing in Singapore', *Integrated Coastal Zone Management (EEZ Technology)*, Launch Edition (2000), 217-222.

¹⁰ Jingxuan Lu, 'Marine oil spill detection, statistics and ERS SAR imagery in South-East Asia', *International Journal of Remote Sensing*, 24.15 (2010), 3013-3032 (p. 3028) <<https://doi.org/10.1080/01431160110076216>>.

¹¹ Peter A. Todd, Xueyuan Ong, Loke Ming Chou, 'Impacts of Pollution on Marine Life in Southeast Asia', *Biodiversity and Conservation (Springer Verlag)*, 19.4 (2010), 1063-1082 (p.5) <<https://doi.org/10.1007/s10531-010-9778-0>>.

¹² H. E. Rodolfo C. Severino as Secretary-General of ASEAN, *Opening Remarks at the AFTA 2002 Symposium on 31 January 2002*, written under 'The ASEAN Free Trade Area: Reaching Its Target', *ASEAN Economic Bulletin*, 19.2 (2002), p. 2.

The policies in the AFTA revolve around three pillars, which are the liberalization of trade through eliminating tariffs and non-tariff barriers among ASEAN members, serving as a catalyst to promote efficiency in production and preserve long-term competitiveness, and expanding intra-regional trade to give ASEAN consumers a wider choice and better-quality consumer products. Because the AFTA's priority is to make trade activities faster and easier, many of its policies involved product tariffs and the elimination of non-tariff barriers, effectively cutting many ordinary trading procedures and reducing the cost of trading. Meanwhile, environmental policies often prolong the amount of time for delivery of goods and delay their arrival at their destination. To solve for this, the AFTA does not regulate or create a framework on the matter of marine protection in shipping goods, leaving the creation of environmental policies to each state.

Recent growth in shipping has made South East Asia's shipping lanes one of the busiest in the world; going hand in hand with this is the amount of oil found in the region's seas, especially in the Straits of Malacca, the South China Sea, the Gulf of Thailand, and the Jakarta-Manila and Singapore-Bangkok routes. By 2003, the majority of oil in the sea actually came from deliberate operational discharge amounts, with the amount up to 10 times heavier than the amount of oil spillage.¹³

4. The Effectiveness of Current Legal Cooperation

Every legal cooperation made by ASEAN nations has always been in accordance with public international law governing the maritime environment and its sustainability. The ASEAN region, as a whole, or Member States of ASEAN, have also actively participated in several international legal endeavors in order to create a working group or framework. As regulated under many international conventions, a cooperation between states plays a very important part to further require measures, goals, and regulate specific rules based on the conditions and purposes of the cooperating states. International conventions, such as the United Nations Convention on the Law of the Sea, also encourage states to enact cooperation with competent international and regional organizations.¹⁴

Any legal cooperation or framework made in the ASEAN region will always leave a gap for Member States to enact necessary policymaking individually, since ASEAN upholds the principle of non-intervention and non-interference on each nation's policies. Herein lies the difference between ASEAN's framework and that of other regions. Consider for example the European Union's framework and the adoption of the Bangkok Declaration on Combating Marine Debris in ASEAN Region. Unlike Uni Europa, which centrally

¹³ 'Impacts of Pollution on Marine Life in Southeast Asia', pp. 1063-1082 (pp. 1071); 'Marine oil spill detection, statistics and ERS SAR imagery in South-East Asia', pp. 3013-3032.

¹⁴ *Status of Research, Legal and Policy Efforts on Marine Plastics in ASEAN+3: A Gap Analysis at the Interface of Science, Law and Policy*, p. 60.

targeted and banned trade activities, the Bangkok Declaration merely outlined broad ideas and left it up to Member States to implement its mandates.

