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INTEGRATING ENVIRONMENTAL PROTECTION

INTO

ASEAN TRADING SYSTEM

BY

KITTINUT SUPSOONTORNKUL

Under the supervision of Professor MARGOT J. POLLANS

A dissertation submitted to the faculty at Elisabeth Haub School of Law

at Pace University in partial fulfillment of the requirements

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ABSTRACT

Integrating environmental protection into ASEAN trading system is pivotal for ensuring long-term economic development and environmental sustainability. Due to its resource-based economy, ASEAN's economic performance highly depends on the sustainable condition of the environment. The ASEAN approach prioritizing economic growth without environmental consideration leads to environmental degradation and economic loss. Many transboundary environmental problems in ASEAN result from unsustainable production methods aiming to maximize advantages in trade competition. There are growing international efforts in addressing production and process methods as a part of the sustainable development goal. Major trading partners of ASEAN increasingly employ unilateral environmental trade measures and environmental provisions in trade agreements to induce sustainable production in exporting countries. Despite its trade-restrictive characteristic and extraterritorial effects, the environmental trade measure can be justified on the environmental ground according to the WTO/GATT rules. Although ASEAN should integrate environmental protection for its own interest, the actual implementation depends on member states as ASEAN is a state-centric regional organization. The political regimes of member states prioritize economic growth over environmental protection, suppress civil participation, disregard human rights to the healthy environment, and insist on a strict application of the ASEAN Way, refusing any intervention in all internal affairs. The lack of democratic norms and human rights assimilation intensify the rule of non-intervention. As a result, ASEAN environmental governance remains weak without effective engagement. Therefore, to integrate environmental protection in trade, ASEAN needs to unlock the ASEAN Way impasse and become more people-centered by having ASEAN representatives democratically elected, enhancing participation from non-state actors, particularly environmental groups, and strengthening a linkage between environmental protection and economic development.

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ABBREVIATIONS

AATHP	ASEAN Agreement on Transboundary Haze Pollution
ACB	ASEAN Centre for Biodiversity
ACFTA	ASEAN-China Free Trade Agreement
ACSC	ASEAN Civil Society Conference
ADB	Asian Development Bank
AEC	ASEAN Economic Community
AECC	ASEAN Economic Community Council
AFTA	ASEAN Free Trade Agreement
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Right
AIF	ASEAN Infrastructure Fund
AMME	ASEAN Ministerial Meeting on Environment
APA	ASEAN People Assembly
APEC	Asia Pacific Economic Cooperation
APSC	ASEAN Political-Security Community
ARF	ASEAN Regional Forum
ASA	Association of Southeast Asia
ASEAN	Association of Southeast Asian Nations
ASEANTA	ASEAN Tourism Association
ASEAN-EIP	ASEAN Environmental Improvement Program
ASEAN-ISIS	ASEAN Institutes for Strategic and International Studies
ASEP	ASEAN subregional environmental programs
ASSC	ASEAN Socio-Cultural Community

ASSIST	ASEAN Solutions for Investments, Services and Trade mechanism
AWGCME	ASEAN Working Group on Coastal and Marine Environment
BAL	Basic Agrarian Law (Indonesian)
BioThai	Biodiversity Sustainable Agriculture Food Sovereignty Thailand Foundation
BLF	Basic Forestry Law (Indonesian)
BRI	Belt and Road Initiative
CBC	Convention on Biological Diversity
CCT	Clean Coal Technology
CCS	Carbon Capture Storage
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species and Wild Animals
COP	Paris Climate Conference
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Commission
ECHA	European Chemical Agency
EDSM	Enhanced Dispute Settlement Mechanism
EHIA	Environmental Health Impact Assessment

EIA	Environmental Impact Assessment
EJF	Environmental Justice Foundation
EKC	Environmental Kuznets Curve
ENSO	El Nino Southern Oscillation
ERL	External Regional Legitimacy
ESCAP	United Nations Economic and Social Commission for Asian and the Pacific
EU	European Union
FAO	Food and Agricultural Organization
Forum-Asia	Asian Forum for Human Rights and Development
GAMBUT	Generating Anticipatory Measures for Better Utilization of Tropical Peatlands
GATT	General Agreement on Tariffs and Trade
GHGs	Greenhouse gases
GLCs	Government-linked companies
GMS	Greater Mekong Sub-Region
GSP	Generalized System of Preferences
IAC	Inter-American Convention for the Protection and Conservation of Sea Turtles
ICEL	Indonesian Center for Environmental Law
ICJ	International Court of Justice
ICTSD	International Centre for Trade Sustainable Development
ILO	International Labor Organization
ILUC	Indirect land-use change
IPCC	Intergovernmental Panel on Climate Change

ISDS	Investor-State Dispute Settlement provision
IUCN	International Union for Conservation of Nature
IUU	The EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing
JBIC	Japan bank for International Cooperation
MARPOL	International Convention for the Prevention of Pollution from Ships
MEAs	Multilateral Environmental Agreements
MEP	Ministry of Environmental Protection (China)
MFN	Most Favored Nation
MMT	Methylcyclopentadienyl Manganese Tricarbonyl
MONRE	Ministry of Natural Resources and Environment of Thailand
MOU	Memorandum of Understanding
MPAC	Master Plan on ASEAN Connectivity
NAFTA	North American Free Trade Agreement
NGOs	Non-Governmental Organizations
NLD	Myanmar National League for Democracy
NTS	Non-Traditional Security
NTUC	National Trades Union Congress
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PAP	People's Action Party (of Singapore)
POPs	Persistent organic pollutants
PPMs	Production and Process Methods
PPP	Polluter Pays Principle

PTA	Preferential Trading Agreement
RCEP	Regional Comprehensive Economic Partnership
RED	Renewable Energy Directive
REACH	Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (EU)
REACH	Reaching Everyone for Active Citizenry@Home
RFMOs	Regional Fisheries Management Organizations
RHAP	Regional Haze Action Plan
SAPA	Solidarity for Asian People's Advocacy
SEAFDEC	Southeast Asian Fisheries Development Center
SEAMEO	Southeast Asia Ministers of Education Organization
SEATO	Southeast Asia Treaty Organization
SEPA	State Environmental Protection Administration (China)
SPS	Sanitary and Phytosanitary Measures
TAC	Treaty Amity and Cooperation
TAI	The Access Initiative
TBT	Technical Barrier to Trade
TEDs	Turtle Excluder Devices
TEI	Thailand Environment Institution
TERRA	Towards Ecological Recovery and Regional Alliance
TEU	Treaty of European Union
TFEU	Treaty of the Functioning of the European Union
TIFA	ASEAN-U.S. Trade and Investment Framework Arrangement
TOR	Term of Reference
TPA	Trade Promotion Authority (of the U.S.)

TPP	Trans-Pacific Partnership
UMNO	United Malay National Organization
UNCLOS	United National Convention on the Law of the Sea
UNEA	United Nations Environment Assembly
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNOPS	United Nations Office for Project Services
US	United States of America
USAID	U.S. Agency for International Development
WRI	World Resource Institute
WTO	World Trade Organization

INTRODUCTION

Environmental protection and economic development through trade are interdependent. Ensuring environmental sustainability in economic activities, particularly massive production for trade, is crucial. Nevertheless, the cooperation on such matters seems deficient in national, regional, and global contexts. While it is logical to see that environmental sustainability will yield long-term economic benefit, the actual practice is challenging due to the conflicting relationship between global trade competition and environmental cooperation.

This dissertation begins with the basic proposition that that the ultimate impediment of environmental cooperation is the competitive global trading system. The underlying incentive for a sovereign state to act for its own interest rather than for global environment is the economic incentives driven by global market system. This dissertation explores how this incentive has played out in Southeast Asia.

The economic relationship between sovereign states is founded on a competitive market basis. The global economic system functions on trade liberalization and the market theory of Comparative Advantage.¹ International trade competition compels each state to compete in the market by producing what it produces best according to its comparative advantages (e.g., natural resources, labor cost, or technology) and trade with others for optimal outcome. Each state has to exploit its resources to obtain the best competitive advantage in trade for its interests because every state is divided in terms of independence, economy, and sovereignty. The division of the world into sovereign states drives each state to act in its own best interest.² Southeast Asia is no exception. In this region, the theory of comparative advantage drives patterns of production and consumption—intensify resources extraction, economic growth, and pollution.

¹ NICK HANLEY ET AL., ENVIRONMENTAL ECONOMICS IN THEORY AND PRACTICE 421 (2nd ed. 2007)

² Susana Borrás, *New Transitions From Human Rights to The Environment to The Rights of Nature*, 5 TEL 113, 127 (2016).

The system leaves a state no other choice but to utilize the assets, particularly natural resources, within its territory to maximize national growth. It eventually leads to environmental degradation because the market fails to take into account the ecological services and costs of nature—the environment is a supplier of global life support, resources, and sink of waste products.³ For instance, such as in Indonesia, Malaysia and Thailand, trade can cause a shift in agricultural production. Instead of producing a wide variety of crops for domestic food consumption, the states start producing cash crops—crops that the state has comparative advantages in producing more efficiently at low cost to profit in exportation in the large international market. Small farmers abandon their traditional bio-diverse cultivation techniques in favor of chemical fertilizers, uniform seeds, and synthetic pesticides leading to soil and water contamination and a decrease in the genetic diversity of crops.⁴ The large-scale production of cash crops such as palm oil leads to habitat destruction and threats to biological diversity.⁵ In a state abundant in fossil fuels, such as Brunei, its whole economy may depend on resource exploitation and exportation.

When the market failure leads to global environmental degradation, individual states must choose between environmental protection and economic growth. According to traditional economic thinking, each state must risk economic loss for global cooperation by changing its production and process methods or limiting the exploitation of its natural resources. To illustrate, for effective climate change mitigation, Brunei loaded with fossil fuels shall not use such abundant resources and instead invest in renewable energy, or Indonesia covered with pristine primary forests serving as global carbon sink shall not engage in logging activities or agricultural production to the extent that it significantly diminishes the richness of the forests.

³ HANLEY ET AL., *supra* note 1, at 3-9.

⁴ HERNÁNDEZ-TRUYOL ET AL., JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 89 (2009).

⁵ HANLEY ET AL., *supra* note 1, at 42.

It is the dilemma between environmental protection and economic growth—global concern and national interest.

The environment does not have borders—the world is one single ecosystem, one unit.⁶ As pollution does not respect national boundaries and sovereignty, the global community must work together and cooperate to address the problem of the global commons. Some environmental issues are security issues. Timoshenko addressed it as “Ecological Security”⁷—it is the issue of human survival requiring collective responsibility and obligations.⁸ The environmental system is founded on cooperation and interdependence. The equilibrium of the environment depends on cooperation from all relevant players.

Whereas states compete in the market, they need to cooperate for the environment. How can these contradicting functions will ever work? Due to this paradoxical commitment, regional and global environmental cooperation has always been moderate at best and not adequate for addressing the current environmental crisis. This dissertation evaluates regional cooperation in Southeast Asia, in particular the evolution of the Association of Southeast Asia Nations (ASEAN).

In international environmental cooperation, the stability of the agreement depends on three factors: profitability, participants, and compliance.⁹ Each party has to profit in joining the agreement rather than staying out, and no party has incentives to become a non-signatory or violate the agreement.¹⁰ Even if all aspects are met, there is still an incentive for free riding

⁶ As Ottavio Quirico observed in the case of climate change: “The world is made up of an interrelated web of ecosystem, including the atmosphere, and thus constitutes a global common—that is, a resource which is difficult or impossible to exclude others from enjoying, but that is degraded by common use.” Ottavio Quirico, *Disentangling Climate Change Governance: A Legal Perspectives*, 21 RECIEL 92, 93 (2012).

⁷ Alexandre S. Timoshenko, *Ecological Security: The international Aspect*, 7 PACE ENVTL. L. REV. 151, 152-156(1989); and Alexander S. Timoshenko, *Ecological Security: Response To Global Challenge*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW : NEW CHALLENGE AND DIMENSIONS 413, 413-456 (Edith Brown ed., 1992).

⁸ RODA MUSHKAT, INTERNATIONAL ENVIRONMENTAL LAW AND ASIAN VALUES 25 (2004).

⁹ Scott Barrett, *On the Theory and Diplomacy of Environmental Treaty-Making*, 11 ERE 317, 317-333 (1998) in Michael Finus, *Possibilities for Cooperation in International Pollution Control*, in THE ECONOMICS OF GLOBAL ENVIRONMENTAL CHANGE 157, 163 (Mario Cogoy & Karl W Steininger eds., 2007).

¹⁰ *Id.*

because of the non-exclusive nature of the environment—everybody can enjoy the benefit without performing its obligations since there is no mechanism to force the cooperation.¹¹ For the use of coercive measures, the threat has to be credible; otherwise, too much force will lead to opting out unless the cost of opting out is too high.¹² Environmental cooperation does operate where there are minimal stakes but it is harder to achieve when the economic sacrifice is more significant.¹³ Since trade competition and economic interest always supersede environmental protection and cooperation, linking trade and environment as an interconnected regime to induce cooperation could be a solution.¹⁴

An evaluation of ASEAN illustrates these phenomena. The world trading system based on comparative advantage leaves ASEAN with a dilemma: economy or environment—to exploit natural resources for trade competition and economic development or to protect the environment. Within this limit, the dissertation aims to explore the issue of environmental integration in the ASEAN trading system. The objective is to unfold the reasons for, the barriers to, and the possibilities of environmental integration in the ASEAN trading system.

Chapter I discusses ASEAN's history, focusing on how ASEAN was constructed, how historical and economic forces shaped its objectives, and how regional environmental governance was developed. The chapter does not intend to discuss ASEAN regionalism in-depth. However, it aims to lay down essential traits of ASEAN—normative and structural challenges—significant obstructions to the environmental integration. In particular, it discusses how adherence to ASEAN Way, a non-interventionist principle for regional governance, results in a loose function of ASEAN and how ASEAN struggles in assimilating liberal norms—democracy and human rights protection. It unfolds that ASEAN accepts human rights norms

¹¹ Michael Finus, *Possibilities for Cooperation in International Pollution Control*, in *THE ECONOMICS OF GLOBAL ENVIRONMENTAL CHANGE* 157, 185 (Mario Cogoy & Karl W Steininger eds., 2007).

¹² *Id.*

¹³ Scott Barrett, *Self-Enforcing International Environmental Agreements*, 46 *OXF. ECON. PAP.* 878, 891-892 (1994).

¹⁴ Henk Folmer et.al., *Interconnected Games And International Environmental Problems*, 3 *ERE* 313, 328 (1993).

only to the extent it coincides with the so-called Asian values but does not embrace human rights within the liberal constructs or universal substances. The chapter argues that the tension towards liberal values creates leeway for human rights violations in ASEAN member states, affecting the integration of environmental norms.

Chapter II engages with ASEAN economic-environmental perspectives. The Chapter identifies a number of economic expectations that motivate policy-making in ASEAN countries. It argues that ASEAN economic approach and its expectation from economic growth do not correspond with reality. In reality, the existing economic approach leads to environmental degradation, wealth concentration, and regulatory chill effect. This chapter serves as a preface to the discussion on actual environmental problems caused by the existing economic approach.

Chapter III illustrates trade-related environmental problems occurring from unsustainable production and process methods. It discusses three environmental cases: regional haze pollution caused by palm oil production, climate change caused by energy production, and marine pollution caused by plastic production. These problems are selected because they are trade-related and transboundary; thus, they become regional and global crises. The chapter argues that sustainable economic development through trade requires sustainable production and process methods of goods. Environmental externalities causing regional and global environmental degradation commonly arise from the production and process of goods. International trade accentuates this problem—increasing the market size means a higher volume of production. The more goods are produced for the exporting markets; the more externalities are borne by the environment of the exporting country. The discussion reveals that economic incentive is the underlying cause of the environmental problems and the regional legal framework to address the problems is inefficient.

Chapter IV unfolds how trade-environmental relationships with major dialogue partners can influence environmental integration in ASEAN. It explores ASEAN's economic relationship with three major trading partners: the European Union, the United States, and China. Each dialogue partner embraces different degrees of environmental sustainability in trade and economic development. It reveals that the US and the EU employ unilateral environmental trade measures and environmental provisions in trade agreements to influence environmental protection in exporting countries. It affects production and process methods in ASEAN member states. The extent to which environmental trade measures or environmental provisions will be used depends on two factors: the internal politics and the geopolitical interests of dialogue partners. The chapter argues that extensive market access can significantly induce environmental compliance and sustainable production patterns in ASEAN exporting countries.

Chapter V evaluates the legality of environmental trade measures employed by importing countries under the World Trade Organization (WTO) rules. In particular, Chapter V assesses the rules to combat illegal, unreported and unregulated fishing (IUU), the phasing out of palm oil under the EU's Renewable Energy Directive (RED), and the ban on microplastic and single-use plastic products. The discussion centers around the potential conflicts of current environmental trade measures and trade rules. Due to their extraterritorial effect and trade-restrictive features, the environmental trade measures can violate the WTO rules. However, the analysis shows that such violation can be justified on environmental grounds if the measures are well-designed and applied in a non-arbitrary manner.

The final Chapter begins by recalling reasons why ASEAN should integrate environmental norms into its trading system. These internal and external forces have been discussed in chapter II-V. It recalls three significant barriers for integration discussed in chapter I—the non-democratic political regimes in member states, the human rights violation, and the

strict application of the ASEAN Way. The discussion explores how the lack of liberal values assimilation in member states strengthens the non-intervention rule; thus, it blocks meaningful engagement and environmental integration. The chapter proposes structural reforms to enhance participation from non-state actors and consolidate the trade-environment linkage ensuring the compatibility between environmental protection and economic development.

ASEAN regionalism may not have a solid integration due to its limitations. By breaking these limitations, ASEAN can strengthen its regional environmental governance and ensure the equilibrium between environmental protection and economic development, state sovereignty and enhanced integration, and liberal norms and Asian values. The aim is to strike the right balance and end the use of economic priority, state sovereignty, and Asian values as excuses for environmental destruction and human rights abuses. Little by little, ASEAN can embrace a proactive approach, becoming a global player in environmental governance.

CHAPTER I

ASEAN WITHIN THE GLOBAL WORLD

INTRODUCTION

Integrating environmental protection into economic development through a trading system is the key to achieve a long-term economic benefit while preserving a sustainable environmental condition. It should be done at national, regional, and international levels. The goal of this dissertation is to discuss why and how to achieve such integration at the regional level—in the Southeast Asia region via the Association of Southeast Asian Nations (ASEAN).¹⁵

Why ASEAN matters? ASEAN is the existing regional platform that should and potentially can influence its member states' political and development goals by pushing forward the environmental integration in the region. The Southeast Asia region makes a clear illustration of the crossroads between economic development and environmental protection. Despite being prone to environmental degradation and natural disasters, the region is abundant in natural resources that fuel its rapid economic growth, mainly through exportation and trade. The region's driving force is the economic interest without environmental consideration, which causes environmental degradation and long-term economic loss. Integrating environmental protection into the trading system should be one of the priorities of ASEAN regionalism; however, it is a challenging task since environmental protection in trade has never been one of ASEAN's primary objectives.

Before discussing the environmental-trade problems and environmental integration in ASEAN, it is essential to examine the historical background of its foundation, the formation of its structure, and its challenges. This chapter does not cover all ASEAN matters or an analysis

¹⁵ It consists of ten member states—Indonesia, Thailand, Philippines, Singapore, Malaysia, Cambodia, Laos, Myanmar, Vietnam and Brunei. ASEAN Member States, ASEAN, <https://asean.org/asean/asean-member-states/>

of ASEAN regionalism per se, but it sets out specific traits of ASEAN and its member states relating to environmental-trade problems and policy in the region, which will be further discussed in the following chapters.

The first part of this chapter addresses the formation of ASEAN regionalism, the ASEAN Charter and Communities, and the introduction to its environmental governance. It shows how ASEAN was constructed, how its legal backbone was laid out, and how environmental governance was developed. The second part discusses the challenges ASEAN is facing. These challenges include the weaknesses in its institutional structure, legal tools, and normative pursuits, and the diversity of its member states in terms of political and economic regimes. These challenges are predicaments for the progress of ASEAN regionalism and the integration of environmental protection in trade of ASEAN. Particularly, the dissertation will later unfold how the struggles in democracy, human rights, and rapid economic development in ASEAN shape its regression in regionalism and impact environmental protection in the region.

1. THE FORMATION OF ASEAN

The regional cooperation in Southeast Asia was formed with political-security incentives to ensure stability and peace in the region. The discussion lays down a historical background of ASEAN and its institutional instruments. External forces, colonization, and intervention by western powers affect the formation and function of ASEAN regionalism and shape ASEAN's underpinning rule of non-intervention. Later, ASEAN created the ASEAN Charter and ASEAN Communities with the hope of having deeper regional integration and becoming a rule-based regime. The ASEAN Communities function in three specific pillars: Political-Security Community, Economic Community, and Socio-Cultural Community. This part also introduces the development of ASEAN environmental governance through four

phases: the economy of natural resources, the environmental norms development, the institutionalization of environmental norms, and the integration of environmental norms into economic development.

1.1 The beginning of regional cooperation: The hope of ASEAN

The regional cooperation in Southeast Asia can be traced back to the 1960s amid the post-decolonization period, nationalism,¹⁶ regional territorial disputes, and ideological wars among neighboring nations in the region during the Cold War period. These are historical forces that shaped regionalism in Southeast Asia.¹⁷ As C. M. Turnbull noted,

The two most important factors affecting regionalism and international relations in the immediate postwar years were the decolonization process itself, and the problems of creating national identity within the (often artificial) former colonial boundaries.¹⁸

During the colonization period, every member state except Thailand was occupied by European¹⁹ and American imperialists.²⁰ The colonial powers exploited the natural resources of their colonies and modified territorial borderlines, administrative and legal systems, and cultural norms. These interventions arguably led to intra-regional territorial disputes and domestic instability of the administrative and legal systems of the colonized nations. Towards the end of decolonization and the end of WWII in 1945, the interferences from extra-regional powers in the region were far from over. During 1946–1989, Southeast Asia became an

¹⁶ Acharya refers to nationalism as the search for self-reliance and autonomy using regional cooperation to oppose the return of western colonization or interference. AMITAV ACHARYA, *THE MAKING OF SOUTHEAST ASIA : INTERNATIONAL RELATIONS OF THE REGION* 108 (2012).

¹⁷ *Id.* at 105 and 141.

¹⁸ Constance Mary Turnbull, *Regionalism and Nationalism, in 2 THE CAMBRIDGE HISTORY OF SOUTHEAST ASIA : THE NINETEENTH AND TWENTIETH CENTURIES* 589 (Nicholas Tarling ed., 1992).

¹⁹ Indonesia was occupied by Netherlands from 1602 to 1949. Cambodia, Laos, and Vietnam were occupied by France from 1863, 1893, and 1883 to 1953, 1953 and 1954 respectively. Myanmar, Malaysia, Singapore, and Brunei were occupied by Great Britain from 1824, 1885, 1819, and 1888 to 1948, 1957, 1963, and 1984 respectively. ASHOK K. DUTT, *SOUTHEAST ASIA: A TEN NATION REGION* 3 (Ashok K. Dutt ed., 1996).

²⁰ By defeating Spain in Spanish-American War, United States took up the colonial ownership of Spain over Philippines. Philippines was occupied by Spain during 1565-1898 and by the United States during 1989-1946. *Id.* at 2

important strategic Cold War zone. The former colonies became proxies for major power rivalries—between the communism movement, supported by China and the Soviet Union, and the capitalist movement, supported by the United States of America and France.²¹ Concerned by the Domino Theory, the U.S. had set up military bases in both Thailand and the Philippines to monitor and control the communism activities in the region.²² At the end of this era, the region was left with unresolved disputes, prolonged fragmentation, and distrust between neighboring countries.²³

Those extended intra-regional disputes and extra-regional interference became a “wake-up call”²⁴ for the region to develop regional cooperation with its primary objective to develop peace, security, and neutrality in the region.²⁵ Before ASEAN, there were several attempts to establish regional organizations. The first attempt was the creation of Southeast Asia Treaty Organization (SEATO) in 1954 and the second was the creation of Association of Southeast Asia (ASA) in 1961 by Thailand, Malaysian, and the Philippines.²⁶ Both were short-lived due in part to their pro-west affiliations.²⁷ In 1967, the ASA was replaced by the Association of Southeast Asian Nations (ASEAN) with the initial five founding member states—Thailand, Malaysia, Indonesia, Singapore, and the Philippines and later joined by Brunei in 1984, Vietnam in 1995, and Laos and Myanmar in 1997.²⁸ ASEAN expected to enhance its bargaining

²¹ MARTY NATALEGAWA, DOES ASEAN MATTER?: A VIEW FROM WITHIN 15-16 (2018).

²² See generally Ang Cheng Guan, *The Domino Theory Revisited: The Southeast Asia Perspective*, 19 WAR&SOCIETY 109, 109-130 (2001).

²³ Cold War polarized nation grouping—Laos, Cambodia and Myanmar chose non-allied while Singapore, Thailand, Malaysia and Philippines adopted a pro-western posture. ACHARYA, *supra* note 16, at 142.

²⁴ NATALEGAWA, *supra* note 21, at 17.

²⁵ For example, Aung San, a nationalist Myanmar politician, believed in regionalism and international independence. As he stated “The one fact from which no nation, big or small, can escape is the increasing universal interdependence of nations. A free and independence Burma is quite ready to enter into any arrangement with other nations for common welfare and security etc.” AUNG SAN, BURMA’S CHALLENGE 192 (1974), in ACHARYA, *supra* note 16, at 110.

²⁶ RANJIT GILL, ASEAN TOWARDS THE 21 CENTURY: A THIRTY-YEAR REVIEW OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS 27 (1997).

²⁷ The concept of both organizations was loose and flexible but flawed by the fact that it was supported by western powers—the United States of America and the United Kingdom; therefore, it was met with dissent from Vietnam and China. ACHARYA, *supra* note 16, at 135-137.

²⁸ Overview on ASEAN, <https://asean.org/asean/about-asean/overview/>

power in international relations as Lee Kwan Yew stated that ASEAN could help small member states “to have their interest taken into consideration when the great powers make their compromises.”²⁹ Adam Malik made the same point that smaller nations cannot resist the dominance of great powers without collective cohesion.³⁰

The ASEAN Declaration (Bangkok Declaration August 8, 1967) announced an intention to promote regional cooperation to enhance economic, social, and cultural development for peace and security in the region.³¹ All foreign bases shall be temporary and remain only with the expressed concurrence of the countries concerned and not intended to be used to subvert national independence and freedom or prejudice their national development.³² The declaration stresses the importance of voluntary cooperation between member states and the importance of ensuring stability and security from external interference to preserve their national identities.³³ This is also known as the **ASEAN Way**—a non-intervention approach based on a strict perception of state sovereignty,³⁴ dictating all ASEAN decision-making based

²⁹ Sunday Times (Singapore) 18 March 1978 in ACHARYA, *supra* note 16, at 159.

³⁰ “Southeast Asia is one region in which the presence and interests of most major powers converge, politically as well as physically. The frequency and intensity of policy interaction among them, as well as their dominant influence on the countries in the region, the smaller nations of the region have no hope of ever making any impact on this pattern of dominant influence of the big powers, unless they act collectively and until they develop the capacity to forge among themselves an area of internal cohesion, stability and common purpose. Thus, regional cooperation within ASEAN also came to represent the conscious effort by its member countries to try to re-assert their position and contribute their own concepts and goals within the on-going process of stabilization of a new power equilibrium in the region.” Adam Malik, *Regional Cooperation in International Politics*, Centre for Strategic and International Studies, 162-163 (1974), in ACHARYA, *supra* note 16, at 159.

³¹ The ASEAN Declaration (Bangkok Declaration August 8, 1967), <https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>

³² *Id.*

³³ *Id.*

³⁴ The ASEAN Way resembles a strict perception of state sovereignty comparable to the Treaty of Münster concluded between Spain and Netherlands on 30 January 1648—the first component of the Peace of Westphalia which is often seen as the emergence of the idea of state sovereignty. In Article I of the treaty, the King of Spain recognized Netherlands as “free and sovereign states, provinces and lands on which he, the King, does not lay and shall not lay in the future any claim for himself, his successors nor his heirs.” Peace of Westphalia is often considered as the “birth year” of sovereign state. The peace treaty had a significant influence on international relations as it signifies that each sovereign state shall be on an equal footing and reject any other intervening powers. It marked the end of religion wars by prohibiting the intervention for religion reasons. It was also seen as an “public act of disregard of the international authority of the Papacy”—the the end of republica Christiana and the beginning of the era of “sovereign and independent states which no longer recognized higher external power.” Wouter G. Werner, *State Sovereignty and International Discourse*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 125, 135-36 (Ige F. Dekker & Wouter Werner eds., 2004); Laura Manzano Baena, *Negotiating Sovereignty: The Peace Treaty of Münster, 1648*, 28 HIST. POLIT THOUGHT 617, 617-41 (2007); Nico Schrijver, *The Changing Nature of State Sovereignty*, 70:1 BR. YEARB. INT. LAW 65, 65-71 (2000); Alfred-Maurice de Zayas,

on cooperation and mutual agreement. The central tenet of the ASEAN Way is non-interference with the internal affairs of member states. All member states refrain from commenting, criticizing, or intervening in the internal affairs of other member states.³⁵³⁶

Later in 1967, at Bali Summit, the Treaty Amity and Cooperation (TAC)³⁷ and the Declaration of ASEAN Concord³⁸ were created to emphasize the cornerstone principle of non-intervention/non-interference regarding relationship and cooperation within the scope of ASEAN. Under Article 2 of the TAC, the contracting parties shall:

- (i) Respect of independence, sovereignty, equality, territorial integrity, and national identities of all;³⁹
- (ii) Free from external interference, subversion, or coercion;⁴⁰
- (iii) Non-interference in internal affairs of one another;⁴¹
- (iv) Settlement of disputes or differences by peaceful means;⁴²

Peace of Westphalia (1648), in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 537 (Rudolf Bernhardt ed., 1984); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 20-41 (1948); and Arthur Eyffinger, *Europe in the Balance: An Appraisal of the Westphalian System*, 45 NILR 161, 175 (1998).

³⁵ The ASEAN Way approach will be further discussed in the second part of this chapter 2.1.1 as one of the challenges and predicaments ASEAN has to overcome in order to progress in regionalism and tackle with newly emerge security issues in the region.

³⁶ “With the hindsight of history, we can say that this aspect of the ASEAN Way has served Southeast Asia well. By not forcing its incredibly diverse and mutually suspicious members into legally binding standards, ASEAN has done the remarkable job of moving its members from animosity to the close cooperative relationship that they enjoy today, a relationship in which violent conflict is all but unthinkable. We can say that the ASEAN Way has served ASEAN well... It is not just a matter of history; it is also a matter of culture. Southeast Asians’ way of dealing with one another has been through manifestations of goodwill and the slow winning and giving of trust. And the way to arrive at agreements has been through consultation and consensus – *mushawara* and *mufakat* – rather than across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law. Let us not exaggerate this distinction. Much consultation and consensus-building goes into the making of the European Union, which has, in any case, been itself painstakingly gradual. Personal chemistry and trust are also important for European processes. Southeast Asians can and do engage in hard bargaining and exchanges of concessions. But historical circumstances and culture can provide at least a partial explanation for ASEAN’s avoidance, particularly in its early days, of legally binding agreements.” Rodolfo C. Severino, *The ASEAN Way and the Rule of Law*, INTERNATIONAL LAW CONFERENCE ON ASEAN LEGAL SYSTEMS AND REGIONAL INTEGRATION (Sept. 3, 2001), https://asean.org/?static_post=the-asean-way-and-the-rule-of-law

³⁷ The Treaty Amity and Cooperation (TAC) 24 February 1976, <https://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/>

³⁸ The Declaration of ASEAN Concord, https://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976

³⁹ The Treaty Amity and Cooperation, *supra* note 37.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

(v) Renunciation of threats or use of force;⁴³

And

(vi) Effective cooperation among themselves.⁴⁴

The Southeast Asia region consists of countries that more or less distrust each other and have been through insurgencies, wars, conflicts, and prolonged occupations from extraterritorial powers.⁴⁵ This history helps explain why the member states see the need for regional cooperation for peace and security and shape the principles for regional cooperation within the voluntary relationship under the rule of non-intervention or non-interference. As Rodolfo C. Severino, former Secretary-General of ASEAN, stated, “ASEAN was not meant to be a supranational entity acting independently from its member states” with full legal and judicial powers over its member states.⁴⁶ Member states were far from ready to confer parts of their sovereignty to the organization or have mandatory obligations for cooperation, especially on the topics they regarded as internal affairs.

ASEAN might not take a direct role in dispute settlement, but according to the TAC Agreement, member states have agreed to resolve their territorial disputes by peaceful means through bilateral negotiations and agreements or by seeking judicial dispute settlement from an intermediate entity, the International Court of Justice (ICJ).⁴⁷ For bilateral negotiation, the ideal

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *E.g.*, Nicole Jenne, *Managing Territorial Disputes in Southeast Asia: Is There More than the South China Sea?*, 3 J. CURR. SOUTHEAST ASIAN AFF. 35, 36 (2017). *See generally* NORMAN G. OWEN, *ROUTLEDGE HANDBOOK OF SOUTHEAST ASIAN HISTORY* (2014); Aurel Croissant & Christoph Trinn, *Culture, Identity and Conflict in Asia and Southeast Asia*, 110 ASIEN, 13-34 (2009); Ramses Amer, *Expanding ASEAN's Conflict Management Framework In Southeast Asia: The Border Dispute Dimension*, 6 ASIAN J. POLIT. SCI. 33, 33-56 (1998); MIKIO OISHI, *CONTEMPORARY CONFLICTS IN SOUTHEAST ASIA: TOWARDS A NEW ASEAN WAY OF CONFLICT MANAGEMENT* (2016); and Richard A. Bitzinger, *A New Arms Race? Explaining Recent Southeast Asian Military Acquisitions*, 32 CONTEMP. SOUTHEAST ASIA 50, 50-69 (2010).

⁴⁶ Thinking ASEAN, Interview of Ambassador Rodolfo C. Severino, Jr., Secretary-General of ASEAN, by the Philippine Graphic Magazine (Nov. 29, 1999), https://asean.org/?static_post=thinking-asean-interview-of-ambassador-rodolfo-c-severino-jr-secretary-general-of-asean-by-the-philippine-graphic-magazine-november-29-1999-2; and Simon Chesterman, *Does ASEAN Exist: The Association of Southeast Asian Nations as an International Legal Person*, 12 SYBIL 199, 200(2008).

⁴⁷ NATALEGAWA, *supra* note 21, at 26-29.

solutions were not easily met. Some disputes could take many decades to be resolved or even remain unresolved until now.⁴⁸

According to the objectives of its creation under limitations, ASEAN member states were meant to be bound together for peace and security with the lowest-common-denominator policy.⁴⁹ Respecting member states' sovereignty on the principle of non-intervention is the supreme condition. However, the "dynamic of power"⁵⁰ and cooperation in ASEAN or ASEAN as an organization itself are not fixed. For ASEAN to stay relevant and effective in the evolution of the interconnected world, it may need to evolve, develop, and modify its principle, structure, and function.⁵¹

1.2. The making of ASEAN Charter and ASEAN Communities

Historically, the creation of ASEAN was to resolve regional disputes with peaceful means to build political stability and security in the region. Later, with the rise of economic competition in the global context, ASEAN strived to build deeper economic cooperation. To have deeper integration, ASEAN needed to create the common will of being a part of the ASEAN community with one vision and goal by promoting sociocultural cooperation. After

⁴⁸ Among intra-regional disputes between neighboring member states of ASEAN, these are prominent examples : the Sabah dispute between Malaysia and Philippines, the Malaysia-Singapore dispute over Pedra Branca Island (later settled in Singapore's favor by ICJ), the Malaysia-Indonesia dispute over Sipandan and Ligitan Islands in the Sulawesi Sea (Settled in Malaysia's favor by ICJ) and the Thai-Cambodia dispute over Preah Vihear temple (Settled in Cambodia's favor by ICJ). See Paridah Abd. Samad & Darusalam Abu Bakar, *Malaysia-Philippines Relations: The Issue of Sabah*, 32:6 *ASIAN SURVEY*, 554-67 (1992); Coalter G. Lathrop, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, 102:4 *AM. J. INT'L L.*, 828-34 (2008); and Nichan Singhaputargun, *The Thailand-Cambodia Preah Vihear Temple Dispute: Its Past, Present and Future*, in 3 *CONTEMPORARY CONFLICTS IN SOUTHEAST ASIA* (Mikio Oishi ed., 2015).

⁴⁹ See, e.g., SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* 33 (2002); Stewart M. Patrick, *ASEAN's Future and Asia's*, *CFR* (Nov. 15, 2012), <https://www.cfr.org/blog/aseans-future-and-asias>; Prashanth Parameswaran, *The Limits Of Minilateralism in Asean*, *ST* (Feb. 15, 2018), <https://www.straitstimes.com/opinion/the-limits-of-minilateralism-in-asean>

⁵⁰ NATALEGAWA, *supra* note 21, at 3.

⁵¹ The development of ASEAN will be further discussed in the matter of how to integrate environmental protection in ASEAN regionalism in chapter IV. During the pre-ASEAN Charter period, the regional cooperation had progressed in a slow pace not only because of the conflicts between member states but also because their domestic political, social, economic and environmental problems. While aiming for peace and stability development in the region as ASEAN, each member state also needed to cope with their internal struggles and insurgencies. These problems will be further discussed in the second section of this chapter and in chapter II and III.

the economic crisis in Southeast Asia during 1997–1998 and the complication in integrating regional economic plans, ASEAN realized that it had to create a legal basis and structure to facilitate deeper integration to have competitiveness and bargaining power in the global trade and maintain political influences in the region.⁵²

All member states signed the ASEAN Charter in 2007 and ratified it in 2008 to create a legal and institutional framework for ASEAN.⁵³ The Charter was meant to serve “as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN” and codify “ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance.”⁵⁴ Article 1 of the Charter reaffirms ASEAN’s initial objectives to maintain peace, security, and stability; strengthen peace-oriented values in the region; and enhance regional resilience by promoting greater political, economic, and socio-cultural cooperation.⁵⁵ There are four new political, economic, and sociocultural commitments envisaged as ASEAN’s purposes in the Charter that highly elevate the ambition of ASEAN and embrace the values of modern universality—strengthening democracy, creating a single market, responding to transboundary challenges, and promoting sustainable development.⁵⁶ Including these ambitious commitments in the Charter is a vast leap for ASEAN since its accomplishment is seemingly challenging for ASEAN member states.

⁵² Simon S.C. Tay, *The ASEAN Charter : Between National Sovereignty and the Region’s Constitutional Moment*, 12 SYBIL 151, 154-56 (2010).

⁵³ See also Tommy Koh et al., *The Making of ASEAN Charter* (2009).

⁵⁴ The ASEAN Charter, <https://asean.org/asean/asean-charter/>

⁵⁵ *Id.* at Art. 1

⁵⁶ ASEAN Charter Article 1 (5), (7), (8) and (9):

- (i) To create a single market and production base which is stable, prosperous, highly competitive, and economically integrated with the effective facilitation for trade and investment in which there is free flow of goods, service and investment; facilitated movement of business persons, personal, talents and labor; and free flow of capital ;
- (ii) To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the right and responsibilities of the Member States of ASEAN ;
- (iii) To response effectively, in accordance with the principle of comprehensive security, to all form of threats, transnational crimes and transboundary challenges ;

And

To achieve its objectives, ASEAN creates three pillars of the ASEAN Community—ASEAN Political-Security Community, ASEAN Socio-Cultural Community, and ASEAN Economic Community.⁵⁷ The ASEAN community functions via the ASEAN Community Council, which consists of national representatives designated from each member state.⁵⁸

1.2.1 Political and Security Community: A stability of the region

By establishing the ASEAN Political-Security Community (APSC), ASEAN aims to create a rule-based community of shared values and norms in a cohesive, peaceful, resilient, and stable region with an outward-looking vision for the integrated and interdependent world.⁵⁹ Under the Charter, APSC aims to ensure that the peoples and member states of ASEAN live in peace with the world at large in a just, democratic, and harmonious environment and that member states adhere to the rule of law, good governance, the principle of democracy, and constitutional government.⁶⁰ ASEAN Sectoral Ministerial Bodies run the APSC: ASEAN Foreign Minister Meeting, Commission for Southeast Asia Nuclear Weapon Free Zone, ASEAN Defense Ministers Meeting, ASEAN Ministers Meeting, and ASEAN Ministerial Meeting on Transnational Crime. In APSC Blueprint 2025, while it contains comprehensive elements and characteristics of the Political-Security Community, the implementation of those elements remains unclear.⁶¹ The terms used in the Blueprint are broad and lack compelling effects. Terms include: “enhance,” “promote,” “encourage,” “develop,” and “support.”⁶² As ASEAN intends to be a rule-based and people-oriented community, member states should

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- (iv) To promote sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its people.

⁵⁷ *Id.* at Art. 9

⁵⁸ *Id.*

⁵⁹ The ASEAN Political-Security Community (APSC), <https://asean.org/asean-political-security-community/>

⁶⁰ ASEAN Charter Article 1(4) and Article 2(h)

⁶¹ The ASEAN Political-Security Community Blueprint 2025, <https://www.asean.org/storage/2012/05/ASEAN-APSC-Blueprint-2025.pdf>

⁶² *Id.*

adhere to ASEAN fundamental principles, implement fully and effectively the Charter and the agreements signed or ratified, and uphold the principles of international law governing peaceful conduct of relations. Yet, the APSC reiterates the obligation to respect the independence, sovereignty, territorial integrity, national identity, and non-interference.

To date, there are ongoing sensitive political and security issues between ASEAN member states. For instance, the drug trafficking between the border of Thailand, Myanmar, and Laos—the Golden Triangle;⁶³ the terrorist issues in the south of Thailand between the border with Malaysia;⁶⁴ the Aceh Sumatra National Front in Indonesia;⁶⁵ and the minority disputes in Myanmar.⁶⁶ Some territorial disputes were resolved peacefully under the rule of law by international proceedings, such as the case of Preah Vihear Temple between Thailand and Cambodia that was resolved in ICJ.⁶⁷ However, some remain unresolved, such as the issue in the South China Sea between Brunei, Philippines, Vietnam, Malaysia, and Taiwan and China or the issue over Sabah between Malaysia and the Philippines⁶⁸.

ASEAN may be deemed to hold together on the lowest common denominator, and it may not take part in the conflicting issues upon legal force and control basis, but it does contribute, to a lesser or greater extent, in urging, putting pressure and building a friendly and compromising environment for negotiation platforms. Surin Pitsuwan, former Secretary-General of ASEAN, mentioned that ASEAN once succeeded to convince the government of Myanmar to join ASEAN paving its way to the world, negotiated with the leader of democratic

⁶³ See also KO-LIN CHIN, *THE GOLDEN TRIANGLE: INSIDE SOUTHEAST ASIA'S DRUG TRADE* (2009); and Peter Chalk, *Southeast Asia and the Golden Triangle's Heroin Trade: Threat and Response*, 23 *STUD. CONFL. TERROR.* 89, 89-106 (2000).

⁶⁴ *Terrorists In Southern Thailand Go On A Bombing Spree*, *THE ECONOMIST* (May 24, 2018), <https://www.economist.com/asia/2018/05/24/terrorists-in-southern-thailand-go-on-a-bombing-spree>

⁶⁵ *Aceh-Sumatra National Liberation Front's (ASNLF) Participation In Indonesia's UPR Review In Geneva*, UNPO (May 8, 2017), <http://unpo.org/article/20073>

⁶⁶ Nicola Smith and Charlotte Krol, *Who Are The Rohingya Muslims? The Stateless Minority Fleeing Violence In Burma*, *THE TELEGRAPH* (Sep. 19, 2017), <https://www.telegraph.co.uk/news/0/rohingya-muslims/>

⁶⁷ *Over View of the Case: Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ, <https://www.icj-cij.org/en/case/45>

⁶⁸ *South China Sea Dispute: Beijing Attacks 'Irresponsible' US Comments*, *BBC* (June 2, 2018), <https://www.bbc.com/news/world-asia-44343368>

party Aung San Suu Kyi, and staged an election with the invitations for ASEAN diplomats and global press to join for observations.⁶⁹ He further shared his optimistic but far-fetched view by stating that in order to solve territory disputes, it may require some more time for ASEAN to have a complete sense of community so that the issue of territory becomes less sensitive and irrelevant.⁷⁰ In contrast, not all territorial disputes are about national pride, sovereignty, or identity, but they also involve substantial economic interests such as the discovery of hydrocarbons and other coastal resources in the South China Sea. Thus, it may be highly improbable for member states to ignore their national interests.

1.2.2 Socio-Cultural Community: ASEAN identity vs. universal values

Socio-Cultural community tasks encompass broad areas of development in human development, social and justice rights, social protection and welfare, environmental sustainability, ASEAN awareness, and narrowing the development gaps.⁷¹ For the last two decades, substantial progress is in the field of human rights.⁷²

The notion of human rights protection has come so far from the beginning of ASEAN cooperation, where human rights protection was not only ignored but also a taboo subject for the member states.⁷³ Many member states believed that while fighting to survive regional insurgencies (e.g., communist war, war on terror, and economic crisis), human rights were not the primary concerns of ASEAN.⁷⁵ Later, there was an opposing force for regional human rights

⁶⁹ SURIN PITSUWAN, WHAT IS ASEAN? 76-80 (2012).

⁷⁰ *Id.* at 69

⁷¹ Overview of The ASEAN Socio-Cultural Community, <https://asean.org/asean-socio-cultural/>

⁷² *Id.*

⁷³ Vitit Muntarbhorn, Unity in Connectivity: Evolving Human Rights Mechanism in ASEAN Region 112 (2013).

⁷⁴ The issue of human right violations in the region will be discussed further in the second section of this chapter. This part focuses only the structural formation of human right protection in ASEAN.

⁷⁵ Malaysia's Deputy Prime Minister Tun Musa Hitam convinced that "Human right must take the back seat to win the war of terror." Marznah Mohammad, *Towards a Human Right Regime in Southeast Asia: Charting the Course of State Commitment*, 24 CONTEMP. SOUTHEAST ASIA 230, 244 (2002).

integration from many member states, including those who are more economically developed and the least developed.⁷⁶

Some member states with authoritarian regimes such as Vietnam, Myanmar, Laos, and Cambodia who joined ASEAN for their status quo under the condition of non-intervention resist the idea of human rights protection because they simply relied their ruling power on the human rights violations.⁷⁷ Some others, such as Singapore or Malaysia, claimed the strong belief in Asian Values—the notion of cultural relativism defying the integration of western or universal values.⁷⁸ Cultural relativism argues that human rights vary among different socio-economic and cultural backgrounds.⁷⁹ “To strengthen the case for relativism, Southeast Asian elites also presented a communitarian view of governance.”⁸⁰ At the Vienna UN World Conference on Human Rights, Ali Alatas addressed that Indonesia and the developing world had to balance between an “individualistic approach” to human rights and the interests of society as a whole. Similarly, Singapore invoked the Confucian principle of “community over self.”⁸¹ The ASEAN foreign ministers issued the statement in the meeting in Singapore in July 1993:

Human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balance and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances ... the promotion and protection of human rights should not be politicised.⁸²

Regardless of its perception and acceptance of human rights, ASEAN institutionalized the human rights protection principle in the ASEAN Charter in 2007⁸³ and created ASEAN

⁷⁶ Catherine Renshaw, *Understanding the New ASEAN Intergovernmental Commission on Human Rights: The Limits and Potential Theory*, 53 UNSW LAW PAPER, Nov.2010, at 1, 6-7.

⁷⁷ *Id.*

⁷⁸ *Id.* at 7

⁷⁹ Gordon Fairclough, *Standing Firm*, 15 FEER, 22 (1993) in ACHARYA, *supra* note 16, at 220.

⁸⁰ ASEAN stance of cultural relativism was seen by the western and many other local sources as the justification of authoritarian political control. ACHARYA, *supra* note 16, at 220-221.

⁸¹ Kishore Mahbubani, *New Areas for ASEAN Reaction : Environment, Human Right and Democracy*, 5 ASEAN-ISIS Monitor, 15 (1992) in ACHARYA, *supra* note 16, at 220.

⁸² Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting, Singapore 23-24 July 1993, 7.

⁸³ Uphold UN Charter and international law including international humanitarian law subscribed by member states

Intergovernmental Commission on Human Rights (AICHR) in 2009 to promote and protect human rights and fundamental freedoms. The AICHR later created the ASEAN Human Rights Declaration (AHRD). All member states adopted it in 2012. AICHR marks a historical point as it is the first mechanism for promoting and protecting human rights in the region. It also acts in four essential tasks: (1) Educator: promoting human right awareness across ASEAN in order to have greater information sharing and raise citizen expectation of their national governments for long-term improvement;⁸⁴ (2) Enabler: assisting upon request by member states in preparing for human rights reports linking ASEAN with the formal review process of international organization;⁸⁵ (3) Standard-setter: opening doors for enhancement and critical negotiations and criticism by civil society, nationals, other member states, or global actors;⁸⁶ and (4) Mobilizer for action: the self-existence provides prospects for further engagement with other interesting actors.⁸⁷

The AHRD affirms the protection of human rights, including fundamental freedoms, civil and political rights, economic and socio-cultural rights, right to development, and right to peace.⁸⁸ The AHRD adheres to the universal values regarding the substances of human rights⁸⁹ but at the same time reserves its right to implement such human rights according to the regional and national context, considering all the differences.⁹⁰ Under the General Principle 7:

All human rights are universal, indivisible, interdependent, and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realization of human rights must be considered in the regional and national context

⁸⁴ Mathew Davies, *Important but De-centered: ASEAN's Role in the Southeast Asian Human Rights Space*, 5 TRANS 99, 103 (2017).

⁸⁵ *Id.* at 112

⁸⁶ *Id.* at 113

⁸⁷ *Id.*

⁸⁸ The ASEAN Human Rights Declaration, https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf

⁸⁹ The AHRD reaffirms “the commitment to the Universal Declaration of Human Rights, the Charter of United Nations, the Vienna Declaration and Program of Action, and other International human rights instruments to which ASEAN Member States are parties” *Id.*

⁹⁰ *Id.*

bearing in mind different political, economic, legal, social, cultural, historical, and religious backgrounds.⁹¹

Under this provision, while it can be seen as a compromise between the universalist and cultural relativist, it is a safe harbor to escape the implementation of human right protection because it provides excuses for member states to continue violating human rights in their internal affairs without being non-compliance.⁹² This provision corresponds with the principle of non-intervention and the duty to respect all member states' independence, sovereignty, equality, territorial integrity, and national identity.

As for AICHR, it operates according to the Term of Reference (TOR) under the ASEAN Charter. The principles of consensus and non-intervention are also applied. Thus, in TOR of AICHR, it contains almost identical provision as described above—AICHR has a purpose of promoting human rights within the regional context bearing in mind national and regional particularities and mutual respect for different historical, cultural, and religious backgrounds.⁹³ The status of AICHR is not a court but a consultative body composing of representatives from each member state who shall be **accountable** to the appointing government.⁹⁴ The term “**accountable**” raises the question of impartiality and neutrality of the representatives acting for AICHR.⁹⁵ AICHR lacks the teeth to be an executor or enforcer of human rights protection. It does not have the institutional power to address the complaints, investigate the non-compliance and violations, or provide further remedies.

⁹¹ *Id.* at Art.7

⁹² Davies, *supra* note 84, at 103.

⁹³ ASEAN Intergovernmental Commission on Human Rights, Terms of Reference, <https://www.asean.org/storage/images/archive/TOR-of-AICHR.pdf>

⁹⁴ David I.Fisher, The Regional and National Context under the ASEAN Human right Declaration and Its Implications for Minority Rights, 50 STOCKHOLM UNIVERSITY RESEARCH PAPER, 2 (2017).

⁹⁵ MUNTARBHORN, *supra* note 73, at 139.

1.2.3 Economic Community: An objective of a single market

At the outset, ASEAN was not meant to be an economic community. It was driven by political incentive. The initial intention of ASEAN is to promote peace and security in the region through the development of political, social, cultural, and economic cooperation. The political and social cooperation had proved to be highly sensitive and complicated. Thus, economic cooperation is expected to be “the most durable foundation upon which political and cultural cooperation can be built.”⁹⁶ Trade is believed to influence international political relationship by creating geopolitical stability.⁹⁷

ASEAN initiated its regional economic cooperation along with the global trading trend of regionalism. In the global context of economic regionalism, the first wave started in the 1960s to 1970s.⁹⁸ After the second ASEAN Summit, member states agreed to increase their economic relation by creating a Preferential Trading Agreement (PTA)⁹⁹ in 1977; however, the success was not impressive. The major setback was the extensive list of items on the exclusion list.¹⁰⁰ Moreover, member state economies relied on the production and trade of similar agricultural products; thus, the intra-trade comprised only 7% of total ASEAN imports and 90% from outside sources.¹⁰¹ Nevertheless, PTA was the first stepping stone for further economic integration.

⁹⁶ Malaysia’s Tun Ismail stated in June 1966 “it is axiomatic that economic cooperation is often the most durable foundation upon which political can cultural cooperation can be built” in Roger Irvine, ASEAN Formative Decade 1967-1977: An Evaluation of the Aspirations and Accomplishments of Its Participants (March, 1991) (unpublished Thesis for the Degree of Master of Arts, Department of International Relations, Research School of Pacific Studies Australian National University) 17, <https://core.ac.uk/download/pdf/156712657.pdf>

⁹⁷ When the countries are dependent on each other for goods and have long established trading relationship, they tend to enhance peace and boost up prosperity; thus, when conflicts occur they are likely to prefer diplomatic negotiations rather than aggressive measures. After the long suffering period of World Wars and underlying conflicts between France and Germany, the European internal market has served to be a significant turning point. DAVID HUNTER ET AL, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1236 (3rd ed. 2007)

⁹⁸ PASHA L. HSIEH & BRYAN MERCURIO, ASEAN LAW IN THE NEW REGIONAL ECONOMIC ORDER: AN INTRODUCTORY ROADMAP TO ASEAN ECONOMIC COMMUNITY 4 (2019).

⁹⁹ Protocol to Amend The Agreement on ASEAN Preferential Trading Arrangements, https://asean.org/?static_post=protocol-to-amend-the-agreement-on-asean-preferential-trading-arrangements

¹⁰⁰ GILL, *supra* note 26, at 79-88

¹⁰¹ *Id.* at 88

The second wave was in the 1980s and 1990s. While the U.S., the EU, and other developed countries embarked on their trading quests creating trading blocs such as the North American Free Trade Agreement (NAFTA) or European Internal Market, ASEAN felt the need to strengthen the economic tie between themselves by creating ASEAN FTA.¹⁰² In 1992, Singapore and Thailand pushed forward the ASEAN Free Trade Agreement (AFTA). Unlike the EU Common Market, AFTA is limited to the free movement of goods but not skilled workers. Not every member state shared the same vision. Many were afraid for the interest of their national producers, citing that the scheme might trigger labor displacement and cause many losing industries.¹⁰³ Since there were many difficulties and reluctance, the reduction period was lengthy. Some economists described AFTA as having modest economic benefits but being a useful showcase of regional unity.¹⁰⁴

The third wave emerged in the 2000s corresponded with the multilateral trade negotiation “Doha Round” and the rise of free trade agreements between developing countries, South-South FTAs wishing to achieve what cannot be done in the multilateral trading forum due to the dominant force of the developed country and the lack of bargaining power of developing countries.¹⁰⁵ By this time, the ASEAN Economic Community (AEC) was born in 2007 and officially launched in 2015. The creation of AEC connecting ten member states diverse in economic capacity and system marks a new regional economic order (NREO) between developing countries (South-South integration).¹⁰⁶

Setting the stage for the economic integration, the ASEAN Charter Article 1 (5) established its goal to create a single market and production base which is stable, prosperous, and highly competitive; economically integrated with effective facilitation for trade and

¹⁰² *Id.*

¹⁰³ Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area*, 53 INT'L & COMP. L.Q. 935, 962 (2004).

¹⁰⁴ *Id.*

¹⁰⁵ HSIEH & MERCURIO, *supra* note 98, at 5.

¹⁰⁶ *Id.* at 3-4

investment in which there is a free flow of goods, service, and investment; facilitated movement of businessmen, professionals, and labors. By doing so, under Article 2(n), ASEAN and its member states adhere to multilateral trade rules and ASEAN rules-based regimes for effective implementation of economic commitments and progressive reduction towards the elimination of all barriers to regional economic integration in a market-driven economy. The AEC Blueprint 2025 provides a roadmap for economic integration from 2016 to 2025.¹⁰⁷ The roadmap stressed distinctive features: to create a deeply integrated and highly cohesive ASEAN economy to facilitate the seamless movement of goods, services, investment, capital, and skilled labors; to establish a more unified market; to create a competitive, innovative, and dynamic; to enhance connectivity and sectoral cooperation; to create a resilient, inclusive, people-oriented ASEAN; and to strengthen the principle of ASEAN Centrality.¹⁰⁸ According to the roadmap, there is an effort to adopt a more effective implementation mechanism by giving power to the ASEAN Economic Community Council (EACC) to enforce compliance of all measures and the ASEAN Secretariat to monitor and track the implementation and compliance. Nevertheless, it remains unclear how ASEAN will enforce the non-compliance except allowing them to opt-out of the specific trade agreement according to Article 21(2) of the Charter.

Regional economic cooperation or regional integration per se has never been an easy task. Even if the most member states all shared the same motives—strengthening intra-trade growth and gain competitiveness and the bargaining power in the global market—the regional cooperation would be prioritized and implemented on a timely basis only when the interest coincided with national interests. The main challenges for ASEAN regionalism will be further discussed in the second part.

¹⁰⁷ The ASEAN Economic Community Blueprint 2025, <https://www.asean.org/storage/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf>

¹⁰⁸ *Id.*

1.3 ASEAN environmental governance

The nature of ASEAN environmental governance is not a bottom-up or spontaneous process but rather driven by ASEAN member states in a vertical top-down pattern—Rosenau described it as a “downward flow of authority originating...among national states and their bureaucracies.”¹⁰⁹ Member states are the key players with limited roles of other non-state actors such as international institutions, civil society, and local communities.¹¹⁰ Thus, the trajectory of environmental governance reflects merely the interest of states.

Environmental protection in ASEAN was not the initial agenda of ASEAN. Environmental issues were not in the ASEAN’s founding document Bangkok Declaration 1967, as ASEAN primary objective was to secure stability and peace without interference from other states according to the TAC agreement. Influenced by international environmental awareness, the environmental initiatives started right after the era of international environmental protection at the Stockholm Conference on the Human Environment in 1972.¹¹¹ Elliott distinguished the development of ASEAN environmental governance into three phases:¹¹²

The first phase was from 1977 until the mid-to-late 1980s emphasizing environmental resources as economic assets and national resilience.¹¹³ With the support of the United Nations Environment Programme (UNEP), ASEAN subregional environmental programs (ASEP), was initiated in 1977.¹¹⁴ All environmental cooperation was done through diplomatic arrangements

¹⁰⁹ James Rosenau, *Governance in a New Global Order*, in GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE 70, 80 (David Held & Anthony McGrew eds., 2002).

¹¹⁰ See also Lorraine Elliott, *ASEAN and Environmental Governance: Strategies of Regionalism in Southeast Asia*, 12 *Glob. Environ. Politics* 38, 38-57 (2012); and ANDERS UHLIN, CIVIL SOCIETY AND REGIONAL GOVERNANCE: THE ASIAN DEVELOPMENT BANK AND THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (2016).

¹¹¹ Koh Kheng-Lian & Md. Saiful Karim, *The Role of ASEAN in Shaping Regional Environmental Protection*, in ROUTLEDGE HANDBOOK OF THE ENVIRONMENT IN SOUTHEAST ASIA 315, 319 (Philip Hirsch ed., 2017).

¹¹² Lorraine Elliott, *ASEAN and Environmental Governance: Rethinking Networked Regionalism in Southeast Asia*, 14 *PROCEDIA SOC BEHAV SCI* 61, 62 (2011).

¹¹³ Elliott, *supra* note 110, at 45.

¹¹⁴ It was later endorsed by the first ASEAN Ministerial Meeting on Environment (AMME) in 1981. <https://asean.org/asean-s-initiatives-in-environmental-education-by-apichai-sunchindah/>

via ASEAN Ministerial Meeting on Environment (AMME), a forum attended by Environmental Ministers from ASEAN member states who decide on environmental issues to be addressed.¹¹⁵ After the AMME meetings, the first regional environmental instrument, Manila Declaration on ASEAN Environment, was adopted in 1981 with the goal to maintain the “continuous availability of natural resources” for sustaining continued development.¹¹⁶ The document further addressed that “as far as practicable” the environmental consideration should be taken into account in development efforts.¹¹⁷ It clearly prioritized economic growth over environmental protection. There was no legally binding agreement. AMME instruments contained only broad guidelines and general principles focusing on natural resources management and conservation.¹¹⁸

The second phase was from the late 1980s to the late 1990s, with the emphasis on state’s responsibility and stewardship.¹¹⁹ It was the period of normative development in ASEAN environmental governance. Several environmental norms were introduced: the transnational environmental problems affecting the “common well-being of the people of ASEAN”;¹²⁰ the sustainable development for better quality of life;¹²¹ and the eco-efficiency and environmental stewardship.¹²² The concept of sustainable development emerged in Jakarta Resolution 1987

¹¹⁵ ASEAN Ministerial Meeting on Environment (AMME), <https://asean.org/asean-socio-cultural/asean-ministerial-meeting-on-environment-amme/>

¹¹⁶ ASEAN Ministerial Meeting on the Environment (AMME), (1981), Manila Declaration on the ASEAN Environment, Manila, 30 April 1981, <https://environment.asean.org/manila-declaration-on-the-asean-environment/>

¹¹⁷ Manila Declaration on the ASEAN Environment :Policy Guidelines

(i) Foster a common awareness among the people of the ASEAN countries of the biological, physical and social environment and its vital significance for sustained development to proceed apace;

(ii) Ensure, as far as practicable, that environmental considerations are taken into account in development efforts, both on-going and future;

(iii) Encourage the enactment and enforcement of environmental protection measures in the ASEAN countries;

(iv) Foster the development of environmental education programmes.

