

SUSTAINABLE INVESTMENT LEGAL FRAMEWORK IN EUROPEAN UNION AND ASEAN: UNDERSTANDING POLICY VARIATIONS BETWEEN TWO REGIONAL ORGANISATIONS

Asrul Ibrahim NUR*

Abstract

The impact of climate change is experienced all over the world. The effort to mitigate the impact continues to be made in a wide range of sectors, including the financial industry. The concept of sustainable investment in the financial services industry is one of the strategies to address climate change. However, sustainable investment is not limited to national jurisdictions. At the regional levels organisations such as the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) have also established definite guidelines. The EU has adopted hard law in the form of regulations on sustainability disclosure and taxonomy that facilitate sustainable investment. ASEAN has also introduced soft law in the form of the ASEAN Taxonomy for Sustainable Finance. The purpose of this study is to examine and provide a comparison of the regulation of sustainable investment in both regional organisations that have distinct integration characteristics. This paper argues that the distinctive characteristics of integration have an influence on the choice of legal instruments and their binding force on member states. The comparative study revealed that both the EU and ASEAN adopt the common principles of environmental protection and climate change mitigation. However, the EU and ASEAN have different ways of defining these principles in their respective legal instruments. In addition, the research also reveals that the different choice of legal instruments also has an effect on the advantages and limitations of implementing sustainable finance. Finally, this study proposes that the EU and ASEAN share a common vision in the implementation of sustainable finance in line with the growing economic relations between the two regions.

Keywords: EU, ASEAN, climate change, comparative, sustainable investment.

1. Introduction

As a global phenomenon, climate change has impacted various sectors of human life. The financial sector was also impacted, on further developments the terms 'green investment', 'sustainable finance', and 'green finance' emerged into a discourse that continues to be discussed and debated in many international forums.¹ In addition, the adoption of Sustainable Development Goals

(SDGs) by the United Nations in 2015 became a catalyst for implementing sustainable principles in the financial sector in many countries.

The SDGs are inseparable from the development of the concept of 'sustainability'. The concept of sustainable development is popularly debated at various academic and industrial levels. The concept historically has strong roots in the

* Ph.D. candidate, "Geza-Marton" Doctoral School of Legal Studies, University of Debrecen; Legal Analyst at the Ministry of Energy and Mineral Resources, Republic of Indonesia (e-mail: asrul.ibrahimnur@mailbox.unideb.hu).

¹ Wei Yin, *Integrating Sustainable Development Goals into the Belt and Road Initiative: Would It Be a New Model for Green and Sustainable Investment?*, Sustainability (Switzerland) 11, no. 24/2019, p. 1.

development of the world economy.² Furthermore, the concept of sustainable development has become a discourse that has been debated and discussed throughout the modern era.³ The echo of the dissemination of this concept throughout the world was the Brundtland Commission Report to the UN in 1987.⁴ In later developments, the aforementioned document became a reference that was generally cited to define the concept of sustainability.

Throughout 2021, green investment grew by more than 55% and is expected to continue to grow more rapidly in the following year, in line with the growth of the world economy after the COVID-19 pandemic.⁵ In its development, international organisations such as the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) have also adopted legal instruments that regulate the implementation of sustainability principles in the financial sector, especially investment.

The EU adopted secondary legislation through two hard law legal instruments that applied legally binding to member states, namely Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (EU Regulation 2019/2088) and Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (EU Regulation 2020/852). These two regulations are an

important legal basis for developing sustainable investment in the European region. However, unlike the EU, ASEAN adopts a soft law in the form of the ASEAN Taxonomy for Sustainable Finance (ATSF). A very interesting legal issue in the EU hard law and ASEAN soft law is the obligation of environmental impact disclosure in sustainable investment. The existence of this obligation is an effort to mitigate and identify the impact that investment will have on the environment.

The EU and ASEAN have a long history of mutually beneficial interactions and relationships. In addition, several studies also mention that the EU exerts a significant influence on the development of ASEAN as a legal entity and organisation. The European Green Deal (EGD), one of the flagship programs during the von der Leyen Commission period, also significantly influenced mainstreaming of environmental issues, especially in the ASEAN region. Therefore, comparative studies on environmental impacts in the EU and the ASEAN sustainable investment legal framework are relevant.

A comparative study of the sustainable investment legal frameworks adopted by the EU and ASEAN is important and relevant for two reasons. First, the EU and ASEAN represent regional organisations with different integration characteristics. Second, the difference in integration affects the legal form adopted to regulate environmental protection, especially in relation to sustainable investment.

² Justice Mensah, *Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review*, Cogent Social Sciences, no. 1/2019, p. 6.

³ Ulrich Grober, *Deep Roots: A Conceptual History of Sustainable Development (Nachhaltigkeit)*, WZB Discussion Paper, P 2007-002, no. February/2007, p. 3.

