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Europe and South-East Asia: Shifting from diplomacy to unilateralism

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ECIPE | S E T A

Societal and Economic Transformation of Asia at ECIPE

Policy Brief No. 1/2019

Europe and South-East Asia: Shifting from Diplomacy to Unilateralism

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EXECUTIVE SUMMARY

- The postponement of the planned 'strategic partnership' between the Association of Southeast Asian Nations (ASEAN) and the EU highlights deep concerns and divisions for opening up in the relationship. The EU-Singapore Free Trade Agreement (FTA), and Investment Partnership Agreement (IPA), stand alone as a success for EU-ASEAN trade relations, in an otherwise troubled landscape. Bilateral trade agreements with Vietnam, Malaysia, Indonesia and Thailand remain frozen or unratified for multiple non-trade reasons, often stemming from domestic politics.
- The treatment of palm oil remains a substantial impediment to improving relations. The EU's delegated regulation, an addition to the RED II Directive, will in effect remove palm oil as a biofuel feedstock from the EU market. This is seen as discrimination in major ASEAN palm oil producing nations and caused bilateral relations to deteriorate further.
- Given existing jurisprudence, such differentiated treatment or selective exclusion of one crop would not comply with WTO law, exposing the EU to a time-consuming WTO dispute. Indonesia has already publicised its intent to bring the matter to the WTO, and Malaysia is expected to follow suit. However, retaliatory actions against European exports cannot be ruled out even before a WTO ruling is issued.
- A more positive assessment can be made of progress in tackling illegal, unreported and unregulated (IUU) fishing. Indonesia, Thailand, Vietnam and the Philippines are major fish producers: significant improvement in legislation and enforcement systems means IUU fishing can now be considered less likely to act as a brake on trade negotiations.
- Cambodia and Myanmar face increasing economic sanctions from the EU as a result of human rights transgressions. The dilemma facing Europe is whether or not such considerations are sufficient to impact future ASEAN-EU negotiations. Also, the European Parliament's interventions over sustainability issues on environmental and labour issues have shifted EU trade policy towards favouring short-term domestic interests and unilateralism rather than incentivising long-term reforms to support the EU's long-term geopolitical interests.
- Sustainability issues have set the EU against decentralised and federal democracies where the rural population have a strong domestic standing. Europe's success in tackling IUU fisheries show that sustainability does not become an obstacle to trade negotiations if intergovernmental processes and mutually recognised international conventions exist. Meanwhile, unilateral or discriminatory actions lead to similar responses as "soft" sanctions (e.g. withdrawal of trade benefits) with little chance of compliance as the counterparts tend to 'rally around the flag' or retaliate.

1. INTRODUCTION

The relationship between the European Union and the Association of South-East Asian Nations (ASEAN) is still in troubled waters. Following efforts to reopen negotiations in the year,[1] ASEAN has unilaterally and indefinitely postponed the signing of a 'strategic partnership' between the regions –[2] that would have been a diplomatic recognition of like-mindedness and an informal pre-requisite towards completion of trade negotiations.

The cause of the diplomatic rift this time is essentially a new EU directive that made Indonesian and Malaysian palm oil commercially unviable as a renewable energy source. In a paper published a year ago, we stipulated that EU-ASEAN negotiations on a region-to-region Free Trade Agreement (FTA) walked in a 'circle of political goodwill, false hopes and misfortunes' since the opening of the talks in 2007.[3] These talks are still on hold and currently in a 'stocktaking exercise' to assess whether the negotiations can be resumed.

In 2019, the factors that shape the dynamics in EU-ASEAN relations are unchanged. Interest groups continue to impose pre-conditions to negotiations or ratification over new issues, despite the long-term developmental and strategic objectives for cooperation. There are no pockets of growth with the magnitude of ASEAN for European exports in the absence of new market openings in India or China. The ASEAN economies are also highly complementary and strategically linked to the recent economic partnership agreement (EPA) with Japan.[4] Yet, the EU is demanding stronger commitments on sustainability issues, while the ASEAN countries perceive that the EU offers less and less in return.

In addition to the regional agreement, bilateral agreements with individual ASEAN countries have suffered a similar fate. Negotiations with Malaysia, Thailand and Indonesia are being held up by different non-trade issues that were mostly known prior to the negotiations. In addition, the EU and Vietnam provisionally agreed upon the terms for an FTA and the accompanying Investment Partnership Agreement (IPA) in August 2018,[5] which fails to be ratified under the current legislature over labour standards.[6] The European Parliament formally adopted the EU-Singapore FTA and IPA in February,[7] but not without public dissent coming from leading members of the European Parliament who may be facing difficult re-election prospects.

In 2019, sustainability issues, human rights violations, sanctions and labour standards continue to be high-level impediments on the trade negotiations. Meanwhile, domestic politics run high on all sides: Nearly a billion citizens across the EU, Indonesia, Thailand and the Philippines will elect their representatives in 2019; Malaysia held elections just last year – and all these five South-East Asian countries are in slow-paced FTA negotiations with the EU.