¹¹⁸ Elliott, *supra* at note 110, at 45; and ASEAN Environmental Declaration from 1981-2000 <https://environment.asean.org/statements-and-declarations-1981-1990/>

¹¹⁹ Elliott, *supra* at note 110, at 45

¹²⁰ ASEAN Ministerial Meeting on the Environment (AMME), (1987), Jakarta Resolution on Sustainable Development, Jakarta, 30 October.

¹²¹ ASEAN Ministerial Meeting on the Environment (AMME), (1992), Resolution on Environment and Development, Singapore, 18 February.

¹²² ASEAN Ministerial Meeting on the Environment (AMME), (1997), Jakarta Declaration on Environment and Development, Jakarta, 18 September.

when ASEAN environmental ministers agreed to “adopt the principle of sustainable development” as part of ASEAN cooperation.¹²³ In Jakarta Declaration 1997, it stressed that “industrialization will continue to be a critical part of ASEAN economy into the foreseeable future” and “a continued, long-term economic growth is essential to the prosperity of ASEAN people and is fundamental to sustainable development.”¹²⁴ To this extent, the principle of sustainable development was used as a basis for the economic growth and exploitation of environmental assets.

The third phase started around the year 2000. It was a period for a formal mode of community building and rule-making efforts. It was the institutionalization of ambitious environmental goals in official instruments such as the ASEAN Charter, the ASEAN Socio-Cultural Community (ASSC) 2009–2015, and the Bali Concord II 2003. Sustainable development and environmental protection were incorporated in the Charter,¹²⁵ plans, and series of ASEAN soft laws.¹²⁶ There were increasing roles of scientific and technocratic bodies working along with member state ministers to address the transnational environmental

¹²³ Jakarta Resolution on Sustainable Development, Jakarta, 30 October 1987 <https://environment.asean.org/jakarta-resolution-on-sustainable-development/>

¹²⁴ Jakarta Declaration on Environment and Development, 18 September 1997 <https://environment.asean.org/jakarta-declaration-on-environment-and-development/>

¹²⁵ In the Preamble of ASEAN Charter, member states “resolved to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the center of ASEAN community building process.” In Article 1(9), the purpose of ASEAN is “to promote sustainable development so as to ensure the protection of region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its people.” <https://asean.org/storage/November-2020-The-ASEAN-Charter-28th-Reprint.pdf>

¹²⁶ ASEAN Ministerial Meeting on the Environment (AMME), (2000), Joint Press Statement, 5th Information ASEAN Ministerial Meeting on the Environment, Bandar Seri Begawan, 4 April ; and ASEAN Secretariat, (2002), ASEAN Report to the World Summit on Sustainable Development. Jakarta: ASEAN Secretariat.

issues.¹²⁷¹²⁸ The severe regional haze crisis in 1997 was a major contributing factor for this change as it raised ASEAN attention to have more legally binding instruments for state responsibility and a concrete mechanism based on environmental science. For instance, ASEAN adopted ASEAN Agreement on Transboundary Haze Pollution (AATHP) and established ASEAN Peatland Management Strategy in 2002.¹²⁹

Recently, environmental protection and sustainable development have been incorporated, at least in a documentary sense, into the frameworks of political, economic, and socio-cultural communities. The subpart argues that this is the fourth phase of ASEAN environmental governance. For the Socio-Cultural roadmap 2025, the notions of environment and sustainable development are strengthened. The strategy is to balance social development and environmental sustainability.¹³⁰ The Political-Security Community blueprint 2025, corresponding with the Charter Article 1(8), shall enhance ASEAN capacity to address transnational crimes and transboundary challenges and promote studies to identify new and transboundary challenges arising from non-traditional security issues.¹³¹ These new security-

¹²⁷ There are 7 working groups of technocrats and scientists working along with the ASEAN Ministerial Meeting on the Environment (AMME) and ASEAN Senior Officials on the Environment (ASOEN): ASEAN Working Group on Climate Change (AWGCC), ASEAN Working Group on Chemicals and Waste (AWGCW) ASEAN Working Group on Coastal and Marine Environment (AWGCME), ASEAN Working Group on Environmental Education (AWGEE), ASEAN Working Group on Environmentally Sustainable Cities (AWGES), ASEAN Working Group on Natural Resources and Biodiversity (AWGNCR), and ASEAN Working Group on Water Resources Management (AWGWRM). <https://environment.asean.org/about-asean-cooperation-on-environment/>

¹²⁸ Ahmad Rizky M Umar, *Constructing ASEAN Environmental Governance: Regional Cooperation, Environmental Rights, and the Politics of Institutional Change*, CONFERENCE OF EARTH SYSTEM GOVERNANCE PROJECT, 3 (2017), https://rwi.lu.se/app/uploads/2020/09/ahmad-rizky_updatepaper-rwi-2020.pdf

¹²⁹ ASEAN Peatland Management Strategy, <https://haze.asean.org/asean-peatland-management-strategy-apms-2/>

¹³⁰ For example, the measures include:

- (i) Conservation and sustainable management of biodiversity and natural resources such as by promoting sustainable use of territorial ecosystems resources, coastal resources and strengthening forest management in the context of forest fire prevention;
 - (ii) Environmental Sustainable Cities by enhancing integrated approaches in urban planning;
 - (iii) Sustainable Climate by strengthening the effort of government, private sectors, and community in reducing GHG emission from main activities of development;
- And
- (iv) Sustainable Consumption and production by strengthening public-private partnerships to promote the adoption of environmental sound technologies for maximizing resource efficiency.

ASEAN Socio-cultural Community Blueprint 2025, <https://www.asean.org/wp-content/uploads/2016/04/8.-March-2016-ASCC-Blueprint-2025.pdf>

¹³¹ B.3.9. Enhance ASEAN capacity to address transnational crimes and transboundary challenges:

environment issues called “non-traditional security issues” include haze pollution, pandemics, hazardous waste, oil spill incidents, and trafficking of wildlife and timber. In the economic community, the AEC roadmap 2025,¹³² for the first time, also incorporates sustainable development in economic integration:

ASEAN recognizes the importance of sustainable economic development as an integral part of the region’s growth strategy. Protection of the environment supports economic growth and vice versa. ASEAN would actively promote green development by developing sustainable growth agenda that promotes the use of clean energy and related technologies, including renewable energy through green technology, as well as enhances sustainable consumption and production and including it in national development plan.¹³³

The new notion of sustainable economic development exhibits ASEAN’s commitment to the UN 2030 Agenda for Sustainable Development¹³⁴ and the global concern of Climate Change, requiring every nation to address and integrate environmental norms and measures in their economic development plans.

Nevertheless, the rule of state sovereignty and non-interference—ASEAN Way—have dominated ASEAN environmental governance through all developmental stages. Umar

i. Strengthen existing ASEAN mechanisms to consider preventive management to effectively address these new challenges, including working with Dialogue Partners, UN and other relevant bodies with the consent of countries concerned;

ii. Convene special meetings, as and when necessary, at Senior Officials’ level to address challenges of transboundary or transnational nature such as haze pollution, pandemics, transnational organised crimes, irregular movement of persons, hazardous waste, oil spill incidents, trafficking in wildlife and timber.

ASEAN Political-security Community Blueprint 2025, <https://www.asean.org/storage/2012/05/ASEAN-APSC-Blueprint-2025.pdf>

¹³² The strategic measures highlighted in the AEC roadmap includes:

- (i) Foster policies of renewable energy;
- (ii) Develop framework to support the deployment of efficient and low carbon technologies and call for international support to ensure ASEAN access to mechanism that foster low carbon technologies more affordably;
- (iii) Promote good agricultural practices to minimize the negative effects on natural resources such as soil, forest, and water, and reduce the greenhouse gas emission;
- (iv) Identify infrastructure investment requirements to increase production and reduce post-production losses to meet projected future demand and ensure food security;

And

- (v) Develop new and appropriate technologies, best practices and managements systems too ensure food safety and address health/disease and environment issues, particularly in the fast growing aquaculture, livestock and horticulture sub-sectors.

¹³³ B.8 Sustainable Economic Development in ASEAN Economic Community Blueprint 2015,

¹³⁴ UN 2030 Agenda for Sustainable Development; <https://sdgs.un.org/2030agenda>

remarked that ASEAN environmental governance is based on environmental sovereignty but lacks the integration of environmental rights.¹³⁵¹³⁶ While the notion of human rights in the environment appeared in ASEAN documents, state sovereignty takes precedence, hindering environmental cooperation and preventing the institutionalization of environmental rights.¹³⁷ As a result, ASEAN produced many environmental instruments and activities but not the effective outcome for environmental protection and environmental integration in economic development and trading system.

The same reflection appears in the environmental governance within the member states. The environmental governance in member states does not lack statutory environmental regulations, but it lacks the genuine political will to implement such environmental regulations and to internalize environmental norms into state's policy and practice. Environmental policies and regulation of ASEAN member states vary in terms of scope and approaches due to different histories, legal traditions, cultures, and political motivations, particularly the political commitment and legal capacity to enforce and implement environmental regulations.¹³⁸ Many ASEAN member states have established environmental legislations and created specialized environmental courts. For instance, Thailand drafted specialized environmental rules for its

¹³⁵ For the purpose of this dissertation, environmental rights will be discussed in the context of human rights but according to many scholars, there are three different ways to view environmental rights. First, the environmental rights is viewed as a part of human rights—a right to a healthy environment. Sheldon argued that human right and environmental right is complementary. Second, it is the right of non-human to co-exist as this view sees human as an equal legal subject. The third way is the middle ground as environmental issues should be incorporated into broader practice of 'earth system governance'. See further discussion on different perceptions of environmental rights in Christopher D. Stone, *Should Trees Have Standing--Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Dinah Shelton, *Human Rights, Environmental Rights, And The Right To Environment*, 28 STAN. J. INT'L L. 103 (1991-1992); Frank Biermann, *Earth System Governance'as a Crosscutting Theme of Global Change Research*, 17 GLOB. ENVIRON. CHANGE 326 (2007); Frank Biermann & Aarti Gupta, *Accountability and Legitimacy in Earth System Governance: A Research Framework*, 70 ECOLOGICAL ECONOMICS 1856 (2011).

¹³⁶ Ahmad Rizky M. Umar, *Constructing ASEAN Environmental Governance: Regional Cooperation, Environmental Rights, and the Politics of Institutional Change*, Conference of Earth System Governance Project (2017), 3, https://rwi.lu.se/app/uploads/2020/09/ahmad-rizky_updatepaper-rwi-2020.pdf

¹³⁷ *Id.*

¹³⁸ MUSHKAT, *supra* note 8, at 47-50.

Administrative courts, and the special environmental court is being formed.¹³⁹ Indonesian Supreme Court endorsed the concept of environmental judicial certification.¹⁴⁰ Philippines Supreme Court adopted the Rules and Procedures of Environmental Cases in 2010.¹⁴¹ Malaysia also established its environmental courts in 2012.¹⁴² However, the overall environmental governance in the region remains weak and lack expertise, resources, and infrastructure.¹⁴³ In many cases, there are no effective environmental agencies to impose significant sanctions on polluters. Environmental sectors are under-funded and understaffed.¹⁴⁴ The underlying cause is the lack of political commitment and corruption.¹⁴⁵

The contributing factors obstructing the effective environmental governance of ASEAN will be further discussed in subsequent parts, and more conflicts will be elaborated in the next chapters.

2. THE FUTURE OF ASEAN AND ITS CHALLENGES

There are normative and structural challenges impeding the progress of ASEAN regionalism and the integration of environmental protection in the trading system of ASEAN. The critical normative challenges are the ASEAN Way, democratic struggle, and human rights violation. ASEAN Way is embraced in practice for most ASEAN affairs by all member states. In contrast, democracy and human rights norms, though endorsed by the ASEAN Charter, have not yet been internalized in the ASEAN community. For structural challenges, ASEAN lacks

¹³⁹ The challenge is the need for judges, prosecutors, and lawyers who have capacity and understand the scientific and technical environmental issues. IGES (Institute for Global Environmental Strategies), *Greening Governance in Asia-Pacific*, IGES White Paper IV, 9 (2012).

¹⁴⁰ Fifth ASEAN Chief Justices' Round Table on Environment ASEAN Judicial Cooperation on the Environment, The Proceedings, Siem Reap, Cambodia, Asian Development Bank, 4-5 December 2015, 16 <https://www.adb.org/sites/default/files/publication/209906/5th-asean-cj-roundtable-envt-proceedings.pdf>

¹⁴¹ Rules and Procedures for Environmental Cases, Republic of the Philippines, Supreme Court, 13 April 2010, https://lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html

¹⁴² Shaila Koshy, *Environmental Court cases to be heard from Monday*, THE STAR (Sep.7, 2012), <https://www.thestar.com.my/news/nation/2012/09/07/environmental-court-cases-to-be-heard-from-monday/>

¹⁴³ HENRIETTE LITTA, REGIMES IN SOUTHEAST ASIA : AN ANALYSIS OF ENVIRONMENTAL COOPERATION 33 (2012).

¹⁴⁴ United Nations Environmental Programme, Asia-Pacific Environmental Outlook 51(2001).

¹⁴⁵ Ben Boer, *Environmental Law in Southeast Asia*, in ROUTLEDGE HANDBOOK OF THE ENVIRONMENT IN SOUTHEAST ASIA 115, 124 (Philip Hirsch ed., 2017).

its legal personality, effective implementation, and judicial review. These structural flaws are the result of the ASEAN Way norm application. Because member states adhere to this norm throughout the process of ASEAN formation and development, the organization's structure is formed with only non-binding power and loose functions.

2.1 The Normative Challenges:

2.1.1 ASEAN Way: Unity in Diversity

The first normative challenge for environmental norms integration in the ASEAN trading system is the ASEAN way—an approach that aims to achieve a “unity in diversity” by respecting member states’ internal affairs, diversity, and commitment.¹⁴⁶

Ten member states of ASEAN are diverse in terms of political and economic systems and cultural aspects such as religions, linguistics, and ethnics.¹⁴⁷ Their legal systems and legal practices also differ among member states.¹⁴⁸ For instance, member states do not have the same economic systems, economic capacity for development, and commercial laws and practice. Some are geared towards a socialist-oriented economy, while others are geared towards a

¹⁴⁶ ASEAN Norms: “respect for sovereignty and territorial integrity; equality; non-interference; peaceful settlement of disputes; the non-use of force; and inclusion. These norms are set out in the Treaty of Amity and Cooperation (TAC), which was signed at the First ASEAN Summit in 1976 (ASEAN 1976), and reflect the Westphalian principles articulated by the United Nations (UN) Charter. They have since been reiterated in core ASEAN documents, including the 2007 ASEAN Charter.” AVERY POOLE, *DEMOCRACY, RIGHTS AND RHETORIC IN SOUTHEAST ASIA* 11-12 (Jean Paul Gagnon & Mark Chou eds., 2019).

¹⁴⁷ Religions vary among those who are Buddhists, Christians, Muslims, and Hinduists. Main ethnic groups are Malay and Chinese in Singapore, Brunei and Malaysia (with some small percentage of indigenous populations) ; Khmer in Cambodia; Javanese and Sudanese in Indonesia; Loatian and Khamou in Laos; Bamar in Myanmar; Tagalog and Cebuano in Philippines; Thai and Chinese in Thailand; and Viet in Vietnam. World Development Indicators Database, World Bank 2014, <https://openknowledge.worldbank.org/bitstream/handle/10986/18237/9781464801631.pdf?sequence=1>

¹⁴⁸ Some member states use common law system while other use civil law system mostly due to their historical influences during the colonization period.

market-oriented economy. Thailand,¹⁴⁹ the Philippines,¹⁵⁰ Malaysia,¹⁵¹ Singapore,¹⁵² Indonesia,¹⁵³ and Brunei¹⁵⁴ are more market-oriented member states, while Cambodia,¹⁵⁵

¹⁴⁹ For Thailand, primary exporting products and economic activities are rubber, rice, jewelries, agricultural products, service sectors, vehicles and devices, and computer devices. While exporting those products to trading partners—ASEAN member states, Japan, US, and EU, Thailand imports gas, machines, electrical appliances, and chemical products from them. ASEAN DEPARTMENT MINISTRY OF FOREIGN AFFAIR OF THAILAND, ASEAN BOOK, 27 (2013).

¹⁵⁰ For Philippines, primary resources are natural gas, gold, and copper. Main economic activities and exporting products to US, Japan, Singapore, China, Netherland and Taiwan are textiles, electronic devices, chemical products, and processed food. Philippines imports fuel, machines, steels, and vehicles from those trading partners. *Id.* at 23.

¹⁵¹ Primary resources are rubber, palm oil, oil, gas and woods. Main economic activities and exporting products are electrical appliances, processed food, Liquid Natural Gas (LNG), palm oil, and chemical products. Malaysia exports those products to Singapore, China, Japan, US and Thailand and imports machines, transportation devices, other chemical products and electricity from them. *Id.* at 11.

¹⁵² For Singapore, the main economic activity is financial service including insurance companies, banks, and asset managements. Casino complex is also a main attraction for wealthy tourists from China. Under the banking secrecy law and secure system, Singapore became a safe monetary haven for regional money from Indonesian, Chinese, or Malaysian. The more corruption occurs in the region, the more income flow in Singapore. Significant resources are human and technology. Major economic activities are construction, transportation, telecommunication, banking and finance, and other service sectors. Singapore exports machines, electrical appliances, and chemical products to Thailand, Malaysia, US, EU, China, Japan, and Taiwan while imports electrical devices, gas, and food products from them. *Id.* at 23-25, 97.

¹⁵³ The primary resource and economic activity of Indonesian are forest and forest exploitation. Logging is the foremost form of exploitation, including the exportation of wood products such as sawn timber, plywood, teak, and wooden furniture. Indonesia has a green gold—rain forest is the most valuable asset of Indonesia and one of the richest flora in the world. The exporting products are mainly oil, natural gas, coal, agricultural and food products, fisheries and processed natural resources. Rubber and palm oil, large-scale plantation on estates, are the primary exporting earning for Indonesia. Major exporting markets are Japan, China, US, and Singapore; however, in return many machineries, chemical products, fuel, and processed food are imported from those countries. *Id.* at 15 and DUTT, *supra* note 19, at 141

¹⁵⁴ There are two major economic sectors: oil and gas business and banking business. The fundamental resources and exporting products of Brunei are black gold—oil and gas. Oil and gas production is mostly run by the multinational UK-Dutch Shell Company with foreign workers and technocrats. Major exporting markets are Japan, member states of ASEAN, South Korea, Australia, and India. Brunei is a one-product market; therefore, they need to imports other products industrial machines, cars, electrical appliances, and agricultural products from other member states of ASEAN, EU, US, Japan and China. ASEAN BOOK, *supra* note, at 11; and ERIK PAUL, OBSTACLE TO DEMOCRATIZATION IN SOUTHEAST ASIA: A STUDY OF THE NATION STATE, REGIONAL AND GLOBAL ORDER 35 (Mark Beeson ed., 2010).

¹⁵⁵ A growing economy depends on attracting foreign investment with low labor cost and a potential oil business development, based on recent oil found offshore of Sihanoukville which could be a major income for the country and secure the stability of the one-party state. Major exporting products are teak, textiles, woods, latex products, and gemstones. Major exporting markets are US, Canada, Germany, UK, Vietnam and Japan. Cambodia mainly imports tobacco, petroleum, gold, machines, vehicles and drugs from Thailand, Vietnam, Singapore, China, and Hong Kong. ASEAN BOOK, *supra* note, at 13, 46.

Laos,¹⁵⁶ Myanmar,¹⁵⁷ and Vietnam¹⁵⁸ are usually regarded as more socialist-oriented member states; however, there is more or less a major shift towards an open economy to generate economic growth in these member states. Member states' economies are mainly based on producing and exporting primary resources, except for Singapore, a city-state that does not have many primary resources to exploit; thus, the main economic activity is financial service, including insurance companies, banks, and asset management.¹⁵⁹ Their national commercial law also makes it more complex, uncertain, time-consuming, and costly for business transactions. For regional economic integration, it may be necessary to have, if not unified, a harmonization of commercial laws within the region so that there are clear and certain parameters for business operators.¹⁶⁰

The cornerstone of the ASEAN way is respecting member states' sovereignty and not intervening in member states' internal affairs.¹⁶¹ Thus, the approach to positively develop the

¹⁵⁶ In recent years, Laos has shifted its economic policy from socialist command to a market economy focusing on economic growth that bases on the exploitation of national natural resource—forest and water. Primary natural resources are rivers as sources for hydropower, wood, minerals, steel, coal, precious stones, and rice. Apart from hydropower plants generating electricity for exporting, main economic activities and exporting products are wooden industries and products, agricultural products, textiles, minerals. Laos exports those products to Thailand, Vietnam, and China and in return imports machines and devices and vehicles from them. *Id.* at 15-17.

¹⁵⁷ Economic activities and foreign investment focus on the exploitation of energy resources (oil and gas), the construction of hydropower mega projects, timber logging, and trade of coal, gold and gems. Many hydropower projects that had been constructed on Salween river to export electricity to Thailand and China has raised many environmental issues including flooding in large areas of ecosystem and the relocation of villagers. (Illegal logging) Myanmar's close relationship with China also poses questions regarding the future of democratization and the sustainable development in trade. Primary exporting resources are natural gas and wooden products: they are exported to Thailand, China and India. Economic activities are limited to agricultural production and textiles. *Id.* at 77-81.

¹⁵⁸ Due to the drive of globalization, Vietnam had a major shift toward a market economy—adopting a neoliberal market approach and pushing for fast economic growth by foreign investment and trade. Vietnam sufficiently produced rice and became the second world's largest rice exporter. Primary natural resources are phosphate, gas, natural gas, coal, and woods. Main economic activities and exporting products are processed food, textiles, gas, leathers, seafood, chemical fertilizers, papers, cement, vehicle tires, and mobile phones. Trading partners are the US, EU, ASEAN member states, China, and Japan. *Id.* at 29; and PAUL, *supra* note 154, at 120-121.

¹⁵⁹ ASEAN BOOK, *supra* note 154, at 97.

¹⁶⁰ Locknie Hsu, *Legal Barriers to Supply Chain Connectivity in ASEAN*, SMU RESEARCH PAPER 184, 189 (2017).

¹⁶¹ In pursuit of the ASEAN's purposes stated in the Article 1 of the Charter, all states shall do so by acting in accordance with the principles that may cause contradictions as following: (i) respect independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States ; (ii) non-interference in internal affairs of ASEAN Member States ; (iii) respect the right of every Member State to lead its national existence free from external interference, subversion, and coercion ; and (iv) respect the different cultures, languages and religions of the people of ASEAN, while emphasizing their common values in the spirit of unity in diversity. ASEAN Charter Article 2 (a), (e), (f), and (l)

sense of regional integration is respecting the differences, focusing on accommodation and consultation, and employing “non-binding commitments rather than legalistic formulae and codified rules.”¹⁶² This concept is also known as “unity in diversity,”¹⁶³ forming parts of ASEAN identity, allowing diverse ASEAN members to “hang together.” It is believed that ASEAN Way is the way to work together constructively and less offensive to their differences.

The ASEAN Socio-Cultural Community Blueprint mentioned several times that consolidating “unity in diversity” is the strategic way to promote the ASEAN sense of community and enhance deep mutual understanding.¹⁶⁴ This concept functions throughout ASEAN cooperation in many significant issues. For instance, while ASEAN has established many trade agreements to facilitate internal market integration, the participation and implementation of those agreements are uneven. This may result from development gaps between the initial member states that are more economically developed and the four least developed member states (CLMV): Cambodia, Laos, Myanmar, and Vietnam.¹⁶⁵ The development gap between those two types of member states is perceived to create a two-tiered ASEAN.¹⁶⁶ The Charter, Article 21 (2), allows for flexible participation, including the ASEAN Minus X formula, where there is consensus.¹⁶⁷

¹⁶² See DAVID CAPIE & PAUL EVANS, THE ASIA-PACIFIC SECURITY LEXICON 11 (2007).

¹⁶³ See generally ASEAN Secretary General Le Luong Minh in an interview with Vietnam News Agency correspondents in Jakarta, Indonesia. 2015 <https://english.vov.vn/world/unity-in-diversity-creates-asean-identity-309101.vov> ; Lada Phumas, Acting Secretary to the Department of ASEAN Affairs Ministry of Foreign Affairs of Thailand, “The ASEAN Spirit of Unity in Cultural Diversity and Social Harmony” at “SPUC Say Hi to ASEAN” Sripatum University (Chonburi Campus) 16 March 2016, <http://www.mfa.go.th/asean/contents/files/news-20160318-154839-668029.pdf> ; and Kristina Jönsson, *Unity-in-Diversity? Regional Identity-building in Southeast Asia*, 29 J. CURR. SOUTHEAST ASIAN AFF. 41, 41-72 (2010).

¹⁶⁴ For instance, “The ASCC shall respect the different cultures, languages, and religions of the peoples of ASEAN emphasizes their common values in the spirit of unity in diversity and adapt them to present realities, opportunities and challenges.” For promotion of ASEAN awareness and a sense of community, the strategic objective is to “create a sense of belonging, consolidate unity in diversity and enhance deeper mutual understanding among ASEAN Member States about their culture, history, religion, and civilization.” ASEAN Socio-Cultural Community Blueprint, <https://asean.org/wp-content/uploads/archive/5187-19.pdf>

¹⁶⁵ Bridging the Development Gap among Members of ASEAN, https://asean.org/?static_post=bridging-the-development-gap-among-members-of-asean

¹⁶⁶ <http://www.nationmultimedia.com/business/Asean-has-become-a-2-tier-market-business-forum-to-30297177.html>

¹⁶⁷ ASEAN Charter Article 21 (2)

While ASEAN adheres to tolerate all diverse aspects among member states and evolve at a pace comfortable to all, there is a thin line between respecting the differences or having an excuse for inaction in many sensitive and controversial issues such as transboundary pollution,¹⁶⁸ democratic struggles, and human rights violations in member states. How can ASEAN expect to create its legal personality, organizational structures and harmonized system under the international law with respect to the principles of democracy, human rights, and sustainable development while preserving regional identity and respecting the sovereignty and cultures of member states under the non-intervention principle?

Non-interference or non-intervention approach for ASEAN means that all domestic governance in member states is excluded from any official dialogue discussion. What should be considered as internal affairs? What issues are purely domestic? When a member state violates the ASEAN Charter, such violation is deemed as domestic? With due respect to the principle of non-interference, how far can ASEAN act before it is deemed as interference, intervention, or coercion?

Intervention is a relative term ranging from criticism to coercion by force.¹⁶⁹ The legality of the intervention bases on two factors: the severity of the intervention and the legitimate nexus ground for intervention.¹⁷⁰ Under the UN Charter and international law basis, intervention means the use of force, coercion, or threat made by one state to coerce another state to comply with the matter that is entirely under domestic jurisdiction.¹⁷¹ What matters are purely under domestic jurisdiction is hard to define.¹⁷² One state may act upon or interfere with another state's practice within its territory if it has a legitimate interest or connection or it has been affected directly or indirectly from the spillover of the actions within the other state's

¹⁶⁸ One of the main transboundary pollution problems in Southeast Asia is forest fire mainly taken place in Indonesia. The issue of haze caused by forest fire will be further discussed in chapter III.

¹⁶⁹ M.N.S. Sellers, *Intervention under International Law*, 29 MD. J. INT'L L. 1, 6 (2014).

¹⁷⁰ *Id.*

¹⁷¹ UN Charter Art.2 (4)

¹⁷² Tay, *supra* note 52, at 167.

territory. However, Southeast Asia's situation has always been susceptible on this matter, probably because the region had been through western imperialism and intervention for an extended period. It appears that member states would regard almost every critical matter, e.g., democracy, human rights, environment, and development, to fall within the scope of internal affairs. Within the ASEAN community, just criticizing or commenting on other member states could be regarded as an intervention.¹⁷³ Commonly, member states avoid publicly criticizing one another.¹⁷⁴ Acharya described the ASEAN non-interference principle as an agreement to refrain from

criticising the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of governments a basis for deciding their membership in ASEAN.¹⁷⁵

Caution and gradualism are preferred by member states rather than a dramatic or revolutionary legal binding commitment.¹⁷⁶ Acharya noted that member states avoid having “an overly formal style of Western institutional structures” but rather prefer having “a closed-door dialogue” or “a private and informal political culture embodied by small elite networks” in which members would not be exposed to “the embarrassment of dissent.”¹⁷⁷ This practice is argued to be efficient in consolidating and enhancing a friendly environment for regional cooperation; nevertheless, it can deter ASEAN from having a meaningful integration and creating an

¹⁷³ JURGEN HAACKE, *ASEAN'S DIPLOMATIC AND SECURITY CULTURE: ORIGINS, DEVELOPMENT, AND PROSPECT* 49-50 (1st ed. 2002).

¹⁷⁴ See Jurgen Haacke, *Enhanced Interaction' with Myanmar and the Project of a Security Community: Is ASEAN Refining or Breaking with Its Diplomatic and Security Culture?* 27 *CONTEMP. SOUTHEAST ASIA* 188, 189 (2005); and Hiro Katsumata, *Why Is ASEAN Diplomacy Changing? From 'Non-interference' to 'Open and Frank Discussions'*, 24 *ASIAN SURV.* 237, 243 (2004).

¹⁷⁵ AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER* 72 (2009).

¹⁷⁶ Amitav Acharya, *Multilateralism, Sovereignty and Normative Change in World Politics*, in *MULTILATERALISM UNDER CHALLENGE? POWER, INTERNATIONAL ORDER, AND STRUCTURAL CHANGE* 95, 99 (Edward Newman et al. eds., 2006).

¹⁷⁷ ACHARYA, *supra* note 175, at 82-83.

effective regional response for time-sensitive matters.¹⁷⁸ It is also challenged by the fact that there are new transnational threats that hardly can be dealt with without intervening in member states' affairs and crossing the line of respecting the differences in political or cultural practices. These threats include environmental threats that will be discussed in the chapter three.

After ASEAN failed to act during the economic crisis of 1997–1998, together with the rise of new transboundary challenges such as transnational crimes and environmental problems, member states are looking for a new interpretation of the non-intervention principle.¹⁷⁹ Thailand proposed the idea of “flexible engagement”¹⁸⁰ allowing other member states to engage in case there is a legitimate basis.¹⁸¹ The community was reluctant but finally agreed on the term “enhanced interaction”—if a member state that agreed to certain commitments or cooperation violates such agreement, it can be held responsible for such violation.¹⁸² Under the Charter, all member states agreed to international law, ASEAN rule-based regime, the principle of democracy, human rights protection, and sustainable development; thus, the violation of such should not be deemed purely internal affairs. While the principle of non-intervention remains a break for integration and execution, the hope is to set new boundaries for the term “internal affair” to know the limits of what member states can do in the light of national sovereignty.

¹⁷⁸ “The ASEAN Way norms include consensus, consultation and ‘moving at a pace comfortable to all’, which means ‘advancing as fast, or as slowly, as the most reluctant or least confident member allows’. Traditionally, member states have preferred caution and gradualism; this explains the ‘relative rarity of legally binding agreements in ASEAN’” RODOLFO C. SEVERINO, *SOUTHEAST ASIA IN SEARCH OF A COMMUNITY* 18 (2006).

¹⁷⁹ Transnational problems bring the silver lining for regional collective operation as Surin Pitsuwan, the Secretary-General of ASEAN in 2008 said: “One good thing about the repeated crises we are having is that a sense of community is growing very fast in the region.” Personal Interview with Surin Pitsuwan by Amitav Acharya in ACHARYA, *supra* note 16, at 255.

¹⁸⁰ Surin Pitsuwan, Thai Foreign Minister, urged ASEAN to review its non-interference doctrine so that ASEAN could develop a capacity for “preventing or resolving domestic issues with regional implications”. See *Thais Retract Call for ASEAN Intervention*, ST (June 27, 1998); and Proceedings of the ASEAN-UNESCO Concept Workshop on Human Security in South-East Asia, <https://unesdoc.unesco.org/ark:/48223/pf0000157883>; and Jürgen Haacke, *The Concept of Flexible Engagement and the Practice of Enhanced Interaction: Intramural challenges to the ‘ASEAN way’*, 12 PACIFIC REV. 581, 581 (1999).

¹⁸¹ HAACKE, *supra* note 173, at 167-183.

¹⁸² “Vietnam and Laos opposed to any departure from non-intervention doctrine, while Thailand under Chuan Leepai administration and the Philippines were the most active pushing for a shift.” Post-Suharto Indonesia also voiced for a shift for a more nuance application of non-interference doctrine—reflecting its democratizing domestic politics. ACHARYA, *supra* note 16, at 183 and 245.

2.1.2 The struggle towards democracy

Although democracy was enlisted in ASEAN Charter as one of the core values, being a democratic state was never a prerequisite to becoming a member state of ASEAN.¹⁸³ Within the member states of ASEAN, there are many internal political struggles for peace, security, and stability. After the decolonization period, many member states had been trying to adjust their institutions and administrations under the expectation of modern governing standards that respect the right and will of the people under the due process of law, which is likely, resemble the liberal democratic system. The adjustments might not be peaceful transitions. Some succeeded in a way, while many others failed to do so.

There are two different reasons for democratic pursuits¹⁸⁴—either due to the acceptance of democracy (liberal democracy) as a normative goal or a cosmetic move to gain “External Regional Legitimacy (ERL).”¹⁸⁵ It depends on actors advocating democratic pursuits. Civil movements within member states seek transition towards a liberal democratic system where people can have political rights and human rights protection. On the other hand, ASEAN may adopt democratic norms in its official statements even if such norms are not internalized. Some leaders of member states may adhere to the aspirational language in the ASEAN Charter regarding the promotion of democracy and make normative statements without the intention to internalize democratic norms.¹⁸⁶ As Emmerson stated, “some politicians, however, want the legitimacy that the word confers without the constraints that the reality can imply.”¹⁸⁷ Poole

¹⁸³ Unlike the European Union, all member states of the EU must respect and upheld the principle of democracy. Treaty on European Union, https://europa.eu/european-union/sites/europa.eu/files/docs/body/treaty_on_european_union_en.pdf

¹⁸⁴ As ASEAN is not a supranational organization having its own independence power, the lack of democracy in member states significantly affects the functions and progress of ASEAN. The lack of liberal democracy impacts not only ASEAN regionalism but also environmental policy integration which will be further discussed in subsequent chapters.

¹⁸⁵ POOLE, *supra* notes 146, at 8.

¹⁸⁶ Poole suggested that “ASEAN member states make normative statements because they want to appear to be advancing democracy and human rights norms—but they do not necessarily want to advance democracy and human rights as normative standards.” *Id.* at 5-8.

¹⁸⁷ Donald K. Emmerson, *Critical Terms: Security, Democracy and Regionalism in Southeast Asia*, in HARD CHOICES: SECURITY, DEMOCRACY AND REGIONALISM IN SOUTHEAST ASIA 3, 9 (Donald K. Emmerson ed., 2008).

suggested that the rhetoric statements made by ASEAN or member states' leaders serve a specific purpose—to appear credible and legitimate as international actors capable of engaging in external relations with powerful partners in trade agreements or security arrangements.¹⁸⁸

Though democracy was endorsed by the ASEAN Charter in 2007 and reaffirmed in ASEAN declarations and plans such as the ASEAN Political-Security Community Blueprint, there are rises and falls in internalizing democratic norms into member states' political systems. One of the struggles is a significant disagreement among the member states in defining what constitutes democracy.¹⁸⁹ As Gomez and Ramcharan stated, there is “discord within ASEAN over the pursuit of the liberal democratic form of governance” and “over the substantive content of fundamental human rights.”¹⁹⁰ Many ASEAN member states establish certain forms of democratic institutions and refer themselves as democratic, but according to the evidence in contrary, they can hardly be regarded as democratic in substances.¹⁹¹

Democracy is indefinite, and it is a matter of degree.¹⁹² There is no absolute democracy.¹⁹³ However, in a democratic state, apart from having a separation of power, there

¹⁸⁸ POOLE, *supra* notes 146, at 6; See also KATHARINA COLEMAN, INTERNATIONAL ORGANISATIONS AND PEACE ENFORCEMENT: THE POLITICS OF INTERNATIONAL LEGITIMACY 21 (2007); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD MANAGE REV 571, 574 (July 1995); Avery Poole, *Visions and Realities: ASEAN's Efforts to Institutionalize Cooperation*, in COLLABORATION UNDER ANARCHY: FUNCTIONAL REGIONALISM AND THE SECURITY OF EAST ASIA 63, 63-75 (See Seng Tan ed., 2009).

¹⁸⁹ “There is significant diversity among the views of member states about democracy within ASEAN. As a result, debate regarding the meaning of ‘democracy’, and the implications for member states of its use in official discourse, have been largely avoided by ASEAN.” POOLE, *supra* notes 146, at 20.

¹⁹⁰ James Gomez & Robin Ramcharan, *Introduction: Democracy and Human Rights in Southeast Asia*, 33 J. CURR. SOUTHEAST ASIAN AFF. 3, 4 (2014).

¹⁹¹ For instance, Than Shwe's military dictatorship regime approved plans to develop a “discipline-flourishing democracy” for Myanmar in 2003. This concept was criticized to be a tool for institutionalizing military rules in disguise. Before Indonesian democratic transition in 1998, Sukarno's regime claimed to be a “guided democracy” followed by Pancasila democracy under Suharto's regime. See Kyaw Zwa Moe, *Burma's Democracy: Just What the Generals Ordered*, THE IRRAWADDY (Jan. 1, 2015), <https://www.irrawaddy.com/election/opinion/burmas-democracy-just-what-the-generals-ordered>; Marco Bünte, *Burma's Transition to “Disciplined Democracy”: Abdication or Institutionalization of Military Rule?*, 177 GIGA RESEARCH PROGRAMME: LEGITIMACY AND EFFICIENCY OF POLITICAL SYSTEMS (August 2011), https://www.files.ethz.ch/isn/134189/wp177_buente.pdf; and Ikar Nusa Bhakti, *The Transition to Democracy in Indonesia: Some Outstanding Problems*, THE ASIA-PACIFIC: A REGION IN TRANSITION 195, 195-206 (2004), <https://apcss.org/Publications/Edited%20Volumes/RegionalFinal%20chapters/Chapter12Bhakti.pdf>

¹⁹² CLARK D. NEHER & ROSS MARLAY, DEMOCRACY AND DEVELOPMENT IN SOUTHEAST ASIA : THE WIND OF CHANGE 6 (1995).

¹⁹³ Democracy is a contested subject among scholars—there is no uniform agreement of what constitute democracy and how to indicate whether a political regime is democratic. It is outside the scope of this research to discuss in depth about democracy.

should be at least three other components: citizen participation in choosing governmental leaders by voting; a competitive election that allows candidates to compete against one another;¹⁹⁴ and recognition of citizens' civil and political rights and liberties.¹⁹⁵ Citizen participation via a fair and competitive election without any intervention is essential for democracy because it ensures that people's voices will be heard.¹⁹⁶ Civil rights and liberties to participate in political matters are also crucial indicators of democracy. In more complex analysis, democratic indicators should encompass the long-term effects of reducing social, economic, and environmental inequality.¹⁹⁷ A political regime may well fit the minimalist definition of democracy but not the complex definition.¹⁹⁸

Despite the difficulties and complexities, for this dissertation, the political regimes in ASEAN are categorized as follows: socialist/communist one-party states—Laos¹⁹⁹ and Vietnam;²⁰⁰ an absolute monarchy—Brunei;²⁰¹ presidential democracies—Indonesia and

¹⁹⁴ Election is essential for minimalist definition of electoral democracy. See Adam Przeworski, *Minimalist Conception of Democracy: A Defence*, in DEMOCRACY'S VALUE 12, 12-17 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); and JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1943).

¹⁹⁵ The more complex definition of democracy includes civil liberties and human rights. This is the cornerstone of what we perceived as "liberal democracy". See ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971); LARRY J. DIAMOND, DEVELOPING DEMOCRACY: TOWARDS CONSOLIDATION (1999); and DAVID A. WILSON, POLITICS IN THAILAND (1962).

¹⁹⁶ NEHER & MARLAY, *supra* note 192.

¹⁹⁷ See, e.g., Dietrich Rueschemeyer, *Addressing Inequality*, 15 J. DEMOCR. 76, 76-90 (October 2004).

¹⁹⁸ For example, while there are regularly held elections with the participation of multiple parties in Indonesia with functioning keys democratic institutions and the separation of powers, there are some limitation in civil liberties and human rights as well as inequality and poverty. POOLE, *supra* note 146, at 23-24.

¹⁹⁹ Laos is ruled by one party consisting of high-ranking military men called Lao's People Revolutionary Party (LPRP), a revolutionary and nationalist regime that gained control over the country since 1975. The prospect of democratization is weak due to limits of civil society, poverty, and isolated ethnic groups. The government controls all press and media. Lao People's Army (LPA), the arm of the government, is self-financing by managing and incorporating commercial activities such as timber logging, tourism, transportation, construction and agricultural business. PAUL, *supra* note 154, at 34.

²⁰⁰ Vietnam is a one-party state. The ruling power is a monopoly of the Communist Party of Vietnam (CPV). Like in Thailand and Indonesia, Vietnamese military finances itself by controlling and running many businesses and conducting many joint ventures with foreign companies: arm industries, food industries, construction, transportation, banking and tourism. . Corruption is part of the system: bribing for services, siphoning of public wealth by party, fiscal fraud, smuggling and illegal appropriation of lands and natural resources. There is wide spread demands and on-going struggle for equality and liberalization of civil rights and political regime; nevertheless, the movement is not significant enough to impact political reform because there is no clear identifiable large cooperated group and the middle class is small and too connected to the state. *Id.* at 120-24.

²⁰¹ Brunei Darussalam remained under control and protection of United Kingdom until 1 January 1984 when Brunei became an independent state and member states of ASEAN. Brunei is an absolute monarchy based on Islam and ruled by Sultan, the supreme leader. Under the constitution, the Sultan can do no wrong—he cannot commit a legal wrong and is immune from civil and criminal liabilities and lawsuits. His ruling is based on the

Philippines; semi/pseudo-democracies—Cambodia, Thailand, Myanmar,²⁰² Malaysia, and Singapore.²⁰³ Some member states may claim that their political systems are democratic; however, the evidence shows the contrary, especially in recent years when there are strong democratic regression and backsliding trends.²⁰⁴

hereditary monarchy legitimacy by historical claims and Islamic divine law and tradition. The Sultan maintain his power by providing a comprehensive welfare system “Shellfare” to his subjects: a tax-free income, free health care and education, a retired pension, free home and loans, subsidies for private schooling and studies, etc. Citizens are employed with high wages by governments in governmental services: oil and security industry, social programs, and infrastructure. The majority of the people, more than 67 percent, are Malay Sunnis of the Shafeite sect. Ethnic Chinese are excluded from full citizenship and state welfare. The prospect for democratization is minuscule. As long as the oil and gas business generates a wealth of the nation and provides citizens appropriate quality of life and the Sultan maintains close business ties with the western countries such as with United Kingdom for oil, arms and banking industry and with United States for generous support for US campaign against communism and war on terror, the Sultan maintains its power and stability as absolute ruler. *Id.* at 34-35; Joint Statement Between the United States of America and Negara Brunei Darussalam <https://2001-2009.state.gov/p/sca/rls/pr/16038.htm> ; <https://www.gov.uk/government/news/mark-field-visits-brunei-for-business-and-bilateral-discussions>

²⁰² During the 18th century, Myanmar had been occupied under British imperialism. Nationalist movements, Burma Independence Army (BIA), organized the resistance against the British during WWII which led to the negotiation of independence between various ethnic groups at the end of the WWII. Though BIA’s leader, General Aung San was assassinated in 1946, Myanmar proclaimed its independence in 1948 under the leadership of Prime Minister U Nu who was overthrown by the military coup led by General Ne Win in 1962. Consequently, Myanmar has been ruled by military dictatorship ever since. What keeps dictatorship in power is the use of nationalism, the pride of early Burmese civilization before the colonization, and the fear of foreign intrusion. In order to maintain its power and legitimacy, military controls the national economy by abolishing a socialist system and adopting a neoliberal-type market—through international trade of national natural resources, foreign investment, and tax incentives, the military remains friendly with western capital and foreign aids. In the path towards democracy and civil society, Myanmar is facing two types of movement: a class struggle led by resistance to state repressive regime, Aung San Suu Kyi, demanding for political and civil rights and ethnic minority groups demanding for self-determination and independence. In order to have full control of natural resources situated in the lands occupied by ethnic minorities group, the government employed military actions in order to rule those minorities. In 2010, the Union Solidarity and Development Party (USDP), a military-backed party, won the election and declared a transition from military rule to civilian democracy despite the fact that the international community condemned the election as fraudulent. Many opposition politicians were prohibited to participate in the election. The election was far from transparent: it was just a mean to legitimize the military ruler. In 2015, National League for Democracy (NLD) led by Aung San Suu Kyi has won a landslide victory in the general election presumably ending the military influence in administration. However, that is not the case. While NLD are the majority in the parliament, military still play key roles in the administration. For example, the head of the army selects key securities ministries such as defense, interior affair, or border affair. The government together with Aung San Suu Kyi, a Nobel Peace Prize winner, faced many criticisms for letting the military continue to violate human right of minorities, especially in the case of muslim Rakhine region (Rohingya) where the military killed civilians. PAUL, *supra* note 154, at 75-80; Nick Clegg, *Myanmar's Sham Election*, N.Y. TIMES (Oct. 3, 2010), <https://www.nytimes.com/2010/10/04/opinion/04iht-edclegg.html> ; *Myanmar's 2015 Landmark Elections Explained*, BBC (Dec. 3, 2015), <https://www.bbc.com/news/world-asia-33547036> ; and Wa Lone & Simon Lewis, *Suu Kyi's Party Wins Nearly Half Of Myanmar By-Elections*, REUTERS (Apr.1, 2017), <https://www.reuters.com/article/us-myanmar-politics-idUSKBN17336D?i%3D0>

²⁰³ This categorizing of political regimes is only for the purpose of the dissertation. The variations and complexities exist and will be further discussed throughout the relevant issues in the research.

²⁰⁴ Joshua Kurlantzick, *Southeast Asia's Regression from Democracy and Its Implications*, CFR (May 28, 2014), <https://www.cfr.org/report/southeast-asias-regression-democracy-and-its-implications> ; Larry J. Diamond, *Facing Up to the Democratic Recession*, in *DEMOCRACY IN DECLINE?* 98, 114-116 (Larry Diamond & Mark F. Plattner 2015); Aurel Croissant & Jeffrey Haynes, *Thematic Section: 'Inequalities and Democracy in Southeast Asia,'* 21 *DEMOCRATIZATION* 775, 775-779 (2014); and Thomas Pepinsky, *Southeast Asia: Voting Against Disorder*, 28 *J. DEMOCR.* 120, 120-131 (Apr. 2017).

For dominant-party parliamentary systems such as Cambodia, Malaysia, and Singapore, free and fair elections with the participation of multiple parties without political repression would prove the prospect of democratization. However, Poole observed that they are likely electoral authoritarian regimes—holding regular elections but consists of political repressions in order to preserve the power to the long-ruling party.²⁰⁵

Malaysia²⁰⁶ had been a one-party state from 1985 until 2018—the United Malay National Organization (UMNO), under the dominant position of Malays with Islam as the religion of the state and a source of legal and social control, had control over the state, its legal institutions, police force, and military.²⁰⁷ Nevertheless, the general election on May 9, 2018, marked an “extraordinary comeback”²⁰⁸ for democracy. Mahathir Mohammad, former Prime Minister and member of UMNO, formed a new opposition political party named Malaysian United Indigenous Party in 2016 and won the general election making him the first leader from the opposition party to win the election against UMNO since Malaysian independence in 1975.²⁰⁹ This could be the result of the corruption scandal against former Prime Minister Najib Razak. He was charged with multiple counts of criminal breach of trust and money

²⁰⁵ POOLE, *supra* note 146, at 21.

²⁰⁶ Owing to an anti-colonial movement led by nationalist and communist parties together with the fact that United Kingdom had suffered financial crisis after WWII, Malaysia gained its independence in 1957. The population consists of Malays as majority and Chinese and Indians who have migrated to Malaysia by the encouragement of the British during the colonial period to develop rubber plantations, tin mining and logging industries. Similar to Brunei, Malaysia has been ruled by an authoritative regime, namely the United Malay National Organization (UMNO) under the dominant position of Malays with Islam as religion of the state and a source of legal and social control. Having control over executive and legislative powers and through the use of Internal Security Act (1948 ISA), the Official Secrets Act (OSA), the Emergency Ordinance (EO), the Sedition Act, and the Printing, Presses and Publication Act (1984 PPPA), UMNO had suppressed any civil movements of dissents by detaining politicians, human right activists, environmental activists, journalists, lawyers, and other opponents of the regime. Students and professors are also forbidden to participate in any political activities; otherwise, they will be barred. UMNO is financed by large business companies own by Chinese, Malay and Indian and by the state companies, mostly from the oil company “Petronas”. PAUL, *supra* note 154, at 66-68.

²⁰⁷ *Id.* at 66.

²⁰⁸ *Malaysia Election: Opposition Scores Historic Victory*, BBC (May 10, 2018), <https://www.bbc.com/news/world-asia-44036178>

²⁰⁹ *Id.*

laundering.²¹⁰ The prospect of democratization is still in progress and remains to be seen with the new administration.

With the chief of state King Narodom Sihamoni, Cambodia is a one-party state led by Prime Minister Hun Sen with uncertain prospects for democratization.²¹¹ After staging a coup in 1997, Hun Sen, the Cambodian People's Party (PPP) leader, has been in power until this present time.²¹² His administration was legitimized after the general election by controlling the electoral roll and ballots, controlling major television channels and radio media, and suspending mobile use during the election.²¹³ His party has won four consecutive national elections by oppressing the opposing political parties and civil movements.²¹⁴ While Hun Sen claimed that in the 2018 general election, "our country ... is moving forward in the framework of a multi-party democracy,"²¹⁵ signs of political repression continued when the main opposition leader, Kem Sokha, was arrested and tried for treason and other opposition politicians were exiled.²¹⁶

²¹⁰ *Former Malaysian Prime Minister Najib Razak Arrested By Anti-Corruption Agency*, INDEPENDENT (Nov. 14, 2018), <https://www.independent.co.uk/news/world/asia/malaysia-former-prime-minister-najib-razak-anti-graft-agency-corruption-1mdb-a8544886.html>

²¹¹ Cambodia gained its independence when France was defeated in the war of Diên Biên Phu in 1954. It was not a peaceful transitional period. Lasting from 1975 until 1979, Cambodia's Communist party or "Khmer Rouge" regime, under the leadership of Pol Pot, became a significant political force of the country with the aims of rejecting modernity, demonizing the west, reverting back to a collective agricultural society, projecting nationalism in order to take society back to the Khmer golden age. After being a pawn of cold war, Paris agreement was signed in 1991 giving Australia control of the UN-mandated military intervention (United Nations Transitional Authority in Cambodia or UNTAC) in Cambodia to restore peace and lay down the foundation of democracy by setting up transitional authority in the country, disarming the remaining armies, and preparing the elections. UNTAC's mission was failed, particularly in regard to establishing the rule of law and judiciary system and putting in place human rights institution with the power to investigate, monitor, and commencing legal process against human right abuse. After the departure of UNTAC, Cambodia was under the political contest between the Cambodian People's Party (PPP) lead by Hun Sen, a former Khmer Rouge commander, and the United National Front and the Independent, Neutral and Cooperative Cambodia party (FUNCINPEC). In 1997, Hun Sen staged a coup and took over a complete power to rule the country. PAUL, *supra* note 154, at 37-40.

²¹² Kingdom of Cambodia, Public Administration Country Profile, Division for Public Administration and Development Management (DPADM) Department of Economic and Social Affairs (DESA) United Nations 2004 <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023231.pdf>

²¹³ PAUL, *supra* note 154, at 40.

²¹⁴ *Cambodia Profile : A Chronology of Key Events*, BBC (July 20, 2018), <https://www.bbc.com/news/world-asia-pacific-13006828>

²¹⁵ Ouch Sony, *Cambodia Does Not Need International Recognition for Upcoming Elections: PM*, CHANNEL NEWS ASIA (Jan. 19, 2018), <https://www.channelnewsasia.com/news/asiapacific/cambodia-does-not-need-international-recognition-for-upcoming-9874358>.

²¹⁶ In 2017, the opposition leader, human right activist Kem Sokha, was charged with treason and his party, Cambodia National Rescue (CNRP), which is the only significant opposition party, was dissolved. James Massola, *'Democracy Is Dead in Cambodia': Deputy Opposition Leader Speaks Out*, SMH (Mar. 21, 2018),

During Singapore's decolonization, the People's Action Party (PAP), led by Lee Kwan Yew, successfully demolished the opposition and created a one-party state.²¹⁷ The organization of the party is in the hands of the Lee family.²¹⁸ The party runs the government and has control over legal institutions. The role of civil society is highly restricted under the control of the government over education, mass media, culture, and any other sectors which can challenge its supremacy.²¹⁹ Within the regime, civil rights movement for social justice and democracy are struck down by the force of cultural relativism—the idea propagated by Lee Kwan Yew and in many authoritarian regimes in Southeast Asia nations stating that universality of human rights does not exist and the Asian cultures and values are different and need not to be the same as the west.²²⁰ Prime Minister Lee Hsien Loong described Singapore in 2015 as “a multi-party liberal democratic system;”²²¹ nevertheless, the electoral process is restricted in ways to ensure the dominance of the People's Action Party (PAP).²²²

There were certain moments of democratic transformation in Thailand, but numerous military interventions destabilized it. Thailand was an absolute monarchy and became a constitutional monarchy in the form of a semi-democratic or pseudo-democratic state under the

<https://www.smh.com.au/world/asia/democracy-is-dead-in-cambodia-deputy-opposition-leader-speaks-out-20180321-p4z5g7.html>.

²¹⁷ PAUL, *supra* note 154, at 92.

²¹⁸ *Id.*

²¹⁹ *Id.* at 93.

²²⁰ This concept is often used to deny basic rights and liberties by authoritarian regimes in order to maintain their legitimacy and control over the states. Michael D. Barr, *Lee Kwan Yew and the Asian Values Debate*, 24 *ASIAN STUD. REV.* 310, 310-331 (2000).

²²¹ Prime Minister's Office Singapore, Transcript of Dialogue with Prime Minister Lee Hsien Loong at the SG50+ Conference on 2 July 2015. July 2, 2015. <http://www.pmo.gov.sg/mediacentre/transcript-dialogue-prime-minister-lee-hsien-loong-sg50-conference-2-july-2015>.

²²² Since the role of civil society is highly restricted, NGOs can only pursue activities that do not intervene with the state's policies and should be maintained within non-political parameters. The sensitive and controversial issues such as sexuality, religion, or inequality are deemed to be outside the parameters of NGOs' works. The use of Internet is also under the surveillance of the government to maintain the well-discipline social order. PAUL, *supra* note 154, at 92-95.

influence of the royal-military alliance.²²³²²⁴ Since the political reform in 1932 (1991–1992), the path to democracy has been constantly intervened by military coups. Undemocratic practices are common to obtain and maintain illegitimate political power—overthrowing elected governments, abrogating the constitutions, violating civil rights, and suppressing oppositions. These military interventions are often regarded as necessary by the junta and some elites to establish a true democracy and conserve conservative Thai values, which is also known as a “Thai-style democracy.”²²⁵ Thai junta often legitimized its action of overthrowing elected governments by claiming that the elected administration was corrupted and non-democratic. To illustrate, at his keynote speech at the Shangri-La Dialogue in June 2016, Thai junta and Prime Minister Prayuth Chan-ocha argued that “the key problem in Thailand is political conflict and unprecedented divisiveness... Democracy existed only in form but not in function. As a result, we want to rebuild our democracy so that it is more sustainable.”²²⁶ At present, there is an ongoing uprising movement from civilians, mainly younger generations of populations,

²²³ In the countries where monarchy still plays important roles in national politics such as Thailand, the monarchies provide stability and security to the people, regardless of the administrative forms: democracy, pseudo-democracy, semi-democracy, or dictatorship. However, the roles of monarchies and democratic governments may contradict and pose threats to each other. In Thailand, some royalists believe that a strong democratic government by gaining immense support from the majority of the populations could jeopardize the stability of monarchy’s power, which closely links to the army. Consequently, the military intervention has been staged to overthrow the elected government making sure that power does not belong too much to the people. A strong support to the western model of democracy can be viewed as disrespect to the monarchy and the army. One of the reasons why the military took control over the country in this recent decade is the fear of instability arising out of the royal transition. King Rama IX had been hospitalized for a long period until he passed away in October 2016. To ensure the smooth transition of the reign, the military believed it was necessary to get involved. The personal characteristics and reputation of King Rama X, the successor of King Rama IX, are also a source of fear for instability. Unlike his father, King Rama X lacks moral authority and is well known for his extravagance life style. The crown and the military in Thailand has formed an interdependent relationship: military junta relies on the crown’s recognition for legitimacy; on the other hand, the crown depends on the military to secure its power and suppress any oppositions or criticisms by enforcing fiercely the Lese Majeste law. For civil society to fight for democracy, it is to fight against this reliance.

²²⁴ E.g., Eugénie Mériéau, *THAILAND IN 2018: Military Dictatorship under Royal Command*, SOUTHEAST ASIAN AFF. 237, 237-240 (2019); Pavin Chachavalpongpun, *Why Thailand’s New Military-Monarchy Alliance Is a Bad Sign for Democracy*, THE DIPLOMAT (June 19, 2019), <https://thediplomat.com/2019/06/why-thailands-new-military-monarchy-alliance-is-a-bad-sign-for-democracy/>; and PAVIN CHACHAVALPONGPUN, COUP, KING, CRISIS: A CRITICAL INTERREGNUM IN THAILAND (2020).

²²⁵ Lindsay Murdoch, *Military’s Iron Grip Tightens with ‘Thai-Style Democracy’*, SMH (Apr. 8, 2016), <https://www.smh.com.au/world/militarys-iron-grip-on-thaistyle-democracy-20160406-gnzher.html>.

²²⁶ Albert Wai, *Thai PM Wants New ‘Strategic Equilibrium’ Amid Security Threats*, TODAY ONLINE (June 4, 2016), <https://www.todayonline.com/world/asia/asia-needs-new-strategic-equilibrium-tackle-security-challeng-es-thai-pm>

demanding authoritarian leaders to step out of power and royal institution to remain genuinely neutral and out of politics; consequently, many of them were arrested and prosecuted.²²⁷

A similar pattern of persistent military intervention in national politics also occurs in Myanmar.²²⁸ A recent coup staged by the army's commander-in-chief, General Min Aung Hlaing, on February 1, 2021, is an utmost step backward for Myanmar's democratic transformation marking a return of military dictatorship.²²⁹ As of April 11, 2021, it is reported that the army has opened fire and killed more than 700 civilians who are protesting against the military rule.²³⁰ To date, the resistance from civilians and the military crackdown continues, and it remains to be seen how it will be resolved.

Though widely seen as democratic states in ASEAN, Indonesia and the Philippines also struggle to fulfill the prospects of democratization in a more liberal and complex term. After winning the Philippines' presidential election in 2016, President Rodrigo Duterte's domestic policy "war on drugs" is highly criticized by the international community due to increased

²²⁷ Helen Regan & Kocho Olarn, *Thailand's Unprecedented Revolt Pits the People Against the King*, CNN (Oct. 15, 2020), <https://edition.cnn.com/2020/10/13/asia/thailand-protest-panusaya-king-intl-hnk/index.html>; Matthew Tostevin, *Explainer: What's behind Thailand's protests?*, REUTERS (Oct. 15, 2020), <https://www.reuters.com/article/us-thailand-protests-reasons-explainer-idUSKBN2700IX>; Rebecca Ratcliffe & Thanit Nilayodhin, *The king and I: the Student Risking Jail by Challenging Thailand's Monarchy*, THE GUARDIAN, (Oct. 13, 2020), <https://www.theguardian.com/world/2020/oct/13/panusaya-sithijirawattanakul-the-student-taking-on-thailands-monarchy->; Jonathan Head, *Thai Protests: Tens of Thousands Gather Again in Mass Defiance of Government*, BBC (Oct.15, 2020), <https://www.bbc.com/news/world-asia-54548988>

²²⁸ See Michael W. Charney, *Myanmar Coup: How the Military Has Held onto Power For 60 Years*, THE CONVERSATION (Feb. 3, 2021), <https://eprints.soas.ac.uk/34733/1/Charney%202021%20Myanmar%20coup%20how%20the%20military%20has%20held%20onto%20power%20for%2060%20years.pdf>; MAUNG AUNG MYOE, 352 BUILDING THE TATMADAW: MYANMAR ARMED FORCES SINCE 1948 (2009); Aurel Croissant & Jil Kamerling, *Why Do Military Regimes Institutionalize? Constitution-making and Elections as Political Survival Strategy in Myanmar*, 21 ASIAN J POLIT SCI 105, 105-125 (2013); Konsam Shakila Devi, *Myanmar Under the Military Rule 1962-1988*, 3 INT. J. SOC. SCI. RES.46, 46-50 (2016); and Roger Lee Huang, *Re-thinking Myanmar's Political Regime: Military Rule in Myanmar and Implications for Current Reforms*, 19 CONTEMP. POLITICS 247, 247-61 (2013).