⁴ Jacobus A. Du Pisani, *Sustainable Development – Historical Roots of the Concept*, Environmental Sciences, Vol. 3, no. 2/2006, p. 92.

⁵ Jennifer Wu, *Five Reasons Why the Future of ESG Investing Is Long Term*, JP Morgan Asset Management ESG outlook 2022: The future of ESG investing, 2022, this document is available online at <https://am.jpmorgan.com/dk/en/asset-management/liq/investment-themes/sustainable-investing/future-of-esg-investing/> (last access: 08.12.2022).

Scholars from various disciplines and perspectives, especially the social sciences, have classically conducted comparative studies between the EU and ASEAN. In addition, some scholars studied sustainable investment or green finance from the perspective of the EU or ASEAN separately. For example, de Sadeleer conducted a study on the development of the EU sustainable development legal framework.⁶ The study conducted by Ahlström and Monciardini discusses the dynamics of EU sustainable finance regulations.⁷ Another study by Conea focuses on the EU Taxonomy and the development of the concept of 'sustainability' and the adoption of the term 'green' in various EU legal instruments.⁸

The study on sustainable investment in ASEAN was conducted by Hieu, who examined the effect of green investment and environment tax on carbon dioxide emissions and economic growth of Southeast Asian countries.⁹ Another study was conducted by McLaughlin, who digested 371 bilateral investment treaties agreed upon by ASEAN and its member states. This study revealed that the principle of sustainable development is only partially recognised in bilateral agreements.¹⁰

This paper will attempt to fill the gap in the study of sustainable investment from a comparative standpoint of the EU and ASEAN legal frameworks. The research makes three significant contributions. First, it provides a complete understanding of the regulatory pattern of sustainable investment in two regional institutions with distinct

characteristics. Second, this paper connects the results of studies on sustainable investment from the perspective of the EU and ASEAN into a coherent and comprehensive comparative study. Finally, this paper contributes to the debate and discourse on sustainable investment from a comparative perspective of two contrasting legal systems. Therefore, the contribution of this paper to the debate and discourse on sustainable investment from the comparative perspective of two different legal systems will certainly provide new insight into the study of the development of the sustainable investment.

This paper is organised into four sections. After the introduction parts, the next section will discuss the sustainable investment in the EU and ASEAN legal framework respectively. Furthermore, the two legal frameworks will be analysed from a comparative perspective to obtain complete and comprehensive knowledge and information about the sustainable investment legal framework, particularly the environmental impact disclosure obligations. Finally, the conclusion part will sum up this article.

2. EU Sustainable Investment Legal Framework: Progress and Development

The EU does not define sustainable development in its primary law. However, the term appears six times in the Treaty of the European Union (TEU) and the Treaty of Functioning of the European Union

⁶ Nicolas de Sadeleer, *Sustainable Development in EU Law: Still a Long Way to Go*, Jindal Global Law Review, Vol. 6, no. 1/2015.

⁷ Hanna Ahlström and David Monciardini, *The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms*, Journal of Business Ethics, Vol. 177, no. 1/2022.

⁸ Alina Mihaela Conea, *EU Taxonomy: Qualifying As Green*, Lex ET Scientia International Journal, Vol. 2, no. XXIX/2022.

⁹ Vu Minh Hieu, *Influence of Green Investment, Environmental Tax and Sustainable Environment: Evidence from ASEAN Countries*, International Journal of Energy Economics and Policy, Vol. 12, no. 3/2022.

¹⁰ Mark McLaughlin, *Mapping Sustainable Development in Investment Treaties: An Analysis of ASEAN State's Practice*, Asian Journal of WTO & International Health Law and Policy, Vol. 17, no. 1/2022.

(TFEU).¹¹ Nonetheless, Art. 11 TFEU (Ex Art. 6 TEU) determines that environmental protection and sustainable development play an important role in every policy and activity of EU organisations. In addition, the principle of sustainable development is also recognised in the preamble of the European Union Charter of Fundamental Rights (EUCFR) and Art. 37 related to environmental protection. The existence of sustainable development clauses in the EU Primary Law provides a strong constitutional basis for technical implementation in various sectors.¹² The finance and investment sector is one such sector for its policy implementation in various sectors, such as finance and investment.

Sustainable investment plays a key role in the European economy, particularly in ensuring the consistent implementation of sustainability principles.¹³ Although investment is an important part of mitigating the impacts of climate change, the flow of financing to environmentally friendly projects will affect the mitigation process.¹⁴ The EGD also confirms that green investment is one pathway to achieving carbon emission reduction targets.¹⁵ In

addition to being a guideline for the EU to achieve carbon emission reductions, the EGD is also a milestone in the EU's strong determination to deliver sustainability in the region in a measurable way.¹⁶

To further discuss sustainable investment in the EU, the discussion will focus on the disclosure concepts in the EU Regulation 2019/2088 and EU Regulation 2020/852. In general, the scope of the EU regulation on environmental disclosure is to harmonise regulations for money market participants and financial advisors, especially related to the transparency of financial products.¹⁷ Both regulations signal the EU's strong ambition to achieve a sustainable economy by establishing specific standards, primarily in compliance with the climate targets.¹⁸

The main principle in environmental impact disclosure in the EU legal framework is to do no significant harm.¹⁹ This principle is also the minimum standard to be met in any financial or economic investment in all EU member states.²⁰ The principle of doing no significant harm was originally applied in international water law, which was later developed into a principle used in development by various world countries.²¹

¹¹ Conea, *EU Taxonomy: Qualifying As Green*, p. 27.