In our first paper,[8] we raised questions over the strategies of making a resumption of negotiations conditional upon changes in behaviour that may need many years of political reforms. The essence of economic diplomacy is "the choice to engage the world for what it really is, rather than use reality as an excuse to disengage".[9] This dilemma is still pertinent to the EU-ASEAN FTA negotiations – and in this paper, we analyse three different examples of recent developments that impact the relationship differently due to their background:

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[1] Joint Media Statement of The Fifteenth AEM-EU Trade Commissioner Consultations. (10 March 2017); Koh, J. (15 July 2018), EU and ASEAN to restart FTA process: PM Lee, Channel News Asia. Available at: https://www.channelnewsasia.com/news/singapore/eu-and-asean-to-restart-fta-process-pm-lee-10531412

[2] Chongkittaborn, K. (22 January 2019). Asean must make EU a strategic partner, *The Bangkok Post*. Available at: https://www.bangkokpost.com/opinion/opinion/1615446/asean-must-make-eu-a-strategic-partner

[3] Deringer, H, Lee-Makiyama, H. (2018), Europe and South-East Asia: An Exercise in Diplomatic Patience, ECIPE.

[4] *EU-Japan Economic Partnership Agreement*, ratified on 8 December 2017, entered into force 1 February 2019

[5] *EU-Vietnam Free Trade Agreement* and *Investment Partnership Agreement*, concluded on 4 August 2018

[6] Dreyer, I. (17 October 2018). Vietnam trade and investment deals face uncertain ratification prospects, *Borderlex*,.

[7] *EU-Singapore Free Trade Agreement* and *Investment Partnership Agreement*, signed on 19 October 2018, ratified on 13 February 2019.

[8] *supra* 3

[9] *ibid.*

- To begin, the EU delegated regulation unilaterally invented thresholds that singles out the palm oil producing countries of Malaysia and Indonesia. The act eroded the EU-ASEAN strategic partnership and any basis for bilateral or regional trade negotiations and provoked the parties to engage in retaliatory behaviour that would further deteriorate the conditions.
- In contrast, the issue of combating illegal, unreported or unregulated (IUU) fishing is an example of how sustainability issues can be resolved prior to any FTA negotiation. We argue that unlike in the conflict over biofuels, international standards and practices existed, thereby limiting the room for unilateral or arbitrary actions that are not acknowledged by both sides.
- Finally, the introduction of new economic sanctions against the human rights violations in Myanmar is not just an issue concerning fundamental values, but core national interests for both. However, the situation on the Rohingya minorities also highlights that the ASEAN is an entirely different political entity than the EU, with different intergovernmental dynamics and means to influence the behaviour of other members. The region-to-region agreement is based on the understanding that the organisations are equal – while they are never going to be the same for their members.

2. NO SOLUTION TO THE PALM OIL CONFLICT

The nature of the palm oil issue

Palm oil is Indonesia's largest export and the ASEAN bloc's largest agricultural export. It stands to reason that ASEAN's largest economy – and ASEAN as a bloc – would object to EU measures to crimp exports. As highlighted in the 2018 paper, the Renewable Energy Directive (RED II) revises the policy for the production and promotion of energy from renewable sources in the EU,[10] which sets targets for a wider area of societal consumption of renewable energy than the previous policy.

RED II has a wider scope (including e.g. transports) and ambition of what the EU considers as renewable energy, stating that 'sustainable' biofuels must play a central role in Europe's transition towards the quantitative goals it set for itself by 2030 –[11] for economic as well as technical reasons. They are not just the targets for fulfilling international commitments under the Paris accords, but also linked to the qualifications for hundreds of billions in national and EU subsidies available for renewable energy.

As a result of the RED II compromise in July 2018, the use of sustainable biofuels is capped at 7% of the renewable energy consumption of each Member State by 2020. Moreover, the European Commission has proposed a delegated regulation, which defines the criteria that determine which biofuel feedstocks will be defined as 'low risk' for indirect land-use change (ILUC) and 'significant expansion of the production area into land with high carbon stock is observed'.[12] Such low-risk feedstocks are allowed to stay on the EU market, while the crops that are defined as high ILUC risks are disincentivised and phase-out.

The politics of the RED II delegated regulation

On the one hand, the concern for climate change in Europe is genuine and increasingly a political factor, especially in the more progressive European Member States. Nor can it be ignored that the reputation of palm oil amongst the European public is tainted, not least after NGO campaigns on its impact on the natural habitat of orangutans and initiatives of the European Parliament.

On the other hand, such policy objectives are conglomerated with another equally important factor: There have been numerous disagreements between the EU and overseas producers of biofuels, including palm oil from South-East Asia, Sub-Saharan Africa, Latin America and the Caribbean. The European agro-industrial conglomerates that grow rapeseed are suffering from declining market

[10] Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (recast), 11 December 2018, Official Journal L328/82.

[11] *ibid.*

[12] European Commission (2019), Commission delegated regulation supplementing directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies.

share and profitability,[13] while the withdrawal of EU crop producer subsidies incentivises them to lobby in favour of measures that will push out competing feedstock.