²²⁹ See Russel Goldman, *Myanmar's Coup, Explained*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/article/2021-myanmar-coup.html>; Jonathan Head, *Myanmar coup: Aung San Suu Kyi Detained as Military Seizes Control*, BBC (Feb. 1, 2021), <https://www.bbc.com/news/world-asia-55882489>; and Hugh Bohane, *Myanmar Coup: The View From Yangon*, THE DIPLOMAT (Feb. 12, 2021), <https://thediplomat.com/2021/02/myanmar-coup-the-view-from-yangon/>

²³⁰ *Myanmar's Post-Coup Civilian Death Toll Climbs Past 700*, FRANCE24 (Apr.11,2021), <https://www.france24.com/en/live-news/20210411-myanmar-s-post-coup-civilian-death-toll-climbs-past-700>

extrajudicial killings and human rights violations.²³¹²³² He declared an “independent foreign policy” denying the influence of external powers, especially from the west.²³³ In May 2018, his role as a leader of the democratic state is questionable, particularly after Former Chief Justice Maria Lourdes Sereno was removed from office.²³⁴ It is skeptical for the public whether President Duterte is behind this removal since Sereno is well known for her outspoken concerning the President’s human rights violations and the suppression of his oppositions by using drug accusations.²³⁵ Duterte often claimed that he is the product of democratic elections to justify his roles: “I believe in democracy and that’s why I ran for President. I’m duty-bound by the Constitution.”²³⁶

After the downfall of Suharto’s New Order regime in 1998, Indonesia adopted a democratic identity in its role towards ASEAN and the international community²³⁷ as subsequent competitive general and presidential elections with a genuine multi-party system marked a rising hope for democratic transition.²³⁸²³⁹ Key democratic institutions and the separation of powers among the executive, the legislature, and the judiciary were established. Regardless of its remaining political influence, the military is under civilian rule.²⁴⁰ Freedom

²³¹ *Philippines election: Maverick Rodrigo Duterte wins presidency*, BBC (May 10 2016), <https://www.bbc.com/news/world-asia-36253612>

²³² *Philippines: Duterte’s ‘Drug War’ Claims 12,000+ Lives*, HRW (Jan. 18, 2018), <https://www.hrw.org/news/2018/01/18/philippines-dutertes-drug-war-claims-12000-lives>

²³³ Mico A. Galang, *US, China, and Duterte’s ‘Independent Foreign Policy’*, THE DIPLOMAT (Apr.6 2017), <https://thediplomat.com/2017/04/us-china-and-dutertes-independent-foreign-policy/>

²³⁴ *Fear for Democracy After Top Philippine Judge and Government Critic Removed*, THE GUARDIAN (May 12, 2018), <https://www.theguardian.com/world/2018/may/12/fear-for-democracy-after-top-philippine-judge-and-government-critic-removed>

²³⁵ *Id.*

²³⁶ POOLE, *supra* note 146, at 29.

²³⁷ As witnessed by official statement from Indonesian leaders : See Hassan Wirajuda, “Statement by H.E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs, Republic of Indonesia.” United Nations General Assembly, 64th Session, New York. September 29, 2009. http://www.un.org/en/ga/64/generaldebate/pdf/ID_en.pdf. ; and Marty M. Natalegawa, “Statement by H.E. Dr. R.M. Marty M. Natalegawa, Minister for Foreign Affairs, Republic of Indonesia.” United Nations General Assembly, 65th Session, New York. September 28, 2010. https://gadebate.un.org/sites/default/files/gastatements/65/65_ID_en.pdf.

²³⁸ See Avery Poole, *The Foreign Policy Nexus: National Interests, Political Values and Identity, in INDONESIA’S ASCENT: POWER, LEADERSHIP, AND THE REGIONAL ORDER* 155, 155-176 (Christopher Roberts et al. eds., 2015).

²³⁹ See Richard Robison & Vedi R. Hadiz, *Indonesia: A Tale of Misplaced Expectations*, 30 PACIFIC REVIEW 895, 895-909 (2017).

²⁴⁰ “A series of changes to the 1945 Constitution have increased the power of the House of Representatives (the Dewan Perwakilan Rakyat or DPR) and introduced a number of checks and balances. Parliamentarians

of the press and civil society have flourished. Still, Indonesia cannot fulfill the complex definition of democracy due to the relatively high degree of poverty and inequality.²⁴¹ Recently, there is also increased tension between stable governance and increase civil freedom.²⁴² President Jokowi openly expressed concerns regarding the limits of democracy, particularly that democracy constraints security governance. In February 2017, Jokowi stressed that “many people asked me whether our democracy had gone too far. I answered, yes, it has gone too far... Political freedom has opened the door for extreme politics, such as liberalism, fundamentalism, sectarianism, radicalism, terrorism and other ideologies that contradict Pancasila.”²⁴³

There are complexities and variations of classifying regime types, the degree of democracy, and the conceptualizations of what constitutes democracy in ASEAN member states.²⁴⁴ One example is Indonesia—a state that most analysts regarded as the most democratic state in ASEAN, but the nature of its democracy is classified in different ways. Morgenbesser and Pepinsky described it as an electoral democracy.²⁴⁵ Peou classified it as a liberal democracy but not yet consolidated.²⁴⁶ The Economist Intelligence Unit 2017 labeled it as a flawed democracy.²⁴⁷ Croissant and Haynes categorized it as an illiberal democracy.²⁴⁸

In most ASEAN member states, consolidated liberal democracies remain unstable and authoritarian rules seem to supersede. Democratic values adopted by ASEAN are not yet

demonstrate their willingness to engage in robust debate, in contrast to the DPR’s rubber-stamp role under Suharto.” POOLE, *supra* note 146, at 24.

²⁴¹ The World Bank estimates that 10.6% of Indonesian people were living in poverty in 2017. This rate remains high relative to developed countries. In addition, income inequality is not narrowing as poverty rates decline. World Bank. 2018. “Data: Indonesia.” <http://data.worldbank.org/country/indonesia>.

²⁴² POOLE, *supra* note 146, at 32.

²⁴³ Nurul Fitri & Haeril Halim, *Democracy ‘Gone Too Far’: Jokowi*, THE JAKARTA POST (Feb. 23, 2017), <http://www.thejakartapost.com/news/2017/02/23/democracy-gone-too-far-jokowi.html>.

²⁴⁴ POOLE, *supra* note 146, at 24.

²⁴⁵ Lee Morgenbesser & Thomas B. Pepinsky, *Elections as Causes of Democratization: Southeast Asia in Comparative Perspective*, 52 COMP. POLITICAL STUD.3, 4-5 (2018).

²⁴⁶ Sorpong Peou, *The Limits and Potential of Liberal Democratization in Southeast Asia*, 33 J. CURR. SOUTHEAST ASIAN AFF. 19, 24 (2014).

²⁴⁷ The Economist Intelligence Unit. 2017. Democracy Index 2017. <https://www.eiu.com/topic/democracy-index>.

²⁴⁸ Aurel Croissant & Jeffrey Haynes, *Thematic Section: ‘Inequalities and Democracy in Southeast Asia’*, 21 DEMOCRATIZATION 775, 776 (2014).

internalized. Naher and Marley observed that there are other factors affecting democracy of the member states of ASEAN.

The first factor is colonial history and intervention. Most states in Southeast Asia were colonized by western imperialism, and though they became independent, they maintained close ties with the former imperials. The imperial states remained influential towards the political situation in formerly colonized states. On the other hand, the history of being colonized can influence the politics of the member states in a path of nationalism and trigger fear of foreigners and loss of sovereignty.²⁴⁹ After decolonization, Cold War is a significant factor contributing to the rise of authoritarianism in the non-communist (pro-western) member states—the common threat of communism justified the shift towards authoritarianism in the region.²⁵⁰ The western powers turned blind eyes on undemocratic political practice and human rights violations in allied ASEAN member states as they were deemed necessary for security and stability. The military supports or aids from foreign countries to maintain an anti-communism alliance or fight against the war on terror consolidate the strong status of military regimes in the region.²⁵¹ Chan Heng Chee observed that many Southeast Asian countries “emerged from the colonial era experimenting with Western liberal democracy, but each abandoned the original model for variations of authoritarian forms which accommodate degree of democracy.”²⁵² Most states focused on political stability and continuity of leadership while limiting the western model of participatory liberal democracy.²⁵³

The second factor limiting the uptake of democratic practice in ASEAN member states is the power of globalization and market capitalism. The common tendency is that the market

²⁴⁹ NAHER & MARLEY, *supra* note 192, at 9.

²⁵⁰ ACHARYA, *supra* note 16, at 105.

²⁵¹ NAHER & MARLEY, *supra* note 192, at 9.

²⁵² Chan Heng Chee, *Political Stability in Southeast Asia*, paper presented to the seminar on “Trend and Perspectives in ASEAN”, Institute of Southeast Asia Studies (ISEAS), Singapore 1-3 February 1982, 11 in ACHARYA, *supra* note 16, at 127.

²⁵³ ACHARYA, *supra* note 16, at 129.

economy will lead to national economic growth, certain social development, and the rise of a middle class that eventually demands or participates in democratic change. On the contrary, authoritarian regimes can use economic development as their legitimacy and as a controlling tool to keep people engaged and competing in the marketplace instead of in the political area.²⁵⁴ For instance, the legitimacy of the Singaporean authoritarian regime is linked to successful economic boost and development, leading to the expansion of the economy and improving living standards for citizens.²⁵⁵ Under the meritocratic system, where power and social status depend on merits and works, citizens are driven to build their social status, seek educational and professional opportunities, and gain wealth.²⁵⁶ The competitiveness of the society may leave no room for disobedience or resistance. Middle-class citizens may not always fight for democracy or participate in democratic activities.²⁵⁷ It depends on other factors such as their cultures, beliefs, workplace, and competition.²⁵⁸

To exemplify, PAP, a dominant party in Singapore, understood that repression alone could not be sufficient to retain elections and remain in power. Several key elements contribute to solidifying the regime. The first element is the substitution of independent labor unions by the PAP-affiliated union—National Trades Union Congress (NTUC). By doing so, people have direct or indirect reliance on the state for economic and social resources like housing, employment, business contracts, and access to personal savings.²⁵⁹ Second, the Singaporean

²⁵⁴ NAHER & MARLEY, *supra* note 192, at 7.

²⁵⁵ PAUL, *supra* note 154, at 96.

²⁵⁶ *Id.*

²⁵⁷ See Apichat Satitniramai, *Yellow vs. Red and the Rise of a New Middle Class in Thailand*, in CITIZENSHIP AND DEMOCRATIZATION IN SOUTHEAST ASIA 289, 289-312 (Ward Berenschot et al. eds., 2017); Pavin Chachavalpongpun, *Why Isn't Thailand's Middle Class Fond of Democracy?*, GLOBAL ASIA (June 2017), https://www.globalasia.org/v12no2/feature/why-isnt-thailands-middle-class-fond-of-democracy_pavin-chachavalpongpun; and Christopher Shay, *Explainer: In Thailand, Why Yellow And Red Clash*, ALJAZEERA (Jan. 24, 2014), <http://america.aljazeera.com/articles/2014/1/24/explainer-in-thailandwhyyellowandredclash.html>

²⁵⁸ Case made a remark that middle class in Southeast Asia region are generally indifference to democracy. For instance in Singapore, the middle class are “depoliticized first through educational methods and curricula, later through its bureaucratic employment.” WILLIAM CASE, POLITICS IN SOUTHEAST ASIA : DEMOCRACY OR LESS 249 (2012).

²⁵⁹ See Garry Rodan, *Singapore Exceptionalism ? Authoritarian Rule and State Transformation*, in POLITICAL TRANSITION IN DOMINANT PARTY SYSTEMS : LEARNING TO LOSE 231, 231-51 (Edward Friedman & Joseph Wong

economy is mainly generated by government-linked companies (GLCs) “held by sovereign wealth funds bolstering the economic and political power of PAP state and the politico-bureaucratic class.”²⁶⁰ This shapes the lifestyle of middle-class people. The opportunities for employment depend on state capitalism through governmental departments, statutory bodies, GLCs, or indirectly through the provision of professional, legal, and commercial services.²⁶¹

The third factor hindering democratic transformation is a strong culture of tolerance and compromise in Southeast Asia. It can affect the political situation when civil movements proceeded at a much slower pace and less intense.²⁶² Through the direct imposition of propaganda, policies, and regulations, non-democratic governments may manage to persuade citizens that it is unnecessary to follow the western model of democracy because they have their own models of administration that fit with their cultures and identities and are different from the western one.²⁶³ This method takes advantage of nationalism and post-colonization effects—people distrust the imposition of rules, values, and ethics by western countries and yearn to preserve their sovereignty, identities, and cultures. It is often stated that western democracy will undermine the strengths of Southeast Asian countries; therefore, without well preparation, it is not suitable for the countries.²⁶⁴ The common belief is that society needs discipline more than democracy: democracy leads to undisciplined and disorder conditions.²⁶⁵

eds., 2008); and Garry Rodan, *Singapore : Globalisation, the State and Politics*, in THE POLITICAL ECONOMY OF SOUTHEAST ASIA : MARKETS POWER, AND CONTESTATION 137, 137-169 (Garry Rodan et al. eds., 2006).

²⁶⁰ GARRY RODAN, PARTICIPATION WITHOUT DEMOCRACY : CONTAINING CONFLICTS IN SOUTHEAST ASIA 47 (2018).

²⁶¹ See Garry Rodan, *International Capital, Singapore' State Companies, and Security*, 36 CRIT ASIAN STUD. 479, 479-99 (2004).

²⁶² NAHER & MARLEY, *supra* note 192, at 9.

²⁶³ See Steven J. Hood, *The Myth of Asian-Style Democracy*, 38 ASIAN SURV. 835, 835-866 (1998); Pravit Rojanaphruk, *Can We Talk About Thai-Style 'Democracy?'*, KHAOSODENGLISH (Jan. 20, 2018), <https://www.khaosodenglish.com/opinion/2018/01/20/can-talk-thai-style-democracy/>; Kevin Hewison & Kengkij Kitirianglarp, *"Thai-Style Democracy": The Royalist Struggle For Thailand's Politics*, in SAYING THE UNSAYABLE: MONARCHY AND DEMOCRACY IN THAILAND 179, 180-183 (2010).

²⁶⁴ NAHER & MARLEY, *supra* note 192, at 475.

²⁶⁵ The public desire for genuine democracy is not strong enough to overthrow the pseudo-democracy or semi-democracy because the elections are controlled and the freedom of press and freedom of speech are mostly suppressed; thus, people have not experienced or involved in a real democratic administration. Beyond personal power and charisma of the authoritarian leaders, authoritative regimes (such as Singapore and Malaysia) are well established and institutionalized—the succession of power is continuous and the power to rule is not personalized

2.1.3 The promotion v. protection of human rights

When ASEAN was formed with its intention to develop regional cooperation for peace and security, the concept of human rights protection as we perceived in these modern periods was not envisioned by the member states. By the end of the Cold War, the western policies guided by strategic consideration that once tolerated human rights abuses by anti-communist authoritarian regimes in Southeast Asia had ended.²⁶⁶ Democracy and human rights protection become the new western forces.²⁶⁷ The principle of human rights was later officially recognized by the ASEAN Charter 2007. During the pre-ASEAN Charter period, the struggles of human rights protection were evident and omnipresent in all member states of ASEAN.

While ASEAN affirmed its commitment during the World Conference of Human Rights in Vienna in 1993 to respect for human rights and fundamental freedoms as set out in the Vienna Declaration 1993, ASEAN stressed that human rights should be addressed according to specific cultural, social, economic, and political circumstances with respect to the member states' sovereignty, territorial integrity, and non-interference in the internal affairs.²⁶⁸ This notion is rooted in a certain degree of cultural relativism—the doctrine supporting communal autonomy and self-determination exempting from legitimate criticism by outsiders.²⁶⁹ Universalist considers if the sole basis of human rights is to be a human being, culture cannot be related. In contrast, relativist argues that the human nature itself is, to some extent, social and culturally related, even in biological dimension.²⁷⁰ Between the two ends, radical universalism regards

but institutionalized in the party of the leader. These non-democratic regimes maintain their legitimacy by attacking the influence and intervention of western countries. KENNETH CHRISTIE & DENNY ROY, *THE POLITICS OF HUMAN RIGHTS IN EAST ASIA* 1-28, 31-79(2001).

²⁶⁶ ACHARYA, *supra* note 16, at 219.

²⁶⁷ Michael Richardson, *For the Planners, a Time to Decide*, IHT, Nov.18, 1993, at 5 in ACHARYA, *supra* note 16, at 220.

²⁶⁸ Joint Communique at the 26th ASEAN Ministerial Meeting (AMM) in Singapore, July 1993.

²⁶⁹ See Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 400-402 (1984)

²⁷⁰ *Id.* at 403.

culture as irrelevant to the validity of moral rights and radical cultural relativism that regards culture as the sole source for the validity of moral rights.²⁷¹ Where does ASEAN stand?

The standing point of ASEAN about human rights has been somewhere between the strong and weak cultural relativism concerning the substance of human rights, the interpretation of individual rights, and the form of implementation. After the end of the Cold War in the region and in the early years of regional cooperation, ASEAN adopted a stronger sense of cultural relativism, especially after Myanmar, Laos, Vietnam, and Cambodia joined the association, the tension human rights issues were extremely high. To keep peace and avoid confrontation, how member states treated their citizens remained an utterly internal affair under the non-intervention rules. Conflicts always arise when certain norms or practices are defensible according to the internal standard, but they are not acceptable by external standards.²⁷²

Under the Universal Declaration of Human Rights 1948, all human beings are born free and equal in dignity and rights without distinction of any kind, such as race, color, sex, language, religion, political opinion, national or social origin, property, or birth.²⁷³ Though these fundamental human rights were recognized and guaranteed by constitutions of all ASEAN member states, the reality and the implementation of such human rights protection are questionable.

Severe human rights violations in ASEAN member states relate to the non-democratic regimes leading to the use of security law to intervene in the judiciary system; to violate the right to life and liberty; and to suppress the due process of law, freedom of civil participation,

²⁷¹ *Id.*

²⁷² *Id.* at 406.

²⁷³ The human right abuses in ASEAN member states relate to these rights under the Universal Declaration of Human Rights: (i) Right to life, liberty and security of the person ;(ii) Right not to be held in slavery or servitude ;(iii) Right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment ;(iv) Right not to be subjected to arbitrary arrest, detention, or exile ;(v) Right to full equality to a fair and public hearing by an independent and impartial tribunal ;(vi) Right to freedom of thought, conscience and religion, including the right to change religion or belief ; (vii) Right to freedom of expression ; and (viii) Right to democratic system—right to take part in the government directly or through freely chosen representatives and right to have periodic and genuine elections held by secret vote.
https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

freedom of speech, and freedom of the press. Authoritarian regimes or pseudo-democratic regimes' viability depends largely on repressive mechanisms to suppress dissent's opinion and movement, control of the police, military, and judiciary system.²⁷⁴ The regimes secure broad and unlimited power under the security law to arrest, detain, and execute people expressively or tacitly. The judiciary system is arbitrary and under direct interference of the authoritarian leaders undermining human rights protection and independence and impartiality of justice.²⁷⁵ A widespread corrupted system created a small fraction of wealthy and powerful elites but poverty and inequality among the rest of the citizens.

The prosecution against freedom of speech is evident. For example, the enforcement of the “*Lèse-Majesté*”²⁷⁶ law in member states where the monarchy still plays imminent roles in both political and social contexts. Under Thai penal code Article 112, “Whoever defames, insults or threatens the King, Queen, the heir apparent or the regent will be punished with imprisonment between 3–15 years.”²⁷⁷ Instead of having a strict and narrow interpretation, the law has been broadly enforced,²⁷⁸ particularly after the coup d'état in 2014²⁷⁹ and under the reign of King Rama X.²⁸⁰ Cambodia just adopted a similar “*Lèse-Majesté*” provision in February 2018.²⁸¹ The actual danger is the abusive use of the law to suppress those who oppose

²⁷⁴ See CASE, *supra* note 258, at 1-29; PAUL, *supra* note 154, at 43; Elliot Brennan, *Thailand's Judicial Coup*, THE INTERPRETER (Mar. 31, 2014), <https://www.lowyinstitute.org/the-interpreter/thailands-judicial-coup>; and PIYABUTR SAENKANOKKUL, THE COUP COURT: COURT, AUTHORITARIAN AND JUDICIAL COUP (2017).

²⁷⁵ *Id.*

²⁷⁶ Erich Parpart, *Lese Majeste Law and Reality*, BANGKOK POST (Mar. 28, 2018), <https://www.bangkokpost.com/opinion/opinion/1435150/lese-majeste-law-and-reality>

²⁷⁷ Thai Penal Code, Article 112, <http://library.siam-legal.com/thai-law/criminal-code-royal-family-sections-107-112/>

²⁷⁸ Feliz Solomon, *Thailand Has Sentenced a Man to 35 Years in Prison For Facebook Posts That 'Insult the Monarchy'*, TIME (June 9, 2017), <http://time.com/4812376/thailand-lese-majeste-facebook-royal-defamation/>

²⁷⁹ *Lese-Majeste Explained: How Thailand Forbids Insult of Its Royalty*, BBC (Oct. 6, 2017), <https://www.bbc.com/news/world-asia-29628191>

²⁸⁰ See *Thailand: New monarch, Old Abuses - Lèse-majesté Prosecutions under King Rama X*, FIDH – INTERNATIONAL FEDERATION FOR HUMAN RIGHTS 1-7, https://www.fidh.org/IMG/pdf/le_se-majeste_prosecutions_under_king_rama_x-2.pdf ; DAVID STRECKFUSS, 10 TRUTH ON TRIAL IN THAILAND: DEFAMATION, TREASON, AND LÈSE-MAJESTÉ (2010); and PAVIN CHACHAVALPONGPUN, “GOOD COUP” GONE BAD: THAILAND'S POLITICAL DEVELOPMENT SINCE THAKSIN'S DOWNFALL 3, 3-16 (2014).

²⁸¹ Prak Chan Thul, *Cambodia Parliament Adopts Lese-Majeste Law, Prompting Rights Concerns*, REUTERS (Feb. 14, 2018), <https://www.reuters.com/article/us-cambodia-king/cambodia-parliament-adopts-lese-majeste-law-prompting-rights-concerns-idUSKCN1FY0RV>

the authoritarian regimes.

Furthermore, violence against civilians relating to ethnic minority groups and human trafficking are extensive. The internal arm conflicts or conflicts on ethnic minority groups include, for example, the Cambodian genocide during the Red Khmer regime led by Pol Pot 1975–1979, the Karen massacre in Myanmar in 2007, or the Rohingya massacre in Myanmar in 2017²⁸² and 2018.²⁸³ There were certain moments of democratic hope when the Myanmar National League for Democracy (NLD)'s victory in the election was recognized, but the military remained significantly influential in politics, and Aung San Suu Kyi²⁸⁴ failed to act against human rights violations, particularly the violation against Rohingya.²⁸⁵ Some ASEAN leaders were outspoken about this genocide. Malaysian Prime Minister Mahathir Mohamad criticized the incompetent role of Aung San Suu Kyi, leader of Myanmar's National League for Democracy, in addressing “what appears like a genocide.”²⁸⁶ Singapore's Prime Minister informed his parliament in October 2018 that the ASEAN Foreign Ministers expressed “their grave concern with these alleged acts of violence.”²⁸⁷ Still, there is no meaningful response from ASEAN as an organization. The Rohingya crisis jeopardized the legitimacy of the Myanmar regime led by Aung San Suu Kyi and exposed ASEAN's main weakness—the lack of teeth and the reluctance to interfere in member states' internal matters.²⁸⁸

²⁸² Rebecca Wright, *Accounts of Rape, Burning Children and Murder: How a Rohingya Massacre Unfolded at Tula Toli*, CNN (Dec.4, 2017), <https://www.cnn.com/2017/11/12/asia/myanmar-rohingya-tula-toli-massacre-testimony/index.html>

²⁸³ Wa Lone et al, *How Myanmar Forces Burned, Looted and Killed in a Remote Village*, REUTERS (Feb.8, 2018), <https://www.reuters.com/investigates/special-report/myanmar-rakhine-events/>

²⁸⁴ *Aung San Suu Kyi Fast Facts*, CNN (June 20, 2019), <https://www.cnn.com/2013/01/18/world/asia/aung-san-suu-kyi-fast-facts/index.html>

²⁸⁵ POOLE, *supra* note 146, at 14.

²⁸⁶ David Boyle, *ASEAN Talks Tough on Rohingya Crisis*, VOICE OF AMERICA (Oct. 5, 2018) <https://www.voanews.com/a/asean-talks-tough-rohingya-crisis/4601349.html>.

²⁸⁷ *Id.*

²⁸⁸ Jera Lego, *Why ASEAN Can't Ignore the Rohingya Crisis*, THE DIPLOMAT (May 17, 2017), <https://thediplomat.com/2017/05/why-asean-cant-ignore-the-rohingya-crisis/>; Jasmine Chia, *The Truth About Myanmar's Rohingya Issue*, THE DIPLOMAT (Mar. 5, 2016), <https://thediplomat.com/2016/03/the-truth-about-myanmars-rohingya-issue/>; Chris Lewa, *ASEAN Must Lead in Rakhine Crisis*, BANGKOK POST (Oct. 30, 2019), <https://www.bangkokpost.com/opinion/opinion/1782964/asean-must-lead-in-rakhine-crisis>; *ASEAN Must Not Turn A Blind Eye To Rohingya Crisis: Rights Groups*, ALJAZEERA (June 19, 2019), <https://www.aljazeera.com/news/2019/06/asean-turn-blind-eye-rohingya-crisis-rights-groups->

In addition, religions can be the cause and legal justification for violence against civilians. Particularly violence against women is, to a lesser or greater extent, related to male chauvinism or religious belief. For example, Brunei is ruled by the hereditary monarchy legitimacy and the Islamic divine law and tradition.²⁸⁹ There is no sexual equality under the law—women do not have equal status with men, and freedom of religion is restricted.²⁹⁰ The Malaysian constitution endorses the Koran, the right of Malays, and the role of religious courts in civil matters dealing with family, marriage, and property.²⁹¹ The freedom of religion is highly restricted—Muslims are not free to convert to other religions. Sexual equality is limited since the law is male dominant, making it easier for men to take advantage of their wives. Muslim women are, in reality, second-class citizens.

When it is contentious that the universal human rights conflict with the cultural values held in ASEAN member states, what represents those cultural values? To be precise, who speaks for and interprets the cultural values? In all cases, it is the governments or political leaders who represent the countries. When those leaders cite the cultural arguments to avoid universal human rights practices, the question is whether such cultural arguments are genuinely for people's interests or they are just excuses for justifying human rights violation and maintaining the ruling power.²⁹² To certain degrees, human rights work against the states' power—human rights protection limit states' power to control and impinge on the individual's affairs. Therefore, when the leaders of member states justify human rights violations by accentuating the political, social, and cultural arguments, whether those practices are truly defensible under the internal cultural standard and reflect the real values for the people, or they are for the interests of certain elite groups who wish to maintain their power and position by

[190619091135258.html](https://www.aa.com.tr/en/asia-pacific/asean-declaration-on-rohingya-lacks-teeth/1514666); and Md. Kamruzzaman, *ASEAN Declaration on Rohingya Lacks Teeth*, AA (June 24 2019) <https://www.aa.com.tr/en/asia-pacific/asean-declaration-on-rohingya-lacks-teeth/1514666>

²⁸⁹ Paul, *supra* note 154, at 4.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² MUSHKAT, *supra* note 8, at 11.

limiting civil participation and freedom.²⁹³ In this latter case, cultural relativism acts as a nationalist tool to legitimize the authoritarian regime's abuse of power, and it respects neither the social cultures nor the minority.

The conflict between universal values and cultural values proves that even with the modern global world, all countries are more interconnected and interdependent, but there is no unity in terms of the substances and implementation of universal values or morals. It is highly controversial and extremely difficult for ASEAN to find an agreement without confrontation to cooperate on human rights issues in the region. Since it lacks the compulsory authority over member states, ASEAN has a limited role in the human rights commitments of member states. In many cases, ASEAN tried to alleviate severe human rights violations through diplomatic negotiations, but the principle of non-intervention remains a deadlock. With the hope that "culture is evolving set of norms influenced by external and internal factors including technology and the market"²⁹⁴, it remains to be seen whether ASEAN can move towards actual human rights protection rather than rhetoric human right promotion.

2.2 The Structural Challenges:

2.2.1 Lack of legal personality

ASEAN meant to establish its substantial legal personality by adopting the ASEAN Charter. The question is whether the ASEAN Charter acts as "legs to go places"²⁹⁵ and serves as an effective legal tool. Effectiveness is relative to the purposes and goals of ASEAN. To articulate the views towards the strengths and weaknesses of ASEAN, three different theories about international relations can be used as premises for evaluation: realist, neoliberal, and

²⁹³ MICHAEL FREEMAN, *HUMAN RIGHT :ASIA AND THE WEST*, HUMAN RIGHT AND INTERNATIONAL RELATIONS 15 (1978).

²⁹⁴ Yash Ghai, *Globalization and the Politics of Right*, UNRISD, International Conference on Globalization and Citizenship, Geneva Dec. 9-11, 1996, at 8

²⁹⁵ Eugene K.B. Tan, *The ASEAN Charter as "Legs to go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia*, 12 SYBIL 171, 171 and 196-198 (2008).

constructivist.²⁹⁶ The realist theory focuses on power to control and enforce—international law needs to have “teeth” to control member states because each sovereign state is likely to act according to its own interest.²⁹⁷ The neoliberal theory suggests that cooperation in an organization, leading to common benefits and improving shared data, can alter the state’s actions.²⁹⁸ The constructivist theory emphasizes the goals and ideas that can be internalized in the organization and can gradually change member states’ relations.²⁹⁹

In the constructivist or neoliberal view, ASEAN and the Charter may not have a direct effect, but it may have positive influences on the member states’ practices. When signing and ratifying the Charter, the member states have acknowledged the regional commitments, purposes, and goals. Member states accepted these new norms whether member states had full intention to apply or implement them or not. Sooner or later, the Charter as the common goals will enhance and motivate the member states to adopt new practices and principles. To ignore the principles of ASEAN is to jeopardize its status not only in the region but also in a global context. All member states will not condone the gross violation of ASEAN principles (e.g., democracy or human rights). This view is best described in a response of Surin Pitsuwan, Former ASEAN Secretariat to Hillary Clinton, Former Minister of Foreign Affairs of the United States³⁰⁰:

ASEAN Charter is a living document for the ASEAN community in this generation and the next generations to have their rights protected under the principles of democracy and human rights. It is an inclusive development where everybody will benefit from it. It will evolve and allow its member states to evolve at its own pace and path. The ASEAN Charter is like the United States Declaration of Independence: when Thomas Jefferson stated that all men are created equal, they are endowed by their creator with certain inalienable rights, that among these are the right to life, liberty, and the pursuit of happiness, he did not even mean to include Indians, slaves, black people or even women;

²⁹⁶ Sheldon Simon, *ASEAN and Multilateralism: The Long Bumpy Road to Community*, 30 CONTEMP. SOUTHEAST ASIA 264, 266-67(2008).

²⁹⁷ Tay, *supra* note 52, at 163.

²⁹⁸ Simon, *supra* 296, at 171

²⁹⁹ *Id.* at 172

³⁰⁰ PITSUWAN, *supra* note 69, at 19.

however, now we have President Obama sitting in the White House and you working as Foreign Minister.³⁰¹

In contrast, from the standpoint of the realist, ASEAN and the Charter have a flexible structure that is ineffective and unenforceable. They have no enforcement authority or sanction measures for any non-compliance. The power vested in the ASEAN entity is too broad and vague. It produces many rhetoric declarations but no actual implementations.³⁰² The ASEAN's goals and purposes envisaged in the Charter are too ambitious and farfetched considering the current circumstances and the region's predominant social construct.

By creating and adopting the ASEAN Charter, ASEAN tried to turn their relation-based cooperation into a rule-based regime for deeper integration of the region. Before the Charter, ASEAN cooperated on the basis of mutual understanding and trust without any legal binding instruments. To be a rule-based regime, ASEAN needs to have a formal institution, sets of hard laws—legal binding norms that member states will be obliged to execute and comply and formalized dispute mechanism. In international law, hard laws can derive from the treaty, customary norms, and general principle of laws. The basic characteristic of hard law, either in written or behavioral form, is to have a legally binding effect.

Regardless of its goal and ambition to create the ASEAN Charter, ASEAN remains, in the greater part, a formalized relation-based regime with soft law instruments.³⁰³ Soft laws are non-legally binding norms that can be found in (1) treaty provisions that are too vague and general for execution; (2) declarations or political pacts; (3) Resolutions of the international organization that is recommendatory in nature; and (4) code of behavior that is a state's choice whether to adopt it.³⁰⁴ Many ASEAN instruments, though in written form, are soft laws by

³⁰¹ *Id.*

³⁰² Donald K. Emmerson, *Security Community and Democracy in Southeast Asia: Analyzing ASEAN*, 6 J. POLITICAL SCI. 165, 166 (2005).

³⁰³ Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, 43 NYUJ INT'L L. & POL. 159, 168 (2010).

³⁰⁴ SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 96 (2006).

nature. They lack the legally binding effect. For instance, many environmental declarations, protocols, and joint statements that often used general and broad terms are soft laws that do not have compelling personality because they are too vague to have legal grounds and effect.

Furthermore, under the Charter, the ASEAN Summit, comprised of the head of the governments of member states, acts as a one-stop service: legislative branch, executive branch, and judiciary branch.³⁰⁵ Still, such power of the ASEAN Summit does not give ASEAN legal personality because it does not have the right and independence to act on its own, separating from member states.³⁰⁶ It does not stand as one entity with its sovereign power to participate in international proceedings or make binding decisions upon the member states.³⁰⁷ Every decision has to be made in consensus; thus, ASEAN lacks the authority on the rule-based system to request compliance from member states. While the Charter empowers ASEAN Secretariat and Secretary-General with some privileges and immunities,³⁰⁸ they do not have initiative and compelling authority. No institution under the Charter acts as a supranational organ.

Although the ASEAN Charter was regarded as a turning point for the constitutional moment of ASEAN, it failed to meet the ambition of a setting stage for a rule-based regime since it contains limited structural improvement to address non-compliance concerns and construct other legal agreements without a lengthy timeline with broad exceptions.³⁰⁹ The

³⁰⁵ For the administrative structure of ASEAN, under Article 7 of the Charter states that ASEAN Summit comprising of the Heads of State or Government of Member States shall be the supreme policy-making body of ASEAN ; deliberate, provide policy guidance and take decisions on key issues pertaining to the realization of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies; address emergency situations affecting ASEAN by taking appropriate actions ; and decide on matters referred to it under Chapters VII and VIII. For the decision-making by ASEAN Summit which comprises of the Heads of State or Government of Member States, under the Article 20, it shall be based on consultation and consensus. Where the consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made. In the case of serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision. ASEAN Charter Art.7.2(a), (b), (d), (e) and Art.20, 20.2 and 20.4

³⁰⁶ Locknie Hsu, *Towards an ASEAN Charter : Some Thoughts from the Legal Perspectives*, in FRAMING THE ASEAN CHARTER 45, 45-52 (Rodolfo C. Serverino ed., 2005).

³⁰⁷ Chung Hung Lin, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 CHIN. J. INT. LAW 821, 824-25(2010).

³⁰⁸ ASEAN Charter Article 17,18,19

³⁰⁹ Tommy Koh observed that the region cooperate by “ building trust, by a process of consultation, mutual accommodation and consensus” but it clearly shows “ a general reluctance to build institution and to rely on laws

notion of ASEAN Way is regarded as ASEAN customary law from the outset since member states have a shared sense of obligation to abide by the rule without any written form of agreement. In contrast, the new principles written in the Charter, such as democracy, human rights, or sustainable development, have yet to evolve their compelling sentiment in the region. Otherwise, it will serve only as non-binding pronouncements of ASEAN goals that lead to soft negotiation for cooperation but no actual implementation and sanctions.

2.2.2 Lack of implementation and enforcement

Since the principle of non-interference stands for preserving national sovereignty and respecting the right of a member state to lead its own existence free from external interference or coercion, the implementation or cooperation in accordance with the ASEAN plans and agreements depends solely on good faith and political will of member states.

The decision-making and policy-making process of ASEAN are abided by the ASEAN Way, which in this case it is the process of compromising negotiation and consultation to have a consensus decision that everybody will all agree and comply under the non-intervention rule in order to protect national diversity and sovereignty. Many issues have gone through countless rounds of negotiations and meetings because it is a usual practice—when there is a disagreement or controversy on certain issues, member states prefer to avoid a confrontation to have a conclusive decision. With the fear of losing face or having heated arguments, member states tend to avoid addressing problematic issues and shift the discussions to other agreeable issues. The common view of all ASEAN leaders is that “one should try to compromise and work on productive issues rather than waste time fighting over unresolved issues. It is better to

and rules”. There is a need to supplement ASEAN Way with institution. Tommy Koh, *What E. Asia Can Learn from the EU*, ST, July 10, 1998, at 48 in ACHARYA, *supra* note 175, at 157.

bend than to break.” In this sense, “ASEAN’s informal makeup is geared to conflict avoidance rather than conflict resolution.”³¹⁰

The consensus rule is an impasse to ASEAN progress and regional integration. Each member state has a right to veto any decision that may affect or lessen its national interest.³¹¹ It is hard for ASEAN to function effectively when member states are unwilling to prioritize regional interest above their national interest. The consensus rule makes it impossible for ASEAN to implement and enforce its laws or decisions, especially in the dispute settlement mechanism by the ASEAN Summit, where it is impossible to have consensus from all leaders or representatives of member states. In the making of the Charter, ASEAN tried to disentangle the consensus deadlock. The Eminent Person Group—a group of prominent citizens from ASEAN member states tasked to draft the ASEAN Charter suggested majority voting where the consensus cannot be reached; nevertheless, the foreign ministers rejected the proposal at their Retreat Siem Riep in 2007. The compromise has been made by enacting Article 20 (2), “Where consensus cannot be achieved, the ASEAN summit may decide how specific decision can be made.”³¹²

This pragmatic approach is intended for the decisions of ASEAN bodies below the Summit.³¹³ If the decision cannot be made by consensus, the leaders can give appropriate instruction.³¹⁴ This opens opportunities for majority voting in other specific areas of ASEAN

³¹⁰ Etel Solingen, *Multilateralism, Regionalism, and Bilateralism: Conceptual Overview from International Relations Theory*, in *INTERNATIONAL RELATIONS IN SOUTHEAST ASIA* 3, 11 (N. Ganesan and Ramses Amer eds., 2010).

³¹¹ It should be noted that “consensus” in ASEAN decision-making is not the same as “unanimity”. The late Ali Alatas, former Foreign Minister of Indonesia, described consensus as finding a way of “moving forward by establishing what seems to have been broad support” This approach can be referred as the “ASEAN minus X” formula or “flexible consensus” which is commonly used in trade matters rather than political-security decisions. Not all member states may agree entirely with a certain decision. They can “agree to disagree” with the other members but choose not to reveal their dissent publicly. The idea is that if a member state disagree with certain decision, but is not affected by it, the member should refrain from voting against it. Instead, it should abstain from voting. See *CAPIE & EVANS, supra* note 162, at 14 and 132; and Amitav Acharya, *Ideas, Identity, and Institution-Building: From the ASEAN Way to the Asia-Pacific Way?*, 10 *PACIFIC REVIEW* 319, 331(1997).

³¹² WALTER WOON, *THE ASEAN CHARTER : A COMMENTARY* 158 (2016).

³¹³ *Id.*

³¹⁴ *Id.*

cooperation, such as matters concerning the implementation of certain economic agreements.³¹⁵ Nevertheless, when it comes to the decision of the ASEAN Summit, which is the supreme policy-making body, it is a dead-end cycle of indecisive decision-making. When the Summit cannot reach a consensus decision, the Summit may decide on specific cases, including breach and non-compliance, but the decision still has to be made by consensus. In the end, ASEAN Summit appears to be a negotiation forum incapable of settling unresolved issues.

ASEAN is not a supranational organization. It cannot force member states to comply. Its agreements and regulations do not have a direct effect of superseding the national laws. Thus, the implementation of regional integration bases on the member states' will to participate. For 50 years of ASEAN, regardless of having many agreements and declarations dealing with many issues, those instruments usually provide loose frameworks and flexible practices and using broad terms rather than concrete binding legal terms with enforcement clauses. It may appear that regionally ASEAN has accomplished in creating many technical instruments. Nevertheless, the implementation of such instruments depends solely on the discretion of the internal affairs of member states as stated under Article 2(F) because of the sensitivity of national sovereignty and external interference. ASEAN does not have a central authority to monitor or compel the implementation and compliance of such binding instruments.³¹⁶ In ASEAN, building community laws is not as complicated as building the common sense of obligations to implement the law. Hard law is of no value if there is no action. Traditionally, ASEAN was formed upon voluntary cooperation and consultation. When the consensus of political will was reached through negotiations, little by little, finally, member states would consider it as an obligation to act. It is a process of soft law rather than coercive hard law instruments.

³¹⁵ *Id.* at 157

³¹⁶ Chung Hung Lin, *supra* note 307, at 832.

2.2.3 Lack of judicial review or dispute settlement mechanism

In order to have a functional regional integration, it is necessary to have an efficient dispute settlement mechanism. The dispute settlement process should be on a fair, impartial, neutral, and non-arbitrary basis. The arbitrators, judges, or mediators should never have any conflict of interest in the disputed matters. The dispute settlement body's judgment or decision on conflicting issues should be binding and enforceable towards the losing party. Notably, on the matter of economic or trading and investment issues that rely on certainty and stability, the party will prefer to have a fair judicial decision rather than an uncertain negotiation.

As stated in the Charter concerning the settlement of disputes, member states shall resolve all disputes peacefully in a timely manner through dialogue, consultation, and negotiation.³¹⁷ In case of any unresolved dispute, the dispute shall be referred to the ASEAN Summit.³¹⁸ Furthermore, suppose any member state is affected by non-compliance after seeking decisions, findings, or recommendations from the dispute settlement mechanism of ASEAN. In that case, it may refer the matter to the ASEAN Summit for the decision.³¹⁹ There is a vicious-cycle problem with these functions.

The Charter suggests conflicting member states resolve the issues by diplomatic negotiations with no binding effect rather by judicial decision. The ASEAN Summit technically acts as a judicial function to resolve the dispute that diplomatic means cannot resolve between the conflicting states. The decision-making of the ASEAN Summit is required by the Charter to be rendered in consensus. The ASEAN Summit consists of all government leaders, including the conflicting states; thus, the decision is not likely to pass by consensus.

Therefore, the ASEAN Summit itself lacks the prerequisites to decide the case because of its conflict of interest—the ASEAN Summit consists of governments' leaders from all

³¹⁷ ASEAN Charter Art.22

³¹⁸ *Id.* at Art.26

³¹⁹ *Id.* at Art.27.2

member states, including the conflicting states which in this case government's leader of the conflicting state may exercise its right to veto the decision, making it impossible to decide by consensus.

Even if the conflicting states managed to have the decision by consensus from the ASEAN Summit or other Dispute Settlement Mechanism of ASEAN, there is no mechanism to enforce such binding decision. To enforce is to contradict the principle of non-interference and sovereignty. The compliance depends exclusively on the member state. The compliance of ASEAN Summit's decision is not likely to be automatic—the state or its national court will take an essential part to enforce the decision. This process of double interpretation can further cause an enforcement problem because national courts require to review and understand the ASEAN process and legal instruments.³²⁰ In case of non-compliance, the member state may refer the matter to the ASEAN summit leading to the same result—a never-ending cycle of negotiation to receive an unenforceable consensus decision.

Dispute settlement is also the most important challenge of economic integration. Member states and private business sectors can always seek trade-related dispute resolution outside ASEAN regimes such as WTO or arbitration. Within ASEAN for economic matters, the ASEAN Protocol for Enhanced Dispute Settlement Mechanism (EDSM) governs member states' disputes (EDSM).³²¹ However, since its adoption in 2004, member states has been avoided to resolve disputes in this venue because it is the duplicate consensus decision-making procedure like the ASEAN Summit—the process is optional and directed by a group of political

³²⁰ Diane A. Desierto, *ASEAN's Constitutionalization of International Law : Challenges to Evolution Under the New ASEAN Charter*, 49 COLUM. J. TRANSNAT'L L.268, 305-306 (2010).

³²¹ To facilitate AFTA, ASEAN crafted a Protocol on Enhanced Dispute Settlement Mechanism (EDSM) in 2004 for economic cooperation as an effort for deeper integration; however, EDSM is based on voluntary consultation or mediation not a formalized dispute settlement institution. It is an option rather than an obligation. The process of EDSM possesses an intrinsic major problem: the settlement process is directed by representatives from each member states, including the conflicting states, and the decision would likely to be made by consensus. Whatever the outcome will be, the losing disputed state would likely veto the decision. Not one single case has ever been brought up to the EDSM. The EDSM is not functional as dispute settlement institution but rather another negotiation and mediation platform. Leviter, *supra* note 303, at 179.

representatives from each member state. The panel lacks the neutrality to decide the disputes and tends to make decision by consensus to avoid further conflict or confrontation. Thus, the EDSM is merely another political negotiation panel, not a dispute settlement body. For private commercial parties, the recent initiative is the ASEAN Solutions for Investments, Services and Trade (ASSIST) mechanism.³²² Yet, ASSIST is an optional and non-binding online problem-solving venue administered by ASEAN Secretariat, providing a clear published timeline for responses and actions.³²³

In essence, the rule of deciding by consensus and non-interference make ASEAN dispute settlement mechanism moot. Avoid having conflicting confrontation will never settle any disputes. That is why conflicting member states have never sought resolution from ASEAN panels. Instead, they have sought dispute settlement from other forums such World Trade Organization, Arbitration, or International Court of Justice. The ASEAN decision lacks the effect, enforceability, and sufficient judicial direction requiring double interpretation from national authority.³²⁴ Even if a member state receives a non-binding resolution from ASEAN panels, the question is, how can it be enforced? Can it be recognized or enforced before national court jurisdiction as if it is a foreign judgment or arbitral awards? The recognition and enforcement of foreign judgment vary among member states; however, in most civil law states, a foreign judgment is deemed as cause of action and likely to be enforced on the conditions that such foreign award is given in accordance with the due process of law and public policy of the enforcing court.³²⁵ The enforcement of the arbitral award depends on the New York Convention. To date, ASEAN has not yet had a formal agreement addressing the resolution or decision from the ASEAN party.

³²² ASEAN Solutions for Investments, Services and Trade (ASSIST) mechanism, <http://assist.asean.org/>

³²³ Leviter, *supra* note 303, at 179.

³²⁴ *Id.* at 299-314

³²⁵ ARNON SRIBOONROJ, HOW TO ENFORCE OR RECOGNIZE A JUDGEMENT FROM ONE MEMBER STATE IN ANOTHER MEMBER STATE OF ASEAN ? 90-108 (2013).

CONCLUSION

ASEAN was meant to promote peace and security in the region through social, economic, and cultural development on relation-based cooperation. Judging by the objective of its creation under limitations and not by the wishes or expectations from others, ASEAN succeeded in creating a sense of regional cooperation. Still, it cannot obtain deeper integration on a legal basis. It cannot address transnational or non-compliance problems unless it commits to rule-based cooperation with actual implementation and enforcement. To do so, a deep-anchored ASEAN Way norm must be reinterpreted to allow effective regional engagement in certain issues that may be deemed as internal affairs of member states—particularly, the issues of environmental protection, sustainable economic development, democratic struggles, and human right violations. These problems are interconnected and will be further discussed in subsequent chapters.

CHAPTER II

ECONOMIC PERSPECTIVES ON TRADE-ENVIRONMENT

RELATIONSHIP IN ASEAN

INTRODUCTION

In pursuit of economic cooperation through intra-regional trade and international trade, ASEAN expects to increase economic growth for national and regional prosperity and create regional security and stability. The expectations do not necessarily meet the reality. The rise of export-led economic activities aiming for rapid growth without development—an increasing scale of economic activities without environmental consideration and any change in economic structure—affects the social condition of nationals, environments, and environmental regulations.³²⁶ ASEAN has not maintained the equilibrium between economic growth and environmental sustainability. Competitiveness in trade creates economic incentives that overshadow environmental consideration and human rights protection leading to wider wealth inequality, environmental degradation, and regulatory chill.

The situation in ASEAN is as explained by Hensengerth: “The introduction of the Western concept of sustainable development came at a time when countries in the region were just emerging from the Third Indochina War and were therefore focused on economic reconstruction.”³²⁷ Since the beginning of regional economic cooperation and development, rapid trade growth comes at the expense of the environment.³²⁸ ASEAN position is that measures for environmental protection can slow down their economic growth. Under the

³²⁶ The economic development includes changes in economic structure, technology, and social transformation such as education, health care, public transportation and legal institution. BARRY C. FIELD & MARTHA K. FIELD, ENVIRONMENTAL ECONOMICS : AN INTRODUCTION 400 (5th ed., 2009).

³²⁷ Oliver Hensengerth, *Transboundary River Cooperation and the Regional Public Good: The Case of the Mekong River*, 31 CONTEMP. SOUTHEAST ASIA 326, 329-330 (2009).

³²⁸ Diana Tussie, *The Environment and International Trade Negotiations: Open Loops in the Developing World*, 22 WORLD ECON 535, 537 (1999).

Charter in 2007, ASEAN adopted the principle of sustainable development. It agrees to “ensure sustainable development for the benefit of present and future generation and to place the well-being, livelihood and welfare of the people at the center of ASEAN community-building process.” Despite the principle endorsed in the Charter, ASEAN faces two dilemmas—how to address environmental problems without regressing the export-led economic growth and how to implement or enforce any sustainable measures under the non-intervention principle.

An economic incentive—national economic growth through trade expansion—guides the ASEAN regime towards trade policy and economic cooperation. ASEAN member states expect that the economic growth through trade would be an anchor for ASEAN to build a more robust competitive regime and secure a better bargaining position in international forums. Much weight has been placed in a competitive trading system leading to deficits in socio-environmental policymaking.

By discussing the relationship between trade and the environment, it reveals the underlying conflicts between economic development and environmental protection. This part discusses economic hypotheses explaining how trade can affect society, the environment, and environmental regulations in the expectation and reality framework. It begins by discussing mainstream economic hypotheses and theories that ASEAN member states rely on for setting national policies and achieving economic targets; next, it discusses conflicts between the economic theories and the outcome in ASEAN.

1. IMPACTS OF TRADE ON INDIVIDUAL AND SOCIETY

It is a common perception among ASEAN member states that trade has positive effects on people and society. International trade is expected to stimulate economic growth, generate wealth among nations, strengthen international political cooperation, and pave the way for environmental consideration. In contrast, reality does not always meet the expectation. The emphasis on economic growth through trade alone disregards the dimension of social and environmental development. As a result, the standard of living declines, and environmental injustice grows.

1.1 Expectation: The rise of national economic growth, the standard of living, and international political stability

The persistent economic outlook of ASEAN promotes economic growth through trade expansion by exploiting natural resources as its comparative advantages—economic assets. Their practice and decision-making for development are based on the economic theory that economic growth through free trade would lead to the rise of national wealth, regional stability, and better quality of life and environment.³²⁹ For member states, in the process of development, prioritizing economic growth and sacrificing environmental protection is a common approach since they believe that they can later address environmental issues after sustaining sufficient growth.

This standpoint can be seen in various ASEAN declarations during different periods. For instance, the first regional environmental instrument, Manila Declaration on ASEAN

³²⁹ According to the theory of the “invisible hand” introduced by Adam Smith (The Wealth of Nation), the foundation of “Laissez Faire” economic philosophy, individual pursuing wealth maximization will, through the mechanism of the market, maximize the common good. Market competition leads to the common good and the government regulatory intervention is unnecessary. In other words, when the free market works well, it will render the common good for the society by itself without any governmental intervention. The simple mechanism of the market is the rule of supply and demand. Once the environmental goods such as clean air or water in demand become scarce, the price will increase. Then people would try not to pollute the valuable assets more. See Adam Smith, *An Inquiry into the Nature & Causes of the Wealth of Nations*, BOOK IV OF SYSTEM OF POLITICAL ECONOMY § 2 (1904)

Environment 1981, centered around maintaining adequate natural resources for the continued economic development to eradicate poverty, and when it is “practicable,” environmental protection should be considered.³³⁰ In 1997, the Jakarta Declaration stressed that “economic growth is essential to the prosperity of ASEAN people and is fundamental for sustainable development.”³³¹ In ASEAN Agreement on Transboundary Haze Pollution 2002 (AATHP), though it stressed member states’ obligation not to cause environmental harms beyond their borders, it endorsed the state’s sovereignty and the right to exploit natural resources for national development.³³² In ASEAN Declaration on Environmental Sustainability 2012, ASEAN confirmed that “fossil fuels will continue to be part of the energy landscape,” and ASEAN member states need to “address global environmental issues without compromising competitiveness or social and economic development.”³³³ Even though in the recent development, ASEAN acknowledges the importance of environmental integration in economic development as “environmental protection supports economic growth,”³³⁴ the economic priority persists with little environmental consideration in the actual practice of member states.³³⁵

Many leaders of member states have made statements confirming their national economic priority from the past to the present. Lee Kwan Yew, former leader of Singapore, stated in 1975, “each ASEAN country has to ensure sufficient economic growth and social

³³⁰ See *supra* note 107-108 and its accompanying text.

³³¹ See *supra* note 114 and its accompanying text.

³³² The issue will be elaborated in the first part of chapter III.

³³³ ASEAN Declaration on Environmental Sustainability 2012, https://asean.org/?static_post=asean-declaration-on-environmental-sustainability

³³⁴ For the first time, the ASEAN Economic Community roadmap 2025 incorporates sustainable development in economic integration: “ASEAN recognizes the importance of sustainable economic development as an integral part of the region’s growth strategy. Protection of the environment supports economic growth and vice versa. ASEAN would actively promote green development by developing sustainable growth agenda that promotes the use of clean energy and related technologies, including renewable energy through green technology, as well as enhances sustainable consumption and production and including it in national development plan.” B.8 Sustainable Economic Development in ASEAN Economic Community Blueprint 2015, https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf

³³⁵ More discussion and examples will be elaborated in subsequent chapters throughout the dissertation.

justice that will make insurgency unattractive and unlikely to succeed.”³³⁶ In 2020, during the interview with the BBC, the President of Indonesia, Jokowi still made a remark that his priority is to boost economic growth and maybe after then the environment, innovation, and human rights.³³⁷

Another evident example is the economic-environment vision shared by Mahathir Muhammad, former Malaysian Prime Minister, during 1981–2003 and 2018–2020. He considered that, to a certain extent, the environmental protection measures would hold back the economic growth.³³⁸ During his leadership in the past, Malaysia had suffered the forest loss about 5 million hectares about for logging business and trade.³³⁹ In 1987, a British boy wrote a letter to him out of concern about deforestation. His answer stressed not only the benefits of timber trade in eradicating poverty but also reflected a strong resentment for foreign critics or intervention in internal affairs, a Malaysian environment:

The timber industry helps hundreds of thousands of poor people in Malaysia. Are they supposed to remain poor because you want to study tropical animals? Is your study more important than filling the empty stomach of poor people? When the British ruled Malaysia, they burnt down millions of acres of Malaysian forest so that they could plant rubber.³⁴⁰

In his speech to the United Nations General Assembly in September 2018, he addressed the concern over the issue of non-tariff trade barriers on palm oil, showing his strong support to

³³⁶ ACHARYA, *supra* note 16, at 164.

³³⁷ Han Nicholas Jong, *Indonesia's Omnibus Law a 'Major Problem' for Environmental Protection*, MONGABAY (Nov. 4, 2020), <https://news.mongabay.com/2020/11/indonesia-omnibus-law-global-investor-letter/>; and The Interview of Indonesian President by BBC, *Indonesia's Jokowi: Reformer Turns Pragmatist*, BBC (Feb. 14, 2020), <https://www.bbc.com/news/av/world-asia-51488811>

³³⁸ In response of international critics, Mahathir Mohammad stated that “You’re asking us to cut back on our standard of living by asking us not to develop. Why can’t we tell you to do the same? If you want us to do it, you do it first.” Interview with Dr. Mahathir Bin Mohamad, Stephen Bradshaw, BBC News and Current Affairs (Canadian Broadcasting Corporation's News Network television broadcast, June 1992) in Ranee K.L. Panjabi, *The South and the Earth Summit: The Development/Environment Dichotomy*, 11 PENN ST. L. REV. 77, 87 (1992).

³³⁹ Thomas Tang, *Mahathir is back—good news or bad for sustainability in Malaysia?* ECOBUSINESS (May, 2018). <https://www.eco-business.com/opinion/mahathir-is-backgood-news-or-bad-for-sustainability-in-malaysia/>

³⁴⁰ Malaysia: Dr Mahathir Cleverly Replies A Young Boy From England About Deforestation In A Letter From 1987, <https://thecoverage.my/news/malaysia-dr-mahathir-cleverly-replies-young-boy-england-deforestation-letter-1987/>

free trade without barriers based on environmental grounds. He believed that it is an unfair use of environmental trade measures employed by superior states which would cause Malaysian people to lose jobs and decent quality of life.³⁴¹

With the perception of economic growth through international trade, ASEAN member states specialize in producing products that they have comparative advantages.³⁴² International trade is an old practice in human civilization, but the concept of free trade has just been introduced in modern society.³⁴³ Two theories underpin the concept of free trade: the theory of Absolute Advantage³⁴⁴ and the theory of **Comparative Advantage**.³⁴⁵ The idea is for the states to produce what they can produce best according to their natural resources, capital, technology, and workforce and then trade the excess for other products from other states. Free trade allows states to specialize and produce more efficiently the products or services they have **comparative advantages**.³⁴⁶ The specialization of labor leads to technical innovation and

³⁴¹“Free trade means no protection by small countries of their infant industries. They must abandon tariff restrictions and open their countries to invasion by-products of the rich and the powerful. Yet the simple products of the poor are subjected to clever barriers so that they cannot penetrate the market of the rich. Malaysian palm oil is labeled as dangerous to health and the estates are destroying the habitat of animals. Food products of the rich declare that they are palm oil free. Now palm diesel is condemned because they are decimating virgin jungles. These caring people forget that their boycott is depriving hundreds of thousands of people from jobs and a decent life. We in Malaysia care for the environment. Some 48% of our country remains virgin jungle. Can our detractors claim the same for their own countries?” *In full: Mahathir's speech at the United Nations General Assembly*, CNA (Sep. 29, 2018), <https://www.channelnewsasia.com/news/asia/in-full-malaysia-pm-mahathir-s-speech-at-the-united-nations-10770426>

³⁴² By providing worldwide market access, international trade will lead to the greater economic scale for the nations. Once trade has generated the economic growth of the nation, the average income will rise accordingly. Furthermore, the above process will provide social benefit to the people in terms of employment and social welfare. Specialization means that employers will secure good terms and condition for employment in order to keep the skilled workforce. CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOM 3-6* (3rd ed., 2010).

³⁴³ Reinhard Schumacker, *Free Trade and Absolute and Comparative Advantage: A Critical Comparison of Two Major Theories of International Trade*, UNIVERSITÄTSVERLAG POTSDAM, 9 (2012).

³⁴⁴ In an Inquiry into the Nature and Causes of the Wealth of Nations, Adam Smith introduced the theory of “*Absolute Advantage*”: the division of labor into specialization of production. Smith is the first to address the gain from free trade and capitalism that is superior than the old feudalistic legacy. KARL POLANYI: *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 72-74* (2nd ed., 2001); and Frank Petrella, *Adam Smith's Rejection of Hume's Price-Specie-Flow Mechanism: A Minor Mystery Resolved*, 34 SOUTH. ECON. J. 365, 373 (1968).

³⁴⁵ The theory of free trade has been further elaborated by David Ricardo in the theory of “*Comparative Advantage*” in the nineteenth century. See DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (1817).

³⁴⁶ *Id.* at 81.

greater productivity on an economic scale—“the more specialization, the more growth.”³⁴⁷ The result is greater total productivity at a cheaper cost, maximizing consumer choices, and ensuring the most efficient use of scarce resources.³⁴⁸

The comparative advantages in ASEAN trade can be determined in four factors. First, the endowment of production, labor, and capital: in traditional Heckscher-Ohlin theory,³⁴⁹ to profit from the market, the states that have less capital but plenty of lower-wage workers (e.g., Thailand) should focus on labor-intensive production such as textiles. In contrast, the states with abundant capital and high-wage workers should focus on capital-intensive goods such as machinery or technological goods. Second, large-scale production: many member states (e.g., Indonesia) have a capacity to produce goods on a larger scale; thus, the cost of production became lower. Third, natural resources and environment: most member states have intensively exploited their abundant natural resources together with labor-intensive production for their exported-led economic growth (e.g., in the agricultural sector, logging, fishery, petroleum, etc.). Last, different regulatory standards of production, especially environmental standards, are part of the member states’ comparative advantages. In the economist’s view, it is the “work of the market”³⁵⁰ if some states can specialize in producing certain goods, but the others cannot do due to their stricter regulations regarding production standards. Arguably, if ASEAN member states can specialize in the pollution-intensive industry and exhaustive-resource production, it is because the national regulations allow them to do so.