¹² de Sadeleer, *Sustainable Development in EU Law: Still a Long Way to Go*, p. 41.

¹³ Dirk A. Zetsche and Linn Anker-Sørensen, *Regulating Sustainable Finance in the Dark*, European Business Organization Law Review, Vol. 23, 2022, p. 81.

¹⁴ Friedemann Polzin and Mark Sanders, *How to Finance the Transition to Low-Carbon Energy in Europe?*, Energy Policy, Vol. 147, no. July/2020, p. 3.

¹⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 2019 (The European Green Deal), this document is available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN> (last access: 09.11.2022).

¹⁶ Alicja Sikora, *European Green Deal – Legal and Financial Challenges of the Climate Change*, ERA Forum, Vol. 21, no. 4/2021, p. 687.

¹⁷ Art. 1 EU Regulation 2019/2088.

¹⁸ Alessio Maria Paces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, Sustainability (Switzerland), Vol. 13/2021, p. 9.

¹⁹ Art. 2a EU Regulation 2019/2088.

²⁰ Art. 18 EU Regulation 2020/852.

²¹ Joyeeta Gupta and Susanne Schmeier, *Future Proofing the Principle of No Significant Harm*, International Environmental Agreements: Politics, Law and Economics, Vol. 20, no. 4/2020, p. 733.

Furthermore, this principle is widely used by national, regional and international court decisions.²² To implement this principle, investment companies and financial advisers must present transparent information in nine aspects.

The first transparency is that investment companies and financial advisers must provide information and policies on the sustainability risk.²³ Furthermore, it is related to the transparency of adverse impacts likely to arise in investments at the entity and product levels.²⁴ The transparency that must be presented next is about integrated sustainability risks, including remuneration policies.²⁵ The process of transparency about sustainability and risks is also required in the promotional and marketing activities of investment products.²⁶ Transparency in sustainable investment is essential to support the achievement of climate targets set by the European Green Deal.²⁷ This transparency makes all parties interested in investing and responsible for realising climate targets.

Furthermore, there are quite interesting provisions in the EU Regulation 2019/2088 and EU Regulation 2020/852, namely the existence of pre-contractual disclosure obligations. There are two substances in pre-contractual disclosure: promoting environmental or social characteristics and sustainable investment.

The first substance in pre-contractual disclosure is to promote environmental aspects in investment.²⁸ The second substance is related to sustainable investment in financial investment products.²⁹ Therefore, the existence of this pre-contractual disclosure obligation, on the one hand, provides an opportunity for investors or the public to find out the contribution of investments or financial products to climate or environmental policy. On the other hand, this provision also examines investors' commitment to sustainable investment and climate change. In other words, this provision can also balance the parties' interests before agreeing to a contract.³⁰ Furthermore, pre-contractual disclosure provisions can also be an 'early exit door' for parties who cannot enforce the terms of the contract.³¹

Based on the above, the EU Sustainable Investment legal framework has provided guidelines for financial industry players to meet environmental requirements. This guideline is not only at the time of execution of investment contracts but also at the existence of initial commitments through transparency and pre-contractual disclosure. If this provision is implemented properly, corporate governance will be under the EU's commitment as a leading global actor in

²² Mara Tignino and Christian Bréthaut, *The Role of International Case Law in Implementing the Obligation Not to Cause Significant Harm*, International Environmental Agreements: Politics, Law and Economics, Vol. 20, no. 4/2020, p. 632.

²³ Art. 3 EU Regulation 2019/2088.

²⁴ Art. 4 and Art. 7 EU Regulation 2019/2088.

²⁵ Art. 5 and Art. 6 EU Regulation 2019/2088.

²⁶ Art. 10 and Art. 11 EU Regulation 2019/2088.

²⁷ Franziska Schütze et al., *EU Taxonomy Increasing Transparency of Sustainable Investments*, Deutsches Institut Für Wirtschaftsforschung, Vol. 10, no. 51/2020, p. 492.

²⁸ Art. 8 EU Regulation 2019/2088 and Art. 6 EU Regulation 2020/852.

²⁹ Art. 9 EU Regulation 2019/2088 and Art. 7 EU Regulation 2020/852.

³⁰ Dagmar Waldzus and Buse Heberer Fromm, *Germany – Pre-Contractual Disclosure Requirements and Relevant Case Law*, International Journal of Franchising Law, Vol. 12, no. 5/2014, p. 4.