Meanwhile, the exportation of palm oil-based products is a core national interest for some ASEAN countries, especially in federal democracies like Indonesia and Malaysia where the rural population is a major political power. One certification scheme counts 2.2 million smallholders alone.[14] One report astonishingly claims palm oil production accounts for the employment of 41 percent of the Indonesian population and two-thirds of rural household income.[15] The developmental dimensions of low-income countries are apparent, as palm oil is an extremely cost-effective crop that requires half the amount of land for the same output from other oilseed crops thus giving local farmers very few other viable alternatives.[16]

Concurrent with the EU RED II legislative process, Malaysia underwent a general election that led to the liberal opposition coming into power that has only strengthened Malaysia's stance. The government under Prime Minister Mahathir is a vocal supporter for retaliatory actions.[17] Similarly, Indonesia – the world's third-largest democracy – will turn to the voters in April 2019, where neither the incumbent government nor the opposition is in a position to disappoint their core constituents.

Diplomats in the region concede privately that the inability of the EU to secure "strategic partner" status with ASEAN is in large part due to anger over the treatment of palm oil in RED II. Perhaps by neglect, rather than design, palm oil certification has become the most urgent issue that needs to be resolved before ASEAN is ready to resume the negotiations to designate the relationship as a 'strategic partnership', or before negotiations for the FTA or the supplementing political cooperation agreement (PCA).

How the delegated regulation impacts trade

As so often is the case with EU policy, societal, institutional and economic interests diverge. The RED II legislative package was subject to considerable horse-trading between the EU institutions, and the resulting compromise for the directive includes a ceiling on the use of 'sustainable' biofuels, i.e. ethanol fuel or biodiesels made from primarily food oils, such as soy, rapeseed, palm or sunflower.

The core of the problem lies in how the delegated regulation defines 'high ILUC risks' on the basis of the type of feedstock, regardless of the actual conditions that apply in the territory where it was grown.[18] Moreover, the proposal weighs the risk of crops that are sometimes cultivated in wetlands three times higher.[19] In addition, the EU's calculations inaccurately determine that only palm oil is grown on such lands.[20] This leads to a threshold being set at a level where only palm oil – and no other comparable biofuel feedstock - is defined as a high-risk crop.

While the draft proposal exempts crops produced by smallholders (suggested as less than a mere two hectares),[21] this exception should have little real-life meaning as any industrial-scale production of biofuels are not made from crops from smallholders alone. Given the scope provided for discretionary assessments in the draft delegated regulation, it is reasonable to assume that most of

[13] USDA Foreign Agricultural Service. (29 March 2018). EU-28 Oilseeds and Products Annual 2018, *USDA GAIN Report*.

[14] RSPO. (30 October 2015). Perseverance of RSPO Smallholders Working Group to continue. Available at: https://www.rspo.org/news-and-events/news/perseverance-of-rspo-smallholders-working-group-to-continue

[15] World Growth. (February 2011). The Economic Benefit of Palm Oil to Indonesia.

[16] The Economist Intelligence Unit (n.d.), Palm oil and deforestation, Food Sustainability Index, Blog. Available at: http://foodsustainability.eiu.com/palm-oil-and-deforestation/

[17] South China Morning Post. (24 March 2019). Malaysian leader Mahathir Mohamad threatens to boycott EU fighter jets and buy from China instead due to palm oil restrictions. Available at: https://www.scmp.com/news/asia/southeast-asia/article/3003055/malaysian-leader-mahathir-mohamad-threatens-boycott-eu

[18] *supra* 12, article 3(a)

[19] *ibid.,* article 3(b)

[20] See Wetlands International. (2016) *Wetlands and biofuels – Case Study*. Available at https://www.wetlands.org/casestudy/wetlands-and-biofuels/; Wetlands International. (2016), *Soy and wetlands – Case Study*. Available at: https://www.wetlands.org/casestudy/soy-and-wetlands/; Herrera, Panigatti, Barral, Blanco. (2013). Biofuels in Argentina – Impact of soybean production on wetlands and water, *Wetlands International.*

[21] *supra* 12, recital 15.

the imports of biofuels from South-East Asian palm oil are intended to be de facto restricted, and phased out entirely.

The politicisation of EU criteria

Although the EU has undertaken good faith negotiations with its counterparts, the European Commission is not a single monolith and sometimes motivated by conflicting objectives. Also, the outcome of RED was clearly a political compromise between the Council, Parliament and Commission – where both the European Parliament and some Member States have regularly sought to ban palm oil entirely.

The Commission has also announced that it would unilaterally declare US soybean imports to be sustainable – and that the US-produced soybeans are exempt from any potential 'high risk' definition under RED II.[22] Most likely, it is a concession to avoid coming US safeguard tariffs against German auto exports.[23] Thus, the proposed EU certification criteria are not just unilateral, but presumably also highly politicised.