The 2002 ASEAN Maritime Transport Development Study raised issues of sustainable sector development in an attempt to create a solution in parallel with the accession to relevant conventions. The study suggested regional actions such as mapping areas sensitive to oil spills, the application of VTS and TSS in all congested waters and important straits in the ASEAN region, and the conduct of annual joint oil spill combating drills with the obligation of ASEAN OSRAP to replenish the latest information and operational procedures in the document after its formulation in 1992.¹⁵ The study suggested more cooperation, the establishment of a working group (hypothetically, a new working group to establish an ASEAN oil-sensitive map or a compliance committee to ensure optimalization of VTS and TSS), and enactment of new and improved procedures.

According to Cuong and Hung, there has been a recommendation to use LNG or sulphur-free-fuel, switching from high sulphur fuel oil (HSFO) for the most commercial ship in Vietnam. This has been regarded as a positive progress to comply with the IMO strategy to reduce ship emission to 2020 and zero in 2050 that could also impact to the ASEAN maritime environmental security.¹⁶ The ASEAN region's recognition of the need to protect the maritime environment is a positive first step and a commitment to working toward a sustainable maritime environment.¹⁷ Without specific regulations and policies, however, it will be very difficult—some may say impossible—to effect significant change in the ASEAN maritime environment. Therefore, in order to create the strongest protection, ASEAN Member States must move past declaration and recognition to enactment of effective legal frameworks and enforcement mechanisms.

In addition to above mentioned cooperation, there was also another pivotal cooperation to protect environment in ASEAN through maritime security cooperation. As argued by Agastia, ASEAN has at least three maritime security-related cooperation namely The ASEAN Regional Forum, the ASEAN Defence Ministers' Meeting and the ASEAN Maritime Forum. Nevertheless, the "ASEAN Way" of dialogue-based forum tend to dominate the cooperation rather than achieving more collective and practical maritime security cooperation.¹⁸

¹⁵ ASEAN, *Final Report Summary: ASEAN Maritime Transport Development Study* (Jakarta: ASEAN and ALMEC Corporation, 2002), p. 23.

¹⁶ Nguyen Manh Cuong & Phan Van Hung, "An analysis of available solutions for commercial vessels to comply with IMO strategy on low sulphur", *Journal of International Maritime Safety, Environmental Affairs, and Shipping*, 4.2 (2020), 40-47, <10.1080/25725084.2020.1784080>.

¹⁷ Helmi, Helmi, Fauzi Syam, Nopyandri Nopyandri, and Akbar Kurnia Putra. "Evaluation of the Regulation Changes on Environment and Forestry in Indonesia." *Hasanuddin Law Review* 6, no. 1 (2020): 100-108. DOI: <http://dx.doi.org/10.20956/halrev.v6i1.2290>

¹⁸ Agastia, I. Gusti Bagus Dharma. "Maritime security cooperation within the ASEAN institutional framework: A gradual shift towards practical cooperation." *JAS (Journal of ASEAN Studies)* 9, no. 1 (2021): 25-48.

5. New Regional Plan to protect ASEAN Maritime Environment and Prevent Marine Pollution caused by Trade Activities

The establishment of free trade will inevitably continue to increase shipping activities, and without enacting regulations to counteract the pollution caused by shipping, pollution will increase, ultimately leading to the degradation of the quality of life.¹⁹ During the 36th session of the ASEAN Maritime Transport Working Group (MTWG) in August 2018, a regional plan was developed and finally adopted. Later that same year was the 24th ASEAN Transport Ministers' Meeting, during which State Members adopted the ASEAN Regional Oil Spill Contingency Plan, which provided a mechanism for ASEAN Member States to submit requests as well as provide mutual support in response to oil spills.