³¹ Pierre Legrand, *Pre-Contractual Disclosure and Information : English and French Law Compared*, Oxford Journal of Legal Studies, Vol. 6, no. 3/1986, p. 323.

climate change issues.³² On the other hand, if it is not implemented, the policy will only become a greenwashing tool for investors who do not commit to environmental issues.³³

This paper argues that the EU has adopted significant actions to achieve sustainable finance by internalisation to member states. This effort was made by adopting EU Regulation 2019/2088 and EU Regulation 2020/852. Both regulations provide clarity to the financial industry on the concepts of 'green' and 'sustainable.' The advantage of clear and legally binding regulations is that environmental protection and climate change mitigation become integral to investment. Directly or indirectly, this condition will give incentives to investors so that economic activities can be sustainable and avoid risks caused by natural forces.³⁴

However, the EU's adoption of sustainable investment regulations is not without its limitations. This study argues that the EU strictly limits investment to industries that do not fulfil the 'green' and 'sustainable' indicators. Therefore, the private sector faces the challenge of meeting the standards set to become an investor of choice. In addition, the EU faces the challenge of much misinformation about an industry's activities, especially regarding its 'green' and 'sustainable' status.³⁵ Therefore,

monitoring the implementation of the provisions of EU Regulation 2019/2088 and EU Regulation 2020/852 is essential so that regulators and the private sector can have a common understanding.

3. The ASEAN Soft Law for Sustainable Investment: Consensus and Informality

Unlike the EU, ASEAN does not adopt a binding hard law on sustainable investment to the member states. Since its establishment in 1967, the role of soft law in ASEAN organisations has become very significant.³⁶ Even in the ASEAN Charter 2008, the main principles mentioned in the lawmaking process are consultancy and consensus.³⁷ However, the clause creates a new problem, namely inconsistencies in the legal nomenclature of the instrument and its interpretation at the ASEAN level.³⁸ The legal instrument that regulates sustainable investment is also in the form of a soft law which is an agreement of member states in the ASEAN Taxonomy Board (ATB) forum. The function of the ATSF is as a guide to promote the transition to a more environmentally friendly economy.³⁹ The transition to a greener economy is critical for ASEAN member states that are largely directly affected by climate change.⁴⁰ Therefore, the role of the ATSF is vital to

³² Paces, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, pp. 17–18.

³³ *Idem*, p. 10.

³⁴ de Sadeleer, *Sustainable Development in EU Law: Still a Long Way to Go*, p. 60.

³⁵ Zetzsche and Anker-Sørensen, *Regulating Sustainable Finance in the Dark*, p. 48.

³⁶ Yoshifumi Fukunaga, *Use of Legal Instruments in the ASEAN Economic Community Building*, *Journal of Contemporary East Asia Studies*, Vol. 10, no. 1/2021.

³⁷ Art. 20 (1) the ASEAN Charter.

³⁸ Nattapat Limsiritong, *The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments*, *MFU Connexion*, Vol. 5, no. 2/2016.

³⁹ ASEAN Taxonomy Board, *ASEAN Taxonomy for Sustainable Finance*, 2021, p. 3, this document is available online at <https://asean.org/wp-content/uploads/2021/11/ASEAN-Taxonomy.pdf>. (last access: 18.10.2022).

⁴⁰ Rabindra Nepal, Han Phoumin, and Abiral Khatri, *Green Technological Development and Deployment in the Association of Southeast Asian Economies (ASEAN)—At Crossroads or Roundabout?*, *Sustainability (Switzerland)*, Vol. 13, no. 2/2021, p. 1.

usher ASEAN into a region that has resilience and can adapt economically to climate change.

ATSF uses five high-level principles: harmony, relevance and contextual, inclusive, credible, and aligned with the market.⁴¹ This principle is generally implemented through two substantial components: environmental objectives and essential criteria. Environmental objectives include climate change mitigation and adaptation, protection of healthy ecosystems & biodiversity, and promoting resource resilience and transition to the circular economy. While the essential criteria consist of the do not significantly harm principle and remedial measures to transition.⁴² The ATSF also details the various industrial sectors contributing to greenhouse gas emissions.

Furthermore, ATSF classifies these industrial sectors in the foundation framework (FF) and standard (PS) categories.⁴³ FF classification uses qualitative assessment analysis methods of industrial activity. Meanwhile, the PS classification uses metrics and thresholds to determine the status of industrial and investment activities.⁴⁴ FF and PS classifications further use green, amber, and red colour codes to describe the status of a particular sector in the taxonomic scheme.

The green indicates that an industry's investment contributes positively to climate change mitigation.⁴⁵ One of the contributions of green investment in mitigating climate change is reducing carbon dioxide gas produced in economic activity.⁴⁶

The next colour code is amber, which indicates that the industry has not made a direct impact in mitigating climate change. Therefore, investment in this industry requires further assessment to determine the factors that hinder such mitigation efforts. The last is the red colour code which indicates that the industry has no contribution to climate change mitigation or even has a significant negative impact on the environment. Therefore, investments in industries that get the red colour code cannot be categorised as sustainable investments.