Such discrepancies in the EU methodology is only possible because it groups all producers of a crop into one: the effect of the RED Delegated Regulation is to regulate on the assumption that all palm oil, regardless of where or how it is grown, is 'high risk' and unsustainable.

Also, there are no international standards on sustainable biofuels, and there are several competing sustainability certifications on the market who certify based on actual production and process methods of individual producers. As the ASEAN members of Indonesia, Thailand and Malaysia account for nearly 90% of global palm oil production,[24] the absence of globally agreed standards provides for the possibility of a methodology that may be specifically designed to single these countries out.

WTO violation and other responses

The proposed EU methodology in the delegated regulation inevitably opens the EU to a WTO complaint and a subsequent dispute – and at least Indonesia has already publicly pledged to pursue this route.[25]

Under the WTO rules, trade measures regulating product characteristics or their related processes and production methods (such as ILUC) are allowed. However, A WTO member must grant no less favourable treatment to "like" products with similar end uses.[26] If the EU calculation weights are inconsistently set to discriminate against a particular crop, this prerequisite cannot be fulfilled. The case law also states it must be based on a scrutiny of the underlying process and production method of each product.[27] By bundling together all palm oil producers in such manner as the delegated regulation, the EU disregards the fact that there may be sustainable practices without any impact on land-use change. The proposal even pre-emptively undermines the commercial viability of any sustainable production of biofuels in the future that may fully comply with the stated objective to avoid ILUC risks, if it is made from palm oil.

Also, under the WTO rules for technical barriers to trade (TBT), mandatory technical standards must be applied in a manner that is not an arbitrary or unjustifiable discrimination where the same conditions prevail.[28] Environmental regulations should not be a disguised restriction or be more trade-restrictive than necessary to fulfil a legitimate objective.[29]

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[22] European Commission (2019), *The Commission recognises the U.S. Soya bean - scheme as compatible with EU sustainability standards*. Available at: http://europa.eu/rapid/press-release_IP-19-748_en.htm

[23] Blenkinsop, P, Renshaw, J. (29 January 2019), 'EU seeks to soothe U.S. by clearing soybeans for biofuel', *Reuters*. Available at: https://www.reuters.com/article/us-usa-trade-eu/eu-seeks-to-soothe-us-by-clearing-soybeans-for-biofuel-idUSKCN1PN1GT

[24] IISD. (2014). Palm Oil Market, *SSI Review 2014*.

[25] Dipa, A. (19 March 2019). Indonesia prepares to take dispute with EU on palm oil to WTO. *The Jakarta Post*. Available at: https://www.thejakartapost.com/news/2019/03/19/indonesia-prepares-to-take-dispute-with-eu-on-palm-oil-to-wto.html

[26] GATT article I.

[27] The notion of PPM established in *United States*—Restrictions on Imports of Tuna, DS21/R (Mexico) and DS29/R (EEC)

[28] Agreement on Technical Barriers to Trade, preamble.

[29] *ibid.*, Article 2.2.

The recent developments in the EU raise a question in the context of trade negotiations. Given that there are neither previous FTA model texts applicable for the issue, nor internationally acknowledged standards that parties could commit to, a template-based Trade and Sustainability Development chapter (TSD) is unlikely to solve a WTO dispute. Pending the inevitable, the question is then how parties react to a WTO dispute and how a market access issue of such political magnitude impacts ongoing bilateral or future regional negotiations.

Such dispute is strictly a matter of WTO compliance for the defendant (in this case, the EU), but for complainants it is a matter of actual outcome. Europe's action is seen as an attempt to define the rules to fit a pre-intended result. In other words, the EU looks purely at this as an issue of legality, whereas ASEAN sees an act of bad faith, on which they could be willing to repay in kind. Hence, the affected countries are therefore openly preparing for retaliation – even before non-compliance has been established by a panel – should any such measure be introduced.

The hardening position in Jakarta and Kuala Lumpur means that Europe cannot preclude retaliation. The accident involving a Boeing 737 MAX belonging to the Indonesian airliner Lion Air has boosted the commercial potential for Airbus in the region, which is now in jeopardy. Similarly, defence and civil engineering projects, which involve several European firms, Thales could be dropped.[30] Also, Malaysia has publicly mused that they could abandon their plans to buy French Rafale fighter jets in favour of another (possibly Chinese) manufacturer.[31]

Also, as emerging economies struggling with their tax base, the ASEAN countries may initiate investigations against European luxury retailers that are using intangibles to shift corporate profits to avoid taxation. Other options that are close at hand include introduction of new taxes on German carmakers, or actions targeted at famous alcoholic or dairy products hailing from Europe.[32]

3. TACKLING ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING

The economic importance of fishing

For most ASEAN countries the fisheries sector is a vital economic sector, especially those with a long coastline. For these countries the fish industry is an important source of nutrition, income and employment. Four ASEAN countries are in the world's top ten largest fish producers (Indonesia, Thailand, Vietnam, and the Philippines) and together ASEAN countries are reported to account for approximately a quarter of global fish production.[33] The sector is therefore also politically important for ASEAN countries.