³⁴⁷ “It gives a value to their superfluidities, by exchanging them for something else, which may satisfy a part of their wants, and increase their enjoyments. By means of it the narrowness of the home market does not hinder the division of labour in any particular branch of art or manufacture from being carried to the highest perfection. By opening a more extensive market for whatever part of the produce of their labour may exceed the home consumption, it encourages them to improve its productive powers, and to augment its annual produce to the utmost, and thereby to increase the real revenue and wealth of the society.” ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 213 (1993); and CHARLES E. STALEY, *A HISTORY OF ECONOMIC THOUGHT: FROM ARISTOTLE TO ARROW* 43 (1989) in Schumacker, *supra* note 343, at 14.

³⁴⁸ BARNARD, *supra* note 342, at 3-6.

³⁴⁹ MARK BLAUG, *THE HECKSCHER-OHLIN THEORY OF INTERNATIONAL TRADE* 185-191 (2nd ed., 1992).

³⁵⁰ Daniel C. Esty, *Environmental Regulation and Competitiveness: Theory and Practice*, in *ASIAN DRAGON AND GREEN TRADE* 33, 34 (Simon S.C. Tay & Daniel C. Esty eds., 1996).

Furthermore, ASEAN aims to use economic cooperation via trade to sustain peace and regional stability. This notion is based on the theory that trade can create geopolitical stability.³⁵¹ When two states are dependent on each other for goods and have long-established trading relationship, they tend to enhance peace and boost up prosperity; thus, when conflicts arrive, both states are likely to prefer diplomatic negotiation rather than an aggressive response. This is the main incentive for the creation of the European Union.³⁵² After a long-suffering period of World Wars and underlying conflict between France and Germany, the European internal market served as a significant turning point.³⁵³ A similar notion also applies to ASEAN. ASEAN's incentive is to use intra-trade cooperation as a building block for peace and security in the region. Economic incentive unites ASEAN to secure the national sovereignty to be free from extraterritorial interference and constitute a better position to leverage power in the international context.³⁵⁴

Some member states joined the ASEAN economic community not because they intend to fully cooperate with regional trade terms but primarily for political reasons—for their status

³⁵¹ DAVID HUNTER ET AL, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1236 (3rd ed. 2007)

³⁵² Vision by French Foreign Minister Robert Schuman in 9 May 1950 for the creation of European Coal and Steel Community, the beginning of the European Union construction: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries. With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification. (...)By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace." The Schuman Declaration 1950 https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en

³⁵³ *Id.*

³⁵⁴ Trade can be used as a tool for setting up an environmental standard. Despite the fact that the use of trade measure may be subject to WTO's rules which will be discussed further in Part V, it is possible that a large political jurisdiction—the most influential or powerful developed nation can set a high environmental product standard which will eventually influence other nations to adopt the same standard in order to keep a strong trade relationship.

quo with the fear of being left behind.³⁵⁵ Regardless of member states' reason to join the community, by joining the community, all member states are abided by the ASEAN principles to seek any dispute settlement in peaceful means and ban the use of force for coercion.

ASEAN believes that trade can lead to a better quality of life and, eventually, a better environmental condition. By the time a member state can sustain adequate economic growth, it can ensure the people's standard of living and healthy environmental conditions. The state would have the financial capacity to address the environmental issues.³⁵⁶ In theory, trade can stimulate the public desire for a better environment. It is a common desire to live in good environmental conditions: fresh air, clean water, and abundant land; however, environmental protection seems to be a luxury sacrifice if most populations of the country have nothing to feed their families. Poverty means survival upon environmental exploitation. In reflection of Indira Gandhi, Robert Mugabe, the President of Zimbabwe affirmed that:

Poverty is one of the major causes of environmental degradation today. Poverty pollutes environment. Those who are poor and hungry will often destroy their immediate environment in order to survive. Their lives stock will overgraze the grasslands and in growing numbers will crowd congested cities. They will overuse marginal lands. This explains why the greatest environmental change is occurring in developing countries. These countries are poor.³⁵⁷

Once the population's income increases due to economic growth, the desire for a better environment will increase, at least for cleaner air and water. Those populations would desire

³⁵⁵ For example, Professor Carlyle Thayer (Australian Defense Force Academy) observed that "Laotian leaders fear moving too fast and losing control. They are also apprehensive about being left isolated. They have opted for membership to balance Thailand's economic, cultural and political influence. Another motivation for joining is to gain a sense of regional identity and not to be left isolated." For a post-Cold War Vietnam, joining ASEAN provided a new status for international acceptance and balance the influence of China. Carlyle A. Thayer, *ASEAN's Expanding Membership*, Submission to Foreign Affairs Subcommittee, Joint Standing Committee on Foreign Affairs, Defense and Trade, Parliament of Australia, February 1997, at 6; Allen E. Goodman, *Vietnam and ASEAN: Who Would Have Thought it Possible*, XXXVI ASIAN SURV 592, 592-601 (June 6, 1996); and Frank Frost, *ASEAN at 30: Enlargement, Consolidation and the Problems of Cambodia*, Issue Brief for the Parliament of Australia, 25 August 1997, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9798/98cib02

³⁵⁶ See more discussion the gain of economic growth in part 2.3 and 2.4

³⁵⁷ R.G. Mugabe, *Environmental Concern in the Third World*, in *EARTH AND US : POPULATION-RESOURCES-ENVIRONMENT AND DEVELOPMENT* 10, 11(M.K. Tolba & A.K.Biswas eds., 1991).

sanitary goods and advanced technology to produce cleaner energy and less hazardous waste. If an appropriate authority is in place, the demand for a better environment will be transformed into effective environmental regulations or policies to control pollution and mitigate environmental harms.

1.2 Reality: Economic inequality and environmental injustice

In contrast with the expected benefit from trade growth, ASEAN member states face inequality in wealth distribution and inequality in environmental justice. The situation in ASEAN has three critical facets. First, national wealth due to economic growth is not equivalent to income equality—richness concentrates within a small percentage of elite groups in the member states. While the GDP is rising, the majority of the population remains poor. Poor people continue to struggle to survive on a daily basis; thus, they are unlikely to participate in a social movement for environmental protection. Second, even if there is a common social desire for stricter environmental regulations to alleviate the degradation, the public desire cannot be transformed into regulations or national policy through social participation and representatives in many non-democratic member states. Last, since public participation is lacking in most non-democratic member states, the poor people in the agricultural sector, who contribute the least to environmental problems and suffer the most from them, have the least say in the government's decisions.³⁵⁸

In the rise of trade regionalism and multilateralism, ASEAN desires to strengthen its intra-regional and extra-regional trade as evidenced by the creation of AFTA, economic community, bilateral trade agreements with trading partners, and the commitment in free trade principle of World Trade Organization. By expanding the market access with an export-led

³⁵⁸ Roberts, J. Timmons, *The International Dimension of Climate Justice and the Need International Adaptation Funding*, 2.4 ENVIRON. JUSTICE 185, 186 (2009).

economy, ASEAN member states have successfully increased national and regional economic growth. The Southeast Asian region is one of the fastest economic expansions.³⁵⁹

Nonetheless, overall national rapid economic growth does not translate into income distribution, poverty alleviation, or reduction of inequality within the member states.³⁶⁰ In many member states, wealth concentrated within the elite groups of few major corporations leading to large development gaps between the richest and the poorest.³⁶¹ The rich become richer, but the poor remain poor. According to several indicators, many member states such as Thailand, Vietnam,³⁶² the Philippines,³⁶³ and Indonesia³⁶⁴ are among the top countries with large wealth inequality gaps.³⁶⁵ For instance, Thailand's GDP is growing, but less than 1% of the people

³⁵⁹ E.g., Malissa Cheok, *Fifty Years On, Southeast Asia Emerges as Global Growth Leader*, BLOOMBERG (Aug. 6, 2017), <https://www.bloomberg.com/news/articles/2017-08-06/fifty-years-on-southeast-asia-emerges-as-global-growth-leader>; OECD, *Economic Outlook for Southeast Asia, China and India 2018: Fostering Growth Through Digitalisation*, (Paris, 2018), at 17, <http://dx.doi.org/9789264286184-en>

³⁶⁰ RAJENDRA RAMLOGAN, *THE DEVELOPING WORLD AND THE ENVIRONMENT: MAKING THE CASE FOR EFFECTIVE PROTECTION OF THE GLOBAL ENVIRONMENT* 153-54 (2004).

³⁶¹ E.g., Tanyatorn Tongwaranan, *Inequality the Rising Challenge for ASEAN*, BANGKOK POST (Apr. 30, 2018), <https://www.bangkokpost.com/business/news/1455114/inequality-a-growing-challenge-for-rising-asean>; Asit K. Biswas & Kris Hartley, *Asia's Wealth Inequality Problem*, THE DIPLOMAT (Oct. 23, 2015), <https://thediplomat.com/2015/10/asias-wealth-inequality-problem/>; Aédán Mordecai, *What is the Future of Integration and Inequality in ASEAN*, THE DIPLOMAT (Sept. 15, 2017), <https://thediplomat.com/2017/09/what-is-the-future-of-integration-and-inequality-in-asean/>; and Kris Hartley, *Commentary: Inequality Looms Beneath the Shiny Façade of Southeast Asia's Growth*, CHANNEL NEWS ASIA (Apr. 23, 2017), <https://www.channelnewsasia.com/news/asia/commentary-inequality-looms-beneath-the-shiny-facade-of-8743726>

³⁶² See Nguyen Tran Lam, *Even It Up: How to tackle inequality in Vietnam*, OXFAM (Jan. 9, 2017), <http://oxf.am/ZLuU>

³⁶³ See Asia Development Bank, *Eradicating Poverty and Promoting Prosperity in a Changing Asia-Pacific* (March 2017), <https://www.adb.org/publications/eradicating-poverty-promoting-prosperity>

³⁶⁴ See Eko Wicaksono et al, *The Sources of Income Inequality in Indonesia: A Regression-Based Inequality Decomposition*, Asian Development Bank, ADBI Working Paper No.667 (2017), <https://www.adb.org/publications/sources-income-inequality-indonesia>

³⁶⁵ "The richest one percent in Thailand controls 58 percent of the country's wealth and the top 10 percent earned 35 times more than the bottom 10 percent. In Indonesia, the four richest men there have more wealth than the poorest 100 million people, and about 50 percent of the country's wealth is in the hands of the top one percent. In Vietnam, 210 of the country's super-rich earn more than enough in a year to lift 3.2 million people out of poverty. The country's richest man earns more in a day than the poorest person earns in 10 years. In Malaysia, while only 0.6 percent of its 31 million people are living under the poverty line, 34 percent of the country's indigenous people and seven percent of children in urban low-cost housing projects live in poverty. In the Philippines, the average annual family income of the top 10 percent is estimated at US\$14,708 in 2015, nine times more than the lowest 10 percent at US\$1,609." Maizura Ismail, *Southeast Asia's Widening Inequalities*, THE ASEAN POST (July 17, 2018), <https://theaseanpost.com/article/southeast-asias-widening-inequalities>

hold the wealth resulting from such growth.³⁶⁶ According to Credit Suisse Global Wealth data 2018, Thailand is the first rank of unequal country in wealth distribution.³⁶⁷

Likewise, environmental injustice occurs in ASEAN member states.³⁶⁸ When the government fails to place limitation on free market competition because it wants to generate maximum economic growth, the participants in the free market will maximize their wealth by over-exploiting common public resources,³⁶⁹ and the result will be the inevitable environmental degradation. Without regulatory limitations, the market fails to take into account the effect of the “Prisoner’s Dilemma” as described in “The Tragedy of the Commons” by Garrett Hardin.^{370,371} “The Tragedy of the Commons” is the term used to explain the cause of

³⁶⁶ Credit Suisse, *Global Wealth Data Book 2018*, <https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=777FDF0E-E060-F608-52DAF97E062CC35B&fbclid=IwAR1QgKFG4dRm50djzWxkoKKDatsMW89rZlQ9UGzDexR8vohbSd03pkpTFyw> ; and Paritta Wangkiat, *Rich get Richer, Poor get the Picture*, BANGKOK POST (Dec.15, 2017), <https://www.bangkokpost.com/opinion/opinion/1379095/rich-get-richer-poor-get-the-picture>

³⁶⁷ *Report: Thailand Most Unequal Country in 2018*, BANGKOK POST (Dec. 6, 2018), <https://www.bangkokpost.com/business/news/1588786/report-thailand-most-unequal-country-in-2018>

³⁶⁸ E.g., ADAM SIMPSON, *THE ENVIRONMENT IN SOUTHEAST ASIA: INJUSTICE, CONFLICT AND ACTIVISM* 164-79, (3ed. 2018); and Pratyusha Basu, *Environmental Justice In South And Southeast Asia: Inequalities And Struggles In Rural And Urban Contexts*, in *THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE* 603, 603-614 (Ryan Holifield et al. eds.,2017).

³⁶⁹ The common is “public goods” and “open to all”; thus, nobody can be excluded from using it. As observed by Pearson: “ Public goods, once produced, it is impossible to exclude people from using the product and the use by one individual does not reduce the amount available for others—private sectors do not have incentives to produce these public goods because they cannot recoup its costs.” Pearson also observed that “Economic services of environment are both consumption goods—that is, they are directly consumed by the individuals—and producer’s good, in which the environmental service help support the conventional production. Examples of consumption goods are cleaner air and recreation activities. Examples of producer’s goods are the quality of soils supporting agriculture and natural fisheries, ecosystem function as flood control in water shreds, as well as industrial process water. In general, these production and consumption services do not pass through the market, and hence are not priced.” Charles Pearson, *Theory, Empirical Studies, and Their Limitations*, in *ASIAN DRAGON AND GREEN TRADE* 21, 25-26 (Simon S.C. Tay & Daniel C. Esty eds.,1995).

³⁷⁰ Steven Kuhn, *Prisoner's Dilemma*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed.,2009), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=prisoner-dilemma> ; Hardin, Garrett, *The Tragedy Of The Commons*, 1.3 *J NAT RESOUR POLICY RES* 243, 243-53 (2009).

³⁷¹ Elinor Ostrom proposed the doctrine “Governing the Commons” by arguing that the common resources can be managed in order to avoid the environmental degradation caused by the Tragedy of the Commons. Various studies, particularly led by Ostrom, argued that Hardin’s theory of the Tragedy of the Commons leads to centralized control of common pool resources and such centralization (top-down approach) accelerates the degradation due to corruption and inefficiency. Ostrom proposed the four following factors for managing common resources: most users have secured tenure or long-term use of resources; most users have homogenous interests—share similar skills, technologies, and cultural view of resources; the cost of communication is low; and the cost of reaching binding and enforceable agreement is low. If these factors are achieved, then the users would spend time and energy to manage institution for governing and managing the common-pool resources; follow costly rules as long as they believe that others would do the same; monitor each other’s compliance; and impose sanctions on each other at a cost to themselves. Ostrom acknowledges the limitation of her assumption—it works with small and medium environmental settings and groups but it would fail in the bigger environmental scale because the essential factors would not be followed. In contrast, Block and Jankovic observed that what Ostrom described the new way

degradation of common environmental goods. Most environmental resources or substances have no market value: They are public goods, free access to everybody but belong to no one.³⁷² Everybody takes advantage of the common goods, but nobody preserves them because, in the absence of regulation, there is nothing to guarantee that other people will restrain themselves from exploiting it too.³⁷³ By exploiting natural resources over the regenerative capacity, short-term economic growth is maximized, but long-term economic and environmental conditions are degraded.³⁷⁴

When the problem of environmental degradation is coupled with larger inequality gaps, the poor people who do not benefit from the rapid economic growth of the nations are the group of people who suffer the most from environmental degradation as a result of such growth.³⁷⁵ Plus, they do not have any right to participate in political decisions to mitigate the adverse circumstances due to the non-democratic regimes. For instance, local poor people whose lives depend on natural resources and ecosystem have to bear the impact of toxic discharge from mega industries, an air-pollution spillover from coal-fired plants in the area they live, or a loss of habitats due to mega hydropower projects.³⁷⁶ In the case of climate change effect caused by

to govern the commons without government control or privatization, it is not the governing of the commons but it is various forms of private partnership. They noted that in her works, the form of governance suggests certain degree of ownership or limited access of resources—the users can own the environmental resources and prevent others from exploiting it. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 15-28 (James E. Alt & Douglas C. North eds., 1990); and Walter Block & Ivan Jankovic, *Tragedy of the Partnership : A Critique of Elinor Ostrom*, 75 AM J ECON SOCIOL 290, 306-307 (2016).

³⁷² The Tragedy of the Commons occurs when market fails to allocate the scarce resources to generate the greatest welfare. The price of natural resources does not capture the social benefit provided by the environment. The commodity prices reflect the supply and demand for certain attributes of these market goods at the expense of biodiversity and social welfare. NICK HANLEY ET AL, *ENVIRONMENTAL ECONOMICS IN THEORY AND PRACTICE* 43 (2nd. 2007).

³⁷³ The people who benefit from the Tragedy of the Commons are called “free riders”—taking advantage of common resources on the loss of other people’s effort to save the environment. As Jean Tirole discussed in climate change context, the problem of free rider discourages a country to make efforts to mitigate environmental problem by reducing CO2 emission because most of its efforts will benefit other free-rider countries. Why saving money today if we know that those savings will be spent by strangers? JEAN TIROLE, *ECONOMICS FOR THE COMMON GOOD* 200 (Steven Randall trans., 2017).

³⁷⁴ HUNTER ET AL, *supra* note 351, at 126

³⁷⁵ See chapter III for discussion on ASEAN environmental problems caused by unsustainable production and process methods aiming for rapid economic growth.

³⁷⁶ E.g., Tong Kimsun & Sry Bopharath , *Poverty and the Environment in Rural Cambodia*; Hermann Waibel et al, *Voices of the Poor on Climate Change in Thailand and Vietnam*; Somchai Jitsuchon, *Poor Thai Farmers’ Adaptation to Climate Change*; Aris Ananta et al, *Prospering in Environmental Degredation: An Illustration from*

CO₂ emission from major industries and power plants in the region and worldwide, poor people are in the frontline.³⁷⁷ Thai farmers suffered the worst drought in 20 years in 2010, but the year after, they suffered the worst flood destroying their farmlands and habitats.³⁷⁸³⁷⁹

Pope Francis stated in his encyclical *Laudato si'*:

Its (Climate Change's) worst impact will probably be felt by developing countries in coming decades. Many of the poor live in areas particularly affected by phenomena related to warming, and their means of subsistence are largely dependent on natural reserves and ecosystem services such as agriculture, fishing, and forestry. They have no other financial activities or resources which can enable them to adapt to climate change or to face natural disaster, and their access to social services and protection is very limited.³⁸⁰

Therefore, the emphasis on economic growth and wealth of the nation alone ignores other dimensions of social development—human development with the objective to improve capacity, opportunity, and quality of people's lives.³⁸¹ Trade growth uses money approach measurement, but it does not take into account the complexity of social dimension and welfare. Trade does not necessarily produce the intended result of poverty eradication and enhance the common good; on the other hand, it may widen the inequality gaps.³⁸² Free trade, domestic or

Upland Area, South Kalimantan, Indonesia, in *THE ENVIRONMENTS OF THE POOR IN SOUTHEAST ASIA, EAST ASIA AND THE PACIFIC* 145, 145-232 (Aris Ananta et al. eds., 2013).

³⁷⁷ "Agriculture is the channel through which climate change has the biggest impact on poverty because the most severe food price increase and reduction in food production happen." Julie Rozenberg & Stephane Hallegatte, *Poor People on the Front Line : The Impacts of Climate Change on Poverty in 2030*, in *CLIMATE JUSTICE : INTEGRATING ECONOMICS AND PHILOSOPHY* 24, 25 (Ravi Kanbur & Henry Shue eds., 2019).

³⁷⁸ Susan M. Darlington, *Environmental Justice in Thailand in the Age of Climate Change*, in *ENVIRONMENTAL AND CLIMATE CHANGE IN SOUTH AND SOUTHEAST ASIA* 211, 212 (Barbara Schuler ed., 2012).

³⁷⁹ More examples and discussion in detail in chapter III

³⁸⁰ POPE FRANCIS, *LAUDATO SI': ON CARE FOR OUR COMMON HOME* 22 (2015).

³⁸¹ See VICTOR GEORGE, *WEALTH, POVERTY, AND STARVATION: A WORLD PERSPECTIVE* 2 (1988); IDRIS JAZAIRY ET AL., *THE STATE OF WORLD RURAL POVERTY* 5 (1992); and KIETH GRIFFIN, & TERRY MACKINLEY, *IMPLEMENTING A HUMAN DEVELOPMENT STRATEGY* 1-6 (1994).

³⁸² Jeffrey Frankel, *Do Globalisation and World Trade Fuel Inequality?*, *THE GUARDIAN* (Jan. 2, 2018), <https://www.theguardian.com/business/2018/jan/02/do-globalisation-and-world-trade-fuel-inequality>; and World Inequality Lab, *Presentation of the World Inequality Report 2018* (Dec. 14, 2017), <https://wir2018.wid.world/files/download/wir-presentation.pdf>

international, does not benefit all participants in equal share—the income and living standard gaps will not be eliminated by free trade; instead, they can be increased by it.³⁸³

2. IMPACTS OF TRADE ON ENVIRONMENT

International trade can have both positive and negative effects on environmental conditions.³⁸⁴ “Grow now, clean up later” is a common practice in many developing countries, including ASEAN member states. This practice leaves environmental matters in the hands of the market without regulatory intervention, believing that the market mechanism would be a cure for all. Once a state generates sufficient economic growth, it can solve environmental problems later. In contrast, “later is too late” because the region suffers from economic growth without development—while the economic activities increase in scale, there is no change in economic composition and technological effect leading to constant environmental degradation. Thus, a regulatory intervention that employs economic incentives and addresses economic perspectives of environmental problems is needed.

2.1 **Expectation: Gain from economic growth “the Kuznets Curve”**

The basis of the debate on the relationship between economic development and the environmental condition is whether economic expansion itself is the cause of environmental

³⁸³ Adam Smith, *Lectures on Jurisprudence*, in *The Glasgow Edition of the Works and Correspondence of Adam Smith*, Indianapolis: Liberty Classics 512 (Ronald Meek et al. eds., 1982)

³⁸⁴ Pearson has distinguished how trade growth can affect environmental conditions in four dimensions that can be applied to ASEAN. First, scale effect—trade increases the scale of economic activities. Thus, without the development in other parts such as social, human, and technological development, the increase of economic activities will eventually disrupt the exploitation of natural resources, increase energy consumption and generate more pollution and solid wastes. Second, composition effect—trade can alter the structure of production according to the states’ comparative advantages. It depends on the member states’ comparative advantages whether to move towards the more or less pollution-intensive production. Third, technology effect—trade can lead to the improvement in technology used for production. Technological innovation can be beneficial for the environmental condition if such technology means cleaner and more energy-efficient production process and not only focus on maximizing the quantity of produced goods. Last, the income/demand effect—trade can increase income growth. Higher income means higher desire and capacity to solve environmental problems but higher income means higher consumption (e.g. the increase of urbanization, transportation, commercial land-use, and deforestation). Pearson, *supra* note 369, at 25-26.

degradation. On one side, many views from researchers such as Georgescu-Roegen, Ehrlich and Holdren, and Meadows et al. see economic growth as an extreme danger to the environment. There can be no sustainable economic growth without destroying the environment beyond repairable capacity.³⁸⁵ On the other side, economic growth and the wealth of nations generated by trade are believed to be the fundamental driving forces for demand for environmental protection. Beckerman suggested: “In the long run, the surest way to improve your environment is to become rich.”³⁸⁶

Many studies by Grossman and Krueger, Shafik, Panayotou, and Seldon and Song argue that the relationship between economic growth and the environment appears in an inverted U-shaped figure called “**Environmental Kuznets Curve**” (EKC).³⁸⁷ The *EKC* shows that at the early stage of economic growth, the environmental conditions are degraded due to massive economic activities and pollution; however, at a later stage, when nations and people become rich, the environmental conditions will become better because people and government will have both demand and capacity to clean up the pollution. There are three contributing factors for this pattern to function: a stage of growth, technological progress, and increased social-environmental consciousness.³⁸⁸ With more capital to invest in infrastructures and innovative technologies and the social movement, it will lead to economic activities with greater energy efficiency, higher material recovery, and lower waste generation. For instance, as observed by

³⁸⁵ See Marzio Galeotti, *Economic Development and Environmental Protection*, Working Papers 2003.89, Fondazione Eni Enrico Mattei (2003), at 1, 3; NICHOLAS GEORGESCU-ROEGEN, *THE ENTROPY LAW AND THE ECONOMIC PROCESS* (1971); Paul R. Ehrlich & John P. Holdren, *The Impact of Population Growth*, 171 *SCIENCE* 1212, 1212-1217 (1971); and DONELLA H. MEADOWS ET AL., *THE LIMIT OF GROWTH* (1972).

³⁸⁶ Wilfred Beckerman, *Economic Growth and the Environment: Whose Growth? Whose Environment?*, 20 *WORLD DEV.* 481, 481-496 (1992), in Natina Yaduma et al., *The Environmental Kuznets Curve at Different Levels of Economic Development: A Counterfactual Quantile Regression Analysis for CO2 Emissions Economics*, Discussion Paper Series EDP-1322 (2013), 1.

³⁸⁷ See Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110 *Q. J. ECON.* 353, 353-377 (1995); Nemat Shafik, *Economic Development and Environmental Quality: An Econometric Analysis*, 46 *OXF. ECON. PAP.* 757, 757-773 (1994); Theo Panayotou, *Empirical Tests and Policy Analysis of Environment Degradation at Different Stages of Development*, Working Paper WP238, Technology and Employment Programme (International Labor Office:Geneva); and Thomas Selden & Daqing Song, *Neoclassical Growth, the J Curve for Abatement, and the Inverted U Curve for pollution*, 29 *J. ENVIRON. ECON. MANAG.* 162, 162-168 (1995)

³⁸⁸ Galeotti, *supra* note 385, at 14.

Intal, countries like Japan and Taiwan followed the inverted U-shaped figure. In the 1960s, Japan became industrialized in pollution-intensive industries such as pulp and paper, chemical products, and metal.³⁸⁹ Later, it switched to less pollution-intensive industries like electronic and service industries.³⁹⁰ Taiwan also followed the same pattern. It turned to pollution-intensive in the 1970s and switched back to less pollution-intensive industries in the 1980s.³⁹¹

2.2 Reality: Economic growth without development

Many member states of ASEAN have gone through this pattern of “grow now and clean later”—seeing “economic growth as a cause and a cure for environmental problems”;³⁹² nonetheless, “later may be too late.” The *EKC* cannot be concluded as the complete analysis of the trade-environment effect because it fails to take into account the following factors:

First, the *EKC* fails to answer the question of irreversible environmental damage occurring before the turning point. It argues that the environment would become better after the developing countries invest money in cleaning operations. This notion is based on the assumption that the existing environmental damages are reversible. However, most significant environmental harms are considered irreversible, and they could occur before the turning point. For instance, economic activities can lead to biodiversity loss or the extinction of species, the depletion of nonrenewable natural resources such as fossil fuels, and the destruction of the earth’s climate, passing the tipping point.³⁹³

Second, the turning point comes when individuals and the nation become richer. Thus, there will be both state capital and capacity and people’s desire towards a better environment.

³⁸⁹ Ponciano S. Intal Jr., *Perspectives from the Philippines and ASEAN*, in *ASIAN DRAGON AND GREEN TRADE* 89, 90 (Simon S.C. Tay & Daniel C. Esty eds., 1996).

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² Galeotti, *supra* note 385, at 4.

³⁹³ Robert McSweeney, *Explainer: Nine ‘Tipping Points’ That Could be Triggered by Climate Change*, CARBON BRIEF (Feb 10, 2020), <https://www.carbonbrief.org/explainer-nine-tipping-points-that-could-be-triggered-by-climate-change>; Timothy M. Lenton et al., *Climate Tipping Points—Too Risky to bet Against*, *NATURE* (2019), at 592-595, <https://www.nature.com/articles/d41586-019-03595-0>.

Nevertheless, as discussed earlier, national growth of ASEAN member states does not mean that the majority of population has better income. The income gap between the rich and the poor remains considerably large. While a small percentage of the population accounts for national wealth, most are still struggling through daily survival needs. As Abdullah, Doucouliagos, and Manning concluded in their studies in Southeast Asia that “most member states have not reached the lower conservative estimate per capita GDP threshold: they are still within the rising portion of *EKC*.”³⁹⁴ Thus, as long as the income inequality will not be alleviated, the turning point for improvement is invisible.

Third, unlike the case of Japan and Taiwan, where the specialization switched from polluting chemical industries to the production of machinery and electrical appliances due to technological investment and regulatory change,³⁹⁵ most ASEAN countries specialize in a resource-based economy (e.g., agricultural products, timber products, and fisheries) as natural resources are their comparative advantages. The production of raw material in ASEAN member states without regulatory intervention does not trigger technological innovations; thus, the specialization in primary products leads to the specialization trap.³⁹⁶ Based on Gill and Kharas’ analysis, most member states cannot diversify the production of goods, accelerate innovation, and shift education for more skilled workers.³⁹⁷ Therefore, they are stuck in a middle-income trap—unable to advance their economy to a high-income level and switch from resources-

³⁹⁴ A.J. Abdullah et al., *Is there a Kuznets’ Process in Southeast Asia ?*, 60 SINGAP. ECON. REV.1, 19 (2015).

³⁹⁵ See Pan-Long Tsai, *Explaining Taiwan's Economic Miracle: Are the Revisionists Right?*, 6 AGENDA: A JOURNAL OF POLICY ANALYSIS AND REFORM, 69-82 (1999); Chih-Hai Yang et al., *Environmental Regulations, Induced R&D, and Productivity: Evidence From Taiwan's Manufacturing Industries*, 34 RESOUR. ENERGY ECON.514, 514-32 (2012); and Committee on the History of Japan’s Trade and Industry Policy RIETI, *Japan’s Industrial Structure: Forced to Change (1973–1982)*, in *Dynamics of Japan’s Trade and Industrial Policy in the Post Rapid Growth Era (1980–2000)*, 17-99 (2020)

³⁹⁶ Specialization trap is part of a middle-income trap. See further discussion on international trade and development trap in Hartmann, Dominik et al., *International Trade, Development Traps, and the Core-Periphery Structure of Income Inequality*, 21.2 ECONOMIA 255, 255-278 (2020); and Rodan Marudian & Joan Martinez-Alier, *Trade and the Environment : From a Southern Perspective*, 36 ECOL ECONOM 281, 281-297 (2001).

³⁹⁷ Indermit Singh Gill & Homi J. Kharas, *Successful Growth in Middle Income Countries: Will East Asia Show the Way Again?*, 121 ECES 1, 6 (2007).

driven growth to productivity-driven growth.³⁹⁸³⁹⁹ Thus, the shift for higher-skilled production according to *EKC* may not arrive.

Last, environmental improvement is not automatic. Once an income per capita rises, there will be strong demand for pollution control regulation. However, such demand will need to be implemented through national regulations. For the people's demand to be translated into efficient environmental regulations, the states need to have appropriate authorities in place and an efficient democratic system. The *EKC* literature demonstrated the environmental-income relationship based on the presumption of governmental authority. Unfortunately, it is not always the case in ASEAN, where most member states are under authoritarian rule.

It is incorrect to cite *EKC* as a claim that if countries promote economic growth, the environment will eventually take care of itself because the analysis of *EKC* bases on the presumption of a perfect market and political mechanism, which rarely exists in reality.

For instance, carbon emissions have been steadily increased since the expansion of the world economy in the 1990s. Many studies show that, contrary to the environment-income relationship, CO₂ emissions gradually increase as income increases.⁴⁰⁰ This problem may be a result of economic growth without economic development. Herman Daly explained that limit to growth do not mean limit to development:

³⁹⁸ See Akiko Egawa, *Will Income Inequality Cause a Middle-Income Trap in Asia?*, 727 BRUEGEL (2013); and Kenichi Ohno, *Avoiding the Middle-Income Trap: Renovating Industrial Policy Formulation in Vietnam*, 26 ASEAN ECON. BULL., 25–43 (2009).

³⁹⁹ Many researchers found that many developing countries are in the development trap associated with cheap labor and resources-based production. The scholars agree that in order to break the trap ceiling, these developing countries have to overcome both market and government failures; link industry, state, science and civil society to promote innovation; and promote diversification strategies. See, e.g., Dominik Hartmann, *The Structural Constraints of Income Inequality in Latin America*, 40 INTEGR. TRADE J., 70-85 (2016); Anna Jankowska et al., *The Product Space and the Middle-Income Trap: Comparing Asian and Latin American experiences*, OECD (2012); Dominik Hartmann et al., *Identifying Smart Strategies for Economic Diversification and Inclusive Growth in Developing Economies. The Case of Paraguay*, WORLD BANK (2018); and DOMINIK HARTMANN, ECONOMIC COMPLEXITY AND HUMAN DEVELOPMENT, HOW ECONOMIC DIVERSIFICATION AND SOCIAL NETWORKS AFFECT HUMAN AGENCY AND WELFARE (2014).

⁴⁰⁰ FIELD & FIELD, *supra* note 236, at 406.

Under the ideal conditions, the market can find an optimal allocation of resources but the market cannot find an optimal scale any more than it can find an optimal distribution of resources. This requires the application of ethical and ecological considerations.⁴⁰¹

Economic growth (quantitative scale) means an increased scale of economic activities without any change in economic structure.⁴⁰² In contrast, economic development (qualitative improvement) includes changes in economic structure, technological and social transformation such as education, health care, public transportation, and legal institutions.⁴⁰³ Thus, economic growth without development means that while there is a massive expansion of economic activities, the nature of such activities is the same—no cleaner technology to reduce the consumption of fuel-based energy and emission of polluting substances. As a result, pollution and resource depletion will grow along with the outputs.

Furthermore, CO₂ is a global (and thus extraterritorial) externality; thus, though incomes per capita increase, the states have less incentive to mitigate the emission. The global threat is that CO₂ will exceed the planet's carrying capacity, leading to the irreversible climate change effect before the turning point of *EKC*.⁴⁰⁴ By that time, it will be too late. Thus, considering the damage that has already been done, it is necessary to reduce further CO₂ emission at the international level to stabilize the situation and prevent the further adverse effect.⁴⁰⁵

3. IMPACTS OF TRADE ON ENVIRONMENTAL REGULATIONS

Environmental regulation can increase the production costs and restrict the productions or trade of certain products on the ground of environmental protection. It can be viewed as a

⁴⁰¹ Herman Daly, *Steady-State Economic: Concepts, Questions, Policies*, 1.6 GAIA 333, 241-256 (1992).

⁴⁰² FIELD & FIELD, *supra* note 236, at 400.

⁴⁰³ *Id.*

⁴⁰⁴ Kris A. Beck & Prathibha Joshi, *An Analysis of the Environment Kuznets Curve for Carbon Dioxide Emission: Evidence for OECD and Non-OECD Countries*, 3 EUR. J. SUSTAIN. DEV. 33, 42-43 (2015); Don Webber & Dave Allen, *Environmental Kuznets Curves : Mess or Meaning ?*, 17 INT J SUST DEV WORLD 198, 198-207 (2010)

⁴⁰⁵ *Id.*

restriction to trade, or it can make trade or investment less attractive to industrial and multinational companies. The concern is that developing countries could refuse to strengthen or enforce their environmental standard to gain competitive advantages in international trade and attract foreign investment. Empirical studies argued that the regulatory race-to-the-bottom effect and pollution theory are not likely to happen due to the democratic system and lack of sufficient economic incentives.⁴⁰⁶ Nevertheless, the struggles for competitive advantage and against internalization of externalities in trade persist in ASEAN member states. In many member states with an unstable democratic system, the relocation of pollution-intensive industries has occurred. The regulatory standards for environmental protection are lowered in certain circumstances or stuck at the bottom at best.

3.1 Expectation: Arguments against the race-to-the-bottom hypothesis and the pollution haven theory

As international trade dramatically grows on a free-market basis, there is growing concern about its effect on environmental regulations. It is argued that many developing countries to promote economic growth may create incentives for foreign investors to conduct business and make an investment in their countries or create competitive advantages for their exporting goods. One way to implement the goal is to impose more flexible national regulations regarding environmental protection, believing that it will lead to lower production costs and higher profits.⁴⁰⁷ Eventually, it may lead to a *race-to-the-bottom* effect of environmental regulations among nations to compete in international trade.⁴⁰⁸

⁴⁰⁶ E.g., Jeffrey H. Leonard, *Pollution and the Struggle for the World Product* (1988) in ERIC NEUMAYER, GREEN TRADE AND INVESTMENTS : ENVIRONMENTAL PROTECTION WITHOUT PROTECTIONISM 54 (2001); Johan Albretch, *Environmental Policy and the Inward Investment Position of US "Dirty" Industries*, 33 INTERECONOMICS 186, 186-194(1998); David Wheeler & Ashoka Mody, *International Investment and Relocation Decisions: the Case of US Firms*, 33 J. INT. ECON. 57, 57-76 (1992); and Gunnar H. Eskeland & Ann E. Harrison, *Moving to Greener Pastures? Multinationals and the Pollution Theory Hypothesis*, 70 J. DEV. ECON 1, 1-23 (2003).

⁴⁰⁷ Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 629-38 (1996).

⁴⁰⁸ Richard L. Revesz, *Rehabilitating Interstate Competition :Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation*, 67 N.Y.U L. REV.1210, 1213-1216 (1992).

The *race-to-the-bottom* hypothesis is a repercussion in the legal aspect of externalities and competitive advantage problems, leading to unfair trade in an international arena. For competitiveness in trade, a state may lower environmental standards or impose lax regulations so that the externalities are not internalized; thus, the cost of the products becomes cheaper in the market. The main reason to discharge polluting substances in the environment instead of cleaning them is that without governmental regulations, those pollutions are the external cost of the product, they are borne by public instead of producers.⁴⁰⁹ If the released wastes are beyond the absorptive level, they will reappear in the form of pollutions or “negative externalities.”⁴¹⁰ The “Polluter Pays Principle” (PPP) urges governments to impose regulations ensuring that the cost of products or services reflects both basic cost of operation and environmental cost.⁴¹¹ Internalization of environmental costs is vital for environmental and economic efficiency because the end price of goods purchased by consumers will bear all economic, social, and environmental costs rendering a just and non-distort market.⁴¹²

Nevertheless, *PPP* is controversial. Most member states of ASEAN have not accepted it due to the issue of competitive advantages.⁴¹³ By focusing on short-term economic gain, many member states export goods that do not internalize the environmental externalities into the price of the goods. Such goods are cheaper than goods from other countries that have adopted *PPP* and internalize the externalities. Therefore, goods without externality costs from member states gain competitive advantages in the international market. The products from high-standard

⁴⁰⁹ Many environmental externalities occurring from the production methods in one country can affect not only national but also global environmental concerns such as an emission of CFC particles effecting ozone layers, emission of CO₂ contributing factors for Climate Change, or by-catch dolphins or turtles leading to a great depletion of species.

⁴¹⁰ HUNTER ET AL, *supra* note 351, at 126-127.

⁴¹¹ Making the polluters pay for the full environmental cost of their activities by internalizing the negative externalities into the products’ price could be a solution for negative externalities because it creates an effective price mechanism showing to consumers the real cost of production and showing to producers what consumers’ valuation are. DAVID PEARCE ET AL., BLUEPRINT FOR A GREEN ECONOMY 154-157 (1989).

⁴¹² As a result of internalization of externalities, polluting products will be more expensive in the market. The consumers will eventually switch to cleaner products forcing the manufacturers to improve the production and cleaning process or adopt cleaner advance technology.

⁴¹³ HUNTER ET AL, *supra* note 351, at 516.

countries that internalize the environmental costs are more expensive.⁴¹⁴ The disparity in environmental regulations conferring a competitive advantage on lower-standard countries may negatively affect existing environmental regulations—it may encourage high-standard countries to lower their environmental regulations, and it may discourage low-standard countries from improving their regulations.⁴¹⁵

Furthermore, due to the disparity of national environmental regulations, there is also a strong concern that low-standard countries may attract more investment from pollution-intensive industries and become their “Pollution Havens.”⁴¹⁶ As some developing countries try to attract capital and foreign investment to boost up their economic growth by relaxing their environmental regulations, many multinational companies operating pollution-intensive industries may relocate themselves from developed countries with stringent environmental regulations to developing countries with less stringent environmental policies.

Despite the probability of the *race-to-the-bottom* hypothesis and pollution haven theory, there is little empirical evidence on the economic side proving such effects:

First, it is less likely that the *race-to-the-bottom* effect will occur to environmental regulations because this effect is not automatic. If the countries have a well-established democratic system, governments cannot impose authoritative amendments to environmental regulations.⁴¹⁷ If the amendment is to lower the environmental standard, it will be controversial and subject to strong opposition.

⁴¹⁴ As discussed by Esty, the producers from higher standard countries endure more financial burdens to comply with environmental regulations making it impossible to sell goods at the low price and earn comparable profits; thus, it creates unfair trade in international market. The failure to act from exporting countries results in two folds: (i) when the price of goods does not take into account the environmental costs, trade leads to environmental degradation. Environmental problems occurring from production and process methods and failure to internalize the externalities are discussed in Part III; and (ii) importing countries with higher environmental standard take unilateral acts to level the playing field and correct the market failure by posing environmental standard for importation—non-tariff trade barriers. This issue will be discussed further in Part V. Esty, *supra* note 350, at 33.

⁴¹⁵ OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT 31-47 (2004).

⁴¹⁶ FIELD & FIELD, *supra* note 326, at 406-407; and ERIC NEUMAYER, GREENING TRADE AND INVESTMENT: ENVIRONMENTAL PROTECTION WITHOUT PROTECTIONISM 41(2001).

⁴¹⁷ PEREZ, *supra* note 415, at 35.

Second, in reality, trade and investment flows are not sensitive to environmental policy because the majorities of industries pollution abatement cost represent only a small fraction of total production cost.⁴¹⁸ The actual aspects affecting multinational companies' relocation decisions are cheaper labor cost and market access rather than lax environmental regulations.⁴¹⁹ Furthermore, there are possible risks concerning the business operation in low-standard countries, such as political instability and uncertainty of law enforcement. Environmental regulations and enforcement that are uncertain or subject to unpredictable change according to political authority may increase disincentives for investment. On the other hand, if the regulations are clear and certain, they may reduce investment risk and enhance economic development even if they are more stringent.⁴²⁰ Moreover, stricter environmental policies may induce companies to invest in cleaner production technology.⁴²¹

Lastly, it is argued that the *pollution haven* theory may occur but will not last for an extended period due to the effect of economic growth or the *EKC* effect. Economic growth will generate the demand for environmental quality and better institutional capacity to regulate.⁴²² However, “the rise of income, the rise of environmental quality” rule would only work under the right conditions—when there is a political system that people’s desire for a better environmental condition would be regulatorily implemented, and the environmental problems are repairable under national regulations.⁴²³

⁴¹⁸ Josh Ederington et al, *Footloose and Pollution Free*, 9718 NBER, 2003, at 12-13.

⁴¹⁹ Adam B. Jaffe et al, *Environmental Regulation and the Competitiveness of U.S. manufacturing: What Does the Evidence Tell US?*, 33 J. ECON. LIT. 132, 132-63 (1995).

⁴²⁰ Richard C. Feiock & Christopher Stream, *Environmental Protection Versus Economic Development: A False Trade-Off?*, 61 PUBLIC ADM. REV. 313, 313-21 (2001).

⁴²¹ Cees van Beers, *International Trade, Environment and Sustainable Development*, in THE ECONOMICS OF GLOBAL ENVIRONMENTAL CHANGE, 47 (Mario Cogoy & Karl Steininger eds., 2007).

⁴²² David Wheeler, *Greening Industry: New Roles for Communities, Markets and Governments*, Oxford University Press for the World Bank, 18-21 (2000).

⁴²³ Jeffrey A. Frankel, *The Environment and Globalization*, w10090 NBER, 2003, at 10

3.2 Reality: The externalities, competitive advantages, and the stuck-at-the-bottom effect

Stringent environmental regulations requiring the internalization of externalities can restrict the exploitation of certain natural resources, impose higher pollution control standards, or require a substantial change in production and process methods. It can increase the cost of production, eliminate the competitive advantages, and reduce incentives for foreign investment. Such effects can be short-term disadvantages and render a long-term sustainable economy. Once the market adapts, the capital and resources will be invested in better economic activities maximizing overall sustainable profit to society. Nevertheless, it is common that the governments focus on the transitional costs of the change to respond to the instant distress for losing profitable gains from economic sectors rather than making a “politically correct choice” to integrate stricter environmental regulation and implement new production activities.⁴²⁴ The situation is also true in the market-based authoritarian regimes. People may perceive those authoritarian regimes, not bound by voters or producers’ support, would regulate and tighten environmental standards. In contrast, the market-based authoritarian regimes in Southeast Asia

⁴²⁴ As President of France, Emanuel Macron stated that the environmental problem, climate change, is the problem between “fin du monde et fin du mois”—the end of the world and the end of the month. To solve environmental problem, it is necessary to solve social and economic problems at the same time because environmental problem such as climate change relates directly with economic perspectives, living standard and lifestyle of the people. For instance, part of the “Gilet Jaune” or “Yellow Vests” protests against government’s measure concerning the fossil fuel tax is that such measure dealt only with environmental concerns and economic benefits of the nations—France, the country with no fossil fuel reserves, would benefit from such measure because it would reduce the importation of fossil fuels and it can be less dependent on the exporting states of such resources. However, the top-down measure disregard the social factor—people have long been dependent on fossil resources as it becomes traditional part of their living norms; thus, changing mindsets and consumer’s behaviors requires extensive educational works. Plus, in order to avoid putting financial burden on people, environmental measures should be supported with management and financial aids system. For instance, financial measures helping people to gradually change fossil fuel cars to electrical cars. APF, *Macron Veut Traiter “Fin du Monde” et “Fin du Mois” à la Fois*, LE POINT (Nov. 27, 2018), https://www.lepoint.fr/politique/macron-veut-traiter-fin-du-monde-et-fin-du-mois-a-la-fois-27-11-2018-2274715_20.php ;and Joachim Roth & Ivetta Gerasimchuk, *What Lies Beneath the Yellow Vests’ Protests in France-Frequent Asked Questions*, IISD (Dec. 7, 2018), <https://www.iisd.org/gsi/subsidy-watch-blog/yellow-vest-protests>

base their power on rapid growth economy; thus, they would continue to undermine the environmental protection.⁴²⁵

Many empirical studies concluded that the *race-to-the-bottom* effect is not likely to happen because a lax environmental policy is not an essential factor for a multinational company or foreign investors' decisions to relocate.

Nevertheless, in some cases, the *race-to-the-bottom* effect does not occur to attract multinational companies or foreign investments but occur to allow governmental projects and domestic industries to maximize their productivity for competitive advantage in international trade at the expense of the environment. Even if there is strong public opposition against lowering the environmental standard, many non-democratic member states tend to disregard those dissenting movements. For instance, in 2017, under the military government, Thailand proposed a new environmental bill—the Enhancement and Conservation of National Environmental Quality Bill.⁴²⁶ This new bill does not contain amendments in overall substances compared to the previous version, but it amended only the section of Environmental Impact Assessment (EIA). This bill has two significant problems. First, it allows the private developers to start their projects before preparing and submitting their Environmental Impact Assessment (EIA) and Environmental Health Impact Assessment (EHIA).⁴²⁷ Second, under the Constitution, any actions that may affect the environment or people's health have to implement the EIA and EHIA. Conversely, the new environmental bill uses narrow terms by stating only “projects or businesses.”⁴²⁸

⁴²⁵ Lyuba Zarsky & Simon C. Tay, *Civil Society and the Future of Environmental Governance in Asia*, in *ASIA'S CLEAN REVOLUTION: INDUSTRY, GROWTH, AND THE ENVIRONMENT* 128, 132-133 (D. Angel & M. Rock eds., 2001).

⁴²⁶ Pratch Rujivanarom, *Groups Call for Environmental Bill to be Scrapped and Redrafted*, THE NATION (Dec. 7, 2017), <http://www.nationmultimedia.com/detail/national/30333343>

⁴²⁷ Pratch Rujivanarom, *Activists Vow to Fight Environmental Bill*, THE NATION (Sept. 23, 2017), <http://www.nationmultimedia.com/detail/national/30327438>

⁴²⁸ *Id.*

In Indonesia, under the revised Criminal Code 2018, it is controversial for undermining human rights⁴²⁹ and environmental protection—more burdens of proof, less strong punishment, and shortcoming of accountability.⁴³⁰ First, there is a loophole in the presumption for the burden of proof. If a producer has a permit for operating, the legal presumption is on its side—it is presumed that the polluting action does not violate the law, and it is the burden of the plaintiff to prove otherwise.⁴³¹ Second, the revised Criminal Code also lowers the maximum prescribed sentences for some environmental crimes.⁴³² Third, the revised Criminal Code focuses on individual accountability for environmental crimes; thus, it may limit corporate liability because it is difficult to prove who is accountable for the environmental crimes—the contributors, individuals, or companies.⁴³³ Environmental adverse effects such as contaminated water or haze pollution can be the results of many contributors; thus, focusing on single-party accountability may let many contributors off the hook.

Furthermore, the relocation is a very much feasible alternative if a company cannot operate due to a prohibition of stricter environmental regulation. China, one of the biggest coal exploiters, endures a critical health impact from air pollution occurring from coal use. In 2017, the level of pollutant particles in many cities was hazardous to human health, causing lung disease, cancer, and death.⁴³⁴ In response to the imminent environmental impact, China has

⁴²⁹ For instance, Article 417 extra-marital sex is punished by up to one year imprisonment. “Article 2 recognizes “any living law” in Indonesia, which could be interpreted to include hukum adat (customary criminal law) and Sharia (Islamic law) regulations at the local level. Indonesia has hundreds of discriminatory Sharia and other regulations that discriminate against women, religious minorities, and LGBT people. As there is no official list of “living laws” in Indonesia, this article could be used to prosecute people under these discriminatory regulations.” *Indonesia: Draft Criminal Code Disastrous for Rights*, HUMAN RIGHT WATCH (Sept. 18, 2019), <https://www.hrw.org/news/2019/09/18/indonesia-draft-criminal-code-disastrous-rights>

⁴³⁰ Han Nicholas Jong, *Activists Fear for Environmental Protection under Indonesia’s Revised Criminal Code*, MONGABAY (Apr. 11, 2018), <https://news.mongabay.com/2018/04/activists-fear-for-environmental-protection-under-indonesias-revised-criminal-code/>

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Edward Wong, *Coal Burning Causes the Most Air Pollution Deaths in China Study Finds*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/2016/08/18/world/asia/china-coal-health-smog-pollution.html?mtrref=www.google.com&gwh=BAEB0FAFE6458AD7378C321C339863DD&gwt=pay>

stopped the construction of coal-fired power plants⁴³⁵ and banned the use of coal in 28 cities.⁴³⁶ As a result, multinational coal companies look elsewhere for new markets. Many Chinese coal-fired power plant projects are concentrated in the Southeast Asia region—in many ASEAN member states.⁴³⁷ Another recent example is the overflow of electronic wastes from worldwide to member states (e.g., Thailand, Laos, Myanmar, and Cambodia).⁴³⁸ China, the former largest importer of the world’s electronic and plastic wastes for recycles, decided to adopt more stringent environmental standards and refused the importation of all foreign wastes because the environmental damage outweighs the short-term economic profit.⁴³⁹ After China closed the door, all wastes have headed to ASEAN member states with lax environmental standards.⁴⁴⁰ Apart from the questionable efficiency of recycling industries in these member states, the e-waste recycling process itself is a pollution-intensive process—it requires a toxic process to remove heavy metals such as lead, mercury, and copper, and the plastic parts are not degradable or too hazardous to be recycled.⁴⁴¹

While it is contentious whether the international trade competition leads to the *race-to-the-bottom* effect in environmental regulations or pollution haven in terms of trade composition effect, the apparent problem is a “*regulatory chill*” or “*stuck-at-the-bottom effect*.” The *stuck-*

⁴³⁵ Lucy Pasha-Robinson, *China Scraps Constructions of 85 Planned Coal Power Plants*, INDEPENDENT (Jan. 17, 2017), <https://www.independent.co.uk/news/world/asia/china-scraps-construction-85-coal-power-plants-renewable-energy-national-energy-administration-paris-a7530571.html>

⁴³⁶ Oiwan Lam, *In Fight Against Smog, China Bans Coal in 28 Cities*, HONG KONG FREE PRESS, (Oct. 14, 2017), <https://www.hongkongfp.com/2017/10/14/fight-smog-china-bans-coal-28-cities/>

⁴³⁷ Ren Peng et al, *China’s Involvement in Coal-Fired Power Plants Along the Belt and Road*, GLOBAL ENVIRONMENTAL INSTITUTION (2017), [http://www.geichina.org/upload/file/report/China%27s Involvement in Coal-fired Power Projects OBOR EN.pdf](http://www.geichina.org/upload/file/report/China%27s%20Involvement%20in%20Coal-fired%20Power%20Projects%20OBOR%20EN.pdf)

⁴³⁸ Angaindrankumar Gnanasagaran, *E-Waste Chokes Southeast Asia*, THE ASEAN POST (June 28, 2018), <https://theaseanpost.com/article/e-waste-chokes-southeast-asia>

⁴³⁹ Zhuang Pinghui, *China’s Most Notorious E-waste Dumping Ground Now Cleaner But Poorer*, SCMP (Sept. 22, 2017), <https://www.scmp.com/news/china/society/article/2112226/chinas-most-notorious-e-waste-dumping-ground-now-cleaner-poorer>

⁴⁴⁰ Hannah Ellis-Petersen, *Deluge of Electronic Waste Turning Thailand into World’s Rubbish Dump*, THE GUARDIAN (June 28, 2018), <https://www.theguardian.com/world/2018/jun/28/deluge-of-electronic-waste-turning-thailand-into-worlds-rubbish-dump>

⁴⁴¹ Syed Faraz Ahmed, *The Global Cost of Electronic Waste*, THE ATLANTIC, (Sept. 29, 2016), <https://www.theatlantic.com/technology/archive/2016/09/the-global-cost-of-electronic-waste/502019/>

to-the-bottom effect is a situation where competition in international trade decelerates any improvement of environmental regulations that can lead to higher production costs for domestic products.⁴⁴² The unwillingness of the governments to improve environmental regulation due to the fear of losing competitiveness affects not only on a national scale but also on a global scale. Changes in environmental regulations, especially in production and process methods, will increase production costs and decrease competitive advantages in a short-term perspective. Producers will have to face increased production costs during the transitional period and a necessary adoption of newer and cleaner technology for sustainable production. This can be an onerous burden, particularly for small to medium enterprises (SMEs) with less investment capital and capacity to bear the loss of profit during the transition.

Another obvious example is the unwillingness of governments from ASEAN member states to bind themselves under the international agreements on climate actions such as the Kyoto Protocol and Paris Agreement, a collective set of policies to reduce the emission of CO₂ to tackle a climate change problem.⁴⁴³ To the international community, ASEAN and governments of many ASEAN member states may present political rhetoric about their intention to prepare the ASEAN community towards reducing emission in response to climate change. On the contrary, there is no actual action or concrete implementation within due respect timeline. It seems as if those political statements are only cosmetic moves to be politically correct in the international community's eyes. To be worse, domestic plans or actions within member states contradict the goal to mitigate climate change.

For instance, in the Thai Prime Minister's statement, made during the Leaders event at Paris Climate Change Conference—COP21/CMP11 2015, he acknowledged the significance of Climate Change and global environmental degradation, and he pledged to reduce greenhouse

⁴⁴² Gareth Porter, *Trade Competition and Pollution Standards: "Race to the Bottom" or "Stuck at the Bottom"*, 8 J. ENVIRON. DEV. 133, 133-51 (1999).

⁴⁴³ LYUBA ZARSKY, STUCK IN THE MUD? NATION STATES, GLOBALIZATION, AND THE ENVIRONMENT 19-44 (2002)

gas emission in Thailand by 20 to 25 percent by 2030.⁴⁴⁴ The targets were to use fewer fossil fuels and more renewable energy.⁴⁴⁵ Nevertheless, despite the public dissent, in 2017, the government announced that they would continue the plan to construct the coal-fired power plant in the Southern Province where there will be adverse effects on the coastal marine environment by claiming that it is the most cost-efficient for the state power consumption.⁴⁴⁶ Moreover, in 2018, the government initiated a plan to subsidize domestic fuel retail prices helping consumers to cope with rising global oil prices.⁴⁴⁷

A similar circumstance appears when Indonesia, in Paris Climate Change Conference 2015, pledged the commitment to reducing emissions by increasing renewable energy and managing sustainable land and forest use.⁴⁴⁸ Despite the political statement, Indonesia, one of the top ten largest emitters of greenhouse gas,⁴⁴⁹ continues to expand the coal power plants. In August 2018, the legal case from the residents in Bali against the expansion of coal-fired plant citing the lack of consideration in Climate Change impacts in EIA and lack of community participation, the court ruled out the complaint by stating that there is no legal standing.⁴⁵⁰

⁴⁴⁴ Statement by General Prayut Chan-o-cha, Prime Minister of the Kingdom of Thailand, at the Leaders Event for Heads of State and Government during the Twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change Paris, France, 30 November 2015, http://unfccc.int/sites/default/files/cop21cmp11_leaders_event_thailand.pdf

⁴⁴⁵ *Id.*

⁴⁴⁶ *Thailand to Build Coal-Fired Power Plant Despite Opposition*, REUTERS (Feb. 17, 2017), <https://www.reuters.com/article/thailand-coal-idUSL4N1G23IJ>

⁴⁴⁷ *Thailand to use Fuel Subsidy to Help Consumers as Global Oil Price Rises*, REUTERS (May 22, 2018), <https://www.reuters.com/article/thailand-economy-oil/thailand-to-use-fuel-subsidy-to-help-consumers-as-global-oil-price-rises-idUSL3N1ST3KX>

⁴⁴⁸ Statement by the President of the Republic of Indonesia, Joko Widodo, at the Leaders's Event 21th Conference of the Parties to the UNFCCC Paris, France, 30 November 2015, http://unfccc.int/sites/default/files/cop21cmp11_leaders_event_indonesia.pdf

⁴⁴⁹ Forests and Landscape in Indonesia, WRI, <https://www.wri.org/our-work/project/forests-and-landscapes-indonesia/climate-change-indonesia>; and Johannes Friedrich et al, *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, WRI (Dec. 10, 2020), <https://www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed>

⁴⁵⁰ Micheal Taylor, *Indonesia Court Rejects Bid to Stop Coal Power Plant Expansion*, REUTERS (Aug. 17, 2018), <https://www.reuters.com/article/us-indonesia-coal-bali/indonesian-court-rejects-bid-to-stop-coal-power-plant-expansion-idUSKBN1L20YK>; and Stefania Palma, *Indonesia Keeps Faith With Coal to Meet Growing Energy Demand*, FT (July 31, 2018) <https://www.ft.com/content/0fd3ed3e-89b9-11e8-affd-da9960227309>

Furthermore, in many countries in ASEAN, the problem is about ineffective enforcement of the environmental regulations rather than the stringency of such regulations.⁴⁵¹ The inefficiency of the enforcement process includes the lack of clear authority to monitor industrial pollution and to prosecute violators and the lack of strong punishment.⁴⁵² The underlying problem of ineffective enforcement of environmental regulation is that the governments have ignored the public demand for more stringent pollution control. This ignorance from the governments could result from the non-democratic system or unstable democratic system where those pollution-intensive industries have a connection with the elected representatives or officials.⁴⁵³

The greater the potential impact on national economic growth and export markets, the more difficult it is to build political support for policy change. Thus, the only way to encourage the improvement is to generate a win-win situation—improvement of both competitiveness and environmental performance.⁴⁵⁴ Member states of ASEAN also made it clear that their efficiency in adopting higher environmental standards to tackle environmental problems depends, partly or wholly, on other countries financial, technological and capacity building supports.

CONCLUSION

In contrast with ASEAN member states' perception, the increasing trade scale without development and the unregulated free market mechanism can adversely affect society, the environment, and environmental regulations. By focusing only on economic growth, trade can enlarge wealth concentration, inequality, and environmental injustice. The environmental conditions also suffer from the market mechanism. Natural resources are exploited according

⁴⁵¹ Sheoli Pargal & David Wheeler, *Informal Regulation of Industrial Pollution in Developing Countries: Evidence from Indonesia*, 104 J POLITICAL ECON 1314, 1315 (1996)

⁴⁵² Bryan Bachner, *Coming Home to Roost: Pollution, Law, and Economics in the People's Republic of China*, 5 GEO. INT'L ENVTL. L. REV. 643, 643-50 (1993).

⁴⁵³ KURT WEYLAND, DEMOCRACY WITHOUT EQUITY 129 (1996).

⁴⁵⁴ Zarsky, *supra* note 443, at 25.

to national comparative advantages without sustainable practice to compete in trade and maximize growth. Environmental degradation is a price to pay. The turning point where people demand a better environment once national growth is sustained is unlikely to happen due to the income inequality, specialization trap, and non-democratic political regimes. Whereas the national economic growth is growing, most people remain poor with no democratic path to voice their desires. The specialization is trapped in resource-based sectors without technological advancement to improve sustainable production. Trade competition also impairs national environmental regulations by weakening political will to adopt stricter environmental standards.