The compiler of the ATSF, namely the ATB, has stated that the document is a guideline or guide. Therefore, the ATSF is a living document that can change at any time based on the principles of consultancy and consensus according to ASEAN organisational procedures. Thus, the ATSF has two opposing sides. Namely, as a soft law that does not have legally binding force, there is no compulsion for ASEAN member states to implement it. However, the existence of ATSF is necessary for ASEAN

⁴¹ See *ASEAN Taxonomy for Sustainable Finance*, 2021, p. 20. The whole principle is as follows: (i) The ASEAN Taxonomy will be the overarching guide for all ASEAN Member States, providing a common language and complementing their respective national sustainability initiatives. (ii) The ASEAN Taxonomy will take into consideration widely used taxonomies and other relevant taxonomies, as appropriate, and shall be contextualised to facilitate an orderly transition towards a sustainable ASEAN. (iii) The ASEAN Taxonomy shall be inclusive and beneficial to all ASEAN Member States. (iv) The ASEAN Taxonomy shall provide a credible framework, including definitions, and where appropriate, be science-based. (v) The ASEAN Taxonomy will be aligned with the sustainability initiatives taken by the capital market, banking and insurance sectors, or at least not in conflict. This document is available online at <https://asean.org/wp-content/uploads/2021/11/ASEAN-Taxonomy.pdf>. (last access: 18.10.2022).

⁴² ASEAN Taxonomy Board, *ASEAN Taxonomy for Sustainable Finance*, p. 23.

⁴³ *Idem*, 40.

⁴⁴ *Ibidem*.

⁴⁵ *Idem*, 42.

⁴⁶ Hieu, *Influence of Green Investment, Environmental Tax and Sustainable Environment: Evidence from ASEAN Countries*, p. 232.

member states to ensure sustainable investment at the regional level. Moreover, the nature of ASEAN soft law based on informality, consensus, and trust makes ATSF a guide and a manifestation of ASEAN member states to protect the environment and climate shock in each national jurisdiction.⁴⁷

This paper argues that there are three advantages of the soft law adopted by ASEAN to regulate sustainable investment. First, the ATSF is a general guideline subject to modification following the needs and economic conditions of the ASEAN member states. Second, there is flexibility for member states to regulate further the substance of the ATSF in national jurisdiction with the appropriate form of the instrument under the adopted legal system being. Finally, member states can freely amend or adjust the ATSF standards in their national legislation. However, there are also shortcomings or limitations of the ATSF. Firstly, since it is a soft law, there is no obligation for ASEAN member states to implement the ATSF consequently. The second is that related to the first disadvantage, and there are also no legal consequences for member states that do not comply with the provisions of the ATSF. As there are no standards that apply uniformly at the regional level, there will be a vulnerability condition for ASEAN member states to claim sustainable investment.⁴⁸

Based on this perspective, the existence of the ATSF raises serious doubts, particularly its contribution to

environmental protection and climate change mitigation at the regional scale. Moreover, the ATSF also faces the challenge of a significant difference in sustainable investment literacy among ASEAN member states.⁴⁹ Nevertheless, ASEAN's initiative to develop and adopt the ATSF is a significant effort to pursue a sustainable economy at the regional level.

4. EU and ASEAN Sustainable Investment Legal Framework: Common Goal in a Different Mechanism

This section will explore the EU and ASEAN sustainable investment legal frameworks from a comparative viewpoint. As discussed in the introduction section, the EU and ASEAN have different integration profiles. In addition, the typologies and enforceability of legal instruments are also significantly different. Nonetheless, this paper will focus on the similarities and differences in the sustainable investment legal framework, especially regarding essential principles, including environmental protection and climate change mitigation.

The comparative examination presented in this section compares two *de lege lata* in two contrasting legal systems.⁵⁰ Comparing the current laws of the EU and ASEAN has its challenges. On the one hand, the EU is a supranational institution that has been properly integrated into an economic, political and legal framework. On the other hand, ASEAN is a multilateral institution

⁴⁷ Further reading for ASEAN informality, consensus dan trust principles please refers to Winfried Huck, *Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability*, "ZaöRV", Vol. 80/2020, p. 115.

⁴⁸ McLaughlin, *Mapping Sustainable Development in Investment Treaties: An Analysis of ASEAN State's Practice*, p. 135.

⁴⁹ Lydia Ivana Kumajas et al., *Kontradiksi Sustainable Finance: Sebuah Literatur Review*, EMBA, Vol. 10, no. 2/2022, p. 5.