South-East Asian countries are also successful in exporting their fish. In 2015 they accounted for approximately 14% of the world's total exportation of fish and fishery products.[34] Trade in fishery products is economically more important for ASEAN countries than for the EU. In 2017 ASEAN members exported to the EU fishery products worth 2,245 million EUR (1.7% of their exports to the EU), whereas the EU only exported fishery products worth 347 million EUR to its ASEAN trade partners (0.4% of EU exports to the region).[35]

However, illegal, unreported or unregulated (IUU) fishing not only threatens the sustainability of fish stocks and the marine environment, but also distorts competition and weakens coastal communities.[36] Over recent years, some positive developments and progress on fighting IUU fishing could be observed in ASEAN countries, suggesting that for the moment the matter will not become

[30] Krukowska E. (13 March 2019). EU Sets Limits on Palm Oil in Biofuels as Trade War Looms, *Bloomberg*.

[31] *supra* 17; see also 'Indonesia To Target Airbus, Thales If EU Cuts Palm Oil Imports' (20 May 2017), *DefenseWorld.net*. Available at: http://www.defenseworld.net/news/19347/Indonesia_To_Target_Airbus__Thales_If_EU_Cuts_Palm_Oil_Imports#.XJy8haeZN2

[32] Tan, H. (28 December 2018) The EU's palm oil policy is triggering condemnation from the other side of the globe, *CNBC Futures & Commodities*. Available at: https://www.cnbc.com/2018/12/11/an-important-food-ingredient-faces-demand-headwinds-as-concerns-over-environment-destruction-bites.html; Kagaya, K. (2017). EU asking for 'trade war' with palm oil curbs: Indonesian minister, *Nikkei Asia Review*. Accessed from: https://asia.nikkei.com/Editor-s-Picks/Interview/EU-asking-for-trade-war-with-palm-oil-curbs-Indonesian-minister

[33] ASEAN. (n.d.) Fisheries - Catch the Potentials. Available at: http://investasean.asean.org/index.php/page/view/fisheries

[34] European Commission. (n.d.). Illegal fishing (IUU). Available at: https://ec.europa.eu/fisheries/cfp/illegal_fishing_en

[35] European Commission. (n.d.). Commissions services' annex on Vietnam to the position paper on the trade sustainability impact assessment of the free trade agreement between the EU and ASEAN. Available at http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151230.pdf

[36] Southeast Asian Fisheries Development Centre (n.d.). International Fish Trade-Related Issues. Available at: http://www.seafdec.org/intlfishtrade/

a stumbling block in the negotiation process. However, since fisheries is an important sector for both regions, expectations and objectives on IUU fishing need to be clear on both sides in order to avoid this becoming an obstacle for the region-to-region dialogue.

The EU disciplines against IUU Fishing

Since 2010 the EU has an IUU regulation in place to prevent and eliminate illegal, unreported or unregulated fishing within and outside of the EU.[37] The regulation only allows *legal* marine fisheries products to be imported into or exported from the EU (in a non-discriminatory manner), which needs to be declared by the exporting state or the country under which flag a vessel is operating. The EU has set up an alert system which aims to motivate partner countries to promote adequate laws and their implementation on IUU fishing and effectively monitor their vessels. In this system countries are "pre-identified", i.e. given a "yellow card", if they fail to put in place and enforce adequate legislation to combat IUU fishing. The EU then enters into a formal dialogue with the selected country and monitors whether the country acts to improve the situation. If a country does not respond adequately to the warning, it is "identified" and receives a "red card". As a result, fisheries products which are caught by vessels operating under their flag are banned from the EU market.

This legislation seems to have been relatively successful. Of the 25 countries which have been given a yellow or red card since 2012, more than half have introduced reforms which were sufficiently satisfactory to have the pre-identification revoked or the ban lifted.[38] Unlike the functioning of the RED II directive, there are working trade incentives for compliance. At the time of writing, there are only three countries from which imports of fisheries products are currently banned.

Of the ASEAN countries only Vietnam, Thailand and the Philippines were "pre-identified" and the yellow cards of the latter two have been revoked already. Vietnam received a yellow card in October 2017, but has issued a new law on fisheries to come into force soon and takes part in an ongoing dialogue and revision process with the EU. Thus, individually ASEAN countries have improved their legal framework and its enforcement to prevent and eliminate IUU fishing, at least by EU standard requirements. Whether the fact that these countries have improved their legislation and enforcement systems is due to the EU's requirements and the threat to lose market access to the EU market, is not necessarily important. What is more important is the fact that seemingly individually the countries mostly have sufficiently effective systems in place to deal with IUU fishing.

At the moment the only ASEAN country which failed to take sufficient measures that allow the EU to lift the given red card is Cambodia. Cambodia was put on the EU's blacklist in 2014 and imports of fisheries products caught by vessels registered in Cambodia have been banned since then. Thus, an important question is whether the alleged non-compliance of Cambodia could be a potential obstacle in the region-to-region negotiation process.