CHAPTER III

TRADE-RELATED ENVIRONMENTAL PROBLEMS:

PRODUCTION AND PROCESS METHODS

INTRODUCTION

Strengthening environmental sustainability and economic development in ASEAN depends on five significant factors: environmental science, economics, law and regulations, political regimes, and human rights. The interplay of these factors in the region will determine whether the economic development through an export-led economy and environmental protection will be evolved in a mutually supportive path. Environmental science provides the states with relevant facts and factors concerning environmental conditions. The global economic system triggers the economic incentives for competitiveness in trade and the state's desire for development. It also dictates political will for economic-environment movement and states' policies. Law and regulations facilitate trade flows and economic activities and protect the environment. Political regimes determine whether political decisions regarding economic-environment development reflect a genuine public demand by providing sufficient democratic channels for civil society expression. Human rights protection signify the states' recognition of their nationals' fundamental rights to benefit from economic advantage without jeopardizing the right to live in a sustainable environment.

Both economic incentives and legal mechanisms can be used to protect or abuse the environment. It depends on two factors: whether the political regimes would target a rapid economic gain claiming the national interest but disregard the interdependent relationship between environment and economic; and to what extent the regimes acknowledge environmental condition as parts of fundamental human rights.

To illustrate the above framework, this chapter explores three particular environmental problems: palm oil production, energy production, and plastic production. These problems are chosen because of two reasons. First, they are trade-related environmental problems involving unsustainable production and process methods to generate economic growth by gaining competitive advantages in international trade. Second, these problems are originated within the region, but they are transboundary and have significant adverse effects on a global scale which urgently need to be addressed.⁴⁵⁵

The discussion of each environmental problem focuses on three questions: what is the problem?; what is the root cause of the problem?; what is the legal framework addressing the problem? The discussion unfolds that these problems occur when the political regimes, with only economic incentives in mind, break the equilibrium between economic development and environmental protection. The fundamental cause of these environmental problems in the region is the inability and unwillingness of the member states to internalize the negative externalities into the cost of production due to economic incentive; thus, the end price does not represent the social and environmental cost. Each environmental problem is addressed by different legal and diplomatic mechanisms in three contexts: national, regional, and international. The discussion reveals how existing ASEAN cooperation and legal framework do not provide sufficient means to tackle the problems at the root cause. ASEAN structure and norms, particularly the ASEAN Way, serve as significant barriers for having a solid engagement for cooperation and an effective mechanism to eliminate the root cause of the environmental problems.

⁴⁵⁵ These trade-related environmental problems are the concrete examples demonstrating the problems of trade-environment relationship due to economic and political perspectives in ASEAN that have been discussed earlier in Chapter II. These environmental problems in ASEAN rooted from economic incentives driven by competitive dynamic of world trading system. Though the problems originate in ASEAN member states, they are not local but global environmental problems that may need not only regional but international resolutions.

1 TRANSBOUNDARY HAZE POLLUTION AND STATE RESPONSIBILITY: THE CASE STUDY OF PALM OIL PRODUCTION

Haze resulting from fire is a persistent problem in the region. Regional cooperation focuses on the mission of stopping the fire once it has started rather than on the more logical but less politically viable mission of stopping the fire from starting in the first place. This part explains why the structure of ASEAN pushes the political actors into the former approach. Though there is an acknowledgment towards the latter approach in a recent development, it has not fully embraced the mechanism to eliminate the economic incentives to stop the fire from starting. This part begins with the discussion on how haze has severe adverse environmental and economic effects; how national political regime together with economic incentives obstruct the sustainable process and production methods and cause the haze problem; and how existing ASEAN mechanisms may not effectively address the problem due to its non-confrontation and non-enforceable traits.

1.1 Transboundary haze pollution

Transboundary air pollution, “Haze” caused by heavy smoke and fire, primarily from Indonesia, is one of the manifest environmental problems in ASEAN. The fire in Indonesia, in the provinces of Kalimantan on the island of Borneo and on the island of Sumatra, occurs almost every year since the 1980s during the dry season.⁴⁵⁶ When the wind pattern contributes to dispersing haze, it can cover a large area of the region, especially Singapore, Malaysia, and Brunei. Despite regional effort and agreement, the worst regional haze crisis occurred in 1997, 1998, 2013, and 2015. Particularly in the year 2015, with a prolonged dry season, it was one of the most severe haze outbreaks in the region⁴⁵⁷—lasting for four months from late June until

⁴⁵⁶ Simon SC Tay, *Southeast Asian Fires : The Challenge for International Environmental Law and Sustainable Development*, 11 GEO. ENVTL. L. REV.241, 241 (1998).

⁴⁵⁷ Francis Chan, *Haze Crisis Set to be One of the Worst on Record*, ST (Oct. 3, 2015), <https://www.straitstimes.com/asia/haze-crisis-set-to-be-one-of-the-worst-on-record>

the end of October and affecting eight member states out of ten (Indonesia, Malaysia, Singapore, Brunei, Thailand, Cambodia, Vietnam, and the Philippines).⁴⁵⁸ The consequences of haze were so catastrophic that the Indonesian Meteorology, Climatology and Geophysics Agency (BMKG) pronounced it as a “crime against humanity.”⁴⁵⁹

These smoke and fire cause significant damages in national, regional, and international contexts. In the countries where the fires took place, it causes massive biodiversity and forest loss, economic loss, health problems and deaths from particulate matter.⁴⁶⁰ At the regional level, haze causes environmental and health issues in the affected states. It could cover the affected areas for weeks or months with no recourse but to wait for the rain or wind to carry it away. It also creates unresolved conflict and tension between member states. It is also a global environmental problem. First, fires release a massive amount of gases contributing to climate change. Particularly, the fire burns on “carbon time-bomb” or carbon-rich peat swamp forest.⁴⁶¹

The WRI analysis shows that the daily emission of Indonesia during the peak period of 2015

⁴⁵⁸ Harvard and Columbia study shows that it may have caused approximately 100,300 premature deaths in total—91,600 deaths in Indonesia, 6,500 deaths in Malaysia and 2,200 in Singapore. The air quality consisting of toxic substance such as particles, cyanide, and formaldehyde was hazardous on both the Air Pollution Index (API) and Pollutants Standard Index (PSI). Since the beginning of the breakout, it caused over 500,000 cases of acute respiratory tract infections. In the worst affected area in Riau, the Mayor had to order evacuation for families with babies under 6-month old. The fire destroyed tropical forest, peat swamp forest, natural habitat of orangutans and many other species and released carbon to the atmosphere. See Agence France-Presse, *Haze from Indonesian Fires May Have Killed More Than 100,000 People*, THE GUARDIAN (Sept. 19, 2016), <https://www.theguardian.com/world/2016/sep/19/haze-indonesia-forest-fires-killed-100000-people-harvard-study>; Dominique Mosbergen, *Staggering Human Toll Of Southeast Asia's Annual Haze*, HUFFINGTON POST (Sept. 21, 2016), https://www.huffingtonpost.com/entry/haze-indonesia-100000-deaths_us_57e21df5e4b0e28b2b511d88; Kate Lamb, *Indonesia's Fires Labelled a 'Crime Against Humanity' as 500,000 Suffer*, THE GUARDIAN (Oct. 26, 2015), <https://www.theguardian.com/world/2015/oct/26/indonesias-fires-crime-against-humanity-hundreds-of-thousands-suffer>; and Georgia McCafferty, *Indonesia Begins Evacuation of Infants From Haze-Affected Regions*, CNN (Oct. 1, 2015), <https://www.cnn.com/2015/10/01/asia/indonesia-evacuates-babies-haze/index.html>

⁴⁵⁹ Euan McKirdy, *Southeast Asia's Haze Crisis: A 'Crime Against Humanity'*, CNN (Oct. 29, 2015), <https://www.cnn.com/2015/10/29/asia/southeast-asia-haze-crisis/index.html>

⁴⁶⁰ *Emergency Nursery set up in Indonesian Town Amid Hazardous Haze*, BBC (Oct. 2, 2015), <https://www.bbc.com/news/world-asia-34421543>; *Indonesia Haze May Have Led To 100,000 Premature Deaths, Says Report*, BBC (Sept. 19, 2016), <https://www.bbc.com/news/world-asia-37404515>; Maria C. Lo Bue, *Indonesia's Huge Fires And Toxic Haze Will Cause Health Problems for Years to Come*, THE CONVERSATION (Oct. 7, 2019), <https://theconversation.com/indonesias-huge-fires-and-toxic-haze-will-cause-health-problems-for-years-to-come-124556>; and Gayatri Suroyo & Tabita Diela, *World Bank Says Indonesia Forest Fires Cost \$5.2 Billion in Economic Losses*, REUTERS (Dec. 11, 2019), <https://www.reuters.com/article/us-indonesia-environment-idUSKBN1YF0FJ>

⁴⁶¹ Chandran Nair, *How to Clear Away the Haze Suffocating Southeast Asia*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/chandran-nair/southeast-asia-haze_b_8434556.html

Haze exceeded the emission of the United States, an economy 20 times larger, producing 15.95 million tons of CO₂ emission per day and three-week emission is more than one-year emission of Germany.⁴⁶² Second, Indonesia has a massive mega-biodiversity, a large area of peat swamp forests, and a third-largest tropical forest in the world.⁴⁶³ Tropical forests and peatlands serve as a global carbon sink. The effect of these biodiversity and forest losses by fire is immeasurable.

1.2 Root cause: the case of palm oil production

Fire is ignited due to a “slash-and-burn”⁴⁶⁴ traditional land clearing practice in Indonesia for agricultural and commercial purposes because it is cost-effective—the cheapest and fastest method of land clearing. The El Niño Southern Oscillation (ENSO) is an aggravating condition for the fire to go out of control because it causes a long period of droughts making forests more prone to fire and a rise of seawater temperatures in the Pacific Ocean, leading to a change in the usual monsoon cycle.⁴⁶⁵ Two types of actors engage in the slash-and-burn practice: small indigenous farmers and major agricultural businesses such as timber industries and palm oil plantations.⁴⁶⁶

⁴⁶² Nancy Haris et al, *Indonesia’s Fire Outbreaks Producing More Daily Emissions than Entire US Economy*, WRI (Oct. 16, 2015), <https://www.wri.org/blog/2015/10/indonesia-s-fire-outbreaks-producing-more-daily-emissions-entire-us-economy>

⁴⁶³ World Atlas, *5 Countries with the Largest Rainforest Coverage*, <https://www.worldatlas.com/articles/5-countries-with-the-largest-rainforest-area.html> ; and Convention on Biological Diversity, Indonesia Biodiversity Fact, <https://www.cbd.int/countries/profile/default.shtml?country=id>

⁴⁶⁴ *South East Asia haze: What is slash-and-burn?* BBC (June 24, 2013) <https://www.bbc.com/news/business-23026219>

⁴⁶⁵ E.g., Neville Nicholas, *Of Drought and Flooding Rain*, http://www.abc.net.au/science/slab/el_nino/story.htm ; M L. Khandekar et al, *The 1997 El Niño, Indonesian Forest Fires and The Malaysian Smoke Problem: A Deadly Combination Of Natural and Man-Made Hazard*, NAT HAZARDS 131, 131-44 (2000); Laurie J. Schmidt, *El Niño a Key Player in Severe Indonesia Fires*, NASA Global Climate Change, CLIMATE NASA (Sept. 8, 2016), <https://climate.nasa.gov/news/2489/el-nino-a-key-player-in-severe-indonesia-fires/>; and Neil Byron & Gill Shepherd, *Indonesia and The 1997-98 El Niño: Fire Problems and Long-Term Solutions*, 77 COMMON FOR REV 236, 236 (1998).

⁴⁶⁶ David S. Jones, *ASEAN and Transboundary Haze Pollution in Southeast Asia*, 4 ASIA EUR J. 431, 433-34(2006) in Vinod K. Aggrawal & Jonathan T. Chow, *The Perils of Consensus : How ASEAN Meta-Regime Undermines Economic and Environmental Cooperation*, 177 RSIS, 2009, 24. See also Asian Development Bank and Association of Southeast Asian Nations, *Fire, Smoke, and Haze : The ASEAN Response Strategy*, ADB (2001), xiii-xvi <https://www.adb.org/sites/default/files/publication/28035/fire-smoke-haze.pdf>

Small indigenous farmers traditionally employ a “swidden agriculture” or “shifting cultivation” method—the farmers cultivate a plot of land for a certain period and then move to another plot leaving the previous plot to regenerate and clearing a new plot by burning vegetation and logging wastes for the next season.⁴⁶⁷ This traditional slash-and-burn practice is highly criticized. Many consider this shifting cultivation method by farmers as a major cause for the forest fire.⁴⁶⁸ By relying on this assessment, many commentators claim that the best solution to prevent fire and haze is to educate local people and gradually change their agricultural practice and mindset through cooperation. On the other hand, studies suggest that indigenous farmers practice the slash-and-burn method for land clearing in small areas of secondary forests—forests previously cleared and not virgin primary rain forests.⁴⁶⁹ The impact of the small-scale fire by those indigenous farmers is thus relatively insignificant compared to the large-scale burning by palm plantations and timber industries.⁴⁷⁰

In Southeast Asia, the palm oil business, especially in Indonesia and Malaysia, has grown significantly since the 1960s due to the increased demand for palm oil consumption globally.⁴⁷¹ In Asia, China and India are the major importers of palm oil.⁴⁷² Palm oil is the most widely consumed vegetable oil—used in food, cosmetics, biofuels, household cleaning

⁴⁶⁷ Tay, *supra* note 456, at 248; Rob Cramb, *Shifting Cultivation and Human Interaction with Forest*, in ROUTLEDGE HANDBOOK OF THE ENVIRONMENT IN SOUTHEAST ASIA 180, 180-96 (Philip Hirsch ed.2017).

⁴⁶⁸ Vice Director of Asia Pulp and Paper (APP)sustainability and stakeholder engagement, Aida Greenbury, stated “It’s simply not logical for APP or its suppliers to put this investment at risk by intentionally burning” Similar view by Fire, Safety and Aviation Manager of APRIL, Bradford Sanders “It does not make sense for plantation companies to allow the destructive burning. Besides the hot spots on the satellite data may demonstrate fires lit by local farmers.” PARUEDEE NGUITRAGOOL, ENVIRONMENTAL COOPERATION IN SOUTHEAST ASIA: ASEAN’S REGIME FOR TRANSBOUNDARY HAZE POLLUTION 111 (2011). *See also* Ayomi Amindoni, *Company Blames Haze Crisis on Illegal Activities*, THE JAKARTA POST (Oct. 1, 2015), <http://www.thejakartapost.com/news/2015/10/01/company-blames-haze-crisis-illegal-activities.html>

⁴⁶⁹ *See, e.g.*, HAROLD BROOKFIELD ET AL., IN PLACE OF THE FOREST: ENVIRONMENTAL AND ECONOMIC TRANSFORMATION IN BORNEO AND EASTERN MALAY PENINSULA 133 (1995); and EVELYNE HONG, NATIVE OF SARAWAK: SURVIVAL IN BORNEO’S VANISHING FOREST 78-81 (1987).

⁴⁷⁰ Euston Quah, *Transboundary Pollution in Southeast Asia: The Indonesian Fires*, 30 WORLD DEV 429, 435(2002). *See also* Neil Byron & Gill Shepherd, *Indonesia and the 1997-98 El Nino : Fire Problems and Long-Term Solutions*, ODI, 1-4 (1998); and ANDREW VAYDA, FINDING CAUSES OF THE 1997-98 INDONESIAN FOREST FIRES: PROBLEMS AND POSSIBILITIES (1998).

⁴⁷¹ NGUITRAGOOL, *supra* note 468, at 106.

⁴⁷² Emily Chow, *Palm Oil Demand Strong as Top Buyers China, India Restock Inventories*, REUTERS (Oct. 16, 2017), <https://www.reuters.com/article/malaysia-palmoil-demand/palm-oil-demand-strong-as-top-buyers-china-india-restock-inventories-idINKBNICL12T>

products, etc.⁴⁷³ In 1975, the global market share of Indonesian palm oil export was 20 percent and increased to 40 percent in 1993.⁴⁷⁴ In 2018, Indonesia and Malaysia accounted for 90 percent of palm oil's global supply.⁴⁷⁵ Most palm oil plantations concentrate in five provinces known to be "hotspots" for haze—North Sumatra, South Sumatra, Riau, Jambi, and West Kalimantan.⁴⁷⁶ The Indonesian timber industry has also expanded intensively according to higher demand in the international market. It is one of the world's largest suppliers of tropical timber. In 1997, the Industrial Forest Plantation Scheme (Hutan Tanaman Industri or HTI) was initiated to plant fast-growing species of woods to meet the demand for plywood, pulp, and paper.⁴⁷⁷ However, during 1988–2000, only ten percent of woods were harvested from the plantations.⁴⁷⁸ The rest was obtained from unsustainable sources and illegal logging.⁴⁷⁹

Plantations and timber industries engage in burning large logged areas to convert into plantations for palm oil, cash crops, and timber production. The incentive for plantations and timber industries to continue burning to clear lands is not about tradition but the economic profit.⁴⁸⁰ The producers choose not to internalize the negative externalities in their production and process method by investing in a better alternative land clearing method. Instead, they choose a cheap unsustainable method of burning. It is the pursuit of profit at the expense of the environment. As Koh and Robinson stated, "Direct private investment, without environmental

⁴⁷³ *Which Everyday Products Contain Palm Oil?*, WWF <https://www.worldwildlife.org/pages/which-everyday-products-contain-palm-oil>

⁴⁷⁴ Nancy Morgan, *World Vegetable Oil Consumption Expands and Diversifies*, Food Review: The Magazine of Food Economics, United States Department of Agriculture, Economic Research Service, Issue 2 (1993) in NGUITRAGOOL, *supra* note 468, at 106.

⁴⁷⁵ Emily Chow, *POLL-Indonesia, Malaysia Palm Oil Output to Rise in 2018; May Pressure Prices*, Reuters (Jan. 28, 2018), <https://uk.reuters.com/article/palmoil-poll/poll-indonesia-malaysia-palm-oil-output-to-rise-in-2018-may-pressure-prices-idUKL4N1P734E>

⁴⁷⁶ World Atlas, *Where Are Indonesia's Palm Oil Plantations Located?*, WORLD ATLAS (Aug. 28, 2018), <https://www.worldatlas.com/articles/where-are-indonesia-s-palm-oil-plantations-located.html>

⁴⁷⁷ Mark Poffenberger, *Rethinking Indonesian Forest Policy*, 34 ASEAN SURV 453, 462 (1997).

⁴⁷⁸ Christopher Barr, *Profits on Paper: The Political-Economy of Fiber and Finance in Indonesia's Pulp and Paper Industries*, in *Banking on Sustainability: Structural Adjustment and Forestry in Post-Suharto Indonesia*, CIFOR and WWF Macroeconomic Program Office (2001), 2, https://photos.mongabay.com/11/Barr_2000_Profits-on-Paper.pdf

⁴⁷⁹ *Id.*

⁴⁸⁰ Tay, *supra* note 456, at 249.

controls, is one of the root causes for forest fire.”⁴⁸¹ The underlying trade incentive induces the use of fire to clear lands used for palm plantations and timber operations.⁴⁸² Thus, it is the market rule of demand and supply without regulation on production and process methods: the higher the demand for palm oil, logging, and paper in the international market, the greater scale of fire will persist.

The reason why these agribusiness owners have been able to employ the unsustainable process of land clearing is intrinsically related to the Indonesian political regime. Indonesian governing regime has been supporting or involving in forestry industries since the 19th century when an economic transformation and the high demand for timber after WWII resulted in urbanization and the emerging forest-related industries in many areas of Indonesia, including the Sumatra and Borneo islands.⁴⁸³ Under the President Sukarno regime (1901–1970), the ideology is a strong, united, and centralized state, including the forest sector—the state centralized the management of land, water, air, forest, and natural resources.⁴⁸⁴ A Basic Agrarian Law (BAL) or *Undang Undang Pokok Agraria* was passed with the initial objective of creating social justice, defining the right of land ownership, and protecting the people from the feudal system.⁴⁸⁵ Nevertheless, this law was just an open door for political elites to exploit.⁴⁸⁶ Under the regime, large government-own companies were responsible for deforestation.⁴⁸⁷

After the succession of President Suharto in 1967, the situation became worse—the new regime opened up for foreign capital and investment using forests as sources for income and

⁴⁸¹ Koh Kheng-Lian & Nicholas A. Robinson, *Strengthening Sustainable Development in Regional Inter-Governmental Governance : Lesson from the ASEAN Way*, 6 SING. J. INT'L & COMP. L. 640, 658 (2002).

⁴⁸² *Id.*

⁴⁸³ NGUITRAGOOL, *supra* note 468, at 99-100.

⁴⁸⁴ *Id.*

⁴⁸⁵ Amy Rossabi, *Legal Policy Surrounding the Degradation of Indonesia's Forest*, 1 VT. J. ENVTL. L. 29, 35-36 (1999).

⁴⁸⁶ *Id.*

⁴⁸⁷ NGUITRAGOOL, *supra* note 468, at 99-100; and Muhammad Beni Saputra, *The Untold Story of Indonesian Deforestation*, THE DIPLOMAT (May 25, 2018), <https://thediplomat.com/2018/05/the-untold-story-of-indonesian-deforestation/>

political support.⁴⁸⁸ By stressing the need for economic development and political stability, the Suharto regime developed the national philosophy called “*Pancasila*”—the society and individuals are submissive to the dominant unity of the state and enacted various laws and regulations to strengthen its control over natural resources.⁴⁸⁹ As observed by Nguitrageol, under the Basic Forestry Law 1967 (BLF), the government has the authority to seize any unclaimed land and appropriate the exploitation rights to private companies leading to vast deforestation—large areas of tropical rain forest were appropriated for logging industries and plantations for rapid productions.⁴⁹⁰ In the New Order, the regime consolidated its executive power by building a patronage system—building strong ties with supporters and military force using economic rewards and political concessions.⁴⁹¹ Due to Suharto’s policy, the military became private an army to the political and economic elites. Its activities had a significant influence on the economy, the welfare of the society, and the politic of corruption. The military was not only an investor but also a security provider, involving in many economic activities such as logging, mining, and palm oil business.⁴⁹² Many governmental development programs were environmentally destructive and responsible for regional haze pollution. One prominent example was the Suharto’s Mega Rice project in 1996—one million hectares of peatlands were drained and converted into rice fields.⁴⁹³ Indonesia consists of a large area of peatland or peat swamp forests—ample carbon storage.⁴⁹⁴ The drained area was the major cause of big haze in 1997–1998 because once dried out, peatlands were prone to catch fire, and even if the fire was

⁴⁸⁸ NGUITRAGOOL, *supra* note 468, at 101-103. See also Dauvergne Peter, *The Politics of Deforestation in Indonesia*, 66 PAC AFF 497, 497-518 (1993).

⁴⁸⁹ NIELS MUDLER, *SOUTHEAST ASIAN IMAGES: TOWARDS CIVIL SOCIETY?* 87 (2003).

⁴⁹⁰ NGUITRAGOOL, *supra* note 468, at 102..

⁴⁹¹ Rita Lindayati, *Ideas and Institutions in Social Forestry Policy*, in WHICH WAY FORWARD? PEOPLE, FOREST, AND POLICY MAKING IN INDONESIA 36, 39 (C.J.P. Colfer & I.A.P. Resosudarmo eds., 2003).

⁴⁹² *Rainforest News, Indonesian Military Behind Illegal Logging*, RAINFOREST NEWS (Feb. 7, 2010), <https://www.salvaleforeste.it/en/illegal-logging/2217-indonesia-army-illegal-logging.html>

⁴⁹³ Jenny Goldstein, *Carbon Bomb: Indonesia’s Failed Mega Rice Project*, ENVIRONMENT & SOCIETY PORTAL (Spring 2016), <http://www.environmentandsociety.org/arcadia/carbon-bomb-indonesias-failed-mega-rice-project>

⁴⁹⁴ The exact extend of peatlands is difficult to determine due to the mapping methodology or annual fluctuations in drainage. It ranges approximately between 15-20 million hectares. Pantua Gambut, *The Size and Distribution of Peatland in Indonesia*, <http://www.en.pantaugambut.id/peatland-101/what-is-peat/the-size-and-distribution-of-peatland-in-indonesia>

stopped on the surface, it continued to burn underground, producing thick smoke haze and substantial emission of carbon.⁴⁹⁵ Regardless of the consequences, over 30 million acres of protected peatlands are subject to a concession for palm oil and timber plantations in recent years.⁴⁹⁶

In the post-Suharto period from the 20th century, the political dynamic still leans towards unsustainable exploitation of natural resources by the governmental-invested companies, private companies with strong ties with the government, and foreign investors such as China, Malaysia, and Singapore.⁴⁹⁷

Three factors cause the inefficiency of Indonesia to control fire. The first factor is the Indonesian's geography and size. Jerger pointed out that Indonesia is the largest archipelagic state in the world, consisting of 17,508 islands, 6000 inhabited.⁴⁹⁸ Simply, it is too big to manage the emergency crisis in case of fire—lack of infrastructure in certain areas makes it more challenging to respond effectively.⁴⁹⁹ The second factor is inefficient legal enforcement. Heilmann argued that Indonesian domestic laws are sufficient to address the problems, and no new laws are required.⁵⁰⁰ However, as Tan observed, the lax and inefficient legal enforcement of the laws resulting from confusion, corruption, and incompetent officials is an obstruction.⁵⁰¹ The third factor was the economic crisis in 1997. Tay stressed that part of Indonesia's failure

⁴⁹⁵ Goldstein, *supra* at 493; and Leona Liu, *Fighting Fires on Indonesia's Peatlands*, UNEP (May 22, 2018), <https://www.unenvironment.org/news-and-stories/story/fighting-fires-indonesias-peatlands>

⁴⁹⁶ Hidayah Hamzah, *Indonesia's Deforestation Dropped 60 Percent in 2017, but There's More to Do*, WRI (Aug. 14, 2017), <https://www.wri.org/blog/2018/08/indonesias-deforestation-dropped-60-percent-2017-theres-more-do>

⁴⁹⁷ Kharishar Kahfi, *Indonesia's Current Development Path Unsustainable: Bappenas*, THE JAKARTA POST (Mar. 26, 2019), <https://www.thejakartapost.com/news/2019/03/26/indonesias-current-development-path-unsustainable-bappenas.html>; and Naomi Larson, *'The last place on Earth': How Sumatra's Rainforest is Being Cleared for Palm Oil*, THE GUARDIAN (Sept. 28, 2017), <https://www.theguardian.com/sustainable-business/2017/sep/28/last-place-on-earth-deforestation-palm-oil-threat-leuser-rainforest>

⁴⁹⁸ David B. Jerger, *Indonesia's Role in Realizing the Goal of ASEAN's Agreement on Transboundary Haze Pollution*, 14 JSDLP 35, 36 (2014).

⁴⁹⁹ *Id.*

⁵⁰⁰ Daniel Heilmann, *After Indonesia's Ratification: The ASEAN Agreement on Transboundary Haze Pollution and Its Effectiveness as a Regional Environmental Governance Tool*, 3 J. CURR. SOUTHEAST ASIAN AFF. 95, 113 (2015).

⁵⁰¹ Alan Khee-Jin Tan, *The Haze Crisis in Southeast Asia: Assessing Singapore's Transboundary Haze Pollution Act 2014*, NUS Law Working Paper (2015), 11-14, https://law.nus.edu.sg/wps/pdfs/002_2015_Alan%20Khee-Jin%20Tan.pdf

to address the haze issue in 1997–1998 was because the national priority had been put in alleviating economic depression; thus, it lacked the political will and financial power to fight the fire.⁵⁰² The economic crisis might impair the governmental ability to deal with major haze disasters in 1997–1998, but the economic crisis did not trigger the fire.⁵⁰³ Fire has been burning since the 1980s when Indonesia’s economy was booming.⁵⁰⁴

In essence, there are two significant root causes contributing to forest fire and haze: first, the market forces—rule of demand and supply and competitive advantage in trade led to unsustainable production and process methods for the rapid economic gains; second, the political and military regimes consisting of corruption and nepotism that aims for short-term economic profit ignoring environmental consequences denying public participation and environmental rights for its nationals.

1.3 Regional cooperation and legal framework within a global context: ASEAN Agreement on Transboundary Haze Pollution 2002 and the principle of state responsibility

Haze has long been considered a regional environmental problem due to its transboundary nature and immediate catastrophic effects on human health and natural conditions. The inability to prevent and stop the fire intensifies both the regional and international cooperation and tension. Due to the ASEAN non-confrontational approach, the existing regional framework implicitly recognizes the economic incentive as the fire’s underlying cause. However, it does not provide an efficient mechanism to eliminate the cause.

ASEAN cooperation on transboundary air pollution was initiated in 1985 with the adoption of Agreement on the Conservation of Nature and Natural Resources acknowledging

⁵⁰² Tay, *supra* note 456, at 252.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

the air pollution and trans-frontier environmental effect.⁵⁰⁵ Then transboundary pollution was highlighted in the 1990 Kuala Lumpur Accord on Environment and Development and was identified as a key environmental concern of ASEAN in Singapore Summit 1992.⁵⁰⁶ Singapore pushed for a multilateral cooperation, citing that it was impossible to reduce the impact of haze domestically.⁵⁰⁷ The substantial cooperation between member states had started when the ASEAN Ministerial Meeting on Haze was established in 1997—this created a specific regime for haze marking its importance and distinguished it from other transboundary pollutions.⁵⁰⁸ In April 1999, after ASEAN adopted the zero-burning policy urging member states to implement it, it launched many dialogue sessions and workshops to promote the zero-burning practice among plantation and timber industries.⁵⁰⁹

The international community has also taken part in giving assistance and training for firefighting. For example, in 1998, Asia Development Bank granted regional technical assistance in accordance with the Regional Haze Action Plan (RHAP).⁵¹⁰ United Nations Environment Programme (UNEP) has been a main organization to tackle the haze issue in the region. In 2015, intensive firefighting programs were staged as part of the UN Environment project “Generating Anticipatory Measures for Better Utilization of Tropical Peatlands (GAMBUT)”—funded by USAID and operated by the United Nations Office for Project Services (UNOPS).⁵¹¹ The Fire Risk System has been installed—“a computerized forecasting

⁵⁰⁵ Hielmann, *supra* note 500, at 101.

⁵⁰⁶ *ASEAN Cooperation Plan on Transboundary Pollution 1995* in KOH KHENG-LIAN, 2 ASEAN ENVIRONMENTAL LAW, POLICY AND GOVERNANCE 321 (2013).

⁵⁰⁷ In 1995, ASEAN agreed to adopt the Cooperation Plan on Transboundary Pollution, follow with Haze Technical Task Force (HTTF) and activation of an alert system. Follow the haze outbreak in 1997, the meeting established the Regional Haze Action Plan (RHAP) requiring member states to develop national plans to prevent and mitigate the fire, to establish early warning and monitoring system, and to enhance firefighting capability Helena M. Varkkey, *Addressing Transboundary Haze Through ASEAN: Singapore’s Normative Constraint*, 7 J. INT. STUD. 83, 91-92 (2011).

⁵⁰⁸ Helena M. Varkkey, *The ASEAN Way and Haze Mitigation Efforts*, 8 J. INT. STUD. 77, 85 (2012).

⁵⁰⁹ Guidelines for the Implementation of the ASEAN Policy on Zero Burning, ASEAN <http://haze.asean.org/download/zero-burning/ZeroBurningGuidelines.pdf>

⁵¹⁰ S. Tahir Qadri, *Asian Development Bank Technical Assistance in Fire, Smoke and Haze: The ASEAN Response Strategy*, ADB, 81 (2001), <https://www.adb.org/sites/default/files/publication/28035/fire-smoke-haze.pdf>

⁵¹¹ Leona Liu, *Fighting Fires on Indonesia’s Peatlands*, UNEP (May 22, 2018), <https://www.unenvironment.org/news-and-stories/story/fighting-fires-indonesias-peatlands>

tool that assesses socio-economic and biophysical factors to predict where hotspots will occur, up to three months in advance.”⁵¹²

In sum, there is numerous regional and international cooperation with an effort to control haze problems.⁵¹³ Still, the emphasis has been put on “how to stop the fire once it is already started” such as firefighting, rehabilitation, states coordination, and fire management. The real question is “how to stop the fire from starting.” They have to directly tackle the underlying causes of fire—the economic incentive in trade and Indonesia’s political mindset—which is the best way to prevent the fire from starting from the beginning. What lies beneath is controlling the sustainability of agricultural process and production. All ASEAN action plans and policies were soft laws and not sufficient to address the issue. They did not have binding effects on member states and did not provide any penalty provision and compensation.⁵¹⁴ Singapore pressed on having a more “concrete” regional agreement.⁵¹⁵

As a result, the ASEAN Agreement on Transboundary Haze Pollution (ATHP) was initiated in 2001, pursuing to be a legally binding instrument, and all member states signed it in 2002.⁵¹⁶ The ATHP entered into force in November 2003. By 2006, all member states have ratified the agreement except Indonesia and the Philippines.⁵¹⁷ The Philippines ratified it in 2010.⁵¹⁸ Despite being a prime source of fire, Indonesia took a considerably long time to consider the ratification due to its domestic politics.⁵¹⁹ Until 14 October 2014, Indonesia has finally ratified the ATHP.⁵²⁰

⁵¹² GAMBUT, <https://gambut.org/new-page/>

⁵¹³ Other countries have contributed equipment assistances for firefighting such as Australia provided water-bombing assistance. <https://www.sbs.com.au/news/australia-among-countries-sending-firefighting-help-to-indonesia>

⁵¹⁴ Varkkey, *supra* note 507, at 92.

⁵¹⁵ *Id.*

⁵¹⁶ Hielmann, *supra* note 500, at 103 and ASEAN Agreement on Transboundary Haze Pollution 2002 <https://haze.asean.org/asean-agreement-on-transboundary-haze-pollution/>

⁵¹⁷ Status for Ratification of ASEAN Agreement on Transboundary Haze Pollution 2002 <http://haze.asean.org/status-of-ratification/>

⁵¹⁸ *Id.*

⁵¹⁹ Jerger, *supra* note 498, at 42.

⁵²⁰ *Id.*

There are two events that might have given a push to Indonesia's ratification after the extensive pending process: the massive haze crisis in 2013 with its disastrous consequences⁵²¹ followed by the enactment of Transboundary Haze Pollution Act by Singapore imposing criminal and civil penalties upon entities having businesses in Singapore and being responsible for land clearing by fires that occurs outside Singapore but causes air pollution in Singapore.⁵²² The Act does not refer to the state responsibility, but it confers extraterritorial criminal and civil liabilities to the legal entities—agribusiness companies causing fire outside the country but has adverse haze impact within the territory.⁵²³ This should have a positive impact on the haze regime since law enforcement is a shortcoming of Indonesia, but it is a strength of Singapore. Part of Indonesia's excuse was that the fire was also the result of foreign companies' practices, especially Malaysian and Singaporean investors and agribusiness owners; thus, it was unfair for Indonesia to bear all the responsibility. With the Singapore's Transboundary Haze Pollution Act, the international and regional pressure shifted to Indonesia without recourse.

Nevertheless, it is interesting to note that Indonesia's laws and regulations have complied with ASEAN Haze policies, plans, and agreements even before the ratification of the ATHP in 2014. For instance, Indonesia adopted the zero-burning policy banning the use of fire for land clearing and created Plans of Actions similar to the ATHP educating people about zero-burning policy and maintaining firefighting force.⁵²⁴ How is it going to be different after the ratification?

⁵²¹ The pollutant Standard Index have reached 401—the highest score in Singapore history. Karishma Vaswani, *Singapore Haze Hits Record High From Indonesia Fires*, BBC (June 21, 2013) <https://www.bbc.com/news/world-asia-22998592>

⁵²² Singapore Transboundary Haze Pollution Act 2014 <https://sso.agc.gov.sg/Act/THPA2014>

⁵²³ Alan Khee-Jin Tan, *The 'Haze' Crisis in Southeast Asia: Assessing Singapore's Transboundary Haze Pollution Act 2014*, NUS, Feb. 2015, at 1, 18.

⁵²⁴ Jerger, *supra* note 498, at 42.

First, it is necessary to discuss the principles, functions, enforcement mechanism, dispute settlement, and effectiveness of the ASEAN Agreement on Transboundary Haze Pollution (ATHP). The foundation principle of ATHP is embedded in Article 3.1:

The Parties have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health of other States or of areas beyond the limits of national jurisdiction.⁵²⁵

This article spelled out the international environmental principle of **state responsibility**—the states are under obligation to do “**no harm**” to the environment of other states and the areas beyond its national jurisdiction. The principle first derives from the famous transboundary air pollution case “Trail-Smelter Case” in 1941 where the United States brought an arbitral case against Canada because the state of Washington had suffered the air pollution of Sulfur Dioxide emitting from the Trail Smelter, a Canadian corporation operated in Canada.⁵²⁶ This principle of state responsibility has been regarded as customary international environmental law by the International Court of Justice; consequently, it creates a binding legal obligation for the state to be held responsible in case of the breach.⁵²⁷ Later, the obligation to cause no harm has been enshrined in Principle 21 of the Stockholm Declaration of the United Conference of the Human Environment 1972⁵²⁸ and Principle 2 of the Rio Declaration 1992.⁵²⁹

⁵²⁵ ASEAN Agreement on Transboundary Haze Pollution 2002, https://haze.asean.org/?wpfb_dl=32

⁵²⁶ The Arbitral Tribunal held that: “Under the principles of international law as well as the law of the United States, no state has a right to use or permit the use of its territory in such a manner so as to cause injury by fumes in or to the territory of another or the properties of person therein, when the case is of serious consequences” Reports of International Arbitral Awards, Trail Smelter Case US/Canada 1941, United Nations available at http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf

⁵²⁷ HUNTER ET AL, *supra* note 97, at 497-98.

⁵²⁸ Declaration of the United Nations Conference on the Human Environment <http://www.un-documents.net/unchedec.htm>

⁵²⁹ “State have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States and areas beyond the limits of national jurisdiction.” The Rio Declaration on Environment and Development 1992 http://www.unesco.org/education/pdf/RIO_E.PDF

In general, there is a possible conflict between the state responsibility and the traditional implication of state sovereignty by the Westphalian system—states have legitimate and absolute sovereign right to govern their nationals and exploit the resources in their territory without external interference.⁵³⁰ In the ASEAN general context, the ASEAN Way principle leans towards the traditional definition of state sovereignty. However, the challenge of state sovereignty under the ASEAN Way is the rise of Non-Traditional Security (NTS) issues—particularly the transnational environmental crisis, pandemic environmental health threats, illegal wildlife trade, and climate change impacts where problems originating in a member state is no more an internal affair but rather a regional or global problem requiring multilateral effort and measures. The Haze crisis in the region is not merely a matter of the environment. It is a matter of regional security. To this extent, it is a matter of world security considering the massive adverse effects it can cause to virgin primary forest, mega-biodiversity, humanity, and global climate change

As Koh, Robinson, and Lye noted, a major progress in ASEAN environmental governance in the past decades is to securitize transboundary challenges, including environmental problems as haze, into a non-traditional issue under the first pillar of the ASEAN Political-Security Community (APSC).⁵³¹ While most environmental problems take the back seat and fall within the scope of the third pillar, the ASEAN Socio-Cultural Community (ASCC), the haze a problem has a priority NTS tag under the first pillar APSC, requiring the enhance cooperation to provide effective and timely response.⁵³² Thus, member states cannot take “isolationist stance” and the traditional state sovereignty gives way for urgent measures and regional cooperation.⁵³³

⁵³⁰ Stephane Beaulac, *Westphalian Model in Defining International Law: Challenging the Myth*, AJLH (2004), <http://classic.austlii.edu.au/au/journals/AJLH/2004/9.html>

⁵³¹ KOH KHENG-LIAN ET AL., ASEAN ENVIRONMENTAL LEGAL INTEGRATION : SUSTAINABLE GOALS ? 128 (2016)

⁵³² *Id.* at 128-129.

⁵³³ *Id.*

When all member states adopted and ratified the ATHP, it is clear that member states' sovereignty over the use of the natural resources in their jurisdictions is limited by the principle of **state responsibility** and obligation to do no harm.⁵³⁴ Because the sovereignty over national jurisdiction is not absolute, member states bear the responsibility to ensure that the activities occurring within their territories will not negatively impacts the others. Nevertheless, adopting state responsibility is not the same as enforcing it. There are no coercive measures to enforce the agreement. ASEAN accepts the principle of state responsibility, but there is no **state liability** attached to it. There is no provision or mechanism for liability, penalties, and compensation.⁵³⁵ The access to justice, the dispute settlement, is limited to consultation and negotiation as the traditional ASEAN Way.⁵³⁶ The enforcement of the ATHP is a matter of diplomacy and has no actual legal recourse.⁵³⁷ Despite the intention to create a legally binding haze regime, the ATHP is another soft law instrument.⁵³⁸

Notwithstanding the existence of customary international law and the ATHP, from the history of all haze crisis in the region, the affected states have never made a single case against the source state claiming the state responsibility and liability, not before the International Court of Justice or Arbitral Tribunal. There are two possible reasons. First, it is the influence of economic interest because Malaysian and Singaporean are the major investors in palm businesses in Indonesia.⁵³⁹ Second, seeking dispute settlement by legal actions is not in the ASEAN tradition of non-intervention and non-confrontation.⁵⁴⁰ State actions against another state seem to be a sensitive matter in ASEAN.⁵⁴¹ It is also likely that the source state would

⁵³⁴ Laely Nurhidayah et al., *The Influence of International Law upon ASEAN Transboundary Haze Pollution in Southeast Asia*, 37 CONTEMP SOUTHEAST ASIA 183, 191 (2015).

⁵³⁵ *Id.* at 192.

⁵³⁶ ASEAN Agreement on Transboundary Haze Pollution Article 27

⁵³⁷ Heilmann, *supra* note 500, at 108.

⁵³⁸ *Id.* at 109.

⁵³⁹ Tan, *supra* note 523, at 3.

⁵⁴⁰ Heilmann, *supra* note 500, at 110.

⁵⁴¹ As Nurhidayah observed: "when Singapore raised the issue of haze in United Nations General Assembly in 2006 to seek assistance for recourse and enforcement, Indonesia strongly disapproved it and accused Singapore for not upholding the spirit of cooperation among ASEAN member states." Nurhidayah, *supra* note 534, at 197.

refuse to submit itself under the international court or tribunal jurisdiction. To neutralize the states' tension in haze conflict, Tay proposed another approach—privatizing the conflict.⁵⁴² Singapore finally followed through with this approach by enacting the Transboundary Haze Pollution Act in 2014, posing criminal and civil liabilities to private parties.

Jerger identified the ATHP as having a non-confrontational managerial model.⁵⁴³ He argued that coercive measures do not lead to greater compliance and pointed out that the managerial model would allow compliance to increase over time.⁵⁴⁴ The managerial features can be found throughout the ATHP. For instance, the ATHP encourages member states to take the precautionary principle—taking steps to anticipate, prevent, and monitor transboundary haze pollution resulting from land and forest fires.⁵⁴⁵ In case of fire, if the state needs assistance, it may request such assistance directly from any other party or request through the ASEAN Coordinating Centre for Transboundary Haze Pollution Control (The Haze Centre).⁵⁴⁶ The main task of Haze Centre is to facilitate cooperation and coordination among parties in managing haze by gathering data and distributing data. Jerger argued that excluding legal sanctions and resources creates incentives for the member states to be more willing to share data and information.

On the contrary, Heilmann argued that since there is no coercive measure for implementation and enforcement, the haze regime largely depends on voluntary commitments of member states.⁵⁴⁷ This could potentially weaken the effectiveness of the ATHP. First, the

⁵⁴² Tay, *supra* note 456, at 295.

⁵⁴³ Jerger, *supra* note 498, at 38.

⁵⁴⁴ *Id.*

⁵⁴⁵ For prevention of fire member states shall:

- (i) Develop and implement legislative and other regulatory measures to promote zero-burning policy;
- (ii) Identify and monitor areas prone to fire;
- (iii) Strengthen local firefighting and fire-management capability;
- (iv) Promote public education and awareness building campaigns.

ASEAN Agreement on Transboundary Haze Pollution Article 3.3 and ASEAN Agreement on Transboundary Haze Pollution Article 9

⁵⁴⁶ ASEAN Agreement on Transboundary Haze Pollution Article 12.2.

⁵⁴⁷ Heilmann, *supra* note 500, at 105-116.

exercise of precautionary principle is a recommendation, not an obligation, since the provision uses the term “should” and not “shall.”⁵⁴⁸ Second, for monitoring, the ATHP obligates the member states to take appropriate measures; however, the appropriateness concerning the types of measures or action plans depends wholly upon member states’ discretion.⁵⁴⁹ Third, for assistance in case of fire, the state where the fire is originated has full discretion and can choose whether to request assistance—meaning that ASEAN or the affecting states do not have authority to compel the state to accept assistance.⁵⁵⁰ Fourth, there is no target timeline for implementing the preventive measures.⁵⁵¹ The provisions are likely to serve as guidelines. Lastly, coordinating information sharing depends on national authority. Unlike what Jerger expected, Indonesia and Malaysia were reluctant to share data at the Kuala Lumpur meeting.⁵⁵² Indonesia claimed that the information law forbids public disclosure of such information. Malaysian shared similar excuses.

The best way to prevent the fire from starting is to eliminate the root cause. Is it whether ASEAN does not regard it as a cause or the issue is too controversial to confront expressly? The latter is likely to be true considering that ATHP recognizes the economic incentives to burn biomass for land clearing because there is no market value of biomass, and it is the cheapest way for land clearing. Thus, in Article 16(g), the member states shall promote the development for both markets to utilize biomass and appropriate methods for disposal of agricultural waste.⁵⁵³ It is an implicit way to use a market mechanism to solve the root cause of haze from

⁵⁴⁸ *Id.* at Article 3.3

⁵⁴⁹ Heilmann, *supra* note 500, at 105.

⁵⁵⁰ *Id.* at 106.

⁵⁵¹ *Id.*

⁵⁵² “At the Kuala Lumpur meeting, the Indonesian government resisted and raised legal obstacles to the sharing of map information. Indeed, the Indonesian Environment Minister insisted that the country’s freedom of information law prohibited the public disclosure of such information. It was further claimed that data that could reveal the country’s natural resources wealth such as forests could not be made public under Indonesian law. Ironically, Indonesia’s reluctance was shared by Malaysia. The Malaysian Natural Resources and Environment Minister highlighted the fact that land matters fell within the authority of the state governments in Malaysia, and went on to doubt if the Malaysian federal government could publish details of concession maps.” Tan, *supra* note 523, at 4.

⁵⁵³ ASEAN Agreement on Transboundary Haze Pollution Article 16

another angle and less confrontational because it is less likely that ASEAN will expressly raise the economic incentive in trade for unsustainable production and process method as a root cause for environmental problems and adopt the polluter pay principle since this economic incentive are all held, to the greater or lesser extent, by all the member states.

1.4 Conclusion and future development

Despite being a soft law instrument with no coercive enforcement provisions, the ATHP successfully inserts the importance of fire prevention instead of the traditional approach of firefighting. In recent years, domestic and regional efforts have been put towards preventive measures. After the ratification of ATHP, at the beginning of 2016, Indonesia strengthened its commitment to fire prevention by setting up the Peatland Restoration Agency. It aimed to implement programs restoring peatland areas, initiating the land-swap scheme aiming to relocate plantations from peatlands to other mineral soil spots, and using Lidar technology for mapping to see data on the water level of peatland.⁵⁵⁴ The government also issued a moratorium on the new conversion of peatland for agricultural activities.⁵⁵⁵ By the end of 2016, land clearing by fire dropped by 90 percent from 2.6 million hectares to 300,000 hectares.⁵⁵⁶ In 2016 and 2017, Indonesia had the highest reduction of primary forest loss in protected peatlands by 68 and 51 percent in Sumatra and Kalimantan.⁵⁵⁷ These government programs and the constant rainfall were claimed to contribute to “the clear skies” in the region during 2016–2017.⁵⁵⁸ Realizing that the catastrophic effects of unsustainable production and process methods

⁵⁵⁴ Audrey Tan & Luke Anthony Tan, *2018 Won't See Repeat of 2015 Haze Crisis: Indonesian Minister*, ST (May 18, 2018), <https://www.straitstimes.com/singapore/environment/2018-wont-see-repeat-of-2015-haze-crisis-indonesian-minister>

⁵⁵⁵ Chelsea Harvey, *Indonesia just Made a Huge Move to Protect the Climate*, WASH. POST. (Dec. 6, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/06/indonesia-just-made-a-huge-move-to-protect-the-climate/?utm_term=.6bb89015e072

⁵⁵⁶ Arlina Arshad, *Indonesia's Strategy: No Fires No Haze*, ST (Dec. 17, 2016), <https://www.straitstimes.com/asia/east-asia/indonesias-strategy-no-fires-no-haze>

⁵⁵⁷ Hamzah, *supra* note 496.

⁵⁵⁸ Dr Nirarta Samadhi, director of research organization World Resources Institute Indonesia gave the interview in Tan & Tan, *supra* note 554.

outweigh any economic profit might be why the government put efforts into tackling the haze problem.

However, the fire and haze outbreak returned in March 2018 during the dry season.⁵⁵⁹ The fact that the hotspots were located in West Kalimantan, where there is a concentration of palm oil plantations, could mean that the government efforts and policies had minor impacts.⁵⁶⁰ The return of haze corresponds to environmentalists' concerns over the new land-swap scheme inserting that it has to be scrutinized as the scheme causes many dissents from big agribusiness companies.⁵⁶¹ Many cite difficulties to relocate and see little benefit to relocate to smaller plots of land. The attention should be put towards the new "substitute" lands to be allocated for the plantations.⁵⁶² For the benefit of the plantations, the substitutes have to be big enough. The environmentalists are afraid that the substitutes would be the untouched primary forests, and it would risk further deforestation.⁵⁶³ Therefore, the transparency of the government and social participation are essential parts of the scheme to ensure that the objective will be followed and not be corrupted by nepotism or other monetary incentives. It remains to be seen whether Indonesia, together with regional cooperation, will be able to stop the fire for good.

⁵⁵⁹ The Jakarta News Network, *Fire Burns Almost 1,700 Hectares of Land, Forests in Riau as Haze Spreads*, ST (Mar. 10, 2018), <https://www.straitstimes.com/asia/se-asia/fire-burns-almost-1700-hectares-of-land-forests-in-riau-as-haze-spreads>

⁵⁶⁰ "The fact that this year the number of hotspots is very high in West Kalimantan shows that efforts to improve peat governance in the province have failed." Anton P. Widjaya, director of Walhi's West Kalimantan chapter, said at a recent press conference in Jakarta, in by Aseanty Pahlevi et al, *Fires and Haze Return to Indonesia as Peat Protection Bid Falls Short*, MONGABAY (Aug 29, 2018), <https://news.mongabay.com/2018/08/fires-and-haze-return-to-indonesia-as-peat-protection-bid-falls-short/>

⁵⁶¹ Han Nicholas Jong, *Land-Swap Rule Among Indonesian President Jokowi's Latest Peat Reforms*, MONGABAY (Aug. 11, 2017), <https://news.mongabay.com/2017/08/land-swap-rule-among-indonesian-president-jokowis-latest-peat-reforms/>

⁵⁶² Han Nicholas Jong, *Indonesia Land Swap, Meant to Protect Peatlands, Risks Wider Deforestation, NGOs Say*, MONGABAY (Apr. 9, 2018), <https://news.mongabay.com/2018/04/indonesia-land-swap-meant-to-protect-peatlands-risks-wider-deforestation-ngos-say/>

⁵⁶³ Ayu Purwaningsih, *'Land Swap' Plan Endangers Indonesia's Rainforest*, DW (Aug. 14, 2018), <https://www.dw.com/en/land-swap-plan-endangers-indonesias-rainforest/a-45074446>

2. COMMON BUT DIFFERENTIATED RESPONSIBILITY IN CLIMATE CHANGE MEASURES: THE CASE STUDY OF ENERGY PRODUCTION

Climate change is the worst environmental problem causing social, economic, and environmental damages to ASEAN member states. On the other hand, the energy production using coal combustion and hydropower in ASEAN for energy trade and consumption due to rapid economic expansion are major emissions contributing to climate change. The increase of coal use in ASEAN member states results from both comparative advantage and carbon leakage aggravating by weak political regimes. The existing ASEAN mechanism to address climate change is not solid and efficient, partly due to the perception of common but differentiated responsibilities. The principle may need to be reconsidered to avoid being an excuse for carbon leakage and achieve efficiency and equity.

2.1 Climate change and Southeast Asia region

The worst form of transboundary pollution is the emission of greenhouse gases (GHGs) causing global climate change.⁵⁶⁴ Climate change is a global environmental problem affecting every state to the lesser or greater extent, regardless of who might be the biggest source of contribution—its effects are highly asymmetrical. While developed states have been more accountable for massive emissions, developing states will suffer more the imminent adverse effects due to the geographical, economic, technological, and infrastructural factors.⁵⁶⁵

Member states of ASEAN are both contributors and victims of climate change. In the region, the emission levels vary among the states who are great contributors (e.g., Indonesia,

⁵⁶⁴ Carbon Dioxide (CO₂), Methane (CH₄), Nitrous Oxide (N₂O), Hydro-Fluorocarbon (HFCs), Perfluorocarbon, and Sulfur Hexafluoride (SF₆) have been listed in Kyoto Protocol as greenhouse gases contributing to global warming. Among all, CO₂ has the most significant impact on global warming. Kyoto Protocol 1998

⁵⁶⁵ UNFCCC (2007) in Isabelle Whitehead, *Climate Change Law in Southeast Asia: Risk, Regulation and Regional Innovation*, 16 ASIA PAC. J. ENVTL. L. 141, 143 (2013). See e.g., Hermann Waibal et al, *Voices of the Poor on Climate Change in Thailand and Vietnam*, 170-184; and Somchai Jitsuchon, *Poor Thai Farmers' Adaptation to Climate Change*, 187-196 in THE ENVIRONMENTS OF THE POOR IN SOUTHEAST ASIA, EAST ASIA, AND THE PACIFIC (Aris Ananta et al., eds 2013).

Thailand, Malaysia, and the Philippines), the states who are insignificant contributors (e.g., Myanmar, Laos, Cambodia, and Singapore), and the states who contribute in emissions elsewhere by exporting hydrocarbon resources (e.g., Brunei and Vietnam).⁵⁶⁶ For the global emission, the region's emission is considered to be relatively low compared to the major powers—China and the United States.⁵⁶⁷ However, the emission by ASEAN member states cannot be neglected since the region's economy is drastically growing.⁵⁶⁸ To date, Indonesia is one of the top ten emitters in the world.⁵⁶⁹ ASEAN economic growth by the export-led policy is a significant factor of rising emissions in the region, and those emissions occur during the production and process of goods and energy production. As long as the production and process methods remain the same, the greater economic scale via trade means the greater emission. Increasing trade agreements and economic growth may increase the region's vulnerability if the approach to development is not adaptive to the climate change impact.⁵⁷⁰

Southeast Asia region is particularly vulnerable to climate change risks due to the concentration of people, especially the poor, economic activities in the coastal areas, its rich biodiversity, and resources-based economy.⁵⁷¹ In these recent years, environmental disasters are more frequent and catastrophic:⁵⁷² cyclone Nargis in Myanmar 2008,⁵⁷³ earthquakes and

⁵⁶⁶ Global Carbon Atlas, <http://globalcarbonatlas.org/en/CO2-emissions>

⁵⁶⁷ CDIAC Carbon Dioxide Analysis Center

⁵⁶⁸ The amount of overall emission from developing countries is speculated to surpass the emission of developed countries in 2040. *Developing Countries to Vastly Outpace OECD in Carbon Emission: EIA*, REUTERS, <https://www.reuters.com/article/us-usa-energy-carbon/developing-countries-to-vastly-outpace-oecd-in-carbon-emissions-eia-idUSBRE96O0KN20130725>

⁵⁶⁹ *Id.*

⁵⁷⁰ Jessica Dator-Bercilla et al, *Climate Change Challenges in ASEAN-facilitated Interventions in the Mekong Subregion*, IISD, V (2010), https://www.iisd.org/system/files/publications/climate_challenges_mekong_report.pdf

⁵⁷¹ IPCC, *Climate Change 2007, Impacts, Adaptation and Vulnerability* : Contribution of Working Group II to the Fourth Assessment Report of the IPCC, Cambridge : Cambridge University Press.

⁵⁷² The environmental impacts of climate change in the region include high sea level rise, earthquakes, extreme droughts, floods, landslides, tropical cyclones and typhoons, tsunamis, temperature disruption, tropical diseases, sea water intrusion, and water shortage. Sea level is expected to rise about 3-16cm by 2030 and 7-50 cm by 2070 IFAD, The global mechanism UNCTCD Fact Sheet Climate Change impacts in the Asia Pacific Region and the Pacific Annual Performance Review workshop 2009.

⁵⁷³ Anthony Mwangi, *Cyclone Nargis and Talk of Climate change*, IFRC (Nov. 5, 2008), <http://www.ifrc.org/en/news-and-media/news-stories/asia-pacific/myanmar/cyclone-nargis-and-talk-of-climate-change/>

tsunami in Indonesia 2010,⁵⁷⁴ extreme floods in Thailand 2011,⁵⁷⁵ typhoon Bopha in the Philippines 2012, cyclone Haiyan in the Philippines 2013, and typhoon Mangkhut or Ompong in the Philippines 2018.⁵⁷⁶ The loss of human lives and resources was tremendous. The member states along the Pacific Coast will continue to be hit by severe typhoons and hazardous sea-level rise that will submerge the coastal areas and face saltwater intrusion.⁵⁷⁷ The other member states will be affected by extreme temperature fluctuation—longer and drier during the dry season leading to reduced inland water supply for consumption and agriculture and increased rainfall during the wet season leading to more severe flooding.⁵⁷⁸

These climate effects threaten the ecosystem, the livelihood of the people, and the economy of the region. Human displacement will be inevitable, which will raise the legal question of human rights and climate refugees' status in the international context.⁵⁷⁹ Agricultural production, the main sources of food supply and primary export goods, and natural resources are exposed to a wide range of climate-related risks leading to food insecurity and loss of natural capital.⁵⁸⁰ The fluctuation in precipitation patterns, temperature, evaporation,

⁵⁷⁴ Bill McGuire, *How Climate Change Triggers Earthquakes, Tsunamis and Volcanoes*, THE GUARDIAN (Oct. 16, 2016), <https://www.theguardian.com/world/2016/oct/16/climate-change-triggers-earthquakes-tsunamis-volcanoes>; and *Tsunami Highlights Climate Change Risk, Says Scientist*, THE GUARDIAN (Dec. 31, 2004), <https://www.theguardian.com/education/2004/dec/31/highereducation.uk1>

⁵⁷⁵ Parichart Promchote et al, *The 2011 Great Flood in Thailand: Climate Diagnostics and Implications from Climate Change*, 29 J. CLIM. 367, 367-79 (2016).

⁵⁷⁶ Brian C. Howard, *Super Typhoon, Hurricane: What's the Difference?*, NATGEO (Sept. 12, 2018) <https://www.nationalgeographic.com/environment/2018/09/super-typhoon-mangkhut-typhoons-vs-hurricanes/>; and Alice Shen, *How Climate Change Could Cause More Mega-Storms like Super Typhoon Mangkhut and Hurricane Florence*, SCMP (Sept. 15, 2018), <https://www.scmp.com/news/china/society/article/2164262/how-climate-change-could-cause-more-mega-storms-super-typhoon>

⁵⁷⁷ According to a survey, coastal mega-cities will be the most vulnerable to climate change—Manila, Bangkok, Jakarta, Yangon and Ho Chi Minh city. Maplecroft, *Climate Change and Environmental Risk Atlas 2013*; and Emma Porio, *Life Along Manila's Flooding Rivers*, 259-265 in *THE ENVIRONMENTS OF THE POOR IN SOUTHEAST ASIA, EAST ASIA, AND THE PACIFIC* (Aris Ananta et al. eds., 2013). See also Mekong River Commission (MRC), *Adaptation to Climate Change in the countries of the Lower Mekong Basin*, 24 MRC, at 1, 9 (2009).

⁵⁷⁸ In the region, the burden of climate risk spreads unevenly: Philippines, Indonesia, Vietnam, and Myanmar will bear the greater cost than technological advanced Singapore or landlocked Laos. Whitehead, *supra* note 564, at 152; and MRC, *supra* note 577, at 2.

⁵⁷⁹ Stefan Gruber, *Human Displacement and Climate Change in the Asia-Pacific*, in *ENVIRONMENTAL LAW DIMENSIONS OF HUMAN RIGHTS* 181, 183-200 (Ben Boer ed., 2015)

⁵⁸⁰ Masatoshi Yoshino, *Climatic Change and Agriculture: Problems for the Asian Tropics*, in *SOUTHEAST ASIA'S ENVIRONMENTAL FUTURE THE SEARCH FOR SUSTAINABILITY*, 179-189 (Harold Brookfield & Yvonne Byron eds., 1993).

and transpiration rate will impact the quantity and quality of inland water supply for human consumption,⁵⁸¹ agricultural production, and hydropower generation.⁵⁸² For instance, rain-fed rice production, palm oil, or rubber will be affected by longer but drier dry season and shorter but wetter wet season.⁵⁸³ The loss of natural capital has significant impacts because ASEAN relies on such capital for growth and development.