⁵⁰ Juha Karhu, *How to Make Comparable Things: Legal Engineering at the Service of Comparative Law*, in *Epistemology and Methodology of Comparative Law*, ed. Mark Van Hoecke, Oxford and Portland: Hart Publishing, 2004, p. 80.

that has decided not to achieve full integration. In addition, the EU also has a well-developed legal system with a legal instrument nomenclature accepted as legally enforceable. In contrast, ASEAN does not recognise a specific format of legal instruments. Hence it is quite common to find a wide variety of legal instrument titles in the ASEAN legal regime.

In the previous section, it was mentioned that the EU and the ASEAN sustainable investment legal framework have fundamental differences, namely in the form of legal instruments and legally binding. The next question is, why is it still relevant to do such comparative studies? To answer this question, it is necessary to look at the existence of 'good faith' and long-term goals in adopting legal instruments for sustainable investment. Mitigating the impacts of climate change is a long-term goal to be achieved by adopting sustainable investment. The EU and ASEAN go in different ways with the characteristics of their respective organisations. The EU adopts a form of hard law as a supranational organisation quite well integrated. Meanwhile, ASEAN, whose organisation is based on consultation and consensus, chose to adopt a soft law. Although the mechanisms are different, the purpose of the two organisations is similar, namely that investment is directed to industries that support climate change targets.

ATSF has something in common with the EU Sustainable Investment Legal Framework: it adheres to the principle of

doing no significant harm as an essential criterion.⁵¹ This principle is essential in protecting the environment, especially amid climate change. The existence of the do no significant harm principle has been known since the seventeenth century and increasingly has an important role in international law.⁵² In subsequent developments, many state entities of the world recognised and applied this principle in the jurisdiction of their national environmental laws. In general, the principle of do no significant harm protects an entity from harm inflicted by other entities.⁵³

The EU and ASEAN legal framework also provide their respective definitions of this principle. The EU defines the do no significant harm principle as an activity that does not hinder achieving sustainable investment goals.⁵⁴ In addition, this principle is also defined by the EU as activities that do not hinder or even hinder climate change mitigation and adaptation, sustainable development goals, circular economy, and protection of biodiversity.⁵⁵ Like the EU, ASEAN also defines the implementation of the do no significant harm principle as an economic activity under the environmental protection objectives and does not make efforts to destroy the environment.⁵⁶ The approach taken by the EU and ASEAN for implementing the do no significant harm principle is the intervention and involvement of the state to ensure that

⁵¹ Art. 2a EU Regulation 2019/2088, Art. 17 EU Regulation 2020/852, ASEAN Taxonomy Board, ASEAN Taxonomy for Sustainable Finance, p. 23.

⁵² Owen McIntyre, *The Current State of Development of the No Significant Harm Principle: How Far Have We Come?*, "International Environmental Agreements: Politics, Law and Economics", Vol. 20, no. 4/2020, p. 603.

⁵³ Otto Spijkers, *The No Significant Harm Principle and the Human Right to Water*, "International Environmental Agreements: Politics, Law and Economics", Vol. 20, no. 4/2020, p. 704.

⁵⁴ Art. 2a EU Regulation 2019/2088.

⁵⁵ Art. 17 EU Regulation 2020/952.

⁵⁶ ASEAN Taxonomy Board, *ASEAN Taxonomy for Sustainable Finance*, p. 28.

economic activity does not damage the environment.⁵⁷

The EU and ASEAN have significant differences in promoting sustainable investment. The EU adopts pre-contractual disclosure, whereas ASEAN does not use this mechanism in the ATSF. The paper argues that the existence of pre-contractual disclosure provisions is an attempt by the EU to encourage transparency from the outset before investment contracts are concluded. The approach taken by the EU sustainable investment legal framework is before, during and after the contract is agreed. Meanwhile, the approach taken by ASEAN is an assessment to assess an investment, followed by providing a certain colour code to determine the sustainability of an investment.

On the one hand, the EU employed a more comprehensive and significant approach with pre-contractual disclosure provisions and adopted strong legal instruments. As a supranational organisation, the effectiveness of implementing this regulation is certainly a must and has become the main goal. On the other hand, based on the principle of consultation and consensus, ASEAN ultimately agrees that the effectiveness of the ATSF implementation should be based on each member state's initiatives.

Another difference is in the aspect of monitoring the implementation of legal instruments. The EU implements periodic monitoring and reporting. Monitoring, reporting, and evaluating data are the central policies of every legal instrument, especially those related to the EGD.⁵⁸ Therefore, monitoring all its stages is an important

instrument in the EU climate change governance.⁵⁹ The ATSF regulates monitoring and reporting, but it is not an integral and major policy. In addition, the reporting and sanctions mechanisms are not very clear. These differences are also affected by the organisational structure, the characteristic of integration, and the organisation's necessities.

Both the EU and ASEAN have challenges in mainstreaming sustainable investment legal frameworks at the regional scale. Regulators must ensure that the legal framework is successfully implemented and has a significant positive impact on environmental protection and climate change mitigation. In addition, the EU and ASEAN must consider a common vision regarding sustainable investment between the two regional organisations as trade relations continue to increase.