Bilateral EU FTAs and fisheries

In its bilateral FTAs the EU currently covers environmental matters, such as IUU fishing, in chapters on trade and sustainable development (TSD). In these chapters the EU aims to include rules that prevent imports and trade in fish from IUU fishing. The bilateral agreement between the EU and Singapore as well as the agreement with Vietnam include such rules. The provisions refer to international agreements, conventions and institutions and call on the parties to comply with international principles, conservation measures and measures for sustainable exploitation, including the combatting of IUU fishing.

Although these TSD chapters in EU FTAs are binding and subject to dispute settlement, critics have questioned their effectiveness since non-compliance is not followed by economic sanctions and no dispute settlement proceedings have been launched so far on TSD matters.[39] The inclusion of provisions on IUU fishing in the bilateral FTAs with ASEAN countries therefore seems to be less threatening for ASEAN countries than the IUU regulation itself since the latter bears an

[37] Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, 2008.

[38] European Commission. (2017). Overview of Existing Procedures as Regards Third Countries. Available at: https://ec.europa.eu/fisheries/sites/fisheries/files/illegal-fishing-overview-of-existing-procedures-third-countries_en.pdf

[39] European Commission. (2017). Trade and Sustainable Development, 12. Available at: http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf; European Commission. (2018) 'Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements' 9. Available at: http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

economic threat. In addition, in relation to the FTAs, the EU also aims to make resources available to partner countries to support the implementation of TSD chapters.

If the EU follows a similar approach in its region-to-region negotiations, it can be expected that these provisions would complement the IUU regulation. Similar to the current provisions in the bilateral FTAs it is possible that areas of cooperation would also just emphasise the existing international rules and principles of intergovernmental institutions like the regional fisheries management organizations (RFMOs) and stress the importance of their implementation. To that end support may be provided for the implementation of such initiatives and civil society. It is unlikely that this would create a dispute and thus obstacle for the negotiations.

A question that remains, however, is what a possible region-to-region cooperation on IUU fishing could look like. According to a study commissioned by the European Parliament the dialogue on fisheries within ASEAN is at a standstill and the regional organisations do not play a role in regulating the fisheries activity in the region.[40] However, some important initiatives on IUU fishing have been taken at regional level. For example, general guidelines on IUU fishing in supply chains (2015) and an action plan on fisheries (2016-2020), which encourages cooperation on IUU fishing, were launched.[41] ASEAN member states are also collaborating with international institutions like the United Nations Food and Agriculture Organization (UN FAO) with which they have entered a Memorandum of Understanding (MoU) to strengthen their cooperation on agriculture and forestry and combat IUU fishing).[42] Similarly, a long-term strategic partnership has been entered with the intergovernmental Southeast Asian Fisheries Development Center (SEAFDEC) to promote the development of sustainable fisheries.[43] Thus, there are several existing initiatives on IUU fishing that could be revived or enforced through region-to-region talks with the EU.

4. NEW SANCTIONS TO HUMAN RIGHTS TRANSGRESSIONS

New sanctions on Cambodia and Myanmar

Economic sanctions enforced by Europe have historically been an unusual occurrence in the Asia-Pacific region. However, in the past six months we have seen the unofficial announcement of the revoking of Cambodia's Everything but Arms (EBA) status over the oppression of the opposition party Cambodia National Rescue Party (CNRP). There are also substantial investigations into Myanmar's EBA status over the treatment of the Rohingya minority.

There has been a pivot towards moral conditionality for access to the EU market. Cecilia Malmström, EU Commissioner for Trade, stressed in this context that our "trade policy must be led by our values".[44] But considering the relative reluctance of both Myanmar's First State Counsellor (and leader), Aung San Suu Kyi and the Cambodian Prime Minister Hun Sen, to right their humanitarian wrongs, any de-escalation seems unlikely.[45]

Europe is intent on following the rhetoric by increasing economic pressure: A €175 per tonne duty was placed on the import of Indica rice from the two countries on 16th January 2019.[46] Moreover, there is talk of suspending sugar import quota exemptions for Myanmar and reducing apparel imports from Cambodia. The policy specifics will only really become apparent when the Commission formally releases its decision to begin its preference withdrawal procedure.

[40] Priit, O. (2018). Research for PECH Committee - Fisheries in Vietnam, 33. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/629175/IPOL_STU(2018)629175_EN.pdf

[41] *supra* 38

[42] Southeast Asian Fisheries Development Center (SAFDC). International Fish Trade-Related Issues. Available at: http://www.seafdec.org/intlfishtrade/

[43] Invest in ASEAN. Fisheries: Where to invest? Available at: http://investasean.asean.org/index.php/page/view/fisheries

[44] Malmström, Cecelia. (5 October 2018). On Myanmar and Cambodia, European Commission. Available at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/myanmar-and-cambodia_en

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The Effectiveness of Sanctions

The full revoking of EBA status is likely to take at least 18 months and is littered with potential pitfalls, while the track record of economic sanctions is equivocal in terms of achieving policy changes. Such manoeuvres can produce a 'rally around the flag' mentality, especially when there is a sectarian or ethnic element involved.[47] The existing hierarchy becomes entrenched and, in some places, ennobled. History shows that sanctions tend to only be successful when they are multilaterally coordinated and supported by the local economic hegemon – i.e. China.