This regional plan is an excellent example of international legal cooperation, not only expressing the commitment of Member States but also regulating a comprehensive mechanism that facilitates mutual support among them. Marine pollution caused by trade activities involves more than oil spills, however, and includes oil discharge, plastic waste, organotin compounds used in anti-fouling paints, and chemical spills. To address these issues, the ASEAN region must develop a new regional plan to provide comprehensive protection of the marine environment and the prevention and mitigation of marine pollution caused by trade activities.²⁰

Even if the ASEAN regional plan has a non-binding nature, a comprehensive and specific set of regulations will have more impact in comparison with a regional declaration. Currently, Article 17 of Agenda 21 contains the most regulations on the protection of the marine environment from various sea-based activities. With the addition of current reports from COBSEA, the International Maritime Organization (IMO), and other regional organizations, the ASEAN will be able to enact a regional legal cooperation in developing a robust regional plan to protect the ASEAN maritime environment and prevent marine pollution caused by trade activities.

6. Implication on Indonesia

In addition to the AFTA, Indonesia has expanded connections with other states to strengthen its trading activities with several agreements such as the Indonesia-Japan Economic Partnership Agreement, the Pakistan-Indonesia Preferential Trade Agreement, and the Preferential Tariff Arrangement-Group of Eight Developing Countries. Indonesia

¹⁹ Hung, Phan Van, Kwang-Soo Kim, and Moonjin Lee. "Cooperative response to marine hazardous and noxious substances and oil spill incidents in the ASEAN region." *Australian Journal of Maritime & Ocean Affairs* 11, no. 1 (2019): 61-72.

²⁰ Tegnan, Hilaire, Lego Karjoko, Jaco Barkhuizen, and Anis H. Bajrektarevic. "Mining Corruption and Environmental Degradation in Indonesia: Critical Legal Issues." *BESTUUR* 9, no. 2: 90-100.

has experienced positive effects from increasing international trade including more foreign exchange earnings, national prosperity, business productivity, expansion of its marketing network, wider variety of goods to purchase, and employment opportunities. Some negative effects include a lower quality of natural resources, dependency on foreign sources, a limited market for domestic products, and the elimination of local and small business.

Geographically, the most used and most polluted shipping lanes in South East Asia are located near or within Indonesia's maritime zone including the Straits of Malacca, the Singapore-Java route, routes crossing the Straits of South China Sea, the Singapore-Bangkok route, the Jakarta-Manila route, and the Manila-Lombok route. Without proper maintenance and protection, the pollution of these shipping lanes will increase and eventually it will become too dangerous for states to conduct shipping through these lanes. Such conditions will ratchet up the urgency to find new shipping lanes, which would first expend IMO's precious time establishing and fulfilling procedures for the establishment of new shipping lanes as regulated under International Convention for the Safety of Life at Sea (SOLAS) 1974, and second, when the new shipping lanes are far from Indonesia, would increase Indonesia's shipping costs and fuel needs.

Even when a new shipping lane is established near Indonesia's maritime zone and its location does not increase Indonesia's shipping cost, Indonesia still has the obligation to conduct damage control of the original shipping lanes in order to prevent the spread of the pollution to a greater area; this action would surely cost be costly. Hypothetically, the establishment of the regional plan suggested above may causes additional procedures and prolong the time of delivery of goods, and it also may incur additional costs for ships to meet the criteria and standard regulated by such a plan. Such cost and delay are incomparable however with the damage control that would be required if states were still using those shipping lanes in an unsustainable way.

7. Conclusion

International and regional legal cooperation varies in the forms of declarations, plan, working group, and the like. Examining the declarations that have been made previously, a gap between the ideals written in the declaration and the existing implementation is apparent. Seeing the increased amount of pollution in ASEAN oceans, current legal cooperation is certainly considered insufficient to prevent damage and protect the ASEAN marine environment. Trading activities will not be stopped or reduced immediately, with or without regulations protecting the marine environment. Thus, the existence of a debate about the ideal form of cooperation should not be a challenge or an obstacle to the protection and preservation of the marine environment but instead a lesson for states to create and implement a better form of legal cooperation.

Regardless of the binding or non-binding power of the ASEAN regional plan, it surely will provide more comprehensive rules and application in comparison with a regional declaration. A declaration is therefore not considered a comprehensive implementation of an international rules or standards, but only to be considered as the first step of implementation and must be followed with the development of a regional framework.

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