5. Conclusions

The EU and ASEAN, as regional organisations, have adopted different sustainable investment legal frameworks according to their specific requirements and mechanisms. Nonetheless, the EU and ASEAN share the common objective of establishing a comprehensive legal framework for sustainable investment practice. The commonality between the EU and ASEAN legal frameworks is the adoption of the principle of “do no significant harm” as an essential requirement in achieving sustainable investment. The adoption of this principle shows a high level of commitment to environmental protection and climate

⁵⁷ Nils Holtug, *The Harm Principle*, in *Ethical Theory and Moral Practice*, Kluwer Academic Publishers, 2002.

⁵⁸ Jonas J. Schoenefeld, *The European Green Deal: What Prospects for Governing Climate Change with Policy Monitoring?*, *Politics and Governance*, Vol. 9, no. 3/2021, p. 376.

⁵⁹ Jonas J. Schoenefeld and Andrew J. Jordan, *Towards Harder Soft Governance? Monitoring Climate Policy in the EU*, *Journal of Environmental Policy and Planning*, Vol 22, no. 6/2020.

change mitigation. Furthermore, there are particular differences in the pre-contractual disclosure mechanism adopted in the EU legal framework and not available in the ATSF. The further distinction is the monitoring and reporting mechanism, which is covered in more detail in the EU legal framework and is generally covered in the ATSF. Such differences and similarities are associated with regional integration, organisational necessity and the internal mechanism.

Despite these similarities and differences, the EU and ASEAN have made a strong and significant endeavour as regional institutions to achieve sustainable investment. The member states of respective organisations have a vital and significant contribution to play in implementing the legal frameworks adopted by the EU and ASEAN. The significance of this comparative study can be applied to assess

the implementation of sustainable investment in the EU and ASEAN member states. This paper argues that the legal frameworks provided by the EU and ASEAN play a significant role and can be a powerful catalyst for member states concerning green investment in their national jurisdictions.

Comparing the legal frameworks of two different regional organisations could also be a first step towards harmonising sustainable investment terms. Therefore, further studies could address this opportunity. The strong influence of the EU as a global actor in climate change issues is a potential factor for such harmonisation. Another aspect that can be addressed in future studies is the implication of the differences in the EU and ASEAN sustainable investment legal framework on climate change mitigation.

References

- Ahlström, Hanna, and David Monciardini. *The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms*, Journal of Business Ethics 177, no. 1 (2022), <https://doi.org/10.1007/s10551-021-04763-x>;
- ASEAN Taxonomy Board, *ASEAN Taxonomy for Sustainable Finance* (2021), <https://asean.org/wp-content/uploads/2021/11/ASEAN-Taxonomy.pdf>;
- Conea, Alina Mihaela. *EU Taxonomy: Qualifying As Green*, Lex ET Scientia International Journal 2, no. XXIX (2022);
- European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions*, Pub. L. No. COM(2019) 640, The European Green Deal (2019), <https://doi.org/10.1017/CBO9781107415324.004>;
- Fukunaga, Yoshifumi. *Use of Legal Instruments in the ASEAN Economic Community Building*, Journal of Contemporary East Asia Studies 10, no. 1 (2021), <https://doi.org/10.1080/24761028.2021.1905199>;
- Grober, Ulrich, *Deep Roots: A Conceptual History of "Sustainable Development"* (Nachhaltigkeit), WZB Discussion Paper P 2007-002, no. February (2007);
- Gupta, Joyeeta, and Susanne Schmeier, *Future Proofing the Principle of No Significant Harm*, International Environmental Agreements: Politics, Law and Economics 20, no. 4 (2020), <https://doi.org/10.1007/s10784-020-09515-2>;
- Hieu, Vu Minh, *Influence of Green Investment, Environmental Tax and Sustainable Environment: Evidence from ASEAN Countries*, International Journal of Energy Economics and Policy 12, no. 3 (2022), <https://doi.org/10.32479/ijeeep.13028>;