This is corroborated by the reactions coming out of Cambodia and Myanmar. Hun Sen stated in January 2019 that, "if you want the opposition dead just cut [the EBA]." These words were supported by action, as further crackdowns on members of the opposition followed the announcement.[48] Trade union and government officials from Myanmar likewise warned of the consequences for labour rights should EBA access be removed.[49] In addition to these potential humanitarian difficulties, problems are further compounded by the nature of Europe's current trading structure in the region – with local trade and investment opportunities available to the countries.

Under such circumstances, escalating to economic sanctions (or revoking preferences) against a least developing country is a policy failure in itself, as the EU effectively signals that it has run out of options and channels of influence. In that regard, the revocation of EBA trade preferences is similar in both their unilateral nature as well as outcome.

In addition to the EU-ASEAN trade agreement, negotiations were also ongoing for an EU-Myanmar Investment Protection Agreement (IPA) prior to the Rohingya crisis. It was intended to "offer investors from both sides a secure investment environment," whereby assets were not sequestered without due compensation.[50]

However, the IPA would be asymmetrically favouring Europe, as its purpose is to grant European companies further rights for their FDI, which is one-eighth of FDI flowing in from China and Singapore. Also, the EU-ASEAN agreement has little incremental value to Myanmar who under the pre-existing EBA had all the duty-free access that an FTA would give.[51] The brunt of the impact from the sanctions is reputational and normative, rather than economic.

ASEAN's internal functioning

EU economic sanctions and normative powers raise the question of the structural and organisational differences between the EU and the ASEAN, which impacts the EU-ASEAN FTA negotiations. On a negotiating level they are equal partners, however they are entirely different political entities with differing levels of political authority. ASEAN does not have pooled sovereignty..[52] The organisation subscribes to the principles of territorial integrity, non-interference and national identities for all members, with no provisions for punitive actions in the case of human rights transgressions or instruments for joint actions or assistance in a time of crisis. As such, the EU may negotiate with the ASEAN, but as a body it has no influence over the policies implemented by Cambodia or Myanmar.[53]

The group has condemned the Rohingya Crisis, not least at the November summit in Singapore, and has pledged bilateral humanitarian aid to the refugees. Indeed, many constituent members, with sizeable and in some cases majority Muslim populations, find the Rohingya persecution particularly abhorrent. However, they fear that acting beyond their constitutional remit would risk the exit of

[47] Hufbauer, G., Schott, J., Elliott, K., and Oegg, B. (2009). Economic Sanctions Reconsidered, 3rd edn. *Peterson Institute.*

[48] The Asahi Shimbun. (14 January 2019). Hun Sen Warns of Dead Opposition if UK Cuts Trade Status. Available at http://www.asahi.com/ajw/articles/AJ201901140032.html (Accessed 20 January 2019).

[49] Lwin, N. (31 October 2018). EU Delegates Face Broad Show of Opposition to Ending Trade Preferences, *The Irrawaddy*. Available at https://www.irrawaddy.com/news/eu-delegates-encounter-broad-show-opposition-ending-trade-preferences.html (Accessed 23 January 2019).

[50] European Commission. (2019). Objectives of EU Investment Policy. Available at http://ec.europa.eu/trade/policy/accessing-markets/investment/

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[52] ASEAN. (2007). ASEAN Charter. Available at https://asean.org/storage/images/archive/publications/ASEAN-Charter.pdf

[53] Ganjanakhundee, S. (18 January 2019). ASEAN Pledges Assistance over Rohingya Crisis, *The Nation*. Available at http://www.nationmultimedia.com/detail/breakingnews/30362494.

Myanmar from the group, and consequently further limit the soft power they have.[54] As such, some members have sought channels other than the ASEAN to express their displeasure and seek action. On 28th September 2018 Malaysian Prime Minister Mahathir Mohamad stated at the UN General Assembly that a country does not "have the right to massacre their own people because they are independent." He criticised the world for watching while "massacres [were] being carried out," imploring them to deal with Myanmar accordingly. Indonesia also pushed for UN action.[55]

The EU cannot assume that intra-ASEAN relations function the way intra-EU relations do or vice versa. Each regional organisation, such as the EU, the North American Free Trade Agreement (NAFTA), Mercosur and ASEAN are unique entities, each with its own approach to settling political differences. Where the EU would assume that a judicial and institutional approach would be a natural path of progression, other regional entities may use an informal and conciliatory one. In the case of ASEAN, its enhanced dispute mechanism, which uses the Secretariat as a mediator, has rarely been used.

This reality has caused the EU to underestimate the impact of potential controversies consistently and to misjudge how best to respond on almost every issue, from the emerging palm oil dispute to the Rohingya crisis. Also, given the paradox in which ASEAN finds itself as a collective, an attempt by the EU to leverage the regional negotiations to act more decisively against one of the ASEAN members is not more likely to induce a policy change than sanctioning individual countries directly.