Intergovernmental Panel on Climate Change (IPCC), the scientific advisory body to the UNFCCC, has estimated that to maintain global temperature fluctuation under 2° c threshold, a safe level to sustain lives, the global emission reduction of 25–40% is mandatory.⁵⁸⁴ The climate change problem has to be addressed now or it will cause mass disasters to the global environment and economy.⁵⁸⁵ The irreversible environmental impacts of climate change will threaten the whole economy but will not be evenly distributed—the poor will suffer the most.⁵⁸⁶ The delay in taking action will lead to more severe consequences and a higher cost of mitigation.⁵⁸⁷ However, as Bulkeley noted, “climate risks are unbounded on two axes: It is spatially diffuse—the impact does not follow national borders or legal jurisdiction and it is unpredictable—no direction, no time frame.”⁵⁸⁸ Therefore, the existing regulatory systems, national or international, may not be suitable for regulating climate risks. The new paradigm has to be built to stretch social relations over space and time.⁵⁸⁹

⁵⁸¹ ADB, *THE ECONOMICS OF CLIMATE CHANGE* 33(2009).

⁵⁸² Dator-Bercilla et al., *supra* note 570, at V.

⁵⁸³ Dator-Bercilla et al., *supra* note 570, at 12.

⁵⁸⁴ See Yun Gao et al., *The 2 °C Global Temperature Target and the Evolution of the Long-Term Goal of Addressing Climate Change—From the United Nations Framework Convention on Climate Change to the Paris Agreement*, 3 *ENGINEERING* 272, 272-278 (2017).

⁵⁸⁵ Whitehead, *supra* note 564, at 143.

⁵⁸⁶ NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE* 15 (2006).

⁵⁸⁷ Stern suggested that it is not about scarifying development to avoid climate change but the shift towards low-carbon development has to be done—reducing demand for carbon-intensive goods, increasing efficiency for production, taking actions on non-energy emissions, and adopting for low-carbon technologies for power, heat and transportation. The shift will be costly during the transformation period but eventually it will create new trade opportunities and the industries will evolve. *Id.*

⁵⁸⁸ Harriet Bulkeley, *Governing Climate Change: The Politic of Risk Society?*, 26 *TRANS. INST. BR. GEOGR.* 430, 434 (2001).

⁵⁸⁹ See Ulrich Beck, *World Risk Society as Cosmopolitan Society? Ecological Questions in A Framework Of Manufactured Uncertainties*, 13 *THEORY, CULTURE & SOCIETY* 1, 1-32 (1996).

2.2 Main contribution of CO₂ emission: Energy production and deforestation

In ASEAN, two primary sources of emission are energy emission by electricity and heat production and non-energy emission by deforestation.⁵⁹⁰ The CO₂ emission by energy power plants is the most significant emission source worldwide, accountable for 26% of the total global emission of CO₂.⁵⁹¹ To sustain the rapid economic expansion, energy demand in ASEAN is exploding, so as the GHGs emission—ASEAN is set to be the leading sources of expansion in global emission.⁵⁹² Whereas the region has abundant natural resources for the potential use of renewable energy (e.g., solar, wind, waves), the significant energy sources are coal, natural gas, and oil. The utilization of renewable energy is still at a preliminary stage or small-scale pilot projects.⁵⁹³ Coal, a major cause of emission, is a dominant fuel for electricity production in the region, especially in Indonesia, Vietnam, the Philippines, and Thailand.⁵⁹⁴

There is an underlying cause explaining why the regional legal and administrative system favors fossil fuel electrical generating installations instead of investing in renewable energy.⁵⁹⁵ Apart from the lack of technological infrastructures and financial capacity in the region, the significant barrier is the economic problem of carbon leakage. Still, it is the rule of supply and demand. As Tirole described, when one country opts for renewable energy and low-carbon economic development by increasing carbon tax or using other related measures, it saves tons of coal or barrels of oil available in the market; as a result, the price goes down,

⁵⁹⁰ Zhi Hua Lee et al, *An Overview on Global Warming in Southeast Asia : CO₂ Emission Status, Efforts Done, and Barriers*, 28 RENEW. SUSTAIN. ENERGY REV. 71, 73 (2013) 73.

⁵⁹¹ IPCC Climate Change 2007 synthesis report, Intergovernmental Panel on Climate Change

⁵⁹² Venkatachalam Anbumozhi & Ponciano S. Intal, *Can Thinking Green and Sustainability be an Economic Opportunity for ASEAN?*, 66 ERIA, at 1, 14 (2015).

⁵⁹³ Zhi Hua Lee et al, *An Overview on Global Warming in Southeast Asia: CO₂ Emission Status, Efforts Done, and Barriers*, 28 RENEW. SUSTAIN. ENERGY REV 71, 79.

⁵⁹⁴ Christine Shearer et al., *Boom and Bust 2018: Tracking the Global Coal Plant Pipeline*, EndCoal (2018), https://endcoal.org/wp-content/uploads/2018/03/BoomAndBust_2018_r6.pdf

⁵⁹⁵ KOH KHENG-LIAN ET AL, *supra* note 531, at 51.

encouraging the greater consumption elsewhere in the world.⁵⁹⁶ Thus, the battle against emission in one region has little effect on worldwide pollution.

Whereas the global coal use declines, the coal-fired power plants in ASEAN member states are growing.⁵⁹⁷ It is a result of the carbon leakage problem due to the availability of coal resources in the market and the relocation of pollution from other stricter countries to member states with more lenient standards. In recent years, coal-fired power plant projects are initiated in many member states.

Thailand has two controversial coal-fired power plant projects in the Southern provinces, Krabi and Songkla.⁵⁹⁸ For the emission issue, the Minister of Energy stressed that Thailand, one of the smallest emitters globally, does not use coal as much as others, and opting for coal rather than other renewable sources will produce electricity at a cheaper cost.⁵⁹⁹ Concerned about the adverse effects on the coastal ecosystem and human health, locals and environmentalists protested against the projects and were arrested by the authority. The current

⁵⁹⁶ The same condition applies to deforestation: conservation of forest in one country will lead to the deforestation in others because of the lack of supply and high in demand for timber products increase prices in the market so encouraging the deforestation in other parts of the world. TIROLE, *supra* note 373, at 21-22.

⁵⁹⁷ Hannah Alcoseba Fernandez, *Coal is in Decline Globally, but Asia is Driving New Plant Development*, ECO-BUSINESS (Mar. 26, 2018), <https://www.eco-business.com/news/coal-is-in-decline-globally-but-asia-is-driving-new-plant-development/>

⁵⁹⁸ In 2015, Thailand has a landmark environmental case regarding the hazardous effects of Mae Moh, the biggest coal-fired power plant in Thailand. In 2003, the villagers of Mae Moh in Lampang provinces brought a case against Electric Generating Authority of Thailand (EGAT) for compensation due to many years' exposure to dust and sulfur dioxide emissions from the coal-fired plant causing agricultural damages, livestock losses, premature deaths and critical health problems. It took 12 years in court proceedings until the Supreme Administrative Court upheld the lower court ruling that EGAT is responsible for the compensation which is not a substantial amount compared to what local people have suffered for 23 years since the release of toxic substance. Cheewin Satta, *EGAT Loses Mae Moh Pollution Appeal*, BANGKOK POST (Feb. 26, 2015), <https://www.bangkokpost.com/news/general/483785/egat-loses-mae-moh-pollution-lawsuit>; and Nithiwadee Srangnitra, *Power and environmental conflict: A case study of the Mae Moh power plant in Thailand*, OPUS Dissertation (2016), <https://opus.lib.uts.edu.au/bitstream/10453/62387/7/02whole.pdf>

⁵⁹⁹ Florence Tan & Chayut Setboonsarng, *Thailand Plans to Increase Coal Use in Power Generation*, REUTERS (Apr. 12, 2018), <https://www.reuters.com/article/india-ief-thailand/thailand-plans-to-increase-coal-use-in-power-generation-minister-idUSL3N1RP1TV>

authoritarian regime highly restricts civil liberties and movements.⁶⁰⁰ For now, the government put the projects on hold for further EHIA reports to minimize public attention.⁶⁰¹

Similar controversy occurs in Indonesia but on a much bigger scale. For supposedly cheap source of energy production, in 2018, the government pushes for dozens of coal-fired power plant constructions to reach 35,000 megawatts of power generation by 2024.⁶⁰² The biggest plant is planned to be constructed on the island of Java, known for its richness of coastal resources and mangroves.⁶⁰³ The project is a joint venture between one of Indonesia's largest coal companies and two Japanese utilities and power plant firms funded by the government-owned Japan Bank for International Cooperation (JBIC) and other Asian banks.⁶⁰⁴ Citizens were arrested and imprisoned for opposing the project due to environmental issues.⁶⁰⁵ Apart from the emission contributed to global climate change, the development and operation of coal-fired power plants have harmfully affected the locals' ecosystem and livelihoods, such as depletion of fish stocks, respiratory infections, and cancer.⁶⁰⁶⁶⁰⁷

As China strengthened its regulation for coal energy combustion due to the severe air pollution crisis, coal investments are flown to Southeast Asia—especially in Vietnam, where China is the biggest investor accountable for 50 percent of Vietnam's total foreign coal

⁶⁰⁰ Patpicha Tanakasempipat et al., *Thai Police Arrest 16 Protesting Against Coal-Fired Power Plant*, REUTERS (Nov. 28, 2017), <https://www.reuters.com/article/us-thailand-coal/thai-police-arrest-16-protesting-against-coal-fired-power-plant-idUSKBN1DS0QE>

⁶⁰¹ *Coal-fired Power Plant Projects in Krabi and Thepa Put Off for 3 Years*, THAI PBS (Feb. 3, 2018), <http://englishnews.thaipbs.or.th/coal-fired-power-plant-projects-krabi-thepa-put-off-3-years/>

⁶⁰² <http://www.atimes.com/article/graft-and-bad-policies-fuel-indonesias-obsession-with-coal/>

⁶⁰³ *Batang Coal Fired Power Plant, Central Java, Indonesia*, Environmental Justice Atlas (Sept. 9, 2017), <https://ejatlas.org/conflict/batang-coal-mining-central-java-indonesia>; and Hans Nicholas Jong, *Coal Pwer Plants Threaten Lives*, THE JAKARTA POST (Aug. 14, 2015), <http://www.thejakartapost.com/news/2015/08/14/coal-power-plants-threaten-lives.html>

⁶⁰⁴ Lucy EJ Woods, *As Construction Begins on Java's Batang Coal Plant, a Divided Community Faces Environmental Problems*, MONGABAY (Jan. 24, 2017), <https://news.mongabay.com/2017/01/as-construction-begins-on-javas-batang-coal-plant-a-divided-community-faces-environmental-problems/>

⁶⁰⁵ *Police Arrest 43 Peaceful Coal Power Plant Protestors in front of State Palace*, Coconuts Jakarta (Oct. 6, 2015), <https://coconuts.co/jakarta/news/police-arrest-43-peaceful-coal-power-plant-protesters-front-state-palace/>

⁶⁰⁶ Lourdes Sanchez & Bernadethe Luan, *The Health Cost of Coal in Indonesia*, IISD (2018), <https://www.iisd.org/sites/default/files/publications/health-cost-coal-indonesia.pdf>

⁶⁰⁷ Michael Taylor, *Legal Fight over Bali Coal Power Plant Illuminates Indonesia Energy Dilemma*, REUTERS (June 26, 2018), <https://www.reuters.com/article/us-indonesia-energy-coal-renewables/legal-fight-over-bali-coal-power-plant-illuminates-indonesia-energy-dilemma-idUSKBN1JN007>

finance.⁶⁰⁸ Japan, South Korea,⁶⁰⁹ and Russia⁶¹⁰ have also taken their shares of investment in coal-fired power plants in Vietnam. According to the study, by 2030, Vietnam will be the most affected state among ASEAN members by coal pollution, causing a higher rate of premature mortality.⁶¹¹ Southeast Asia becomes a coal haven for foreign companies.

Another primary emission source in the region is a non-energy emission—deforestation for logging, land clearing for agricultural purposes, and collateral damage from hydropower plant projects.⁶¹² Hydropower is another significant cheap source of power generation in the region. Although hydroelectric dams can generate significant methane emissions contributing to global warming, member states wrongly perceived them as cleaner energy sources than the dirty combustion of coal.⁶¹³ There are massive environmental and socio-economic damages associating with the construction and operation of dams—emission of greenhouse gas, destruction of primary forests due to floods, disruption of the ecosystem, blockage of animal migrations, the devastation of animals and their habitats, and the livelihood of the locals whose lives depend on the natural resources in the area.⁶¹⁴ Many locals and indigenous people lost

⁶⁰⁸ Huileng Tang, *China is Massively Betting on Coal Outside Its Borders — Even as Investment Falls Globally*, CNBC (Apr. 6, 2018), <https://www.cnbc.com/2018/04/06/china-is-massively-betting-on-coal-outside-its-shores--even-as-investment-falls-globally.html>

⁶⁰⁹ Thanh Dat, *China Funds Coal Far Away From Home*, VIR (Dec. 27, 2017), <https://www.vir.com.vn/china-funds-coal-away-from-home-55038.html>

⁶¹⁰ *The U.S. May Back a Vietnam Coal Plant. Russia is Already Helping*, N. Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/business/exim-bank-vietnam-russia-coal.html>

⁶¹¹ Viet Phuong Nguyen, *With Growth of Coal Power Plants, Vietnam's Future is Grim*, THE DIPLOMAT (Jan. 25, 2017), <https://thediplomat.com/2017/01/with-growth-of-coal-power-plants-vietnams-future-is-grim/>; and Shannon N. Koplitz et al, *Burden of Disease from Rising Coal-Fired Power Plant Emissions in Southeast Asia*, 51 ENVIRON. SCI. TECHNOL. 1467, 1467-1473 (2017).

⁶¹² John Vidal, *Greater Mekong Countries 'Lost One-Third of Forest Cover in 40 Years'*, THE GUARDIAN (May 2, 2013), <https://www.theguardian.com/environment/2013/may/02/greater-mekong-forest-cover>

⁶¹³ *Hydroelectric Dams Emit a Billion Tonnes of Greenhouse Gases a Year, Study Finds*, THE GUARDIAN (Nov. 14, 2016), [https://www.theguardian.com/global-development/2016/nov/14/hydroelectric-dams-emit-billion-tonnes-greenhouse-gas-methane-study-climate-change#:~:text=%2C%20she%20added,-.Methane%20is%20produced%20at%20the%20bottom%20of%20the%20reservoirs%2C%20where,to%20the%20surface%20as%20bubbles.](https://www.theguardian.com/global-development/2016/nov/14/hydroelectric-dams-emit-billion-tonnes-greenhouse-gas-methane-study-climate-change#:~:text=%2C%20she%20added,-.Methane%20is%20produced%20at%20the%20bottom%20of%20the%20reservoirs%2C%20where,to%20the%20surface%20as%20bubbles.;); and Bridget R. Deemer et al., *Greenhouse Gas Emissions From Reservoir Water Surfaces: A New Global Synthesis*, 66 BIOSCIENCE 949, 949-64 (2016).

⁶¹⁴ My Hoang Hao Tra, *Hydropower and Deforestation: An Unexpected Linkage or an Obvious One?*, Forest Asia Summit, CIFOR (2014) <http://www.cifor.org/forestsasia/hydropower-deforestation-unexpected-linkage-obvious-one/>; and Jonathan Watts, *Laos Sees Big Fish as Small Price to Pay for Hydropower*, THE GUARDIAN (Sept. 24, 2010), <https://www.theguardian.com/environment/2010/sep/24/laos-hydropower-plant-mekong-river>

their habitats and were forced to relocate.⁶¹⁵ Dams were constructed in many member states (e.g., Laos, Cambodia, Thailand, Myanmar, and Vietnam) to generate enough power for the up-growing economy and urban expansion. The constructions were concentrated in the areas along Mekong Basin, the 10th largest river rich in fish stocks and biodiversity, causing many environmental impacts, including a fall of fish stocks, decreased sediment flow downstream and soil fertility, and delta erosion.⁶¹⁶

In Vietnam, four major hydropower plants were built in the protected forest areas: Srepok 3, Srepok 4, KrongKma, and Buon Koup—large areas of forest were cleared for the construction of dams and roads by authority and other illegal loggers.⁶¹⁷ According to the record of Vietnam’s Forestry Administration, during the peak of the hydropower projects 2008–2014, the Central Highlands lost 358,700 hectares (886,367 acres) of forests.⁶¹⁸ Due to the foreign demands⁶¹⁹ and incentive in energy trade, Laos invested in megaprojects for hydropower generation.⁶²⁰ The electricity trade has made up to 30% of export for Laos, and the government plans to double the energy production to reach 28,000 megawatts by 2020, becoming the “Battery of Asia”—in 2017, Laos has 46 hydroelectric power plants and 54 more plants under development.⁶²¹

⁶¹⁵ For instance, the case of dams building on the Agno River in Luzon Philippines results in soil erosion, siltation and dislocation of thousands of Ibaloi, indigenous people living in the north of Philippines, who were force to find new ways of living in the new pieces of lands that are less abundant. Marissa Hughes, *Indigenous Rights in the Phillipines: Exploring the Intersection of Cultural Identity, Environment, and Development*, in INDIGENOUS PEOPLES, THE ENVIRONMENT AND LAW: AN ANTHOLOGY, 284-285 (Lawrence Watters ed. 2004).

⁶¹⁶ Nyshaka Chandran, *Southeast Asia is Betting on Hydropower, but There are Risks of Economic Damage*, CNBC (Aug. 9, 2018), <https://www.cnbc.com/2018/08/10/hydropower-in-southeast-asia-dams-may-risk-economic-damage.html>

⁶¹⁷ Thanh Nguyen & Nhung Nguyen, *Confessions of a Hydropower Calamity in Vietnam*, VN EXPRESS INTERNATIONAL (Oct. 15, 2017), <https://e.vnexpress.net/projects/confessions-of-a-hydropower-calamity-in-vietnam-3655314/index.html>

⁶¹⁸ Thu Van, *The High Price We Pay for Deforestation*, THE NATION (Sept. 3, 2017), <http://www.nationmultimedia.com/detail/opinion/30325603>

⁶¹⁹ Including investors from Thailand, China, South Korea. Yokako Ono, *Laos Dam Builders Under Scrutiny for Rushing Project*, NIKKEI (Aug. 10, 2018), <https://asia.nikkei.com/Business/Laos-dam-builders-under-scrutiny-for-rushing-project>

⁶²⁰ For Instance, a project called Nam Theun 2 (NT2), a massive hydropower project generating electricity by damming major branch of Mekong River, is very controversial due to its immense social and environmental impacts—the sensitive ecosystem will be flooded and the resettlement of approximately 6000 indigenous people.

⁶²¹ The rapid expansion and development of hydroelectric power plants has pose serious questions in term of safety of substandard construction when Xe-Pian Xe-Namnoy hydroelectric dam collapsed in July 2018 causing massive

The economic incentive outweighs the environmental interest and weakens the political will towards a low-carbon economy. As Tirole stated: “National interest takes priority over the environmental imperative. Benefit of reducing the climate change remains global and distance in time while the costs of that reduction are local and immediate.”⁶²² The carbon leakage problem is aggravated by the fact that there is no internalization of externalities from energy production—the utilization of coal for energy production or the construction of hydropower plants are deemed as cost-effective because it does not take into account the environmental costs. If we cannot control the market, we cannot control the use of carbon energy or deforestation.⁶²³ Without the common binding obligation to internalize the environmental cost, such as carbon pricing, a unilateral effort by one country or one region to reduce emission will shift such emission to a less responsible country or region, causing a mere redistribution or relocation of emission and not the reduction of emission globally.⁶²⁴

2.3 Regional cooperation and legal framework within a global context: Singapore Declaration on Climate Change, Energy and the Environment 2007 and the failure of international climate change regime

For addressing climate change problems, ASEAN insists on pursuing the objective without sacrificing competitiveness or economic development based on the **principle of equity and common but differentiated responsibilities**.⁶²⁵ The principle of common but

floods washing away the entire villages, killing at least 35 people, and displacing more than 6,000 people. The total impacts cannot be clarified due to the press release ban from the communist government. *Laos Hydroelectric Power Ambitions under Scrutiny*, BBC (July 24, 2018), <https://www.bbc.com/news/world-asia-44936378>; Kochar Olarn et al., ‘Substandard Construction’ Caused Laos Dam Collapse, Minister Says, CNN (July 27, 2018), <https://www.cnn.com/2018/07/27/asia/laos-dam-collapse-construction-intl/index.html>; and Hannah Ellis-Peterson, *Laos Dam Collapse: Work Continues on Huge Projects Despite Promised Halt*, THE GUARDIAN (Aug. 21, 2018), <https://www.theguardian.com/world/2018/aug/21/laos-dam-collapse-work-continues-on-huge-projects-despite-promised-halt>

⁶²² TIROLE, *supra* note 373, at 201.

⁶²³ As in the case of trade in endangered species or CFCs products, regulating the market by using trade measures to control the leakage is necessary.

⁶²⁴ TIROLE, *supra* note 373, at 201.

⁶²⁵ The principle seeks to address the issue of equality and fairness to those most vulnerable to climate change effects, lack the ability to respond, and historically contribute the least to the cause of the problem. The principle

differentiated responsibilities, an exception to the principle of sovereign equality,⁶²⁶ differentiates states based on the vulnerability to climate change, the capability to address the issue, and the contribution to the problem.⁶²⁷ According to Rajamani, there are three kinds of differentiated treatments: obligation to emission reduction, implementation of obligation, and assistance in technological transfer and financial support.⁶²⁸ ASEAN stressed upon this principle in most ASEAN instruments regarding sustainable development and climate change.⁶²⁹ The key argument is:

The developed countries with their historically unfettered industrial growth have enjoyed these rights and have crowded out the carbon space which is now limiting the development potential of developing countries given that they too should have a right to equitable development. Thus, environment cannot be separated from economic and social development.⁶³⁰

The developing countries need to advance their economic scales and energy generation in pursuit of development and poverty alleviation; thus, the “survival emission” is more necessary compared to the “luxury emission” from those developed countries.⁶³¹ Nonetheless, it is worth

was first applied in the Montreal Protocol on Substances that Depletes the Ozone Layer and later recognized in the Rio Declaration. SUMUDU ATAPATTU, HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE : CHALLENGES AND OPPORTUNITIES 118 (2016).

⁶²⁶ Charter of the United Nations (1945) Article 1(1).

⁶²⁷ ATAPATTU, *supra* note 625 at 121.

⁶²⁸ Lavanya Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 REV. EUR. COMP. & INT'L ENVTL. L. 120, 191 (2002).

⁶²⁹ See for example: ASEAN Secretariat, Roadmap for ASEAN Community 2009-2015 (2009), 80; Singapore Declaration on Climate Change, Energy, and the Environment; Singapore Resolution on Environmental Sustainability and Climate Change; ASEAN Declaration on the 13th Session of the Conference of Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC) and the 3rd Session of the Conference of the Parties Serving as the Meeting of the Parties (CMP) to the Kyoto Protocol; and ASEAN Joint Statement on Climate Change to the 15th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change and the 5th Session of the Conference of Parties serving as the Meeting of Parties to the Kyoto Protocol.

⁶³⁰ Raman Letchumanan, *Climate change: is Southeast Asia up to the challenge?: Is there an ASEAN policy on climate change?*, LSE IDEAS, at 50, 51 (2010). Similar argument has been stated by others. For instance: “The industrial countries have benefitted disproportionately from the industrialization process that led to the accumulation of greenhouse gases in the atmosphere, yet since the damage is universal, the cost are borne by everyone. Equity herein would demand that those who have benefitted the most from the process that led to the creation of the problem bear unequal burden for addressing the problem. It is this equity that the measure of historical responsibility within the principle of common but differentiated responsibility aims to achieved” Rajamani, *supra* note 628, at 123.

⁶³¹ ATAPATTU, *supra* note 625 at 120; and Charles Kenny, *Poor Countries Shouldn't Sacrifice Growth to Fight Climate Change*, BLOOMBERG NEWS (Aug. 29, 2014), <https://www.bloomberg.com/news/articles/2014-08-29/poor-countries-shouldn-t-sacrifice-growth-to-fight-climate-change>

noting that the economic efforts made by most member states resulting in greater emission—expansion of production for trade and power generation—do not transform into a poverty eradication or a better standard of living for people. In contrast, the prosperity gap between the rich, and the poor remains exceptionally large and the poor continue to suffer the most from environmental risks.⁶³² Can national growth at the expense of the environment depriving citizens, local communities, and indigenous people of their right to live in a healthy environment be regarded as equitable development in the international context? This point needs to be reconsidered in the international law framework.

With the notion of common but differentiated responsibility in mind, ASEAN aims to address environmental concerns, provided that such measures will not regress the economic growth and the developed countries will provide financial and technological aids. The concrete climate change measures are conditioned on the overwhelming reliance from developed countries or international finance organizations for financial aids and innovative technologies transfers.

ASEAN cooperation is visibly different between haze and climate change regime. While the ASEAN haze regime is intense and concrete, the climate change regime is vague and broad. The reason is perhaps that the consequence of haze is local and immediate. In contrast, the consequence of climate change can be as catastrophic as mass distinction, but it is highly unpredictable and diffuse in time—we do not know where, when, or how the impacts would precisely occur.

Since the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992, ASEAN acknowledged the problem and issued many documents

⁶³² For instance, the expansion of coal mining and coal-fired power plants to generate more electricity for trade or for increase demand in industrialization or urban areas occur in remote rural areas where local communities will likely to suffer the instant pollution. As for the climate change risks (e.g. natural disasters, diseases, etc.), these poor rural people are likely to be most affected due to the lack of capacity in terms of finance, access to healthcare, and security to cope with the issue.

addressing the concern but nothing solid.⁶³³ During the period of the 1990s, the political and economic momentum of ASEAN outshined environmental concerns. Trade incentives, competitiveness in the market, and drives for economic growth have caused an environmental regulatory chill.⁶³⁴ Not until the December 2007 Bali UNFCCC conference, the Indonesian government pushed to discuss trade and climate change linkage between trade ministers. Trade policy contributes to climate change by increasing the scale of activities and changing the composition of activities and production and process methods. On the other hand, climate change mitigation measures impact the competitiveness for trade and investment flow.⁶³⁵

The issue became solid when ASEAN committed through the Singapore Declaration on Climate Change, Energy, and the Environment in the 13th ASEAN Summit November 2007.⁶³⁶ The Singapore Declaration confirms the principles in UNFCCC and Kyoto Protocol and sets out targets to foster regional understanding and implement mitigating and adaptation measures.⁶³⁷ It recognizes that rapid economic development poses new challenges in dealing with greater energy consumption and there is a need to adopt an effective approach to tackle the problem without creating barriers to trade, investment, and socio-economic development.⁶³⁸ It prioritizes adaptation measures to climate change rather than mitigating measures—emission reduction: for example, strengthening cooperation and management capacity for natural disasters raised by climate change, promoting environmental education, mobilizing financial supports, etc. It indicates the common motivation and cooperation but does not identify a specific target for emission reduction commitment.⁶³⁹

⁶³³ Koh Kheng-Lian & Lovleen Bhullar, *ASEAN: the Singapore Declaration on Climate change, Energy, and the Environment, 2007 and Beyond*, in REGIONAL ENVIRONMENTAL LAW : TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT 282, 287 (Werner Scholt & Jonathan Verschuuren eds., 2015).

⁶³⁴ Matthias Buck & Roda Verheyen, *International Trade Law and Climate Change : A Positive Way Forward* 1 (2001).

⁶³⁵ AARON COSBEY, TRADE AND CLIMATE CHANGE: ISSUES IN PERSPECTIVE 22 (2008).

⁶³⁶ Singapore Declaration on Climate Change, Energy and the Environment, https://asean.org/?static_post=singapore-declaration-on-climate-change-energy-and-the-environment

⁶³⁷ *Id.*

⁶³⁸ *Id.*

⁶³⁹ Koh Kheng-Lian & Bhullar, *supra* note 633, at 288-289.

In 2009, the ASEAN Ministers Responsible for the Environment signed the Singapore Resolution on Environmental Sustainability and Climate Change.⁶⁴⁰ The Resolution focuses on implementing measures related to environmental protection within the region to address climate change.⁶⁴¹ During the 42nd Anniversary of ASEAN, Surin Pitsuwan, former ASEAN Secretary-General, stressed the importance of building the sustainable and people-centered ASEAN by implementing policies such as green growth and low-carbon growth for trade in environmental goods and services as means to achieve the win-win solution for both economic development and environmental sustainability.⁶⁴² Later, in these recent years, ASEAN leaders have addressed climate change in many Declarations and Statements. In the roadmap for ASEAN Community, climate change becomes a part of the sustainable development agenda in all three pillars: ASEAN Socio-Cultural Community, Economic Community, and Political-Security Community.

In Economic Community blueprint 2025, climate change appears as part of sustainable economic development,⁶⁴³ environmental risk for tourism,⁶⁴⁴ and food security.⁶⁴⁵ Sustainable economic development includes sustainable growth agenda promoting the use of clean energy, renewable energy, and sustainable consumption and production.⁶⁴⁶ The strategic measures include fostering policy supporting renewable energy, supporting utilization of low-carbon technologies, and calling for international support to ensure ASEAN access to a mechanism for low-carbon technologies.⁶⁴⁷ The Socio-Cultural blueprint 2025 directly addresses climate change, including the strategic measures for sustainable climate and the adaptive measures for

⁶⁴⁰ Singapore Resolution on Environmental Sustainability and Climate Change, <http://environment.asean.org/wp-content/uploads/2015/06/Singapore-AMME-Resolution.pdf>

⁶⁴¹ *Id.* at 16-22.

⁶⁴² Surin Pitsuwan, Speech by H.E. Surin Pitsuwan Secretary General of ASEAN at the 42 Anniversary of ASEAN, 2009, https://asean.org/?static_post=speech-by-he-dr-surin-pitsuwan-secretary-general-of-asean-at-the-42nd-anniversary-of-asean

⁶⁴³ Economic Community blueprint 2025, B8, 19.

⁶⁴⁴ *Id.* at C5 Tourism, 31.

⁶⁴⁵ *Id.* at C5 Food, Agricultural, and Forestry, 30.

⁶⁴⁶ *Id.* at B8, 19.

⁶⁴⁷ *Id.* at B8, 20.

impacts of climate change.⁶⁴⁸⁶⁴⁹The measures listed are mainly adaptive measures rather than mitigating measures. In Political-Security blueprint 2025, climate change is not addressed expressively; however, it should be within the scope of new transboundary challenges.⁶⁵⁰ This point needs to be further identified.

ASEAN Climate Change Initiatives can be categorized into sectors: environment, disaster management, energy and transportation, and agricultural and forestry.⁶⁵¹ The most contradicting initiatives are between the development of renewable energy and the promotion

⁶⁴⁸ Socio-Cultural Community blueprint 2025 C.3. Sustainable Climate Strategic Measures

- i. Strengthen human and institutional capacity in implementing climate change adaptation and mitigation, especially on vulnerable and marginalized communities;
- ii. Facilitate the development of comprehensive and coherent responses to climate change challenges, such as but not limited to multi-stakeholder and multi-sectoral approaches;
- iii. Leverage on private sector and community to have access to new and innovative nuancing mechanisms to address climate change;

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- iv. Strengthen the capacity of sectoral institutions and local governments in conducting Greenhouse Gas (GHG) inventory, and vulnerability assessments and adaptation needs;
- v. Strengthen the effort of government, private sector and community in reducing GHG emission from main activities of development;
- vi. Mainstream climate change risk management and GHG emission reduction on sectoral planning; and
- vii. Strengthen global partnerships and support the implementation of relevant international agreements and frameworks, e.g. the United Nations Framework Convention on Climate Change (UNFCCC).

⁶⁴⁹ Socio-Cultural Community blueprint 2025 D.3. A Climate Adaptive ASEAN with Enhanced Institutional and Human Capacities to Adapt to the Impacts of Climate Change

Strategic Measures

- i. Expand regional cross-sectoral platforms and establish shared strategies to respond to the impacts of climate change;
- ii. Promote sound scientific and evidence-based policies on climate change adaptation; and
- iii. Promote and consider indigenous and traditional knowledge and practices in responding and adapting to the impacts of climate change.

⁶⁵⁰ Political-Security Community blueprint 2025 B.3.9. Enhance ASEAN capacity to address transnational crimes and transboundary challenges

- i. Strengthen existing ASEAN mechanisms to consider preventive management to effectively address these new challenges, including working with Dialogue Partners, UN and other relevant bodies with the consent of countries concerned;
- ii. Convene special meetings, as and when necessary, at Senior officials level to address challenges of transboundary or transnational nature such as haze pollution, pandemics, transnational organized crimes, irregular movement of persons, hazardous waste, oil spill incidents, trafficking in wildlife and timber; and
- iii. Promote studies by think-tanks, universities and other relevant academic institutions to identify new and transboundary challenges arising from non-traditional security issues.

⁶⁵¹ For instance, ASEAN Working Group on Climate Change (AWGCC) and ASEAN Climate Change Initiative (ACCI) are meant to be consultative platform to further strengthen regional coordination and ASEAN Heritage Park (AHP) Programme is one of the most successful programs in regional cooperation. Fina Astriana, *ASEAN Response to Climate Change*, ASEAN Studies Program <https://thcasean.org/read/blog/118/ASEANs-Response-to-Climate-Change>

and utilization of Coal and Clean Coal Technology (CCT)⁶⁵² to reduce harsh substances emission.⁶⁵³ The objective of ASEAN's Coal and CCT is to promote cleaner coal use, encourage the use of CCT, and build the perception of coal as cleaner fuel due to the CCT.⁶⁵⁴ This clearly shows that coal will continue to be a significant source of energy generation in ASEAN. The energy demand in the region is expected to increase by 60 percent by 2040, and coal will constitute 40 percent of this growth.⁶⁵⁵ Many climate change initiatives, specifically the Coal and CCT, seem like greenwashing measures rather than real commitments for emission reduction.⁶⁵⁶

What is Clean Coal Technology (CCT)? It is the Carbon Capture Storage (CCS) technology that captures carbon dioxide and stores it underground.⁶⁵⁷ Can coal ever be cleaned? How clean is regarded as clean? The use of “clean” term is ambiguous and misleading to a certain degree. There are big supporters and strong dissents. The supporters are major coal investors and countries with abundant coal resources claiming that coal is a cost-effective source of energy and the CCT is efficient enough. The environmentalists, activists, and local communities see it otherwise. The arguments against the CCT are two folds: CCT does not

⁶⁵² Septia Buntara, *The Challenges of Clean Coal Technology in ASEAN*, ASEAN CENTER FOR ENERGY (Nov. 30, 2016), <http://www.aseanenergy.org/blog/the-challenges-of-clean-coal-technology-in-asean/>

⁶⁵³ *Clean Coal Technologies, Carbon Capture & Sequestration*, WORLD NUCLEAR ASSOCIATION (Nov. 2018), <http://www.world-nuclear.org/information-library/energy-and-the-environment/clean-coal-technologies.aspx>

⁶⁵⁴ Coal and Clean Coal Technology, ASEAN Center for Energy, <http://www.aseanenergy.org/programme-area/cct/>

⁶⁵⁵ The ASEAN Post Team, *Clean Coal Clean Enough?*, THE ASEAN POST (Nov. 6, 2018) <https://theaseanpost.com/article/clean-coal-clean-enough>

⁶⁵⁶ Fred Pearce, *Greenwash: Why 'Clean Coal' is the Ultimate Climate Change Oxymoron*, THE GUARDIAN (Feb.26, 2009), <https://www.theguardian.com/environment/2009/feb/26/greenwash-clean-coal>; Fred Pearce, *Time to Bury the 'Clean Coal' Myth*, THE GUARDIAN (Oct. 30, 2008), <https://www.theguardian.com/environment/2008/oct/30/fossilfuels-carbonemissions>; and Polly Michelle Cunanan, *Clean Coal Explained: What It Is and Is It Really Sustainable?*, ECO-WARRIOR (Apr. 1, 2018), <https://ecowarriorprincess.net/2018/04/clean-coal-explained-what-it-is-and-is-it-really-sustainable/>

⁶⁵⁷ “Clean coal technologies can be implemented during four steps of coal processing: precombustion, combustion, post-combustion, and conversion. When the industry currently speaks of clean coal, they are typically referencing carbon capture and sequestration/storage. This is done at integrated gasification combined cycle (IGCC) plants and results in a synthetic gas that creates steam as it is cooled, which is used for electricity generation.” Laurie E. Winston, *Clean Coal Technology: Environmental Solution or Greenwashing?* Ohio University, Program of Environmental Studies, 42 (2009), https://etd.ohiolink.edu/!etd.send_file?accession=ohiou1251224628&disposition=inline

resolve environmental damages resulting from coal processing, essentially coal extractions,⁶⁵⁸ and CCT itself is not a reliable or even viable technology.⁶⁵⁹ As the arguments continue, the environmental damages to the global climate, ecosystems, and human health persist.⁶⁶⁰

All ASEAN instruments are highly criticized for being all talk but no action.⁶⁶¹ All of them are soft laws with no binding effect, which leads to implementation deficits. Raman Letchumanan, Head of the Environmental Division of ASEAN Secretariat, stated that ASEAN adopted the broad-based approach—voluntary and appropriate mitigating actions. Koh and Bhular indicated two important aspects that have been discussed earlier as weaknesses of the ASEAN structure: ASEAN's role is limited to policymaking and adoption of soft law measures and the implementation of such has to be at a national level where ASEAN Way cannot enforce or interfere with the state's jurisdiction.⁶⁶² Asian Development Bank (ADB) also observed that ASEAN plans need an actual implementation and need to be more proactive.⁶⁶³

In the international context, all ASEAN member states signed and ratified the UNFCCC and Kyoto Protocol to stabilize GHGs emissions at an acceptable level to prevent danger to the climate system.⁶⁶⁴ However, certain aspects contribute to the climate change regime's struggle to keep pace with its goal.

First, the regime establishes a clear separation between developed and developing countries on the principle of **common but differentiated responsibilities**.⁶⁶⁵ All ASEAN member states are not obliged to reduce their emissions. The commitment is based on a

⁶⁵⁸ For example, water pollution is caused by drainage system of coal mining that release other toxic substances and heavy metals such as mercury, lead, arsenic or selenium. See detailed study in R. K. Tiwary *Environmental Impact of Coal Mining on Water Regime and Its Management*, 132 WATER AIR SOIL POLLUT 185, 187 (2001).

⁶⁵⁹ Winston, *supra* note 657, at 72-89.

⁶⁶⁰ Isabelle Esterman, *Southeast Asia's Coal Boom Could Cause 70,000 Deaths per Year by 2030*, MONGABAY (Jan. 16, 2017), <https://news.mongabay.com/2017/01/southeast-asias-coal-boom-could-cause-70000-deaths-per-year-by-2030-report-says/>; and Juliet Perry, *Southeast Asia Air Pollution Deaths Could Triple*, CNN (Jan. 13, 2017), <https://www.cnn.com/2017/01/12/asia/southeast-asia-pollution-coal-report/index.html>

⁶⁶¹ Koh Kheng-Lian & Bhullar, *supra* note 633, at 290.

⁶⁶² *Id.* at 290-291.

⁶⁶³ ADB, THE ECONOMICS OF CLIMATE CHANGE IN SOUTHEAST ASIA: A REGIONAL REVIEW 90 (2009).

⁶⁶⁴ UNFCCC Art 2.

⁶⁶⁵ UNFCCC Article 3.1

voluntary basis without real constraints. In ASEAN, the significant barriers are the lack of interest and the disparity in member states' economies.⁶⁶⁶ Singapore and Brunei are wealthy but heavily depend on fossil fuels. Malaysia, Thailand, Indonesia, the Philippines, and Vietnam are developing and looking for cheap energy sources to feed their up-growing economic growth. Laos, Myanmar, and Cambodia are far behind but looking forward to catching up with others.

Second, the regime covers less than 15 percent of worldwide emissions given the exemption of developing states, the U.S. failure to ratify, and the withdrawal of Canada, Russia, and Japan.⁶⁶⁷ It cannot prevent the free-rider and carbon leakage problems. Those who do not have an obligation to reduce emissions, like ASEAN member states, will condition their commitments upon more financial and technical aids.

Third, the sharing resources mechanism such as Clean Development Mechanism (CDM)⁶⁶⁸ is slowly and not steadily developed.⁶⁶⁹ There is a significant risk that the developed states will not commit enough to make the mechanism work.⁶⁷⁰

As the Conference of the Parties to UNFCCC continues, the same problems reappear without an optimal solution. ASEAN member states expressed their commitments during the COP, provided that there are financial and technological aids.⁶⁷¹ The promises from ASEAN member states to reduce carbon energy use would never be kept due to the carbon leakage problem unless there could be more concrete and substantial commitments from developed countries for technological and financial support. For instance, after making the ideal statement

⁶⁶⁶ Zhi Hua Lee et al, *supra* note 590, at 79.

⁶⁶⁷ TIROLE, *supra* note 373, at 207.

⁶⁶⁸ Kyoto Protocol Article 12 <https://unfccc.int/process-and-meetings/the-kyoto-protocol/mechanisms-under-the-kyoto-protocol/the-clean-development-mechanism>

⁶⁶⁹ Whitehead, *supra* note 564, at 146.

⁶⁷⁰ Michael Grubb, *Doha's Dawn*, 13 CLIMATE POLICY 281, 281-84 (2013).

⁶⁷¹ For example: Cambodia's Statement https://unfccc.int/sites/default/files/cop21cmp11_leaders_event_cambodia.pdf ; Indonesia's Statement, https://unfccc.int/sites/default/files/cop21cmp11_leaders_event_indonesia.pdf ; The Philippines's Statement, https://unfccc.int/sites/default/files/cop21cmp11_leaders_event_philippines.pdf ; Thailand's Statement, https://unfccc.int/sites/default/files/cop21cmp11_leaders_event_thailand.pdf

during COP21 in 2015, Thailand has pursued two more coal-fired power plant projects and coal purchase deals with the U.S.⁶⁷² Tirole believed that it is part of the common belief as an incentive to delay the reform because if the states do less today, they will obtain better deals tomorrow.

The stronger the country relies on fossil fuel, the better its bargaining position will be to demand for compensation for joining the agreement tomorrow. The international community will be obliged to grant them higher and larger transfer.⁶⁷³

As for promises by developed states for aids and technological and financial transfer, there are no specific and concrete details regarding their contribution shares; thus, the collective promise is unlikely to be kept.⁶⁷⁴ The special treatment given to the developing countries—they are not subject to the same monitoring, notification, and verification process as developed countries—gives the developed countries the excuse for not keeping their promises.⁶⁷⁵

2.4 Conclusion and future development

Studies show that the current emission level is hazardous. We need concrete actions and new technologies. We must reach a negative emission level by 2050—the absorption of carbon by carbon sink must exceed the emissions. It means that the current global effort is not enough. The existing system cannot fix the carbon leakage problem. New negotiations focusing on economic efficiency, an incentive to respect the commitment, and fairness are needed.⁶⁷⁶ Environmental measures alone achieve a marginal outcome unless it is tied with economic incentives and trade measures.⁶⁷⁷ The ASEAN member states still fail to view trade measures

⁶⁷² Wasamon Audjarint, *PM Strikes Deals on US Trip*, THE NATION (Oct. 4, 2017), <http://www.nationmultimedia.com/detail/politics/30328384>; and Teeranai Charuvastra, *Experts Raise Alarm Over Prayuth-Trump Coal Deal*, KHAOSOD (Oct. 4, 2017), <http://www.khaosodenglish.com/politics/2017/10/04/expert-raises-alarm-prayuth-trump-coal-deal/>

⁶⁷³ TIROLE, *supra* note 373, at 203.

⁶⁷⁴ *Id.* at 211.

⁶⁷⁵ *Id.* at 212.

⁶⁷⁶ *Id.* at 228.

⁶⁷⁷ Zhi Hua Lee et al, *supra* note 590, at 80.

such as standard setting, carbon pricing, or carbon tax as essential elements in addressing climate change due to the fear of bearing the burden and losing the competitive advantages in the market.⁶⁷⁸

How to stop carbon leakage? The only way is to employ a carbon pricing approach by internalizing the emissions into the production cost. Only a global accord for one common standard for the internalization of carbon will eliminate the carbon leakage problem and resolve global climate change.⁶⁷⁹ Nevertheless, it is complicated because no central supranational authority can implement and enforce the expected standard to manage the common good.

How to make everybody accountable for the emissions on an equitable basis? It is undeniable that for developing countries' burden to cope with climate change measures, the technological transfer is necessary to mitigate and adapt. Still, the IPRs, investment conditions, and the absorptive innovation capacity are the barriers that deter efficient adaptation and mitigation actions.⁶⁸⁰ However, the principle of common but differentiated responsibility should be reconsidered regarding the extent to which developing countries have a right to pollute on the equitable ground. It is widely cited that developed countries had polluted their ways to development; thus, the developing countries should have equitable rights to do the same. The emission made by developing countries is necessary for survival and development. This is the issue of human rights to development and environmental ethics. Whether polluting the environment is justifiable on development ground and whether the emission contributed to the climate change is genuinely for equitable development in domestic affairs.

First, at present, is the right to develop by polluting the planet justifiable at all in terms of environmental justice? Each state is conscious of climate change consequences based on

⁶⁷⁸ See also Vincent P. Yu, *Developing Countries Perspective on Carbon-Based Competitiveness, Trade, and Climate Change Linkages*, DFID EEDP Paper, at 1, 5 (Oct.2009).

⁶⁷⁹ TIROLE, *supra* note 373, at 202.

⁶⁸⁰ Chatham House, *IPRs and the Innovation and Diffusion of Climate Technologies: Workshop Report*, (London : Chatham House 2007).

scientific facts and fully aware that there are alternative energy sources. Is it still justifiable to claim that others had done it before, even though they might not have known the consequences of their actions at the time? Can wrongdoing in the past by others be a justification for wrongdoing today?

Second, the nation's economic growth does not signify the overall development of the whole country in terms of social welfare, education, and equitable allocation of wealth. For instance, in many member states, megaprojects on coal-fired power plants are initiated to feed power for the up-growing urban megacities and industries that benefit a small group of people. The economic growth is enjoyed by a small group of elites, but the environmental expense is borne by all—mostly the poor. The emission remains “luxury emission.” Thus, the right to development on equitable ground in the international context does not consider the complexity of environmental justice in each country's circumstances. The principle could serve as a loophole for carbon leakage. As long as there is no market control of carbon, there will always be investors in these resources either within their territories or elsewhere—mostly in developing countries where the defense of “right to development” can be used.

3. MARINE POLLUTION AND NEW TRANSBOUNDARY CHALLENGE: THE CASE STUDY OF THE PRODUCTION AND DISPOSAL OF PLASTIC AND MICROPLASTIC

Plastics debris in the ocean is a new transboundary pollution challenge. The discussion seeks to address how the plastic problem is associated with ASEAN, the underlying cause, the effects of plastic pollution on the environment and human health, and the existing legal mechanism to address the problem in regional and international contexts. Deficient waste management may contribute to the problem, but the underlying cause is massive plastic production. Plastics are the resources that give substantial comparative advantages to the region

for trade competition since the plastic industry is one of the top exports of the region. For this, ASEAN faces a dilemma between saving the environment or growing the economic sector. It lacks the concrete mechanism and legal instrument to tackle the problem at its roots

3.1 Plastic marine pollution

In recent years, a new waste problem contaminating rivers and oceans—plastic and microplastic—has taken the limelight. Plastic production and disposal threaten marine biodiversity and food safety, and security and contribute to climate change risks in regional and global contexts.

Plastic constitutes 80–85% of marine litter, and it has continued to increase significantly in the past decades.⁶⁸¹ The United Nations Environment Programme (UNEP) estimates that over 300 million tons of plastic are produced every year, but only nine percent of plastic has been recycled—the rest remains in the environment, and at least eight million tons of plastic ending up in the oceans every year.⁶⁸² At the current rate of dumping, the study expects that plastic in the ocean will double to 250 million tons by 2025, and there will be more plastic than fish (by weight) by 2050.⁶⁸³

The plastic debris from land-based activities—discharge from industries and municipal waste stream leaking into the ocean—becomes a transboundary environmental challenge.⁶⁸⁴ According to a study, 95% of plastic in the ocean comes from ten main rivers, eight of which are in Asia—Yangtze, Yellow, Hai, Pearl, and Amur rivers in China; Mekong in Southeast Asia running through Thailand, Laos, Myanmar, Cambodia, and Vietnam; Ganges river in India; and

⁶⁸¹ Helen S. Auta et al, *Distribution and Importance of Microplastics in the Marine Environment: A Review of the Sources, Fate, Effects, and Potential Solutions*, *Environment International*, 102 ENVIRON. INT. 165, 166 (2017).

⁶⁸² *Our Planet is Drowning in Plastic Pollution*, UN ENVIRONMENT <https://www.unenvironment.org/interactive/beat-plastic-pollution/>

⁶⁸³ *The New Plastic Economy: Rethinking the Future of Plastics*, WEF, 7 (2016), http://www3.weforum.org/docs/WEF_The_New_Plastics_Economy.pdf

⁶⁸⁴ Won J. Shim & Richard C. Thompson, *Microplastics in the ocean*, 69 AECT 265, 265–268 (2015).

Indus River running through Pakistan India and China.⁶⁸⁵ Ocean Conservancy, a U.S. environmental nonprofit organization, reported that about 60% of plastic trash in the ocean comes from five Asian countries—China, Indonesia, Philippines, Vietnam, and Thailand.⁶⁸⁶ Five Southeast Asian countries⁶⁸⁷—Indonesia, Philippines, Vietnam, Thailand, and Malaysia are among the top 10 countries worldwide ranked by mass of mismanaged plastic waste.⁶⁸⁸ These studies suggest that ASEAN member states are among the world’s leading sources of plastic pollution.

Several main rivers are the significant water sources for the communities and the routes to the ocean for plastic trash stream and other toxic substances in the region. Mekong, the 12th longest river in the world and a significant source of water supply for consumption, hydropower generation, agriculture, and fishing in the Southeast Asia region, is also one of the most polluted rivers from plastic waste dumped or leaked from the member states along the Mekong basin.⁶⁸⁹ Citarum, situated in Bandung West Java, Indonesia, is filled with industrial toxic waste and was listed as the world dirtiest river by World Bank—the mercury level is 100 times more than legal limits, and the lead level is 1000 times more than the U.S. safe drinking water standard.⁶⁹⁰

⁶⁸⁵ Christian Schmidt et al., *Export of Plastic Debris by Rivers into the Sea*, 51 ENVIRON. SCI. TECHNOL. 11246, 12246-12253 (2017); and Prachi Patel, *Stemming the Plastic Tide: 10 Rivers Contribute Most of the Plastic in the Oceans*, SCIENTIFIC AMERICAN (Feb. 1, 2018), <https://www.scientificamerican.com/article/stemming-the-plastic-tide-10-rivers-contribute-most-of-the-plastic-in-the-oceans/>

⁶⁸⁶ *Stemming the Tide: Land-Based Strategies for a Plastic-Free Ocean*, OCEAN CONSERVANCY AND MCKINSEY, 3 (2017), <https://oceanconservancy.org/wp-content/uploads/2017/04/full-report-stemming-the.pdf>

⁶⁸⁷ “The five ASEAN member states collectively contributed 8.9 million metric tons of mismanaged plastic waste, defined as material that is either littered or inadequately disposed in dumps or open, uncontrolled landfills. Mismanaged waste could eventually enter the sea via inland waterways, wastewater outflows, and transport by wind or tides” Maizura Ismail, *Deaths by Plastic Waste*, THE ASEAN POST (Aug. 12, 2018), <https://theaseanpost.com/article/death-plastic-waste>

⁶⁸⁸ Top 20 Countries Ranked by Mass of Mismanaged Plastic Waste <https://www.earthday.org/2018/04/06/top-20-countries-ranked-by-mass-of-mismanaged-plastic-waste/>

⁶⁸⁹ “Plastic-fed lifestyles are proliferating across the Mekong neighborhood. An estimated 200 tonnes of plastic waste is being dumped into Myanmar’s waterways every day. Cambodian households use ten times more plastic than their counterparts in more developed economies, and plastic has become a challenge to increasingly prosperous Laos” *The World’s Plastic Crisis in The Mekong Region*, Mekong Eye (June 4, 2018), <https://www.mekongeye.com/2018/06/04/the-worlds-plastic-crisis-in-the-mekong-region/>; and Van Dat, *Mekong Swimmer ‘Drowns’ in Trash*, THE NATION (Jan. 19, 2015), <http://www.nationmultimedia.com/life/Mekong-swimmer-drowns-in-trash-30252037.html>

⁶⁹⁰ *Indonesia Scrubbing the ‘World’s Dirtiest River’*, ST (Mar. 2, 2018), <https://www.straitstimes.com/asia/se-asia/indonesia-scrubbing-the-worlds-dirtiest-river>; and *Downstream Impacts of Water Pollution in the Upper Citarum River, West Java, Indonesia: Economic Assessment of Interventions to Improve Water Quality*, ADB AND

Mariloa, flowing through Manila in the Philippines, contains toxic discharges from industries, untreated residential wastes, and plastic wastes.⁶⁹¹ Irawaddy river in Myanmar and Choapraya river in Thailand also share the same polluting path.⁶⁹²

Apart from the industrial discharge of plastic particles used in the production process of products,⁶⁹³ plastic leakage from inland waterways to the ocean also occurred due to the deficiency or the lack of household waste collection, treatment, disposal, and recycle in the region. The problem is aggravated by the increase of plastic production and consumption in the enlarging economies. Joi Danielson, programme director of Oceans Plastics Asia at Systemiq, said “You’re battling against this constantly growing target”—while the plastic consumption is growing along the income, especially in the mega-cities, only 40% of garbage is collected with few resources to deal with waste management.⁶⁹⁴ According to Nguyen Hong Tien, director of the ministry’s Administration of Technical Infrastructure, only a few cities in Vietnam have wastewater treatment plants, and the drainage system is inadequate.⁶⁹⁵

Southeast Asia has the richest marine biodiversity on our planet. For example, Indonesia hosts a marine mega-biodiversity called “Amazon of the Ocean” with various coral reefs, mangroves, and the marine ecosystem.⁶⁹⁶ It also had the highest rate of plastic pollution, around

THE WORLD BANK (2013), <http://documents.worldbank.org/curated/en/137801468044659895/pdf/851940WSP0Box300West0Java0Indonesia.pdf>

⁶⁹¹ “Based on the Institute for the Advanced Study of Sustainability’s Policy Brief report, pollution levels in Metro Manila’s rivers are so high that “they could be considered open sewers.” Pamela Victor, *Southeast Asia’s Stream of Polluted Rivers*, THE ASEAN POST (Nov. 14, 2017), <https://theaseanpost.com/article/southeast-asias-stream-polluted-rivers>

⁶⁹² *Id.*

⁶⁹³ Industrial discharge containing plastic particles can be the discharge without treatment or ineffective treatment. Plastic particles including other additives are used in many industries such as cosmetic, textiles, and plastic products which will be discussed further in section 3.2 concerning the root cause and effect of plastic.

⁶⁹⁴ *Plastic Wasteland: Asia’s Ocean Pollution Crisis*, THE STAR (June 5, 2018), <https://www.thestar.com.my/news/regional/2018/06/05/plastic-wasteland-asias-ocean-pollution-crisis/>

⁶⁹⁵ *Waste Water Treatment Badly Needed in Southeast Asia*, ECO-BUSINESS (Oct. 13, 2011), <https://www.eco-business.com/news/waste-water-treatment-badly-needed-in-southeast-asia/>

⁶⁹⁶ GRI, *Indonesia’s Plan of Action on Marine Plastic Debris 2017-2025*, Executive Summary Deputy of Human Resources, Science and Technology, and Maritime Culture Affairs (2017) in Markus T. Lasut et al, *From Coral Triangle to Trash Triangle—How the Hot Spot of Global Marine Biodiversity is Threatened by Plastic Waste*, in PROCEEDING OF THE INTERNATIONAL CONFERENCE ON MICROPLASTIC POLLUTION IN THE MEDITERRANEAN SEA 107, 107 (M.Cocca et al eds., 2018).

3.22 million tons of plastic in 2010.⁶⁹⁷ The regional ocean is suffocating from plastic debris.⁶⁹⁸ The plastic debris intensively circulates in the regional marine environment and spread throughout the world ocean. Thus, it is one of the leading transboundary environmental pollutions that deserve regional and global attention to address the root causes of the problem.

3.2 Root causes: Plastic production and disposal

In ASEAN, the production and consumption of plastic grow along with trade growth, consuming society, and urban lifestyles. ASEAN contributes to plastic production and trade in two ways: producing and exporting plastic products and other products containing plastic particles.

Plastic products are among the top five ASEAN export sectors⁶⁹⁹ and continue to grow along with the ASEAN Free Trade Agreements.⁷⁰⁰ Plastic is made of two essential components, Ethylene and Propylene, byproducts produced from natural gas, oil, and coal.⁷⁰¹ As plastic production is part of the fossil-fuel supply chain, many fossil-fuel companies or their subsidiaries also produce plastic resins and products.⁷⁰² In Asia, China is the leading producer of propylene from coal.⁷⁰³ Southeast Asia is one of the regions abundant in oil and gas

⁶⁹⁷ Jenna R. Jambeck et al, *Plastic Waste Input from Land to Ocean*, 347 SCIENCE 768 ,768-771 (2015).

⁶⁹⁸ *River Plastic Emission to the World's Ocean*, THE OCEAN CLEANUP <https://www.theoceancleanup.com/sources/>

⁶⁹⁹ “One of ASEAN’s top export sectors by value is plastics and plastic products earning US\$ 39.3 billion in export revenues in 2013, the International Trade Statistics reported.” Thailand, Indonesia, Malaysia, Singapore and Vietnam are the top producers and exporters. Worldwide plastics industry: ASEAN countries rediscover their strengths, <https://www.plastics.gl/exhibit/worldwide-plastics-industry-asean-countries-rediscover-their-strengths/>; and Southeast Asia’s Top Product Export Sectors (2013), <http://bdg-asia.com/southeast-asias-top-export-sectors-2013/>

⁷⁰⁰ Lilian Meyer, *ASEAN’s Plastics Industry is Thriving – Free Trade Agreements Offer New Opportunities*, BDG-Asia (May 30, 2016), <http://bdg-asia.com/aseans-plastics-industry-is-thriving-free-trade-agreements-offer-new-opportunities/>

⁷⁰¹ Roland Geyer et al., *Production, Use, and Fate Of All Plastics Ever Made*, 3 Science Advances e1700782, (2017); and How Plastic are Made, <https://plastics.americanchemistry.com/How-Plastics-Are-Made/>

⁷⁰² For example, DowDuPont, Exxon- Mobil, Shell, Chevron, BP, and Sinopec — are all integrated companies that produce both fossil fuels and plastics. *The Production of Plastics and Petrochemical Feedstocks*, CIEL, at 1, 3-4 (2017), <http://www.ciel.org/wp-content/uploads/2017/09/Fueling-Plastics-Fossils-Plastics-Petrochemical-Feedstocks.pdf>

⁷⁰³ *Fueling Plastics: How Fracked Gas, Cheap Oil, and Unburnable Coal are Driving the Plastics Boom*, CIEL (2017) <https://www.ciel.org/wp-content/uploads/2017/09/Fueling-Plastics-How-Fracked-Gas-Cheap-Oil-and-Unburnable-Coal-are-Driving-the-Plastics-Boom.pdf>

resources.⁷⁰⁴ Petrochemical industries are the leading economic sectors in the region. In ASEAN, Singapore hosts petrochemical complexes and invests in ExxonMobil, the integrated company producing both oil and plastic. Thailand has a state-owned PTT Global Chemical Company, the largest petrochemical and refining group producing Ethylene, Olefins, and other plastic resins.⁷⁰⁵ Malaysia also owns Petronas and undertakes two joint venture projects to develop the Refinery and Petrochemical Integrated Development project.⁷⁰⁶ The petrochemical and plastic industries are blooming in the region. Since the environmental cost is not internalized, plastic is regarded as cheap material creating high demand in production and consumption.

Small particles “microplastics” are used in many productions of goods that ASEAN member states are the major producers and exporters. Microplastics, minuscule plastic particles smaller than 5 mm in size, are invisible threats. There are two sources of microplastics. The primary source is microscopic plastic particles (including microfibers, microbeads, and plastic pellets) that are used as ingredients in the industrial production of goods such as cosmetics, cleansers, toothpaste, shower gels, scrubs, and synthetic clothing and textiles.⁷⁰⁷ The secondary source is the commonly used plastic articles exposed to external environmental factors such as sunlight and temperature.⁷⁰⁸ Over time, they disintegrate and end up as microplastics.⁷⁰⁹ In short, plastics will eventually break down into microplastics.

The clothing and textile industry is one of the most dynamic and prime productions and exports in the region—since the 1970s, it has been one of ASEAN’s largest export-oriented

⁷⁰⁴ Brunei’s whole economy depends on crude oil exportation. Thailand, Malaysia, Indonesia, Singapore, Philippines are major oil refineries of the region.

⁷⁰⁵ PTT, <https://www.pttgcgroup.com/en/markets/olefins>

⁷⁰⁶ Refinery and Petrochemical Integrated Development project, <https://oxfordbusinessgroup.com/news/foreign-investment-malaysia's-petrochemicals-industry-gains-momentum>

⁷⁰⁷ Matthew Cole et al, *Microplastics as Contaminants in the Marine Environment: a Review*, 62 MAR. POLLUT. BULL. 2588, 2588-97 (2011); and Carme Alomar et al, *Microplastics in The Mediterranean Sea: Deposition in Coastal Shallow Sediments, Spatial Variation and Preferential Grain Size*, 115 MAR. ENVIRON. RES. 1, 1-10 (2016).

⁷⁰⁸ Cole et al, *supra* note 707.