- Holtug, Nils, *The Harm Principle*, in *Ethical Theory and Moral Practice*, Kluwer Academic Publishers, 2002, <https://doi.org/10.1002/9781118736739.ch27>;
- Huck, Winfried, *Informal International Lawmaking in the ASEAN: Consensus, Informality and Accountability*, *ZaöRV* 80 (2020), <http://www.zaoerv.de>;
- Karhu, Juha, *How to Make Comparable Things: Legal Engineering at the Service of Comparative Law*, in *Epistemology and Methodology of Comparative Law*, edited by Mark Van Hoecke, Oxford and Portland: Hart Publishing, 2004;
- Kumajas, Lydia Ivana, David Paul Elia Saerang, Joubert Baren Maramis, Lucky Otto Herman Dotulong, and Djurwati Soepeno, *Kontradiksi Sustainable Finance : Sebuah Literatur Review*, *EMBA* 10, no. 2 (2022);
- Legrand, Pierre, *Pre-Contractual Disclosure and Information: English and French Law Compared*, *Oxford Journal of Legal Studies* 6, no. 3 (1986);
- Limsiritong, Nattapat, *The Problems of Law Interpretation under ASEAN Instruments and ASEAN Legal Instruments*. *MFU Connexion* 5, no. 2 (2016);
- McIntyre, Owen, *The Current State of Development of the No Significant Harm Principle: How Far Have We Come?* *International Environmental Agreements: Politics, Law and Economics* 20, no. 4 (2020), <https://doi.org/10.1007/s10784-020-09501-8>;
- McLaughlin, Mark, *Mapping Sustainable Development in Investment Treaties : An Analysis of ASEAN State's Practice*, *Asian Journal of WTO & International Health Law and Policy* 17, no. 1 (2022);
- Mensah, Justice, *Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review*, *Cogent Social Sciences* 5, no. 1 (2019), <https://doi.org/10.1080/23311886.2019.1653531>;
- Nepal, Rabindra, Han Phoumin, and Abiral Khatri, *Green Technological Development and Deployment in the Association of Southeast Asian Economies (ASEAN)—At Crossroads or Roundabout?*, *Sustainability (Switzerland)* 13, no. 2 (2021), <https://doi.org/10.3390/su13020758>;
- Paces, Alessio Maria, *Will the EU Taxonomy Regulation Foster a Sustainable Corporate Governance?*, *Sustainability (Switzerland)* 13, (2021), <https://doi.org/10.2139/ssrn.3940375>;
- Pisani, Jacobus A. Du, *Sustainable Development – Historical Roots of the Concept*, *Environmental Sciences* 3, no. 2 (2006), <https://doi.org/10.1080/15693430600688831>;
- Polzin, Friedemann, and Mark Sanders, *How to Finance the Transition to Low-Carbon Energy in Europe?*, *Energy Policy* 147, no. July (2020), <https://doi.org/10.1016/j.enpol.2020.111863>;
- Sadeleer, Nicolas de., *Sustainable Development in EU Law: Still a Long Way to Go*, *Jindal Global Law Review* 6, no. 1 (2015), <https://doi.org/10.1007/s41020-015-0009-0>;
- Schoenefeld, Jonas J., *The European Green Deal: What Prospects for Governing Climate Change with Policy Monitoring?*, *Politics and Governance* 9, no. 3 (2021), <https://doi.org/10.17645/pag.v9i3.4306>;
- Schoenefeld, Jonas J., and Andrew J. Jordan, *Towards Harder Soft Governance? Monitoring Climate Policy in the EU*, *Journal of Environmental Policy and Planning* 22, no. 6 (2020), <https://doi.org/10.1080/1523908X.2020.1792861>;
- Schütze, Franziska, Jan Stede, Marc Blauert, and Katharina Erdmann, *EU Taxonomy Increasing Transparency of Sustainable Investments DIW Weekly Report*, *Deutsches Institut Für Wirtschaftsforschung* 10, no. 51 (2020), <http://hdl.handle.net/10419/229644>;
- Sikora, Alicja. *European Green Deal – Legal and Financial Challenges of the Climate Change*, *ERA Forum* 21, no. 4 (2021), <https://doi.org/10.1007/s12027-020-00637-3>;
- Spijkers, Otto, *The No Significant Harm Principle and the Human Right to Water*, *International Environmental Agreements: Politics, Law and Economics* 20, no. 4 (2020), <https://doi.org/10.1007/s10784-020-09506-3>;

- Tignino, Mara, and Christian Bréthaut. *The Role of International Case Law in Implementing the Obligation Not to Cause Significant Harm*, International Environmental Agreements: Politics, Law and Economics 20, no. 4 (2020), <https://doi.org/10.1007/s10784-020-09503-6>;
- Waldzus, Dagmar, and Buse Heberer Fromm, *Germany – Pre-Contractual Disclosure Requirements and Relevant Case Law*, International Journal of Franchising Law 12, no. 5 (2014);
- Wu, Jennifer, *Five Reasons Why the Future of ESG Investing Is Long Term*, JP Morgan Asset Management ESG outlook 2022: The future of ESG investing, 2022, <https://am.jpmorgan.com/dk/en/asset-management/liq/investment-themes/sustainable-investing/future-of-esg-investing/>;
- Yin, Wei, *Integrating Sustainable Development Goals into the Belt and Road Initiative: Would It Be a New Model for Green and Sustainable Investment?*, Sustainability (Switzerland) 11, no. 24 (2019), <https://doi.org/10.3390/su11246991>;
- Zetzsche, Dirk A., and Linn Anker-Sørensen, *Regulating Sustainable Finance in the Dark*, European Business Organization Law Review, Vol. 23, Springer International Publishing, 2022, <https://doi.org/10.1007/s40804-021-00237-9>.