Thus, the EU trade policy is stuck in a dilemma where freezing its negotiations with ASEAN would not achieve any of its intended goals, but only undermine its long-term goal to encourage Asian regional integration. At the same time, the EU is not in a position to compromise on its values in front of the European constituents by arguing that one, or even two bad apples should not spoil the barrel.

Given the inability to act regionally, the EU resorts to the ineffectiveness and unintended consequences of unilateral instruments like economic sanctions and revocation of preferences. Obviously, it is illogical (and infeasible) to negotiate a regional agreement that effectively consists of bilateral agreements while concurrently revoking preferences bilaterally.

5. CONCLUSIONS

Trade policy is always defined and limited by domestic politics and short-term interest, and differences of opinion on sustainability and other non-trade issues are practical means to extricate from trade negotiations. However, differences should be a reason to engage rather than disengage. FTAs are not designed to achieve immediate reforms, but rather as tools to engage in long-term commercial relationships, which can indirectly encourage and support change. By Europe increasing their prerequisites and conditionality in FTA negotiations, they are equally likely to be hindering or helping the rate of progress.

The palm oil issue shows that matters of high economic or political importance for both of the trading partners are not necessarily a token for success. ASEAN member states took the EU's initiative on palm oil as an arbitrary intervention into a sector which is of high economic and political importance for many countries in the region. On the contrary, if the change is affecting a relatively limited group of stakeholders – like fishers in Thailand – the EU is more likely to succeed.

The EU and ASEAN have both unilateral as well as cooperative instruments to achieve such goals, which in turn could be implemented as carrots (e.g. EBA tariff reductions) or sticks (sanctions and trade restrictions) for compliance. Unlike EU actions to tackle IUU fishing, its restrictions on biofuel feedstocks exemplify how it is challenging to find an agreement which satisfies both sides if there is no pre-existing international consensus or intergovernmental bodies that provides basic rules and definitions. Unilateral measures in such cases bear a close resemblance to the EU's "soft" sanction regime based on revoking fiscal or trade preferences like the EBA.

The biofuels industry is also characterised by private market players amongst producers and certifiers, while the work on IUU fishery is intergovernmental, where internationally recognised principles, agreements and bodies exist, providing a path towards standard compliance and reforms. The subject of IUU fishing was discussed outside of and independent from the trade negotiations

[54] Lee, H. (12 October 2018). ASEAN's Limited Role in Solving the Rohingya Crisis, *The Diplomat*. Available at https://thediplomat.com/2018/10/aseans-limited-role-in-solving-the-rohingya-crisis/

[55] Tani, M. (13 November 2018). ASEAN Aims to Express Concern on Rohingya Crisis for First Time, Nikkei Asian Review. Available at https://asia.nikkei.com/Politics/International-Relations/ASEAN-aims-to-express-concern-on-Rohingya-crisis-for-first-time.

before they are bound in FTAs. As parties engage in such organisations or have subscribed to these principles, there is a common ground upon which negotiations can build. Such structures tie both sides from taking unilateral actions that could escalate to WTO disputes. As a result, the matter is less of a stumbling block for FTA negotiations.

In this regard, the role of the government is pivotal. The subject for RED II certification is essentially a crop, whereas, under the IUU, a jurisdiction (i.e. a national authority) is the subject for evaluation. Paradoxically, a more centralised (rather than a federalised) government or an omnipotent and less publicly accountable executive power may be a more reliable counterpart when it comes to pursuing EU environmental objectives.

Looking forward, there are also clear signs that the prospects of an EU-ASEAN FTA look more difficult due to coming reforms on sustainability dimensions. The EU is increasingly moving towards imposing pre-conditions on sustainability – i.e. a verifiable change in policy or behaviour is necessary to open up or conclude trade negotiations. Some of the most influential MEPs refused to submit the EU-Japan EPA for ratification, citing Japan not being a signatory of a few ILO conventions on equal pay and forced labour, although such commitments existed in domestic Japanese law. The same MEPs also refuse to ratify the EU-Vietnam agreement without significant changes in Vietnam's labour conditions. In both cases, we are primarily dealing with conditions that were known before the negotiations were launched.

The EU is also in a review process of its TSD chapters. Unlike similar chapters under Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or US FTAs, the current EU sustainability chapters are not subject to sanctions and are therefore only enforceable pro forma. Also, the EU ideas for revised TSD disciplines may have a wider scope than CPTPP, covering more subjects given Europe's interest to defend its social model or industrialised agriculture. The subsequent question is whether ASEAN – with its diversity in economic structure, governance models, and not least, varying interests in EU market access – is ready to accept such changes unanimously.

In conclusion, an FTA with Europe looks politically dispensable for the ASEAN members, especially in the light of more urgent trade policy questions in the region, such as CPTPP accessions for Thailand and Indonesia, Regional Economic and Economic Partnership (RCEP) or not least finalising the ASEAN's own internal market.

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