⁷⁰⁹ *Id.*

industries.⁷¹⁰ The textile industry has been discharging toxic wastes, including microplastic particles used as components fabricating synthetic clothes, into the member states' waterways. In most cases, industries discharge untreated or maltreated wastewater due to their malpractices, ignoring the negative externalities. For instance, about 20,000 tons of waste and 340,000 tons of wastewater, primarily from 2,000 textile factories, are disposed of daily and directly into the waterways of the Citarum River.⁷¹¹ In the past, Citarum was once clean and pristine. Until the 1980s, the new industrial zone of 2,000 factories, including at least 200 textile factories, had emerged and provided jobs in the area.⁷¹² For many years, the Indonesian government had allowed the factories to release wastewater into the river provided that it does not contain banned industrial chemicals.⁷¹³ The government did not impose stricter standards probably because it was afraid that smaller factories could not bear the cleaning cost and end the business.⁷¹⁴ Recently, the Indonesian government has made efforts to clean up the rivers and revoke permits of any factories releasing toxic discharge in the rivers.⁷¹⁵ To date, Indonesia ranks among the top ten clothes and textiles producers in the world.⁷¹⁶ The economic growth

⁷¹⁰ ASEAN Industry Focus https://asean.org/?static_post=industry-focus

⁷¹¹ Dikanaya Tarahita & Muhammad Zulfikar Rakhmat, *Indonesia's Citarum: The World's Most Polluted River*, THE DIPLOMAT (Apr. 28, 2018), <https://thediplomat.com/2018/04/indonesias-citarum-the-worlds-most-polluted-river/>

⁷¹² *Indonesia Scrubbing the 'World's Dirtiest River'*, ST (Mar. 2, 2018), <https://www.straitstimes.com/asia/se-asia/indonesia-scrubbing-the-worlds-dirtiest-river>

⁷¹³ Decree of the State Minister for Populations and Environment No. no. KEP- 03/MENKLH/II/1991, <http://extwprlegs1.fao.org/docs/pdf/ins2416.pdf> See also Tjandra Setiadi, *Industrial Wastewater Management in Indonesia*, PSLH, http://wepa-db.net/3rd/en/meeting/20170926/pdf/26_3-03_Indonesia.pdf

⁷¹⁴ Debbie M. Price, *Worse for Wear: Indonesia's Textile Boom*, UNDARK (Febr. 23, 2017), <https://undark.org/article/indonesia-textiles-citarum-river-pollution/>; and Jack Hewson, *Pollution Flows Freely in Indonesia's Rivers*, ALJAZEERA (Nov. 21, 2013), <https://www.aljazeera.com/indepth/features/2013/11/pollution-flows-freely-indonesia-rivers-2013112013166643513.html>

⁷¹⁵ Safri Burhanuddin, a Deputy Coordinating Maritime Affairs Minister, told Channel NewsAsia in an interview at his office that "the hardest challenge for authorities is tackling industrial waste because only 10 per cent of factories along the river put their waste through a wastewater management plant." Chandni Vatvani, *The Toxic Waste that Enters Indonesia's Citarum River, One of the World's Most Polluted*, CHANNEL NEWSASIA (Apr. 14, 2018) <https://www.channelnewsasia.com/news/asia/indonesia-citarum-river-worlds-most-polluted-toxic-waste-10124436>

⁷¹⁶ *Textile Industry Indonesia*, INDONESIA-INVESTMENT (June 6, 2016), <https://www.indonesia-investments.com/business/industries-sectors/textile/item6896?>

from textile industries provides the world with cheap clothes but with a profoundly high environmental cost.⁷¹⁷

The underlying problems are the increase of plastic production due to comparative advantages and the lack of political will to internalize environmental costs or enforce stricter standards due to economic incentives. For the disposal of plastic waste, the region suffers from the mismanagement of plastic waste disposal and the lack of infrastructure and technology to efficiently treat wastewater before releasing it into the environment. In most cases, it is because of the lack of political will to enforce stricter environmental standards and invest in those cleaning infrastructures because cleaning does not make profits. Nevertheless, even in the best circumstances, the current technology of wastewater treatment may not completely prevent microplastics from leaking into the waterways and eventually the ocean. A 2016 study of one plant shows that despite claims for high waste reduction rates, it still releases 65 million microplastics into the receiving water every day.⁷¹⁸ There is also byproduct leakage from washing synthetic clothes—microfiber plastics are released in each wash.⁷¹⁹ Thus, plastics and microplastics end up in the ocean through drainage or sewage system of manufacturers, runoff, and household wastewater.⁷²⁰

3.3 Effects of plastic and microplastics

Plastic production and disposal have significant effects on the environment, marine biodiversity, human food and health, and the economy.

⁷¹⁷ Another example is the city of Manado, medium sized city with a dense population situated next to the Manado Bay and Buaken Island which is one of the world-class diving destination, is origin of the stream of mismanaged waste entering the ocean every day. Rivers flow to Manado Bay is full of trash, especially plastic waste. Lasut et al, *supra* note 696, at 109-110. See also Kathleen Webber, *How Fast Fashion Is Killing Rivers Worldwide*, ECOWATCH (Mar. 22, 2017), <https://www.ecowatch.com/fast-fashion-riverblue-2318389169.html>

⁷¹⁸ Fionn Murphy et al., *Wastewater Treatment Works (WwTW) as a Source of Microplastics in the Aquatic Environment*, 50 ENVIRON. SCI. TECHNOL. 58000, 5800-5808 (2016) in Karen Graham, *Removing Microplastic in Tap Water Starts at Treatment Plants*, DIGITAL JOURNAL (Sep. 7, 2017) <http://www.digitaljournal.com/tech-and-science/technology/removing-microplastics-from-tap-water-starts-at-treatment-plants/article/501870>

⁷¹⁹ Id.

⁷²⁰ Cole et al, *supra* note 707, at 2588–2597.

Plastic production contributes to climate change. Plastic is made of petroleum byproducts and natural gas.⁷²¹ The more we use plastic, the more we use oil and gas, but the more we move away from fossil fuels, the more we move away from single-use plastics. Furthermore, researchers from the University of Hawaii recently published a study showing that plastics, once break down and expose to certain elements, release methane and ethylene—significant greenhouse gases contributing to global climate change.⁷²² Thus, the emission occurs not only during the production but also from the end products.

Plastic debris in any form pollutes inland water resources and the world ocean—from the Arctic to the Antarctic.⁷²³ Because microplastics are floatable and persistent, they are easily dispersed by the ocean current.⁷²⁴ They are found on beaches, the sea, and deep-sea beds.⁷²⁵

Plastic litter in the ocean or rivers has adverse effects on marine biodiversity and animals from the smallest to the biggest beasts. It contaminates mangroves, seabed, and coral reefs. Coral reefs are covered and cut by plastic wastes blocking them light and oxygen and leaving them vulnerable to infection.⁷²⁶ The International Union for Conservation of Nature (IUCN) reported that marine plastic pollution affected at least 267 species by ingestion, suffocation, and entanglement.⁷²⁷ Marine animals mistake plastic waste for their food, and once their stomachs

⁷²¹ Geyer et al., *supra* note 701.

⁷²² Sarah-Jeanne Royer et al., *Production of Methane and Ethylene From Plastic in the Environment*, 13 PLoS ONE (2018), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0200574&type=printable>; and Shannon Waters, *New Study Shows Plastics Release Greenhouse Gases, Contributing to Climate Change*, SURFRIDER FOUNDATION (Aug. 10, 2018) <https://www.surfrider.org/coastal-blog/entry/new-study-shows-plastic-as-source-of-greenhouse-gases-potentially-contribut>

⁷²³ Cole et al, *supra* note 707, at 2588–2597; and Maritime Organization, *Plastic Particles in the Ocean may be as Harmful as Plastic Bags, Report Says*, IMO (Apr. 27, 2015).

⁷²⁴ Diego Gomes de Carvalho et al, *Microplastic pollution of the beaches of Guanabara Bay, Southeast Brazil*, 128 OCEAN & COASTAL MANAGEMENT 10, 10-17 (2016).

⁷²⁵ Anthony Gallagher et al, *Microplastics in the Solent Estuarine Complex, UK: An Initial Assessment*, 102 MAR. POLLUT. BULL. 243, 243-49 (2016).

⁷²⁶ Joleah B. Lamb et al, *Plastic Waste Associated with Disease on Coral Reefs*, 359 SCIENCE 460, 460-462 (2018); and Damian Carrington, *Billions of Pieces of Plastic on Coral Reefs Send Disease Soaring Research Reveals*, THE GUARDIAN (Jan. 25, 2018), <https://www.theguardian.com/environment/2018/jan/25/billions-of-pieces-of-plastic-on-coral-reefs-send-disease-soaring-research-reveals>

⁷²⁷ Florian Thevenon et al., *Plastic Debris in the Ocean : The Characterization of Marine Plastics and their Environmental Impacts*, IUCN Report (2014) <https://www.researchgate.net/publication/269405308> Plastic Debris in the Ocean The Characterization of Marine Plastics and their Environmental Impacts Situation Analysis Report

are filled with plastic, it can cause deaths by infections, internal injuries, reduced ability to swim, and starvation.⁷²⁸ In Southeast Asia, the number of endangered marine animals killed with large amounts of plastic in their stomachs are rising in recent years and will continue to increase if ASEAN takes no effective action.⁷²⁹ In 2016, an Indonesian Coelacanth, a rare and vulnerable species that was once thought to be extinct, was found dead off the coast of Indonesia with plastic wraps of Lay's Potato Chips in its intestine.⁷³⁰ In June 2018, after the death of a pilot whale found on the beach in Songkhla, Southern of Thailand, it is revealed that the whale had ingested 80 pieces of plastic waste weighing eight kilograms in its stomach.⁷³¹ In November 2018, the recent victim is a 9.5 metered sperm whale found dead in Indonesia's national park with 115 drinking cups, 4 plastic bottles, 25 plastic bags, and 2 flip-flops in its stomach.⁷³² Thom Thamrongnawasawat, a marine biologist and lecturer at Kasetsart University, estimated that over 100 million marine animals are killed each year by plastic waste.⁷³³

The death of "iconic marine species"⁷³⁴ caused by large plastic debris is impactful, but it is just the tip of the iceberg. While common plastic trash such as all single-use plastic bags, straws, or wraps may be an evident problem, microplastics are an invisible threat. Dealing with microplastics is not as simple as waste management since they are too small to be removed from waste streams by most filtration systems. Indeed, microplastics can leak into the

⁷²⁸ Marine Plastics, IUCN Issue Brief (May 2018) <https://www.iucn.org/resources/issues-briefs/marine-plastics>

⁷²⁹ For example: A green turtle found in Chanthaburi, Thailand was also dead because of plastic shreds from fishing gear, rubber bands and other marine debris in its stomach. In August 2018, a whale shark was found dead having plastic wastes in its gills on the Philippine shores of Tagum City in Davao del Norte. Lorraine Chow, *Plastic Shreds, Rubber Bands and Balloon Pieces Found in Thai Turtle*, ECOWATCH (June 11, 2018), <https://www.ecowatch.com/turtle-plastic-waste-thailand-2577138477.html>; and *CNN Philippines, LOOK: Whale Shark Found Dead in Davao Del Norte*, CNN (Aug. 9, 2018), <http://cnnphilippines.com/news/2018/08/09/Whale-shark-dead-Davao-del-Norte-Tagum-City-plastic-pollution.html>

⁷³⁰ Howard Dryden, *Coelacanth Found Full of Plastic*, GLOBAL OCEANIC ENVIRONMENTAL SURVEY (Jan. 9, 2018), <https://www.goesfoundation.com/resources/posts/2019/january/coelacanth-found-full-of-plastic/>

⁷³¹ Ismail, *supra* note 687.

⁷³² *Dead Sperm Whale Found in Indonesia had Ingested '6kg of Plastic'*, BBC (Nov. 20, 2018), https://www.bbc.com/news/world-asia-46275742?ns_source=facebook&ns_campaign=bbcnews&ocid=socialflow_facebook&ns_mchannel=social&fbclid=IwAR3B4LPod2R_6kf16b-YFHDp3CFSdnR5JJAm23g1OFsBFXfl9yU8X1J6q-s

⁷³³ Ismail, *supra* note 687.

⁷³⁴ Matt McGrath, *A Single Piece of Plastic Can Kill Sea Turtles, Says Study*, BBC (Sept. 13, 2018), <https://www.bbc.com/news/science-environment-45509822>

environment both during the production process and by using the end products regardless of the waste treatment process. As the size decreases, the potential of absorption increases—more marine organisms are exposed to plastic particles’ ingestion.⁷³⁵ Marine organisms ingest the particles because they are mistaken for food.⁷³⁶ Microplastics can absorb other toxic substances in seawater⁷³⁷ and enter the food chain of marine animals from the smallest to the biggest: zooplankton, mussels, fish, turtles, shrimps, oysters, whales.⁷³⁸ Microplastics can cause pathological stress, false satiation, reproductive complications, blocked enzyme production, reduced growth rate, and oxidative stress.⁷³⁹ These health problems could lead to fish stock depletion and human food security problems. Eventually, humans—the end consumer is affected by marine plastic pollution either directly from seafood, sea salt,⁷⁴⁰ or water containing microplastics or indirectly by the potential risk of fish depletion.

Economic damages, direct or indirect, are inevitable. Losses occur in the fishing industry due to fish population decline and damage to fishing vessels and gears due to the debris. Losses also appear in the tourism industry due to declining aesthetic and sanitation values of the coastline driving away potential tourists, and in the transportation industry because of damage to vessels due to entanglement with debris.⁷⁴¹ The clean-up operations also contribute to economic loss, especially if touristic sites have to be closed for the clean-up operation. For instance, from June to September 2018, Maya Bay, the famous tourist destination

⁷³⁵ Shim & Thompson, *supra* note 684, at 265-268.

⁷³⁶ Oona M. Lönnstedt & Peter Eklöv, *Environmentally Relevant Concentrations of Microplastic Particles Influence Larval Fish Ecology*, *Ecotoxicology*, 352 SCIENCE 1213, 1213-16 (2016).

⁷³⁷ Julia Reisser et al, *Millimeter-Sized Marine Plastics: A New Pelagic Habitat for Microorganisms and Invertebrates*, 9 PLoS One (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4062529/>

⁷³⁸ Cole et al, *supra* note 707, at 2588-97; and Pedro Ferreira et al, *Effects Of Multi-Stressors on Juveniles of the Marine Fish Pomatoschistus Microps: Gold Nanoparticles, Microplastics and Temperature*, 170 AQUAT. TOXICOL. 89, 89-103 (2016).

⁷³⁹ Rebecca Sutton, *Microplastic Contamination in the San Francisco Bay, California, USA*, 109 MAR. POLLUT. BULL. 230, 230-35 (2016).

⁷⁴⁰ Donggi Yang et al, *Microplastic Pollution in Table Salts from China*, 49 ENVIRON. SCI. TECHNOL. 13622, 13622–13627 (2015).

⁷⁴¹ *Understanding Economic Benefits and Costs of Controlling Marine Debris in the APEC Region*, APEC MARINE RESOURCES WORKING GROUP, at 1, 12 (2009).

in Thailand, was closed to clean up and restore coral reefs.⁷⁴² The Philippines also closed its famous Boracay island for six months to improve the sewage systems.⁷⁴³ The UNEP estimates that the economic damage caused by plastic waste in the Asia-Pacific in tourism, fishing, and shipping industries is about 1.3 billion US dollars every year. The total economic damage to the world's marine ecosystem amounts to at least 13 billion US dollars every year.⁷⁴⁴

3.4 Regional cooperation and legal framework within global context: the potential of Basel and Stockholm Conventions

ASEAN member states are the key contributors to the plastic pollution in the marine environment from the production and disposal of plastic and products containing microplastic particles.⁷⁴⁵ This global challenge has to be addressed within ASEAN cooperation and legal framework and in the international context.⁷⁴⁶ The problem is complex, encompassing matters

⁷⁴² Will Coldwell, *Thailand's Maya Bay, Location for The Beach, to Close to Tourists*, THE GUARDIAN (Feb. 14, 2018), <https://www.theguardian.com/travel/2018/feb/14/thailand-maya-bay-the-beach-movie-close-to-tourists-leonardo-dicaprio>

⁷⁴³ Euan Mckirdy, *Philippines Closes 'Cesspool' Tourist Island of Boracay*, CNN (Apr. 5, 2018), <https://www.cnn.com/2018/04/04/asia/philippines-duterte-boracay-shutdown-intl/index.html>

⁷⁴⁴ *Single Use Plastic A Road Map to Sustainability*, UNEP, viii (2018), https://wedocs.unep.org/bitstream/handle/20.500.11822/25496/singleUsePlastic_sustainability.pdf

⁷⁴⁵ On top of its own production, the region also recently became plastic waste haven for the world as China just banned the importation of plastic wastes. For this plastic trash flow, member states have to choose either banning the importation or strengthening their environmental standards by upgrading their recycling industries and infrastructure becoming the major players in plastic waste trade. To date, while receiving more imported plastic wastes, member states did neither ban the importation nor improve their environmental standards regarding recycling capacity and standard; as a result, more plastic leakage will be borne by the ocean. Straits Times reviewed that "Preliminary data from the BIR, shared with the Thomson Reuters Foundation, showed imports of plastic waste into South-east Asia are already rising fast. Due partly to a ramp-up in shipments in the final quarter of last year, the BIR estimates that annual imports of plastic scrap into Malaysia jumped to 450,000-500,000 tonnes in 2017 from 288,000 tonnes in 2016. Vietnam's imports rose by 62 per cent to 500,000-550,000 tonnes for 2017, while Thailand and Indonesia showed increases of up to 117 per cent and 65 per cent respectively." *South-east Asian Plastic Recyclers Hope to Clean up After China Ban*, ST (Jan. 16, 2018), <https://www.straitstimes.com/asia/se-asia/south-east-asian-plastic-recyclers-hope-to-clean-up-after-china-ban> See also Ariane Combal-Weiss, *EU-Asia Cooperation on Plastics*, EU-ASIA CENTRE, http://www.eu-asiacentre.eu/pub_details.php?pub_id=235 and Laura Parker, *China's Ban on Trash Imports Shifts Waste Crisis to Southeast Asia*, NATGEO (Nov. 16, 2018), <https://www.nationalgeographic.com/environment/2018/11/china-ban-plastic-trash-imports-shifts-waste-crisis-southeast-asia-malaysia/>

⁷⁴⁶ As Mr. Tamelander Jerker Tamelander, the head of the United Nations Environment Programme's Coral Reef Unit stated "It's clear now that this region is probably the single largest contributor of plastic litter into the marine environment in the world, which means that if we want to solve the marine litter problem as a global challenge, we have to solve it in this region." *Tackling Plastic Pollution Priority at ASEAN Meeting*, UNEP (Dec. 8, 2017), <https://www.unenvironment.org/news-and-stories/story/tackling-plastic-pollution-priority-asean-meeting>

of the disposal and management of waste, transboundary pollution, coastal and marine biodiversity conservation, food safety and security, water resources, plastic waste trade, and climate change. Regional cooperation on plastic pollution is in the initial stage. Although plastic pollution is not a new issue, it has just received a spotlight in the media, partly due to social media's rising use. Plus, many recent scientific studies confirm its adverse effects on the environment and human life. In Southeast Asia, the measures dealing with the plastic crisis remain at the national level. Same as in the international context, efforts have been taken at the domestic level by the public authority or private sectors, except in European Union, where there are regional legal policy and instruments on the issue.

An ASEAN-based movement to reduce plastic waste was started by ASEAN Centre for Biodiversity (ACB)—its tasks are to support and coordinate the implementation of activities among member states and regional and international organizations leading to the conservation and sustainable use of biological diversity in the region.⁷⁴⁷ According to Theresa Mundita Lim, executive director of ACB, the current works are limited in the field of environmental education and data gathering on the interconnectivity of marine areas, the volume of trash, and its transboundary movement—the regional action plan has not yet been initiated.⁷⁴⁸

While waiting for regional action plan or further legal framework, domestic measures are taking place. These measures aim to phase out or disincentivize the use of single-use plastic products, but they do not respond to the production sources or industrial sources of plastic contamination.

As ACB Executive Director pointed out, Los Baños Laguna, is the first city in the Philippines to regulate the use of plastic bags and prohibit the use of plastic straws, plastic cups,

⁷⁴⁷ ASEAN Centre for Biodiversity <https://aseanbiodiversity.org/about-acb/>

⁷⁴⁸ “We recognize [plastic pollution] is a threat to biodiversity, to food security, to climate adaptation measures, and all of the services that marine biodiversity can provide to all of ASEAN. So what we want is really to establish all these linkages to strengthen the resolve to come up with a regional action plan.” Interview of Theresa Mundita Lim in Kelly Rogers, *What Role for the ASEAN in the Fight Against Plastic Pollution?*, DEVEX (Oct.26, 2018), <https://www.devex.com/news/what-role-for-asean-in-the-fight-against-plastic-pollution-93738>

and plates. Later, similar efforts “say no to plastic bags” were initiated in other countries.⁷⁴⁹ In Cambodia, major supermarkets charge KHR 400 (10 US cents) per plastic bag to create an incentive for customers to avoid using plastic bags.⁷⁵⁰ Singapore banned plastic straws and lids for dine-in customers in many restaurant chains and the National University of Singapore.⁷⁵¹ Malaysia, one of the prime exporters of plastics,⁷⁵² attempted to impose a plastic tax with a roadmap towards zero plastic by 2050.⁷⁵³ However, not all efforts are successful. In 2016, Indonesia launched a three-month trial period imposing a fee on plastic bags in megacities, but the participating retailers refused to continue citing that it is a controversial measure. Later, the Indonesian government initiated to impose fees and regulate plastic producers but failed to execute it due to the protest from plastic manufacturers who have a strong connection with the Indonesian Industry Ministry.⁷⁵⁴ Vietnam has enacted an environmental tax on plastics, but it

⁷⁴⁹ Philippines, Thailand, Laos and Brunei run campaigns encouraging general public to use reusable bags for shopping and “say no to plastic bags”. In some coastal cities or islands of Thailand, a line of minimarts and convenient stores stop giving plastic bags for customers. *ASEAN Joins Movement to Beat Plastic Pollution*, ASEAN SECRETARIAT NEWS (July 2, 2018), <https://asean.org/asean-joins-movement-beat-plastic-pollution/>; and *7-Eleven Launches Campaign to ‘Reduce and Stop’ Use of Plastic Bags*, THE NATION (Nov. 8, 2018), <http://www.nationmultimedia.com/detail/Corporate/30358155>

⁷⁵⁰ Khouth Sophak Chakrya & Daphne Chen, *Environment Ministry Rolls Out Plastic Bag Fee*, THE PHANOM PENH POST (Mar. 29, 2018), <https://www.phnompenhpost.com/national/environment-ministry-rolls-out-plastic-bag-fee>

⁷⁵¹ Robin Hicks, *Singapore University’s Plastic Straw Ban Sparks Backlash from Students: ‘I’ve been greatly inconvenienced’*, ECO-BUSINESS (Nov. 8, 2018), <https://www.eco-business.com/news/singapore-universitys-plastic-straw-ban-sparks-backlash-from-students-ive-been-greatly-inconvenienced/>

⁷⁵² The minister in charge of environment matters Yeo Bee Yin gave the interview that “Malaysia is the fourth largest plastic exporter in ASEAN and is ranked number 25 in global plastic exports in 2017. The ministry doesn’t want to kill the plastic manufacturers but prepare them to produce more eco-friendly products. The ministry wants to help plastic manufacturers to grow with alternative (products).” *Malaysia to Abolish Single-Use Plastics by 2030, Introduce Plastic Bag Charge*, CHANNEL NEWS ASIA (Sept. 24, 2018), <https://www.channelnewsasia.com/news/asia/malaysia-abolish-single-use-plastics-2030-plastic-bag-charge-10753114>

⁷⁵³ Zafirah Zein, *Malaysia to Ban Single-Use Plastic*, ECO-BUSINESS (Sept. 26, 2018), <https://www.eco-business.com/news/malaysia-to-ban-single-use-plastic/>

⁷⁵⁴ The Indonesian Olefin, Aromatic and Plastic Industry Association (Inaplas) stated that “Imposing an excise on plastic bags will have a large impact on the plastics industry, including small and medium enterprises”. Nugroho Wahyu Widodo, a director at the Finance Ministry, said that the Industry Ministry “is concerned that the excise could disrupt small and medium enterprises especially, which use a lot [of plastic bags], so it would be a [cost] burden.” Basten Gokkon, *As Planned Excise Flops, Indonesia Ponders How to Give up Plastic Bags*, MONGABAY (July 23, 2018), <https://news.mongabay.com/2018/07/as-planned-excise-flops-indonesia-ponders-how-to-give-up-plastic-bags/>

has proven ineffective due to tax invasion and legal loopholes.⁷⁵⁵ For example, when the regulations state that individuals and companies that manufacture, import, or buy plastic bags from others to package their homemade products are not subjected to tax, companies find a way to outsource their plastic packaging.⁷⁵⁶ To evade tax collected by plastic bulk weight, the bag manufacturers start producing thinner bags, which have a greater negative impact on the environment because thinner bags are easier to break down into microplastic particles and less durable so people tend to use more.⁷⁵⁷

As for existing ASEAN legal frameworks, several platforms and instruments can be stepping stones to develop further agreement or action plan on plastic the pollution problem. In the broad view, the cornerstone of ASEAN environmental cooperation is to achieve sustainable development with four critical areas of environmental sustainability: sustainable climate, sustainable consumption and production, conservation and sustainable management of biodiversity and natural resources, and sustainable cities.⁷⁵⁸ For the institutional framework, ASEAN Ministerial Meeting for the Environment is on top of the pyramid. There are seven working groups: Climate Change, Chemical and Waste, Coastal and Marine Environment, Environmental Education, Environmentally Sustainable Cities, Nature Conservation and Biodiversity, and Water Resources Management.⁷⁵⁹ Among seven key environmental areas, chemical waste, climate change, coastal marine environment, conservation and biodiversity, and water resources management are the issues most connected with plastic waste pollution.

Considering the overall effects of plastic pollution, all ASEAN environmental groups should work together to find the optimum solution and action plans. The current key players

⁷⁵⁵ *Loopholes and Evasion Limit Success of Plastic Bag Tax*, VIET NAM NEWS (Sept. 27, 2018), <https://vietnamnews.vn/environment/466610/loopholes-and-evasion-limit-success-of-plastic-bag-tax.html#8tl3VsVZO3agugA4.97>

⁷⁵⁶ *Id.*

⁷⁵⁷ *Id.*

⁷⁵⁸ ASEAN Cooperation on Environment: At a Glance https://www.env.go.jp/earth/cop/cop22/common/pdf/event/14/03_presentation3.pdf

⁷⁵⁹ About ASEAN Cooperation on Environment <https://environment.asean.org/about-asean-cooperation-on-environment/>

are the ACB and the ASEAN Working Group on Coastal and Marine Environment (AWGCME), a consultative forum to promote coordination and collaboration among marine-based initiatives to ensure sustainable management of coastal and marine environment.⁷⁶⁰ In November 2017, ASEAN held a Conference on Reducing Marine Debris in ASEAN Region organized and co-hosted by the Department of Marine and Coastal Resources and the Ministry of Natural Resources and Environment (MONRE) of Thailand and International Union for Conservation of Nature (IUCN) in Phuket Thailand.⁷⁶¹ From the conference, ASEAN recognizes the transboundary nature of marine debris pollution; thus, it is becoming a global concern since it poses severe threats to the health of the world's oceans, marine biodiversity, environments, and peoples.⁷⁶² Collective and coordinated actions among member states and partners are urgently needed.⁷⁶³ The majority of marine debris originated from land-based sources, so the preventive approach is the key to solve the problem.⁷⁶⁴ Nonetheless, it stresses that further research is needed on marine plastic debris and microplastics, including biodegradable alternatives, waste management, and impacts on the environment and human health.⁷⁶⁵

Therefore, it concluded that ASEAN needs to develop a land-to-sea approach and create an agreement on sustainable management of marine debris pollution.⁷⁶⁶ It also laid out the

⁷⁶⁰ ASEAN Working Group on Coastal and Marine Environment (AWGCME) <http://environment.asean.org/awgcme/>

⁷⁶¹ IUCN Co-hosted ASEAN Conference on Reducing Marine Debris, IUCN (Dec. 15, 2017), <https://www.iucn.org/news/thailand/201712/iucn-co-hosted-asean-conference-reducing-marine-debris>

⁷⁶² Since ASEAN recognized that the marine plastic pollution is transboundary problem and its effects pose serious threats to environment, marine biodiversity and human, this issue is not only environmental issue but it is a Non-Traditional Security (NTS) issue under the political-security pillar requiring enhance operation among member states

⁷⁶³ During the opening ceremony H.E. Vongthep Arthakaivalvatee, Deputy Secretary General of ASEAN stated "It is important to note that the top 20 countries ranked by size of mismanaged plastic waste include six ASEAN member states. Marine debris pollution is a regional concern which requires regional action" https://www.iucn.org/sites/dev/files/content/documents/2017/asean_marine_debris_report.pdf

⁷⁶⁴ ASEAN Conference on Reducing Marine Debris in ASEAN Region, Conference Summary (December 26, 2017) <http://environment.asean.org/wp-content/uploads/2017/12/Summary-of-ASEAN-Conference-on-Marine-Debris-26-Dec-2017.pdf>

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.*

importance of capacity building with other international partners, education and innovation, private sector engagement, and public awareness and outreach.⁷⁶⁷ With the private sector engagement, economic preventive measures are at the center of focus: implement measures for sustainable production and solid waste management; application of circular economy for plastic production; and investment in redesigning products/packaging and alternative materials.

In the international law context, there are three international instruments with the potential to address the issue of marine plastic pollution.⁷⁶⁸

First, the United National Convention on the Law of the Sea obligates all member states to conserve the marine environment and take measures to preserve the sea, including measures to reduce land-based pollution.⁷⁶⁹ All ASEAN member states, except Cambodia,⁷⁷⁰ have ratified the convention. This convention lay down a general ground base for a legally binding obligation of the states to prevent and control pollution of the marine environment from land-based sources. However, the scope of the convention does not address plastic pollution throughout the life cycle—it aims to address waste disposal; therefore, the plastic production

⁷⁶⁷ *Id.*

⁷⁶⁸ There are also the International Convention for the Prevention of Pollution from Ships (MARPOL) and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention). However, MARPOL is dealing with marine pollution from vessels while most of plastic litter are from land-based sources. For London Convention, it prohibits the international dumping of waste in all maritime zones but only Philippines is the party to the Convention; thus, its application is very limited in the region.

⁷⁶⁹ Part XII Protection and Preservation of Marine Environment Article 207 Pollution from land-based sources

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. States shall endeavour to harmonize their policies in this connection at the appropriate regional level.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5. Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment. The United National Convention on the Law of the Sea http://www.un.org/Depts/los/convention_agreements/texts/unclos/part12.htm

⁷⁷⁰ Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm

and process methods are not covered. The problem of marine litter by plastics and microplastics should be eliminated or minimized at the origin, not at a later stage by cleaning operation once they become wastes and risk to enter the marine environment. The following conventions may shed some light on how to address the plastic issue from the sources.

Second, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (Basel Convention) was adopted by all ASEAN member states.⁷⁷¹ In the 11th meeting of the Open-ended Working Group of the Basel Convention Geneva, 3–6 September 2018, the report confirms that marine plastic litter and microplastics are critical global concerns and emphasizes that the Basel Convention can play a central role in addressing this problem.⁷⁷² The objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes by reducing hazardous waste generation, restricting transboundary movements of hazardous wastes, and regulating systems where transboundary movements are permissible.⁷⁷³ There are two types of waste under the convention: hazardous waste under Annex I, Annex III, and Annex XI, and other waste under Annex II—wastes collected from households and residues arising out of incineration of household wastes.⁷⁷⁴ Plastics can be regarded as both hazardous wastes and other wastes under the terms of the convention. In general, plastics are deemed as other waste—household wastes, significant sources of marine litter, but plastics can fall within the scope of hazardous wastes if they contain constituents under Annex I and XI or hazardous characteristics under Annex III.⁷⁷⁵ With the increase of recent and ongoing scientific studies on the effects of

⁷⁷¹ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>

⁷⁷² Report on possible options available under the Basel Convention to further address marine plastic litter and microplastics, Open-ended Working Group of the Basel Convention on the Control of Transboundary of Movements Hazardous Wastes and Their Disposal Eleventh meeting Geneva, 3-6 September 2018. Available at <https://www.informea.org/sites/default/files/imported-documents/UNEP-CHW-OEWG.11-INF-22.English.pdf>

⁷⁷³ The Basel Convention.

⁷⁷⁴ The Basel Convention, Annex I, II, III and XI

⁷⁷⁵ For instance, Annex I (Y18) categories of wastes to be controlled includes residues arising from industrial waste disposal operations. In Annex XI B3 Waste Containing Principally Organic Constituents, which may contain Metals and Inorganic Materials B3010 Solid plastic waste: The following plastic or mixed plastic materials,

plastics and microplastics, there are possibilities that they could have certain characteristics being categorized as hazardous under the existing terms of convention or the new extended definition in the future. There are ongoing works by the expert groups to improve the legal clarity of the convention and consider whether there are any additional constituents to be added to the Annex.⁷⁷⁶

For the application of the Basel Convention regarding the production and disposal of plastic, under Article 4.2, each party shall take appropriate measures to ensure minimum generation of hazardous wastes, the availability of adequate disposal facilities, and efficient management of hazardous wastes.⁷⁷⁷

While being legally binding and having almost universal membership with a comprehensive approach, the Basel Convention has certain limitations in dealing with plastic pollution. First, the provisions on minimizing waste generation and ensuring environmentally sound management are not effectively measured at national, regional, and global levels.⁷⁷⁸ The implementation needs to be strengthened and monitored. Second, some provisions are too vague—for instance, the definition of environmentally sound management of hazardous waste or other waste means “taking all practicable steps” to ensure that hazardous wastes or other wastes are managed in a manner that will protect human health and the environment against

provided they are not mixed with other wastes and are prepared to a specification: Scrap plastic of non-halogenated polymers and co-polymers, including but not limited to the following, ethylene, styrene, polypropylene, polyethylene terephthalate, acrylonitrile, butadiene, etc.

⁷⁷⁶ Report on possible options available under the Basel Convention to further address marine plastic litter and microplastics, Open-ended Working Group of the Basel Convention on the Control of Transboundary of Movements Hazardous Wastes and Their Disposal Eleventh meeting Geneva, 3-6 September 2018 and Annex to decision OEWG-11/8 Draft elements as a basis for a decision on marine plastic litter, to be considered at the fourteenth meeting of the Conference of the Parties, on which Parties and others are invited to comment.

⁷⁷⁷ Article 4.2 each party shall take appropriate measure to (a) Ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects; (b) Ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal; and (d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement.

⁷⁷⁸ Report on possible options available under the Basel Convention, 5.

adverse effects resulting from such waste.⁷⁷⁹ The guidance is given in the technical guidelines for the identification and environmentally sound management of plastic wastes and for their disposal; nonetheless, the guidelines do not have a binding effect.⁷⁸⁰ This depends on the implementation on national levels, which vary among those with high capacity and those who lack both infrastructure and technological capacities. Last, the convention may not cover all plastic debris that may end up in the ocean. For instance, it may not cover plastics from industrial production unless hazardous or become household wastes or microfiber plastics that are byproducts from washing synthetic clothes.⁷⁸¹ The clarity on application to plastics and microplastics through every aspect of their life cycle remains to be seen.

Last, the Stockholm Convention on Persistent Organic Pollutants 2001 was adopted by all ASEAN member states, except Malaysia and Brunei.⁷⁸² The objective of the Stockholm Convention is to protect human health and the environment from persistent organic pollutants (POPs)—organic chemical substances that persist in the environment and bioaccumulate in humans and wildlife having harmful effects and potential for long-range distribution in the environment.⁷⁸³ Serious health problems associated with POPs exposure include certain cancers, congenital disabilities, dysfunctional immune and reproductive systems, greater disease susceptibility, and diminished intelligence.⁷⁸⁴ Chemicals found in plastics marine litter are originated from four sources: chemicals intentionally added during the production process; unintentional chemicals from the production processes; chemicals from the recycling of plastic

⁷⁷⁹ Karen Raubenheimer & Alistair McIlgorm, *Can The Basel and Stockholm Conventions Provide a Global Framework to Reduce the Impact of Marine Plastic Litter?*, 96 MAR. POLICY 285, 285-290 (2018).

⁷⁸⁰ Technical guidelines for the identification and environmentally sound management (ESM) of plastic wastes and for their disposal (UNEP/CHW.6/21)

⁷⁸¹ Report on possible options available under the Basel Convention, 5.

⁷⁸² Status of Ratification of the Stockholm Convention on Persistent Organic Pollutants 2001, <http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatoires/tabid/4500/Default.aspx>

⁷⁸³ What are POPs, the Stockholm Convention on Persistent Organic Pollutants 2001, <http://chm.pops.int/TheConvention/ThePOPs/tabid/673/Default.aspx>

⁷⁸⁴ Opening Remarks delivered by Abiola Olanipekun, Chief of the Science and Technical Assistance (STA) Branch at the UN Palais des Nations, June 5th 2018 World Environment Day 2018: Solutions to beat plastic pollution

<http://www.brsmeas.org/Implementation/MediaResources/SpeechesandInterviews/WorldEnvironmentDay2018Abiola/tabid/7431/language/en-US/Default.aspx>

waste; and Hydrophobic chemicals adsorbed from environmental pollution into plastics.⁷⁸⁵ Thus, plastics may contain hazardous substances, including POPs such as plasticizers and flame retardants which may be slowly released into the ocean.⁷⁸⁶ As microplastics can absorb toxic substances existing in seawater, microplastics can be the carrier of POPs listed under the convention, such as PCB, DDT, and dioxins.⁷⁸⁷

The Stockholm Convention regulates the production and use of POPs in three ways: (i) Eliminating the production and use of chemicals listed in Annex A⁷⁸⁸; (ii) Restricting the production and use of chemicals listed in Annex B⁷⁸⁹; and (iii) Reducing the unintentional release of chemicals listed in Annex C with the goal of continuing minimization and, where feasible, the ultimate elimination.⁷⁹⁰ As Raubenheimer and McIlgorm pointed out, the application of the convention to plastics is limited to plastic products containing POPs listed in the Annexes.⁷⁹¹ Some plastic products may contain particular POPs regulated by the convention but not the others. The convention has global application to all plastic products but only to the products containing POPs listed under the convention. For instance, plastics produced for food packaging applications, around 26% of global volume, are unlikely to contain POPs listed under the convention.⁷⁹²

⁷⁸⁵ “Chemicals intentionally added during the production process (additives such as flame retardants, plasticizers, antioxidants, UV stabilizers, and pigments); Unintentional chemicals coming from the production processes, including monomers (e.g. vinyl chloride, BPA, etc.)—which may also originate from UV radiation onto the plastic waste and catalysts, normally present in traces (ppm); Chemicals coming from the recycling of plastic waste; and finally, Hydrophobic chemicals adsorbed from environmental pollution onto the surface of the plastics.” Frederic Gallo et al, *Marine litter plastics and microplastics and their toxic chemicals components: the need for urgent preventive measures*, 30 ENVIRON. SCI. EUR. 1, 4 (2018).

⁷⁸⁶ “As of 2018, the Convention controls 28 POPs, including those which have been used as additives, flame retardants or plasticizers in plastics such as: Brominated diphenyl ethers, Hexabromocyclododecane, Perfluorooctane sulfonic acid, its salts and perfluorooctane sulfonyl fluoride, and Short-chain chlorinated paraffins.” Secretariat of the Basel, Rotterdam and Stockholm Conventions, *Marine Plastic Litter and Microplastic: Stockholm Convention and Persistent Organic Pollutants*. <http://chm.pops.int/Portals/0/download.aspx?d=UNEP-POPS-PUB-LEAFLET-Brochure-MarineLitter-2018.English.pdf>

⁷⁸⁷ *Id.*

⁷⁸⁸ The Stockholm Convention on Persistent Organic Pollutants 200, Article 3.1 (a)

⁷⁸⁹ *Id.* at Article 3.1(b)

⁷⁹⁰ *Id.* at Article 5.

⁷⁹¹ Raubenheimer and McIlgorm, *supra* note 779, at 3-4.

⁷⁹² *Id.*

In sum, there is a need for further development of environmental governance on the marine plastic issues at every level: national, regional, and international. There are existing basic legal grounds for law enforcement in the international context, but specification and clarification are to be advanced. At the 2017 Conferences of the Parties to the Basel and Stockholm Convention, regional centers and working groups are invited to work on the impact of plastic waste, marine plastic litter, microplastics, and measures for prevention and environmentally sound management and to report on their activities to the next meetings of the conferences of the Parties in 2019.⁷⁹³ Other international groups and organizations such as the United Nations Environment Assembly (UNEA), UNEP Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, and the Global Partnership on Marine Litter are also working on the issue for more scientific data and strategic plans.⁷⁹⁴ Nonetheless, the legal venues are unlikely to be used between ASEAN member states because it is not in line with the ASEAN Way. Besides, there is no sole responsible party, but most member states are the contributors to the crisis.⁷⁹⁵ ASEAN would probably take the “wait and see” position to consider the international legal guidelines and coordinate diplomacy conferences with international organizations and member states for further cooperation.

3.5 Conclusion and future development

As marine plastic litter is growing along with the greater scale of economic activities and trade, new environmental governance needs to tackle the problem at its root cause—the production and use of plastics to gain an effective outcome. Cleaning operations, collecting

⁷⁹³ Decisions BC-13/11 and SC-8/15 <http://www.brsmeas.org/Implementation/TechnicalAssistance/RegionalCenters/JointRegionalCentersMeetings/JointRCsMeeting2017/tabid/6097/ctl/Download/mid/18477/language/en-US/Default.aspx?id=5&ObjID=24676>

⁷⁹⁴ Report on possible options available under the Basel Convention, 3.

⁷⁹⁵ Similar to Haze regime, ASEAN member states are unlikely to pursue legal action for dispute settlement or enforcement. They prefer the method of cooperation, especially in this plastic pollution problem where it is hard to find the sole source of contributor. For haze issue, it is evident to see where the fire is coming from. Plastic litter, especially microplastic is, like the emission of GHGs, harder to point the finger and precisely find the responsible parties.

more waste, and making a campaign for using less plastic will never solve the problem. The role of public authority is essential. Only initiatives from private sectors may not be able to cope with the economic incentives—the price of plastic production remains cheap while investment cost for alternatives remains high. The regulation is needed to limit plastic production and consumption, such as taxing, pricing, or setting quotas.⁷⁹⁶ With the collected tax, the government can create funds or subsidiaries for plastic-alternative initiatives such as biodegradable substance or a bigger project as the circular economy to create a world without waste by producing and using the products until the end of its lifetime then regenerating the products again.⁷⁹⁷

However, any governmental measures will face internal pressures and conflict of interests between economic interests and socio-environmental interests since oil, gas, and plastic are the resources that give substantial comparative advantages to the region for trade competition. Reducing production means loss of profit. The political decision that is paradoxical to economic interest will be hard to make.

CONCLUSION

The three trade-related environmental problems originating in ASEAN member states demonstrate how economic incentives (i.e., competitive drives and comparative advantages) dictate political will and undermine sustainable development and environmental protection. Each problem may have particular origins and effects. Still, they are the results of the

⁷⁹⁶ Johnny Wood, *Asia's plastic problem is choking the world's oceans. Here's how to fix it*, WEF, 3-4 (2018), <https://www.weforum.org/agenda/2018/09/asia-s-plastic-problem-is-choking-the-world-s-oceans-here-s-how-to-fix-it/>

⁷⁹⁷ Jenna Jambeck, a professor of the University of Georgia, explained the concept: “What we need to think about is how to make our whole economic system more circular and think about designing products and systems where we capture the value in our materials at their end of life. I work on developing waste management systems so if we actually think about those as material management systems and capture that material for value, that’s another way that we can really make a change on this issue.” *Tackling Plastic Pollution Priority at ASEAN Meeting*, UNEP (Dec. 8, 2017), <https://www.unenvironment.org/news-and-stories/story/tackling-plastic-pollution-priority-asean-meeting>

unsustainable process and production methods in which environmental costs are not internalized to compete in trade. The most effective way to solve the problems is to eliminate the factors precluding producers or the exporting states from internalizing the negative externalities, albeit the inconvenience. Nevertheless, it is unlikely to happen by the ASEAN initiative because, in the eyes of member states, the national stake for losing the economic interests is too high and immediate while environmental damage, though threatening, is less visible and borne by the public. The world trading system based on comparative advantage leaves ASEAN with a dilemma: environment or economy. The following questions are whether using market access as trade leverage for environmental protection by powerful states can trigger the sustainable change in ASEAN member states and how major dialogue partners play significant roles in influencing ASEAN trade and environmental regimes.

CHAPTER IV

TRADE-ENVIRONMENT COOPERATION BETWEEN ASEAN AND ITS DIALOGUE PARTNERS

INTRODUCTION

As economic incentives are driving forces setting the path for economic and environmental development, they inevitably affect the environmental condition in domestic, regional, and global contexts. The ASEAN rapid growth is greatly due to its export-led economic strategy focusing on short-term economic gain—high volume production and expansion of the market without environmental consideration. Thus, trade relations between ASEAN and its dialogue partners play a crucial role in shaping ASEAN's economic-environment path. This chapter begins with a brief discussion of ASEAN objectives and scopes for its external relations. It focuses on the trade-environment linkage of ASEAN external relations with three major dialogue partners: the European Union, the United States, and China. These three biggest market economies in the world are major trading partners of ASEAN. Their intersected powers have impacts on dynamic equilibrium in the Southeast Asia region. They are major players in the multiplex world order wielding their normative powers to export their political, economic, and social norms, values, and interests. To this end, they employ both trade agreements and economic and other social assistance to ASEAN. This chapter describes how each major dialogue partner engages a different approach in its external trading policies with ASEAN.

The chapter discusses whether economic cooperation, market access, and trade agreement with these dialogue partners can significantly promote environmental protection in ASEAN. The chapter argues that unilateral environmental trade measures or environmental provisions in bilateral or multilateral trade agreements employed by the EU, the U.S., and China

as major importing states and dialogue partners of ASEAN can generate the sustainable production and process methods of goods and trigger environmental norms integration within ASEAN member states. The extent to which these trading partners will employ environmental trade measures depends on three thresholds: the internal politics of importing states, the international geopolitics economic interest of importing states, and the justification for using environmental trade measures according to WTO's rules. This chapter discusses how internal politics, geopolitics, and economic interests of the EU, the U.S., and China influence their decisions to pursue environmental protection through trade measures and agreements. The justification of environmental trade measures will be further discussed in chapter V.

1. ASEAN TOWARDS EXTERNAL RELATIONS

This part discusses the general objectives of ASEAN for external relations, the initial outlook of the relations, and the recent development. ASEAN external relations were initiated before the endorsement of the ASEAN Charter, establishing the legal and institutional framework. Three key objectives of ASEAN external relations are securing technical assistance, promoting trade expansion and economic development, and strengthening political relations. The outward-looking relations remain under the principle of non-intervention. ASEAN strategy towards external relations has also adapted to the global political and economic dynamic changes in various periods. In the beginning, the external relations of ASEAN profoundly depended on the western powers for technical support and financial aids. As its economy grows, ASEAN becomes more of an active dialogue partner and develops its external relations more towards the east.

1.1 Objectives: Securing technical assistance and cooperation, strengthening political relations and promoting trade and economic linkages.

For pre-ASEAN Charter legal mandates, the founding document of ASEAN, the Bangkok Declaration of 1967, does not set the groundwork for ASEAN external relations.⁷⁹⁸ The Declaration of ASEAN Concord 1976 mentions “joint efforts to improve access markets outside ASEAN,”⁷⁹⁹ and the Treaty of Amity and Cooperation (TAC) in Southeast Asia 1976 encourages “close and beneficial cooperation with other states as well as international and regional organizations outside the region.”⁸⁰⁰ The golden rule that ASEAN has established for its relations and cooperation with others is the accession to TAC—to ensure that the relations will be formed on peaceful means and mutual respect of sovereignty, independence, and internal affairs.⁸⁰¹ Later, the first official document explicitly mentions the outward-looking external relation’s objective to promote global trade liberalization is the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation.⁸⁰² Article 5 stresses the need for ASEAN to “establish and/or strengthen cooperation with other countries as well as regional and international organizations and arrangements.”⁸⁰³ After ASEAN Charter entered into force in 2008, it establishes an explicit mandate for ASEAN external relations: “maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive.”⁸⁰⁴ The principle is the “Centrality of ASEAN in external political, economic, social and cultural

⁷⁹⁸ MARISE CREMONA ET AL, ASEAN’S EXTERNAL AGREEMENTS : LAW, PRACTICE AND THE QUEST FOR COLLECTIVE ACTION 23 (2015).

⁷⁹⁹ Declaration of ASEAN Concord 1976, B.3 IV, https://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976

⁸⁰⁰ Treaty of Amity and Co-operation in Southeast Asia 1976, Article 6, <https://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/>

⁸⁰¹ LAURA ALLISON, THE EU, ASEAN AND INTERREGIONALISM : REGIONALISM SUPPORT AND NORM DIFFUSION BETWEEN THE EU AND ASEAN 58-59 (2015).

⁸⁰² The Framework Agreement on Enhancing ASEAN Economic Cooperation 1992, Article 1.1, https://www.asean.org/storage/images/2012/Economic/AFTA/Common_Effective_Preferential_Tariff/Framework%20Agreements%20on%20Enhancing%20ASEAN%20Economic%20Cooperation%20.pdf

⁸⁰³ *Id.* at Article 5.

⁸⁰⁴ ASEAN Charter, Article 1 (15)

relations while remaining actively engaged, outward looking, inclusive and non-discriminatory.”⁸⁰⁵

S. Pushpanathan, Deputy Secretary-General for ASEAN Economic Community, stressed three goals of ASEAN’s external relations: “secure technical assistance for regional cooperation projects; promote trade and economic relations; and strengthen political relations with third countries and regional groupings.”⁸⁰⁶ Given the parameters, ASEAN, through the Foreign Ministers, can confer to an external party the status of a Dialogue Partner, Sectoral Dialogue Partner, Development Partner, Observer or Guest.⁸⁰⁷ The decision to strengthen ties with certain external parties depends on the intensity and substance of interactions and the potential contribution that the external party can provide to ASEAN.⁸⁰⁸ Among all status, Dialogue Partnership is the most extensive status characterized by regular high-level exchanges and dialogues, including ministerial meetings and summit meetings.⁸⁰⁹ The formal engagement with its dialogue partners started in the 1970s. Today, ASEAN has ten dialogue partners—Australia, Canada, China, the European Union, India, Japan, the Republic of Korea, New Zealand, Russia, and the United States of America.

There are two main types of instruments ASEAN engages with external parties ranging from non-binding agreements with no legal obligations to those legal-binding treaty commitments.⁸¹⁰

First, agreements entered into by ASEAN Secretariat as an international organization and not by ASEAN member states. These agreements do not create binding obligations and

⁸⁰⁵ *Id.* at Article 2 (2).

⁸⁰⁶ S. Pushpanathan, *ASEAN’s Strategy Towards Its Dialogue Partners and ASEAN Plus Three Process*, ASEAN (Nov. 4 2003), https://asean.org/?static_post=asean-s-strategy-towards-its-dialogue-partners-and-asean-plus-three-process-by-s-pushpanathan

⁸⁰⁷ ASEAN External Relations, ASEAN <https://asean.org/asean/external-relations/>

⁸⁰⁸ Louie Dane C. Merced, *Partners for Change : Understanding the External Relations of ASEAN*, IV CIRSS (2017), <https://www.think-asia.org/bitstream/handle/11540/7440/Vol-IV-No-20-Partners-for-Change-Understanding-the-External-Relations-of-ASEAN-Merced.pdf?sequence=1>

⁸⁰⁹ *Id.*

⁸¹⁰ INGO VENKE & LI-ANN THIO, *THE INTERNAL EFFECTS OF ASEAN EXTERNAL RELATIONS* 32-33 (2016).

internal effects in member states in a direct way. It may indirectly affect the member states by boosting cooperation through the function of the ASEAN Secretariat.⁸¹¹ The ASEAN Secretariat aims “to provide for greater efficiency in the coordination of ASEAN organs and for more effective implementation of ASEAN projects and activities.”⁸¹² Thus, it can initiate projects and activities promoting cooperation within ASEAN according to the agreements made with other parties. The external parties to these agreements are usually other international organizations. Some examples include a Memorandum of Understanding (MOU) between ASEAN Secretariat and the Secretariat of United Nations Economic and Social Commission for Asian and the Pacific (ESCAP) 2002,⁸¹³ MOU between ASEAN and Asian Development Bank (ADB) 2006,⁸¹⁴ or MOU between ASEAN Secretariat and United Nations Office on Drugs and Crimes on Drug Control and Crime Preventive Cooperation.⁸¹⁵

Second, binding agreements entered into by ASEAN member states as collectively ASEAN either in a case where all member states listed as parties to the agreement; where the Secretary General concluded on behalf of member states; or where one member state concluded on behalf of all others.⁸¹⁶ Since ASEAN does not have a supranational characteristic, any binding agreements will be entered into only by the consensus of all member states. This category is the most prevalent instrument for ASEAN external relations, especially in economic

⁸¹¹ *Id.*

⁸¹² ASEAN Secretariat, <https://asean.org/asean/asean-secretariat/>

⁸¹³ Memorandum of Understanding between the Secretariat of the Association of Southeast Asian Nations (ASEAN Secretariat) and the Secretariat of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP Secretariat), https://asean.org/?static_post=memorandum-of-understanding-between-the-secretariat-of-the-association-of-southeast-asian-nations-asean-secretariat-and-the-secretariat-of-the-united-nations-economic-and-social-commission-for-asia-an

⁸¹⁴ MOU between ASEAN and Asian Development Bank (ADB) 2006, <https://www.adb.org/sites/default/files/institutional-document/33433/files/mou-asean.pdf>

⁸¹⁵ INGO VENKE & LI-ANN THIO, *supra* at 810, at 32-33 and MOU between ASEAN Secretariat and United Nations Office on Drugs and Crimes on Drug Control and Crime Preventive Cooperation, https://asean.org/?static_post=memorandum-of-understanding-between-the-asean-secretariat-and-the-un-office-on-drugs-and-crime-1-on-drug-control-and-crime-prevention-cooperation

⁸¹⁶ MARISE CREMONA ET AL, *supra* note 798,86.

cooperation and trade agreement with dialogue partners; thus, the chapter focuses the discussion on this type of agreement.⁸¹⁷

1.2 Initial outlook and recent development: Donor-client relationship v. cooperation on equal footing

ASEAN relationship with major dialogue partners has tended to follow two types of tracks. At the outset, the U.S. and the EU had significant roles in providing technical assistance and financial aids to ASEAN member states. By doing so, they also forged normative values through many initiatives in the fields of social development and environmental protection. The initiatives supported by these foreign donors might not be successfully achieved due to the limited capacity of member states. At present, ASEAN becomes less dependent on the western foreign donors, and their relationship appears to be more on equal ground. The rise of China in global economic power is also a key contribution to this dynamic change. This is important, particularly in the issue of environmental protection, because the change in economic power and geopolitics affects the diffusion of normative values—environmental norms.

The initial outlook of ASEAN towards external relations with dialogue partners is to cautiously secure technical and economic assistance for the developing economies of ASEAN, forming the so-called donor-client relationship where the more developed external state has the upper hand on cooperative activities with ASEAN or member states.⁸¹⁸ The EU and the U.S. have taken prominent roles as active donors of development, humanitarian, environmental, and trade assistance.⁸¹⁹ Environmental protection initiative is the common form of assistance and aid from developed countries. As Dosch noted:

⁸¹⁷ *Id.* at 88.

⁸¹⁸ S. Pushpanathan, *supra* note 806.

⁸¹⁹ U.S Assistance to ASEAN <https://www.state.gov/ASEAN/indexU.html> and Europe Aid Project to ASEAN https://ec.europa.eu/europeaid/regions/asia/association-south-east-asian-nations-asean_en

National and regional legislative and policy initiatives towards environmental protection and sustainability in general and the forging link between trade/investment and the environment in particular are more often than not driven by foreign donors.⁸²⁰

The U.S.-funded program linking trade and environment is USAID's ASEAN Environmental Improvement Program (ASEAN-EIP), established in 1992, providing four years of funding of USD 15 million in 6 participants' states: Thailand, Indonesia, the Philippines, Brunei, Malaysia, and Singapore.⁸²¹ Later in 1995, it is absorbed into U.S.-ASIA Environmental Partnership Program, and USAID sponsored USD 100 million to transfer environmental management and technological skills.⁸²² The project was designed to provide a regional framework to introduce cleaner industrial production and environmental management.

Even though the role of the European Union seems to fade away after the end of the Vietnam wars, the EU remains an active donor in the region. For instance, Asia Pro-Eco launched by the European Commission (EC) in 2002 was designed to strengthen environmental dialogue between Asia and Europe via "exchange of policies, technologies, the exchange of policies, technologies, and best practices to promote more resource-efficient, market-driven, and sustainable solutions to environmental problems in Asia."⁸²³ Asia Urbs, launched in 1997, was designed to promote urban management, urban socio-economic development, urban environment, urban infrastructure, and urban poverty.⁸²⁴ In Laos, there are 25 ongoing EC environment and development projects such as wetlands protection and Asia Urbs aiming to promote a sustainable urban environment in Luang Prabang.⁸²⁵ In Vietnam, the EU funded the Multilateral Trade Assistance project helping the development of socially and environmentally

⁸²⁰ Jorn Dosch, *Balancing Trade Growth and Environmental Protection in ASEAN: Environmental Issues in Trade and Investment Policy Deliberations in the Mekong Subregion*, Series on Trade and Environment in ASEAN—Policy Report 2, IISD, 17 (2010).

⁸²¹ *Id.* at 13.

⁸²² *Id.*

⁸²³ Asia Pro Eco Programme and SWITCH Programme, http://www.eeas.europa.eu/archives/delegations/indonesia/documents/eu_indonesia/apeswitch_en.pdf

⁸²⁴ Asia-URBS - Strengthening Links Between Local Authorities, <https://cordis.europa.eu/news/rcn/9232/en>

⁸²⁵ Dosch, *supra* note 820, at 12.

sustainable trade and economic integration strategy as part of the national economic reform process.⁸²⁶ However, the problem with regional donor programs with ASEAN is that they cannot be well linked with national initiatives and implementation.⁸²⁷ The receiving states' capacity to implement the projects was overestimated.⁸²⁸ There are disparities among ASEAN member states in technical and institutional capacities, infrastructure, economic development, and political priorities. ASEAN itself is not a fully integrated entity with harmonized policies and implementation systems.

As ASEAN grows, it gains confidence in becoming an outward-looking community playing a responsible and constructive role regionally and globally in promoting stability and economic prosperity.⁸²⁹ The relation between ASEAN and its dialogue partners has also evolved and become two-way cooperation in political, economic, and social issues based on joint decision and planning for implementation.⁸³⁰ The emphasis on development cooperation with dialogue partners is put into four issues: strengthening economic cooperation by gaining market access for ASEAN exports and more investment flows; supporting ASEAN's integration, including the narrowing of development gaps through physical interconnections and capacity building; addressing transnational concerns; and promoting people-to-people contacts.⁸³¹ ASEAN external trade relation has been implemented in two phases: through ASEAN-Plus Free Trade Agreements covering the Asia-Pacific region and major mega-regional economic cooperation covering the Asian economies.⁸³² The cooperation in the political and security area has been prominent. ASEAN has established ASEAN Regional Forum (ARF), engaging the world's major players and keeping their interest in the region.

⁸²⁶ *Id.* at 12-13 and Multilateral Aid Assistance project, <https://www.oecd.org/aidfortrade/47462174.pdf>

⁸²⁷ Richard S. Stevenson, *An Assessment of the Design and Effectiveness of the ASEAN Environmental Improvement Program*, 12 J. CLEAN. PROD. 227, 227-36 (2004).

⁸²⁸ Dosch, *supra* note 820, at 18.

⁸²⁹ Merced, *supra* note 808.

⁸³⁰ *Id.*

⁸³¹ S. Pushpanathan, *supra* note 806.

⁸³² Michael G. Plummer, *US-ASEAN Relations in a Changing Global Context, ASEAN at 50: A Look at Its External Relations*, KAS 139, 145-146 (2017).

Recently, ASEAN external relation strategy is turning more towards the east rather than to the west due to two factors: first, the changing dynamic of the world order and economic power;⁸³³ and second, the rise of authoritarianism and dysfunctional democracy in ASEAN member states.⁸³⁴ This complicates the policy forging approach or the diffusion of western normative values in environmental protection in trade. The next part will further elaborate on the issue by discussing the ASEAN trade-environment relationship with each dialogue partner, the EU, the U.S., and China.

2. MAJOR DIALOGUE PARTNERS

Linking environmental protection and social development with market access in bilateral or multilateral trade agreements can be the solution for sustainable development as it allows international environmental law to “gain traction” and raise domestic and regional concerns.⁸³⁵ Upon linking trade and environment, the parties can create binding agreement and precise obligations to which the parties need to adhere.⁸³⁶ In other words, linking environmental norms with trade agreements allows the legalization of environmental protection in the context of international trade agreement with the balance of obligation, precision, and delegation.⁸³⁷ Despite its potential effectiveness, the attempt to influence other states’ environmental regulation and policy using unilateral trade measures can be questionable upon its legality

⁸³³ S. Pushpanathan, *supra* note 806.

⁸³⁴ E.g., Ian Storey, *Thailand’s Military Relations with China: Moving from Strength to Strength*, 43 ISEAS 1, 2-3 (May 27, 2019), https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2019_43.pdf; and Ian Storey, *Does China want to establish a Military Presence in Cambodia?*, ST (Nov. 9, 2020), <https://www.straitstimes.com/opinion/does-china-want-to-establish-a-military-presence-in-cambodia-0>;

⁸³⁵ Maxwell C. Radley, *Mega-Trade Agreements : Could They Become the Foremost Vehicle to Unify Global and Regional Environmental Law ?*, 80 ALB L. REV. 649, 650 (2018).

⁸³⁶ *Id.* at 652.

⁸³⁷“Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. Precision means that rules unambiguously define the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.” Kenneth W. Abbot et al, *The Concept of Legalization*, 54 INT. ORGAN. 401, 401(2000).

according to WTO rules. On the other hand, the more developed party having economic imperative may be able to insert environmental norms as part of bilateral and multilateral trade deals. In this context, the analysis will focus on the integration of environmental norms in economic cooperation and trade agreements between ASEAN and three significant dialogue partners—the EU, the U.S., and China. The discussions focus on the questions: which dialogue partner integrated environmental norms into economic cooperation and trade agreement with ASEAN; and whether the inclusion of environmental norms effectively addresses the trade-related environmental problems while serving the interest of all parties.

2.1 The path of environmental legal integration of European Union: the lesson for the development of ASEAN

“The EU and ASEAN are drivers of regionalism in their own geographical and political contexts and supporters of regionalism within their own regions and elsewhere.”⁸³⁸

The EU and ASEAN are the most important examples of regionalism in the 21st century.⁸³⁹ There are, of course, significant differences in political and institutional settings, but the EU and ASEAN both have long-established cooperation encompassing political-security, economic-trade, and sociocultural issues.⁸⁴⁰ The EU has been not only one of the significant donors assisting ASEAN for institutionalization, economic integration, and other development fields but also a significant dialogue partner. The relation has evolved as Islam noted that while the EU development aid remains significant, the relationship of EU-ASEAN has changed from

⁸³⁸ ALLISON, *supra* note 801, at 44.

⁸³⁹ AMITAV ACHARYA, *THE END OF AMERICAN WORLD ORDER* 94 (2014).

⁸⁴⁰ ALLISON, *supra* note 801, at 45.

a donor-recipient dynamic into a more symmetrical relationship.⁸⁴¹ In the view of the EU, there are two reasons why the engagement with ASEAN matters: the economic benefit from trade expansion and liberalization and the balance of power in the global context.⁸⁴² Since the power of ASEAN economy is growing, the EU has to consider the emergence of the new Asian powers for the EU not to be excluded.⁸⁴³ The EU seeks to “promote its ability to be a legitimate international actor”⁸⁴⁴ by diffusing its influence in another region and supporting the concept of regionalism.⁸⁴⁵ As Hanggi and Roloff et al. stated: “Interregional cooperation is used as an instrument to balance the dominance of other regional groupings.”⁸⁴⁶ The interregional cooperation was triggered by competitive motivation.⁸⁴⁷

By engaging in interregional cooperation, the EU seeks to disseminate its interest, values, and norms, particularly the principle of democracy, human rights, and sustainable development, through regional and bilateral cooperation and agreements. It can employ both environmental cooperation clauses dealing only with environmental issues and environmental integration clauses promoting the integration of environmental consideration into other cooperation areas.⁸⁴⁸ The subject of discussion is the use of environmental clauses in the Free Trade Agreement (FTA) for sustainable development in the region. The EU has been using

⁸⁴¹ Shada Islam, *A Fresh Start from ASEM or How to Revive Asia-Europe Relations*, NEWEUROPE (Sept. 26, 2010), <https://www.neweurope.eu/article/fresh-start-asean-or-how-revive-asia-europe-relations/>

⁸⁴² ALLISON, *supra* note 801, at 48-49.

⁸⁴³ The European's Commission, *Towards a New Asia Strategy*, Commission of the European Community, 3 (1994), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51994DC0314&from=EN>

⁸⁴⁴ ALLISON, *supra* note 801, at 54.

⁸⁴⁵ Evidenced by the funding for regional projects aiming to strengthen regional institution in Southeast Asia such as the APRIS program and READI initiative. ARISE programme supporting EU-ASEAN cooperation on economic integration and the development of AEC. READI initiative designed to strengthen ASEAN secretariat and the capacity of ASEAN member states to implement regional policies. Jurgen Ruland, *ASEAN and the European Union: A Bumpy Interregional Relationship*, ZEI (2010) in ALLISON, *supra* note 801, at 54.

⁸⁴⁶ EU also promoted the establishment of ASEM in response to APEC's refusal to grant the EU observer status. Ralf Roroff, *Interrregionalism in Theoretical Perspective: State of Art*, in INTERREGIONAL AND INTERNATIONAL RELATIONS 17, 17 (Heiner Hanggi et al. eds., 2006).

⁸⁴⁷ ALLISON, *supra* note 801, at 53.

⁸⁴⁸ GRACIA M.DURAN & ELISA MORGERA, ENVIRONMENTAL INTEGRATION IN THE EU'S EXTERNAL RELATIONS : BEYOND MULTILATERAL DIMENSIONS 56 (2012).

FTAs and region-to-region negotiations to achieve what it has failed to achieve in multilateral negotiations.⁸⁴⁹

To understand the EU-ASEAN relation and how EU environmental norms can influence ASEAN's development, the following subparts investigate the differences and similarities of the EU and ASEAN regionalism; the basis of environmental integration towards the EU's external relations; and the impacts and obstacles of the environmental integration in EU-ASEAN trade agreement.

2.1.1 ASEAN and EU Regionalism

This subpart addresses the differences and similarities between ASEAN and EU regionalism. The differences between ASEAN and the EU affect the interregional engagement in trade-environment cooperation and agreements. Archarya has categorized the main differences into four key areas: history, foundational objectives, political structures, and pattern of security relationship with external powers.⁸⁵⁰

In terms of historical background, member states of the EU have more common roots for religions and similar cultural traditions based on the Roman Empire through periodically extensive diplomatic interactions.⁸⁵¹ In contrast, ASEAN comprises member states who are diverse in terms of religions, traditions, and cultures influenced by Chinese and Indian customs and Western powers during colonization. These diversities affect its coherent actions⁸⁵² as well as its ability to institutionalize and fully integrate common policies. The similarity between the two regions is that they both have suffered from aggression committed by a strong state in their own region (German and Indonesia) against their neighboring states in the past. However, after

⁸⁴⁹ Stephen Woolcock, *European Union Policy Towards Free Trade Agreements*, ECIPE Working Paper No.03/2007, 4 (2007).

⁸⁵⁰ ACHARYA, *supra* note 839, at 94.

⁸⁵¹ *Id.*

⁸⁵² ALLISON, *supra* note 801, at 75.

such strong states have restrained themselves, the neighboring states reciprocate this restraint by acknowledging the leadership status of the powers.⁸⁵³

Emerging from the ashes of the two world wars, the EU's founding fathers, Jean Monnet and Friedlich Schuman, were motivated by the creation of nation-state and absolute sovereignty.⁸⁵⁴ The EU favors strong institutionalization: governance structure, decision-making process, and legal frameworks. Thus, each member state has vested part of its national sovereignty to the EU as a supranational decision-making entity capable of creating legally binding instruments, negotiating with external countries, and adopting agreements for all member states. On the other hand, the foundation of ASEAN's institutionalism for regional integration is distinct from the western path.⁸⁵⁵ After a long period of foreign domination and intervention, ASEAN nationalism dominates the typical norm of preserving national sovereignty and opposes moving towards supranational institutions for integration. ASEAN does not have the EU's supranational power. For the decision-making process, ASEAN needs to have consensus from all member states. Thus, the EU-ASEAN trade negotiation and relation are asymmetric—one single member state of ASEAN can initiate a bilateral trade agreement with the EU referred to as “Reg-bilateral” agreement, and the EU can initiate an agreement with a single member state of ASEAN; however, a single EU member cannot have a bilateral deal with ASEAN member state or regional deal with ASEAN.⁸⁵⁶

The EU and ASEAN display different sorts of political contexts and purposes. According to domestic political structures, EU member states have strong democratic political systems. “Western Europe is home of ‘strong states’ centuries of evolution through warfare and

⁸⁵³ “Indonesia restrained itself from wedge wars with Singapore and Malaysia and the latter express degree of deference to Indonesia as the “first among equals” in ASEAN. No wars between Indonesia and neighbors since ASEAN was founded in 1967 just after Indo-Malay war was ended” ACHARYA, *supra* note 839, at 103.

⁸⁵⁴ *Id.* at 95.

⁸⁵⁵ See Richard Stubbs, *The ASEAN Alternative ? Ideas, Institutions and the Challenge to Global Governance*, 21 PACIFIC REVIEW 451, 451-68 (2008).

⁸⁵⁶ Lena Lindberg & Claes G. Alvstam, *EU-ASEAN Trade Facing Free Trade Negotiations*, 21 Handelshogskolan, Goteborgs Universitet 1, 2 (2008).

unity has reached a point of political and economic consolidation that is seemingly irreversible.”⁸⁵⁷ The foundation value of the EU articulated in the Lisbon Treaty Article 2 “The Union is founded on the values of respect, freedom, democracy, equality, the rule of law and respect for human rights, including the right of persons’ belongings to minorities.” Based on democratic norms, the EU has secured peace in the region. ASEAN is a group of authoritarian states, “where rule by law rather than the rule of law tends to prevail.”⁸⁵⁸ Democratic development has always been, to the lesser or greater extent, weak. The regime types of member states have never been a normative issue for regional integration. Instead, it claims that not democracy but the pursuit of capitalist economies with an open and stable market constitutes peace in the region.⁸⁵⁹

The last difference is the pattern of security relations with external powers. The EU considers itself a great contemporary power with its own normative power to engage small players and influence other states’ policies within the European periphery and outside the western world.⁸⁶⁰ It establishes its own interest, identity, and norms in its foreign policy that overlap and complement the relationship with other great powers.⁸⁶¹ ASEAN security, by contrast, depends on the competition between great powers in the region; thus, the cornerstone is to balance the influence of such power play and avoid domination and intervention.

Due to differences between the EU and ASEAN, tensions and conflicts arise from contradicting norms in the interregional relations and cooperation. While seeking to secure economic interests through trade liberalization and maximization, the EU is also pursuing norms diffusion (environment, democracy, human rights) against ASEAN resistance.⁸⁶² Can an

⁸⁵⁷ ACHARYA, *supra* note 839, at 95.

⁸⁵⁸ *Id.*

⁸⁵⁹ Chih-Mao Tang, *Southeast Asian Peace Revisited: A Capitalist Trajectory*, 12 INT. RELAT. ASIA-PAC 389,412 (2012).

⁸⁶⁰ ACHARYA, *supra* note 839, at 95.

⁸⁶¹ *Id.*

⁸⁶² ALLISON, *supra* note 801, at 74.

EU free trade agreement open the door for environmental integration in ASEAN? Or will it yield to other considerations and strategic interests?⁸⁶³

2.1.2 EU sustainable development integration and external relationship

This subpart explains the principle of sustainable development and the legal basis for integrating environmental norms in the EU economic development and trade. It unfolds why the EU sets up its internal environmental integration policy and exports such norms beyond the border through a trading mechanism—using unilateral trade measures to induce environmental compliance from ASEAN member states.

Sustainable development is a concept with popular currency and use in international, regional, and national application through various legal and policy instruments and initiatives. It applies generally to balance social, economic, and environmental objectives in decision-making.⁸⁶⁴

In the pursuit of economic growth, natural resources have been exploited to the extent that they severely affected the environment; thus, the principle of sustainable development emerged⁸⁶⁵ to “regulate economic activities for environmental protection alongside the competing need for ensuring economic and social sustainability.”⁸⁶⁶ The idea is to integrate environmental considerations into economic activities to have long-term sustainability. The Brundtland Report by the World Commission on Environment and Development 1987 defined the principle as “Development which meets the needs of the current generations without compromising the ability of future generations to meet their own needs.”⁸⁶⁷

⁸⁶³ “Whether explicitly or not, EU-ASEAN involvement is predominated by considerations of what will benefit the EU and ASEAN”. *Id.*

⁸⁶⁴ MATTHEW HUMPHREYS, *SUSTAINABLE DEVELOPMENT IN THE EUROPEAN UNION: A GENERAL PRINCIPLE* 21 (2018).

⁸⁶⁵ Pricilla Schwartz, *Sustainable Development in International Law*, in 5 *NON-STATE ACTORS AND INTERNATIONAL LAW* 127, 128 (Malgosia Fitzmaurice ed., 2005).

⁸⁶⁶ HUMPHREYS, *supra* note 864, at 107.

⁸⁶⁷The Brundtland Report by the World Commission on Environment and Development 1987, <http://www.un-documents.net/our-common-future.pdf>

Sustainable development is applied in the principle framework of the EU law and integrated into primary law and in soft law covering all ranges of EU policy such as rural development, common agricultural policy, maritime policy, fisheries, transport, energy, etc.⁸⁶⁸ The legal basis for the integration was founded in the Treaty of the Functioning of the European Union Article (TFEU) 11,⁸⁶⁹ the Treaty of European Union (TEU) Article 3(5) and 21 (2),⁸⁷⁰ and the EU Charter of Fundamental Rights and Freedoms Article 37.⁸⁷¹ In the EU Charter:

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.⁸⁷²

Sustainable Development is operating through the principle of polluter pay, the precautionary principle, and public participation.⁸⁷³ Notably, the EU institutions interpret the polluter pays principle as an essential mechanism to integrate economic consideration in environmental decision-making to address regional environmental problems such as process and production taxes, effluent charges, EU emission trading, and crediting.⁸⁷⁴

The EU steadily commits to advance towards sustainable development as articulated in its communication, “Next Steps for the Sustainable European Future.”⁸⁷⁵ Integrating environmental norms into economic development can yield economic and environmental advantages and sustain stability in security for the EU. For instance, the promotion of renewable energy is to reduce climate change risk and secure the independence and stability of the

⁸⁶⁸ HUMPHREYS, *supra* note 864, at 42-43.

⁸⁶⁹ Article 11 “Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.”, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

⁸⁷⁰ Treaty of European Union (TEU) , http://ec.europa.eu/environment/sustainable-development/index_en.htm

⁸⁷¹ The EU Charter of Fundamental Rights and Freedoms, http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁸⁷² The EU Charter, http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁸⁷³ HUMPHREYS, *supra* note 864, at 87.

⁸⁷⁴ *Id.*

⁸⁷⁵ European Commission (2016), Next steps for a sustainable European future: European action for sustainability, COM(2016) 739.

region.⁸⁷⁶ The reliance on fossil-fuel energy that is abundant in unstable regions weakens the stability and independence of the EU.⁸⁷⁷ The EU tries not to rely on countries with political agenda that may not fit with the EU's good governance.⁸⁷⁸ Hence, shifting towards renewal energy benefits the economic, environmental, and political security of the EU. On top of the internal application, why does the EU push to integrate sustainable development towards its external relation? Why promoting sustainable development beyond its border?

First, the core perspective of the EU to address sustainable development externally derives from the fact that only a global approach can genuinely solve the problem.⁸⁷⁹ Promoting sustainable development in the global context reduces the environmental risk and threat directly and indirectly to the internal stability since environmental hazards have no borders.⁸⁸⁰ If the overall common good is alleviated, it will benefit the EU too. Second, it is to correct the market failure causing unfair trade competition and disadvantage for countries that internalize environmental externalities. Because the EU applies the polluter pay principle under the sustainable development goal, it bears a greater economic burden in terms of production cost and the market price of the products; therefore, cooperation with other non-member states will balance and sustain the competitiveness.⁸⁸¹ Third, for the EU to advance sustainable development goals, it benefits the environmental protection and the economic competitiveness—the EU gets the “first-mover advantage” on environmental-friendly technology that they can later export. By dispersing sustainable practice, the EU can also benefit in technological export.⁸⁸²

⁸⁷⁶ European Union, A Secure Europe in a Better World—European Security Strategy (Dec. 12, 2003)

⁸⁷⁷ Michal Natorki & Anna Herranz Surrallés, *Securitizing Moves to Nowhere? The Framing of the European Union's Energy Policy*, 4 J. CONTEMP. EUR. RES. 70, 71 (2008).

⁸⁷⁸ *Id.* at 71-77.

⁸⁷⁹ The same idea of addressing climate change problem: only global approach can render the efficient result and eliminate the free-rider problems.

⁸⁸⁰ HUMPHREYS, *supra* note 864, at 108.

⁸⁸¹ *Id.*

⁸⁸² *Id.*

The legal foundation to promote sustainable development through EU external policy can be found in EU regulations⁸⁸³ such as the Regulation EC/2493/2000 dealing with integrating environmental dimension in developing countries.⁸⁸⁴ Article 21 of TEU also obliges the EU to promote sustainable development through external relations. EU external policies must “foster sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.”⁸⁸⁵ The EU’s approach to influencing other states has multi-faces:

- (i) Through the use of its “Soft Power”: the way to influence other states without forcing but instead drawing examples and aspiring to its level of prosperity and openness⁸⁸⁶;
- (ii) Through the exercise of “Normative Power”: “The EU upholds a collective identity based upon ideational impact which provides it with an ability to shape the conceptions of ‘normal’ in international relations.”⁸⁸⁷ There are core values that contributed to the EU’s normative presence, and sustainable development is one of them.⁸⁸⁸

By promoting these values, particularly sustainable development, the EU can take the leadership in diffusing norms and standards to the other global players.⁸⁸⁹ “As the world’s largest market, largest exporter, most generous aid donor and largest foreign investor, the EU

⁸⁸³ *Id.* at 115.

⁸⁸⁴ Regulation EC/2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension into development process of developing countries, OJ L288/1.

⁸⁸⁵ Article 21 of the Treaty of the Functioning of European Union. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

⁸⁸⁶ Joseph S. Nye, *Soft Power : The Mean to Success in World Politics* (2004) in Humphreys, *supra* note 864, at 116.

⁸⁸⁷ Ian Manner, *Normative Power Europe: A Contradiction in Terms?*, 40 J COMMON MARK. STUD. 235, 238-239 (2002).

⁸⁸⁸ *Id.* at 242.

⁸⁸⁹ CHARLOTTE BRETHERTON & JOHN VOGLER, *THE EUROPEAN UNION AS THE GLOBAL ACTOR* 42 (2nd ed.2006) in HUMPHREYS, *supra* note 864, at 116.

is well endowed to offer economic, technological and diplomatic incentives.”⁸⁹⁰ These incentives allow the EU to enforce its standards through trade agreements and trading policy on its trading partners.⁸⁹¹

The EU’s attempt to export the environmental integration can be found in unilateral, bilateral, and multilateral contexts. The EU also has a strong position in supporting the inclusion of environmental protection issues into the agenda of WTO conference Doha round raising closer link between trade and environment.⁸⁹²

In a unilateral context, one of the mechanisms is the Generalized System of Preferences (GSP), established in 1971 employed to integrate labor and environmental protection. GSP is open to all developing countries and the least developed country and designed to enhance market access conditions for those countries via preferential tariff treatment granted to developing countries on a voluntary and non-reciprocal basis.⁸⁹³ Under the GSP, the EU grants developing countries that respect the environmental and social standards an autonomous tariff reduction—tariff-free import of goods and agricultural goods.⁸⁹⁴ The environmental clause in GSP aims to help other countries to improve their environmental and social standard.⁸⁹⁵ It is a special-incentive mechanism providing positive trade linkage for environmental protection requirements.⁸⁹⁶ According to International Tropical Timber Organization, the GSP 2001–2005 was the first to contain clauses dealing with environmental matters focusing on timber trade

⁸⁹⁰ Charles F. Parker & Christer Karlsson, *Climate Change and European Union’s Leadership Moment : An Inconvenient Truth ?*, 48 J. COMMON MARK. STUD. 923, 928-29 (2010).

⁸⁹¹ HUMPHREYS, *supra* note 864, at 118.

⁸⁹² CHARLOTTE BRETHERTON & JOHN VOGLER, *THE EUROPEAN UNION AS A GLOBAL ACTOR* 85-86 (1999); and Jan Orbie, *Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe?*, in *NORMATIVE POWER EUROPE EMPIRICAL AND THEORETICAL PERSPECTIVES* 160, 160-83 (Richard Whitman ed., 2011).

⁸⁹³ “To date, it remains the most concrete application of the principle of differential and more favorable treatment of developing countries in international trade.” GRACIA M. DURAN & ELISA MORGERA, *ENVIRONMENTAL INTEGRATION IN THE EU’S EXTERNAL RELATIONS : BEYOND MULTILATERAL DIMENSIONS* 145 (2012).

⁸⁹⁴ Ludo Cuyvers, *The Sustainable Development Clauses in Free Trade Agreements of the EU with Asian Countries : Perspectives for ASEAN ?*, 22 J. CONTEMP. EUR. STUD. 427, 431 (2014).

⁸⁹⁵ *Id.*

⁸⁹⁶ DURAN AND MORGERA, *supra* note 893, at 147.

and deforestation.⁸⁹⁷ In 2005, the GSP merged the old special-incentive arrangement in the environment, labor, and drugs into a single arrangement—sustainable development and good governance and called it “GSP-plus”, endorsing a more comprehensive approach and provide a broader scope of environmental integration extending to seven MEAs covering the issues of climate change, atmosphere, biodiversity, and hazardous waste and chemicals.⁸⁹⁸

The GSP is controversial due to its unilateral application. There is a possibility that its application contradicts WTO trade rules. It is also regarded as a neocolonialist mechanism—the more powerful state is imposing its value and interest upon the weaker state under the guise of trade protectionism.⁸⁹⁹

Apart from GSP, there are other EU importation rules that are unilaterally applied within the EU territory but have an extraterritorial effect—aiming to protect the environment and improve the production and process methods of products in the exporting countries. The EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU) entered into force on 1 January 2010.⁹⁰⁰ The IUU aims to reject fishery products that have been harvested in an illegal, unreported, and unregulated manner according to national laws, international obligations, and conservation and management measures by the Regional Fisheries Management Organizations (RFMOs) to avoid fish stocks depletion, marine habitat destruction, and competition distortion.⁹⁰¹ The non-compliance exporting countries will be pre-identified and given a yellow card as a formal warning; thus, the formal dialogue will be held for at least six months.⁹⁰² If the exporting countries manage to improve the condition, they will

⁸⁹⁷ *Id.* at 144–172.

⁸⁹⁸ *Id.* at 155-160.

⁸⁹⁹ DURAN AND MORGERA, *supra* note 893, at 151.

⁹⁰⁰ Council Regulation (EC) No 1005/2008, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF> and Commission Regulation (EC) No 1010/2009, <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:02009R1010-20130917&from=EN>

⁹⁰¹ EU's IUU, Overview on the EU Rule to Combat Illegal Fishing, EU https://ec.europa.eu/fisheries/cfp/illegal_fishing_en

⁹⁰² *Id.*

be delisted. In contrast, if the exporting countries do not address the problem, they will be listed as non-cooperating and given a red card; thus, their fishery products will be banned from the EU's market.⁹⁰³ The final measure is the blacklist—all marine products caught by vessels operating under the blacklisted countries will be banned from the EU market, and the EU's fisheries companies cannot operate in these blacklisted countries.⁹⁰⁴ As most ASEAN member states are coastal states, fisheries are one of the major exporting industries in the regions; therefore, this regulation directly affect the economy of ASEAN member states.

Complying with the EU's IUU standard is challenging for member states due to the lack of monitoring and control systems, standard modern fishing equipment, and law enforcement.⁹⁰⁵ Cambodia received a yellow card in 2012 and has been blacklisted since 2014.⁹⁰⁶ Vietnam has received a yellow card since 2017.⁹⁰⁷ The Philippines received a yellow card in 2014 but managed to get it rescinded in 2015.⁹⁰⁸ Despite being a host of the ASEAN-Southeast Asian Fisheries Development Center (SEAFDEC) regional cooperation forum in August 2016, Thailand, the third-largest seafood exporter, had been given a yellow card since 2015.⁹⁰⁹ The EU's decision to issue a yellow card to Thailand was triggered not only by under-regulated fish industries but also by the exposure of the cases involving slave labor on Thai fishing fleets.⁹¹⁰ The investigation by the Guardian revealed that a large number of men were trafficked, bought, and sold to work on the fishing boats under extreme violent conditions—

⁹⁰³ *Id.*

⁹⁰⁴ *Id.*

⁹⁰⁵ Arthur Nelson, *EU Threatens Thailand with Trade Ban over Illegal Fishing*, THE GUARDIAN (Apr. 21, 2015), <https://www.theguardian.com/environment/2015/apr/21/eu-threatens-thailand-with-trade-ban-over-illegal-fishing> and Stephen Chin, *A Hard Tackle Against Illegal Fishing*, THE ASEAN POST (Aug. 7, 2018), <https://theaseanpost.com/article/hard-tackle-against-illegal-fishing>

⁹⁰⁶ EU's IUU, *supra* at 901.

⁹⁰⁷ *Id.*

⁹⁰⁸ *Id.*

⁹⁰⁹ Stephen Chin, *A Hard Tackle Against Illegal Fishing*, THE ASEAN POST (Aug. 7, 2018), <https://theaseanpost.com/article/hard-tackle-against-illegal-fishing>

⁹¹⁰ Oliver Holmes, *EU Investigators to Decide on Thai Fishing Industries Ban Over Slave Labor*, THE GUARDIAN (Jan. 20, 2016), <https://www.theguardian.com/world/2016/jan/21/eu-investigators-to-decide-on-thai-fishing-industry-ban-over-slave-labour>

forced, beaten, tortured, and murdered.⁹¹¹ Almost all workers in the fishing fleets are migrants from neighboring countries such as Myanmar and Cambodia. They are often trafficked into the fishing workforce, not paid or paid well below the required minimum wages, and not protected under Thai Labor Law.⁹¹² This fishing operation involving slave labors is also part of the shrimp farming industries exported worldwide and sold in many major supermarkets in Thailand and abroad, including the EU market.⁹¹³ The prawn farms bought fishmeal, food for farmed prawns, from suppliers who own, operate, or relate to the fishing fleets using slave labors.⁹¹⁴ This operation is not only a human right violation but also unsustainable for the marine environment because these fishing fleets are likely to operate in international waters and catch all the fish, including infant fish, to be ground into cheap fish meal for shrimp farms so that they can sell and export cheap shrimps to the international markets.⁹¹⁵ The price of exported shrimps does not take into account the externalities—labor and environmental costs. The EU uses the IUU regulation as a trade measure aiming to tackle the unsustainable PPMs and corrects the market's failure.

Thai Military Junta has taken over the fishing industry monitoring, control, and management regimes by strengthening law enforcement and increasing penalties. Thailand also ratified the International Labor Organization (ILO) Convention on Work in Fishing No. 188 set

⁹¹¹ Anne Kelly, *Thai Seafood: Are the Prawn on Your Plate Still Fished by Slaves?* THE GUARDIAN (Jan. 23, 2018), <https://www.theguardian.com/global-development/2018/jan/23/thai-seafood-industry-report-trafficking-rights-abuses> and *Thailand: Forced Labor, Trafficking Persist in Fishing Fleets*

Reforms Fall Short of Addressing EU, US Concerns, HRW (Jan. 23, 2018), <https://www.hrw.org/news/2018/01/23/thailand-forced-labor-trafficking-persist-fishing-fleets>

⁹¹² *Hidden Chain: Right Abuses and Forced Labor in Thailand Fishing Industries*, HRW (Jan. 23, 2018), <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>

⁹¹³ Kate Hodal et al., *Revealed: Asian Slave Labour Producing Prawn for Supermarkets in US and UK*, THE GUARDIAN (June 10, 2014), <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>

⁹¹⁴ Kevin Grace, *Why We at Tesco Are Not Boycotting Thai Fishmeal Suppliers*, THE GUARDIAN (June 10, 2014), <https://www.theguardian.com/commentisfree/2014/jun/20/tesco-boycotting-thai-fishmeal-farmers>

⁹¹⁵ Kate Hodal & Cris Kelly, *Trafficked into Slavery on Thai Trawlers to Catch Food for Prawn*, THE GUARDIAN (June 10, 2014), <https://www.theguardian.com/global-development/2014/jun/10/sp-migrant-workers-new-life-enslaved-thai-fishing>

out requirements for decent working conditions.⁹¹⁶ Until recently, on January 8, 2019, the EC decided to lift the yellow card and delisted Thailand citing the constructive cooperation of Thailand resulting in comprehensive structural reform.⁹¹⁷ Nevertheless, the Environmental Justice Foundation (EJF) stated that the important shortcomings prevent Thai fishing industry from becoming ethical and sustainable—persistence on human rights abuse due to inequality in protected rights between domestic workers.⁹¹⁸ Regardless of stricter regulations, poor implementation persists in an actual inspection that the officers merely rely on paper records submitted by fishing companies and fails to examine actual labor practice at sea.⁹¹⁹ Johnny Hansen, chair of fisheries at the International Transport Workers’ Federation, insisted that according to the records obtained from fishermen, there is still illegal fishing and labor abuse, and the reform put in place is only a cosmetic move.⁹²⁰ It remains to be seen if Thailand is up to deliver the actual change.

Despite their effectiveness in influencing environmental norms, unilateral environmental-trade measures used by the importing states targeting the PPMs in the exporting states are controversial because the application is not about the quality of the products itself, and its extraterritorial effect may raise contradiction with WTO trade rules.⁹²¹ However, even the EU’s IUU mechanism uses a unilateral trade measure; it possesses certain degrees of coherence between the unilateral and multilateral schemes. Its mechanism is based on the multilateral legal frameworks on sustainable fishing such as the United Nations Convention on

⁹¹⁶ *Thailand Ratifies ILO Convention on “Working in Fishing”*, ASIA TIMES (Dec. 3 2018), <http://www.atimes.com/article/thailand-ratifies-ilo-convention-on-work-in-fishing/>

⁹¹⁷ Questions and Answers - Illegal, Unreported and Unregulated (IUU) fishing in general and in Thailand, EU [http://europa.eu/rapid/press-release MEMO-19-201_en.htm](http://europa.eu/rapid/press-release_MEMO-19-201_en.htm)

⁹¹⁸ *E.U. Lifts Thailand’s “Yellow Card” but Concerns Remain*, THE MARITIME EXECUTIVE (Jan. 8, 2019), <https://www.maritime-executive.com/article/e-u-lifts-thailand-s-yellow-card-but-concerns-remain>

⁹¹⁹ *Hidden Chain: Right Abuses and Forced Labor in Thailand Fishing Industries*, HRW (Jan. 23, 2018), <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>

⁹²⁰ Kate Hodal, *EU Under Fire after Lifting Threat to Ban Thai Seafood Imports Over Illegal Fishing*, THE GUARDIAN (Jan. 10, 2019), <https://www.theguardian.com/environment/2019/jan/10/eu-under-fire-after-lifting-threat-to-ban-thai-seafood-imports-over-illegal-fishing>

⁹²¹ The issue of unilateral environmental trade measures dealing with PPMs will be further discussed in Chapter V.

the Law of the Sea 1994 (UNCLOS), the Agreement on Compliance with Conservation and Management Measures 1993, and Code of Conduct for Responsible Fisheries 1995 under the Food and Agricultural Organization (FAO).⁹²² Moreover, it recognizes an equivalence endorsement for products under the RFMOs scheme—the products covered by RFMOs certificates imported to the EU are exempted from the requirement to provide the EU catch certificates.⁹²³ Thus, the application of the EU’s IUU measures tends to receive much less resistance and more cooperation in ASEAN.⁹²⁴

The EU has a solid legal basis for integrating environmental protection in its internal economic development and external trade. With economic and environmental incentives, by wielding its normative power, the EU exports the integration of environmental protection in trade by using unilateral trade measures to generate sustainable production and process methods in ASEAN as exporting states. Such unilateral measures are effective but cause tension with ASEAN trading partners and concerns over the compliance with WTO rules. The next subpart unfolds the obstacles and possibilities for the EU to diffuse environmental integration in bilateral trade agreements with ASEAN and ASEAN member states.

2.1.3 EU-ASEAN Free Trade Agreement: obstacles and possibilities

With the power granted by the original Treaty of Rome, the EU can conclude agreements with other countries and international organizations, but the scope of the agreements will be determined by political choices and priorities.⁹²⁵ The EU has no specific template for FTA but negotiates on a case-by-case basis according to particular needs and

⁹²² FAO Code of Conduct for Responsible Fisheries 1995, <http://www.fao.org/resilience/resources/ressources-detail/fr/c/273397/>

⁹²³ Gilles Horsch, *Trade Measures to Combat IUU Fishing : Comparative Analysis of Unilateral and Multilateral Approach*, ICTSD, 31 (2016), https://www.ictsd.org/sites/default/files/research/trade_measures_to_combat_iuu_fishing-post_publishing_corrections_-_1_-_done.pdf

⁹²⁴ <http://www.asean2017.ph/wp-content/uploads/8.ARF-Statement-on-Cooperation-to-Prevent-Deter-and-Eliminate-IUU-Fishing- Adopted.pdf>

⁹²⁵ DURAN AND MORGERA, *supra* note 893, at 58.

circumstances of trading partners.⁹²⁶ It is worth noting that in the process of accession to the EU, a candidate to become a member state has to abide by the “acquis communautaire”⁹²⁷—a term referring to a legal order or set of fundamental norms, but the EU does not strictly apply it when negotiating FTAs.⁹²⁸ However, the new generation of EU FTA often includes the “social clauses” covering labor and environmental issues which are part of the EU acquis.⁹²⁹ The integration of sustainable development in EU FTA stems from the idea that “trade supports environmental protection and social development.”⁹³⁰ The EU aims to use trade leverage to influence and diffuse normative objectives “universal value” of human rights and environmental protection.⁹³¹ The EU views trade as means to promote sustainable development principles. It wields its normative power and spread particular norms through trade.⁹³² “It is the use of trade to achieve non-trade objectives reflects its ambition to play a significant role in ‘harnessing globalization’⁹³³ according to its interest and values.”⁹³⁴ The first pioneering FTA containing the most comprehensive trade provisions and the integration of environmental concerns with Asian country is EU-Korea FTA.⁹³⁵ It stresses the objective of promoting and

⁹²⁶ Stephen Woolcock, *European Union Policy Towards Free Trade Agreements*, ECIP, 4 (2007), <http://felixpena.com.ar/contenido/negociaciones/anexos/2010-09-european-union-policy-towards-free-trade-agreements.pdf>

⁹²⁷ “Acquis communautaire is a French term referring to the cumulative body of European Community laws, comprising the EC’s objectives, substantive rules, policies and, in particular, the primary and secondary legislation and case law – all of which form part of the legal order of the European Union (EU). This includes all the treaties, regulations and directives passed by the European institutions, as well as judgments laid down by the European Court of Justice. The acquis is dynamic, constantly developing as the Community evolves, and fundamental. All Member States are bound to comply with the acquis communautaire.” <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/acquis-communautaire>

⁹²⁸ Woolcock, *supra* note 926, at 4.

⁹²⁹ Hoang Ha Hai, *The Social Dimension in the EU Free Trade Agreement: ASEAN Perspectives*, 25 EUR. REV. 532, 532 (2017); and The EU Acquis, https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en

⁹³⁰ Ludo Cuyvers et al., *EU-ASEAN FTAs: Does One Size Fit All?* 91 CAS, Apr. 2013, at 1, 59.

⁹³¹ Hong Hai Ha, *supra* note 929, at 533.

⁹³² Thomas Diez & Ian Manners, *10 Reflecting on Normative-Power Europe*, in *POWER IN WORLD POLITICS* 173, 174 (Felix Berenskoetter & M. J. Williams eds., 2007) ; and and European Community, World Trade Organization, Trade Policy Review, WT/TPR/G/136, 23 June 2004, 8, <https://www.wbginvestmentclimate.org/uploads/FIAS+Competition+Policy+final.pdf>

⁹³³ European Commission, “Reflection Paper on Harnessing Globalisation”, COM(2017)240.

⁹³⁴ Sophie Meunier & Kalypso Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 J. EUR.PUBLIC POLICY 906, 910-912 (2006).

⁹³⁵ DURAN AND MORGERA, *supra* note 893, at 118..

strengthening sustainable development and enforcement of labor and environmental law policies and develop international trade in a sustainable way.⁹³⁶

For EU-ASEAN trade relation, in 2017, ASEAN ranked 3rd among the EU's major trading partners outside the EU with a total trade amount of 227 billion euros. For ASEAN, the EU is the 2nd largest trading partner after China accounting for 13% of ASEAN trade and the largest investor in the region.⁹³⁷ The dynamic of the world economy is moving towards the Asia Pacific region⁹³⁸ "ASEAN emerges as the world's largest exporter, the EU has both offensive and defensive interests in forging stronger economic ties with the region."⁹³⁹ The EU has concerns about economic interest in the region and the shift of trading dynamics of ASEAN towards China, the U.S. and Japan.⁹⁴⁰ EU Trade Commissioner Cecilia Malmstrom gave the interview:

When it comes to trade, geography is a factor that is always difficult to surmount. However, the EU is currently ASEAN's third trading partner and first non-Asian partner, well ahead of the U.S. Bilateral trade in goods and services have hit record values in the last years, reaching €180 billion and €55 billion respectively. Our trade relationship is immensely important. Southeast Asia has been very high in the EU's trade agenda for decades now. We are determined to negotiate a region-to-region free trade agreement with ASEAN, building on the bilateral deals that we are currently putting in place.⁹⁴¹

EU-ASEAN FTA negotiation was launched in 2007 and suspended in 2009 due to the limited capacity of ASEAN and the complexity of non-trade issues. Though the EU favors the region-to-region agreements, it is difficult to progress since the EU approach on FTA includes

⁹³⁶ EU-South Korea FTA, <https://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>

⁹³⁷ EU policy on ASEAN, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/>

⁹³⁸ Cuyvers, *supra* note 894, at 8.

⁹³⁹ EC, Communication from the Commission - A new partnership with South East Asia, Brussels :European Commission, COM (2003),

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0399:EN:HTML>

⁹⁴⁰ Cuyvers, *supra* note 894, at 8; and Council of the European Union, Guidelines on the EU's Foreign and Security Policy in East Asia, Brussels: Council of European Union, Doc16468/07

⁹⁴¹ *EXCLUSIVE: EU Says Trade, Investment Relations With Malaysia Will Be Even Stronger*, NST (Apr. 25, 2015), <https://www.nst.com.my/news/2015/09/exclusive-eu-says-trade-investment-relations-malaysia-will-be-even-stronger>

development issues such as human rights and environmental protection.⁹⁴² ASEAN does not have the same level of integration. ASEAN has diverse levels of economic development and inconsistency in economic performance among the member states; thus, their expectation and interest in FTA diverge.⁹⁴³ The severe violation of human rights in Myanmar is also one of the factors complicating the negotiation.⁹⁴⁴ Regional trade was on hold but bilateral negotiations continue, and they are expected to be building blocks for future EU-ASEAN FTA.⁹⁴⁵ The EU has concluded FTA with Singapore and Vietnam and there are ongoing negotiations with Malaysia, Indonesia, the Philippines, and Thailand.

The EU-Singapore FTA was concluded in 2012. It was branded the first green FTA in the region containing comprehensive parts on trade and sustainable development along with the specific terms on the liberalization of environmental service and rules on illegal fishing and logging.⁹⁴⁶ Some believed that this FTA could serve as templates for the future ASEAN-EU FTA⁹⁴⁷ or serve as a major point of reference for EU-ASEAN FTA negotiation.⁹⁴⁸ Nevertheless, the integration of sustainable development and protection of labor rights in Singapore is not the issue at stake since Singapore is the most developed member state of ASEAN with the economic performance, skilled labor, and banking credits equivalent to the western developed countries. Thus, EU-ASEAN FTA may not be a model or template for the regional agreement, but it can be at least a baseline for the future FTA.⁹⁴⁹ It is considered that the trade agreement

⁹⁴² Maria García, *Fears and strategies: The European Union, China and their Free Trade Agreements in East Asia*, 6 J. CONTEMP. EUR. RES. 496, 501 (2010); Paul J. Lim, *Aseans Relations with The EU: Obstacles and Opportunities*, 2 EUR. EXTERNAL AFF. REV. 46, 52-53 (2012); and *EU To Resume Political Contact 'At All Levels' With Thailand: Statement*, REUTERS (Dec. 11, 2017), <https://www.reuters.com/article/us-thailand-eu/eu-to-resume-political-contact-at-all-levels-with-thailand-statement-idUSKBN1E51TH>

⁹⁴³ Cuyvers, *supra* note 894, at 9 and Neil Jerome Morales, *EU And ASEAN Agree to put Free Trade Pact Back on Agenda*, REUTERS (Mar. 10, 2017), <https://www.reuters.com/article/us-eu-asean/eu-and-asean-agree-to-put-free-trade-pact-back-on-agenda-idUSKBN16HOS7>

⁹⁴⁴ Cuyvers, *supra* note 894, at 9; and Woolcock, *supra* note 926, at 4.

⁹⁴⁵ Cuyvers, *supra* note 894, at 9.

⁹⁴⁶ *Id.* at 13.

⁹⁴⁷ Hoang Ha Hai, *supra* note 929, at 535.

⁹⁴⁸ Cuyvers, *supra* note 894, at 12.

⁹⁴⁹ Cuyvers et al, *supra* note 930, at 6.

with ASEAN will not go beyond the lowest common denominator since it is the ASEAN preference.⁹⁵⁰

The EU-Malaysia FTA was launched in 2010 and put on hold in 2012 because of the tense atmosphere caused by the issue of palm oil production. Though the EU is the second-largest palm-oil importer in 2016/2017,⁹⁵¹ the EU openly criticized the biodiversity loss caused by deforestation and the intensified agriculture of cash crops like palm oil.⁹⁵² According to Renewable Energy Directive (RED),⁹⁵³ the EU can grant tax credits to renewable fuel resources that fit in three main sustainable criteria aiming for carbon saving and protecting biodiversity⁹⁵⁴:

- (i) GHG emission from biofuels at all life cycle—production, processing, and transport is at least 35% less than the traditional fossil fuel. In 2017, the GHG saving requirement rose to 50%;⁹⁵⁵
- (ii) Biofuels cannot be grown in the converted carbon stock areas: wetlands and forests;⁹⁵⁶

And

- (iii) Biofuels cannot be produced by raw materials from lands rich in biodiversity, such as primary forests.⁹⁵⁷

Palm oil biofuel imported from Malaysia is not qualified for the credit because its emission is only 19% less than the traditional fossil fuel.⁹⁵⁸ Without the credit, the palm oil biofuel cannot

⁹⁵⁰ David Kielmann, *Beyond Market Access? The Anatomy of ASEAN's Preferential Trade Agreements*, EUI Working Paper Law 2013/01 (2013).

⁹⁵¹ *The EU War on Palm Oil*, ASEAN Today (Mar. 27 2018), <https://www.aseantoday.com/2018/03/the-eus-war-on-palm-oil/>

⁹⁵² Cuyvers, *supra* note 894, at 14.

⁹⁵³ Directive 2009/28/EC of The European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=EN>

⁹⁵⁴ EU Sustainability Criteria, <https://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/sustainability-criteria>

⁹⁵⁵ *Id.*

⁹⁵⁶ *Id.*

⁹⁵⁷ *Id.*

⁹⁵⁸ Michael W. Meredith, *Malaysia's World Trade Organization Challenge to the European Union's Renewable Energy Directive : An Economic Analysis*, 21 PAC. RIM L & POL'Y J. 399, 403 (2012).

compete with the European rapeseed oil biofuel that qualified for tax credits. Malaysia criticizes the application of the directive as arbitrary and disguised trade protectionism or “green protectionism,” which contradicts WTO trade rules.⁹⁵⁹ The EU directive for the importation of palm oil aims to screen out the products not because of the products itself but for unsustainable production and process methods (PPMs) of such products. The issue of PPMs and how an importing state can use PPMs measures unilaterally as criteria for importation is controversial. It will be further discussed in the next chapter of multilateral trade and environmental context.

In 2017, the FTA negotiation was relaunched, but the tension remains very high because, in January 2018, the European Parliament voted in favor of the draft law on renewable energy, calling for the ban on the use of palm oil biofuels by 2021.⁹⁶⁰ After intense lobbying and to avoid potential disputes in WTO, the EU agreed to delay the phase-out period to another 12 years by 2030.⁹⁶¹ The Plantation Industry and Commodities Minister Datuk Seri Mah Siew Keong stressed that “Malaysia can only sign on a free trade agreement with the EU, if the deal is mutually beneficial. As long as the EU continues to discriminate against palm oil, it violates the essence of free trade.”⁹⁶²

The phasing out of palm oil use and importation in the EU will highly affect the ongoing FTA negotiation with Malaysia, Indonesia, and Thailand because these three countries are the major producers and exporters of palm oil to the EU’s market. The stake is very high as palm

⁹⁵⁹ Fredrik Erixon, *Green Protectionism in the European Union: How Europe’s Biofuels Policy and the Renewable Energy Directive Violate WTO Commitments*, (ECIPE) Occasional Paper, 2009, at 1, 2 and 29, <https://ecipe.org/wp-content/uploads/2014/12/green-protectionism-in-the-european-union-how-europe2019s-biofuels-policy-and-the-renewable-energy-directive-violate-wto-commitments.pdf>

⁹⁶⁰ Sarantis Michalopoulos, *EU Parliament ends Palm Oil and Caps Crop-Based Biofuels at 2017 Levels*, EURACTIV (Jan. 17, 2018), <https://www.euractiv.com/section/agriculture-food/news/eu-parliament-ends-palm-oil-and-caps-crop-based-biofuels-at-2017-levels/> and Frederic Simon, *EU Heading for ‘Zero Palm Oil’ in Transport by 2021*, EURACTIV (Jan. 10, 2018), <https://www.euractiv.com/section/energy/news/eu-heading-for-zero-palm-oil-in-transport-by-2021/>

⁹⁶¹ Perrine Fournier, *Could EU-Indonesia Free Trade Deal end Palm Oil Conundrum?*, EURACTIV (July 10, 2018), <https://www.euractiv.com/section/agriculture-food/opinion/could-eu-indonesia-free-trade-deal-end-palm-oil-conundrum/>

⁹⁶² Ooi Tee Ching, *No Free Trade Agreement if EU bans Palm Oil*, NST (Mar. 4, 2018), <https://www.nst.com.my/business/2018/03/341297/no-free-trade-agreement-if-eu-bans-palm-oil-mah>

oil is the key source for economic revenue, especially for Indonesia and Malaysia who are accountable to about 80–90% of palm oil producers for the market.⁹⁶³

The inclusion of an environmental clause in FTA and other unilateral trade measures used for environmental protection are likely to receive resistance from the ASEAN and member states. For ASEAN, an active player in FTAs, the standpoint is to promote free trade and firmly resist all forms of protectionist trade measures—tariff or non-tariff trade barriers.⁹⁶⁴

The problem with the social and environmental approach linked to trade is that it can allow importing countries to discriminate and use trade barriers against the exporting country. That is why it is found only in unilateral measures or bilateral agreements.⁹⁶⁵ As the example case of palm oil has shown, ASEAN sees environmental trade measures, especially PPMs measures, as trade protectionism to protect the industries and producers in the EU. To put it bluntly, the new trade barrier in the form of social clauses aiming for labor and environmental protection undermines the competitiveness and comparative advantages of ASEAN member states—low labor cost and low environmental standard. Plus, ASEAN regards the social clause in FTAs and the unilateral trade measures as the imposition of western “universal” value on Asian cultures.⁹⁶⁶ Such imposition of western values upon sovereign states goes against the ASEAN Way, which is the bedrock of ASEAN.⁹⁶⁷

Furthermore, even if the measures are genuinely for the common good of the environment, there is still an economic cost-related argument—the labor or environmental standard can be too high to implement given the low level of economic development and capacity of the member states. A small and medium business will have difficulties complying

⁹⁶³ *Malaysia Trade Ministry to Approach WTO on EU Move to Limit Palm Oil use*, REUTERS (Jan. 22, 2018) <https://www.reuters.com/article/malaysia-palmoil/malaysia-trade-ministry-to-approach-wto-on-eu-move-to-limit-palm-oil-use-idUSL4N1PH39K>

⁹⁶⁴ Joseph Purugganan, *Business as Usual in ASEAN's Trade Policy*, FOCUSONPOVERTY (Oct. 2010), <http://focusonpoverty.org/business-as-usual-in-aseans-trade-policy/>.

⁹⁶⁵ Cuyvers, *supra* note 894, at 3.

⁹⁶⁶ Cuyvers et al, *supra* note 930, at 22.

⁹⁶⁷ Monserrat G. Garibay, *The Trade-Labour Linkage from the Eyes of the Developing Countries: A Euphemism for Protectionist Practices*, 14 EUR. FOREIGN AFF. REV. 763, 772 (2009).

with the standard. In ASEAN, there are disparities among ASEAN member states' capacities to fulfill environmental requirements as Ramon Vincente Kabisigting, a director with the Philippines' Department of Trade and Industry, explained that some member states do not have the infrastructure and legal mechanism to deal with the issues of IP, labor rights, and environmental protection; thus, the preference is the separation of social clause and trade agreement.⁹⁶⁸

It is also a common perception among ASEAN member states that stringent environmental policies could slow economic growth, so they should grow now and clean up later.⁹⁶⁹ Despite many ASEAN environmental initiatives, the environmental objective is not a priority and regulations are not well implemented, especially in member states with low economic development. Member states show weak political will when it comes to the crossroad of environment and trade. National competitive in trade is the top priority and not the global commons.⁹⁷⁰ Therefore, the focal point of trade negotiation should be purely about trade liberalization and maximization. From the ASEAN perspective, a trade agreement should not go beyond trade issues.⁹⁷¹ The integration of social clauses like labor and environment is not favored. Since the EU wants to integrate the labor and environmental protection clause in EU-ASEAN FTAs, it complicates the negotiation.⁹⁷²

The EU sees the integration of social clauses as a way to promote economic development in the Southeast Asia region.⁹⁷³ For instance, there can be a potential economic development for environmental-friendly practices and products such as organic seafood, fruit,

⁹⁶⁸ Dosch, *supra* note 820, at 19.

⁹⁶⁹ Morten Bøås, *The Trade-Environment Nexus and the Potential of Regional Trade Institutions*, in *NEW REGIONALISM IN THE GLOBAL POLITICAL ECONOMY: THEORIES AND CASES* 48, 52 (Shaun Breslin et al. eds., 2002).

⁹⁷⁰ *Id.* at 50.

⁹⁷¹ Xuan L. Doan, *Opportunities and Challenges in EU-ASEAN Trade Relations*, EU-ASIA CENTRE (July, 2 2012), http://www.eu-asiacentre.eu/pub_details.php?pub_id=60

⁹⁷² García, *supra* note 942, at 501.

⁹⁷³ Alexander C. Chandra et al, *Hopes and Fears: Indonesia's prospects in an ASEAN-EU Free Trade Agreement*, IISD, 2010, at 1, 74.

and vegetables which already have a large market share and opportunities in the EU market.⁹⁷⁴ ASEAN sees it as unrelated to trade performance, and doing so is opening the door for protectionism due to the fear of domestic industries.⁹⁷⁵ Sustainable development should be put in development cooperation, not trade talk. Trade-environment linkage is sensitive for ASEAN.⁹⁷⁶ The EU will continue to face the reluctance from ASEAN to agree with the norms intended to be integrated into a trade agreement.⁹⁷⁷ It is the obstacle for regional and bilateral trade agreements.

Allison observed that:

Economic development, poverty eradication, cultural and educational exchange have been the areas of concern for ASEAN and assistance provided by the EU is appreciated. In contrast, the insistence on democracy promotion and political rights, especially when they are linked to the trade or aid policies of the EU has often been met with resistance.⁹⁷⁸

This notion is also true within the ASEAN internal relations. All member states are more willing to cooperate in the area where it is less confrontational and mutually beneficial, such as economic and socio-cultural matters, rather than touching on controversial subjects such as democracy, civil rights violation, or environmental destruction.

Since the 1990s, the EU approach is to link environmental norms in unilateral measures or in trade agreements to promote sustainable development. While GSP and other importation standards are unilateral and non-negotiable trade instruments, the bilateral trade negotiation for FTA with ASEAN allows more flexibility.⁹⁷⁹ The EU tried to apply a more “homogenous approach” to the social sections of bilateral FTAs aiming to recognize sustainable development

⁹⁷⁴ Dosch, *supra* note 820, at 12.

⁹⁷⁵ Garibay, *supra* note 967, at 772.

⁹⁷⁶ Leigh Phillips, *Burmese Human Rights Block to EU-Southeast Asia Trade Pact*, EU OBSERVER (June 2, 2009), <https://euobserver.com/economic/28223>

⁹⁷⁷ Cuyvers, *supra* note 894, at 10.

⁹⁷⁸ ALLISON, *supra* note 801, at 173.

⁹⁷⁹ Cuyvers, *supra* note 894, at 10.

as the general objectives of the parties.⁹⁸⁰ In addition, the inclusion of a sustainable clause in the trade agreement does not link to sanctions and mainly refers to international agreements already signed by the partners.⁹⁸¹ The agreement fails to create a clear standard in implementing, monitoring, and evaluating the environmental clauses; thus, it fails to ensure the actual implementation.⁹⁸² Thus, the EU approach to sustainable development in a trade agreement is more a symbolic treaty requirement encouraging and promoting the adoption rather than enforcement.⁹⁸³

In conclusion, the tension and complexity of EU-ASEAN FTA or EU FTA with the member states may not derive from the environmental clauses in the FTAs itself but from the EU's unilateral environmental-trade measures such as the RED in palm oil case, which negatively affect the FTA negotiation. For ASEAN or member states to bind itself on FTAs containing environmental clauses which have no punitive measures for non-compliance is not of any great importance since all member states of ASEAN have already abided by the ASEAN Charter and the ASEAN blueprints endorsing the principle of sustainable development and significant linkage between environmental protection and economic development. These clauses containing in the EU's FTAs or in the Charter are similar in a sense that it is only a declaratory statement with great flexibility for implementation, unlike the EU's unilateral measures aiming to tackle PPMs, which directly affect the production and sale of exporting products making the economic stake much higher.

Setting for itself high expectation and ambitious environmental goals, the EU credibility in inserting itself as a leader of sustainable development in the international context depends on

⁹⁸⁰ Fabienne Bossuyt, *The Social Dimension of the New Generation of EU FTAs with Asia and Latin America: Ambitious Continuation for the Sake of Policy Coherence*, 14 EUR. FOREIGN AFF. REV. 703, 704 (2009).

⁹⁸¹ Cuyvers et al, *supra* note 930, at 22.

⁹⁸² Beatrice Chaylor, *Environmental Provisions in Economic Partnership Agreements: Implications for Developing Countries*, ICTSD BIORES Vol.3 No.1 (2009), <https://www.ictsd.org/bridges-news/biores/news/environmental-provisions-in-economic-partnership-agreements-implications>

⁹⁸³ HUMPHREYS, *supra* note 864, at 142-43.

how much it can ensure the environmental performance within the Union as well as the implementation of its member states and how much it is willing to implement and enforce the environmental clause in the trade agreement.⁹⁸⁴ In the EU-ASEAN environment-trade engagement, there are only two alternatives. First, economic or other strategic benefits may supersede the EU's attempt to establish environmental integration in trade. The EU may continue the FTAs negotiation and back down on unilateral measures. As Robles noted, while attempting to adhere to the norms such as human rights principles, the EU still desires to be competitively involved in the Southeast Asia region. Although human rights, democracy, and other social norms are essential for the EU, trade and economic benefit will precede.⁹⁸⁵ Second, the EU may continue to commit itself to strong institutional cooperation and mechanism in the social and environmental aspects of sustainable development and continue to implement and enforce its unilateral environmental-trade measures. If it is the latter case, one of the ASEAN member states may bring the case before WTO for dispute resolution. We can then see if the multilateral trade forum is ready to open a door for the more robust application of PPMs trade measures and become "greener."

2.2 The environmental challenge for U.S.-ASEAN relations

After the end of World Wars, the United States has been wielding its normative power or liberal power to spread liberal democracy and capitalist market economy dominating the world's politics and economic regimes. To a greater and lesser extent, the Southeast Asia region has undergone the domination and geopolitical influence of American power through the colonization period, the cold war, the war of terror, and the current trade war era. However, the period of unipolar world order is over with the change in the global economy and politics. The

⁹⁸⁴ DURAN AND MORGERA, *supra* note 893, at 288; and HUMPHREYS, *supra* note 864, at 142-43.

⁹⁸⁵ A. C. ROBLES JR., *THE ASIA-EUROPE MEETING: THE THEORY AND PRACTICE OF INTERREGIONALISM* (2008) in ALLISON, *supra* note 801, at 189.

crash of the global financial crisis in 2008 can mark the turning point.⁹⁸⁶ Acharya noted that “American World Order is coming to an end whether or not America itself is declining” and instead, the era of the multiplex world begins.⁹⁸⁷ He described, “a multiplex world would be a world of diversity and complexity, a decentered architecture of order management, featuring old and new powers with a greater role for regional governance.”⁹⁸⁸

According to Acharya, the multiplex world reflects a power shift—the elements of the U.S. liberal order survive but incorporate in a complex web of other rising international orders, thus, reshaping the management of the world order.⁹⁸⁹ For instance, the rise of Asian nations is strong enough to counterbalance the U.S. power but not strong enough to dominate the world by itself.⁹⁹⁰ Ikenberry asserted that the downfall of liberal power, which is founded on the principle of free trade, multilateralism, democracy, and liberal orders, is not solely due to the rise of Asian powers.⁹⁹¹ It is the consequence of the failure to cope with economic insecurity in the western industrial world, leading to economic inequality and stagnation and the fragility of liberal democracy in the west that lost its grip of centrist and progressive position to far-right populism.⁹⁹²

In recent decades, Asian nations, notably China, have gained more economic and political power. A group of weaker states, ASEAN, have developed cooperative institutions pursuing its own autonomy, values, and identities. Doing so means to steer away from the domination of superpowers and socialize on their own terms based on locally developed norms

⁹⁸⁶ See Laris Gaiser & Igor Kovac, *From Bipolarity to Bipolarity : International Relations Repeating Again*, 1 J. GLOB. POL’Y & GOVERN. 49, 49-63 (2012).

⁹⁸⁷ ACHARYA, *supra* note 839, at 2. See also Joseph S. Nye, *Will the Liberal Order Survive? The History of an Idea*, 96 FOREIGN AFFAIRS (January/February 2017).

⁹⁸⁸ ACHARYA, *supra* note 839, at 8.

⁹⁸⁹ Amitav Acharya, *After Liberal Hegemony Advent of a Multiplex World Order*, ETHICS AND INTERNATIONAL AFFAIRS, (September 2017), <https://www.ethicsandinternationalaffairs.org/2017/multiplex-world-order/#fnref-12859-3>

⁹⁹⁰ ACHARYA, *supra* note 839, at 10.

⁹⁹¹ G. John Ikenberry, *The End of Liberal Interantional Order?*, 94 INT. AFF. 7, 11 (2018).

⁹⁹² *Id.* at 20-23.

instead of principles and practices laid down by hegemonic powers.⁹⁹³ ASEAN also shifted from norm-taking to norm-making position. Though still relying on a free-market economy, the ASEAN norms cannot be regarded as liberal democratic. Despite being constrained by the lack of resources and institutional capacity, ASEAN regionalism has gained traction as an emerging power in the 21st century. It is playing a significant role in the geopolitical competition between the U.S. and China. In this part, the discussion focuses on three questions: what is the background of the U.S.-ASEAN relations? Is there a trade-environment linkage in U.S.-ASEAN relations? And how the U.S. and ASEAN will move towards the integration of environmental norms in trade?

2.2.1 The background of U.S.-ASEAN relation

Southeast Asia region has always been a strategic position in terms of geopolitics—it stands between the great powers rivalry since the ideological cold war. Later, the importance shifts towards the economic interest as ASEAN is rising in economic performance. The regional success is supported by the guarantee of security and stability supported by the U.S. liberal order after the Cold war and the economic ties with trading partners—North America, Europe, China, Japan, South Korea, and Taiwan.⁹⁹⁴ The first U.S.-ASEAN dialogue took place in 1977. The relations encompass political security, trade and investment, and social and cultural issues.⁹⁹⁵ The relation between U.S.-ASEAN evolves as the global system evolves—ASEAN is a hub and a neutral player that attracts many key global players including the U.S.⁹⁹⁶ Mazel

⁹⁹³ ACHARYA, *supra* note 839, at 53-54.

⁹⁹⁴ Ja Ian Chong, *Deconstructing Order in Southeast Asia in the Age of Trump*, 39 CONTEMP. SOUTHEAST ASIA 29, 30-31 (2017).

⁹⁹⁵ Minda Calaguin-Cruz, *Development in ASEAN-U.S. Relations*, in ASEAN-US RELATIONS: WHAT ARE THE TALKING POINTS? 10, 10 (Pavin Chachavalpongpun ed., 2012).

⁹⁹⁶ K.Kesavapany, *U.S. Engagement with ASEAN*, in ASEAN-US RELATIONS: WHAT ARE THE TALKING POINTS? 3, 5 (Pavin Chachavalpongpun ed., 2012).

noted that “ASEAN has become the centerpiece of the construction of a regional architecture in the Asia-Pacific region, a central role that the United States supports.”⁹⁹⁷

The U.S. has been regarded as the predominant security player in the Asia-Pacific.⁹⁹⁸ Due to the maritime geography of Southeast Asia, the concerning security issues are both traditional (e.g., nuclear nonproliferation, counterterrorism, and transnational crime) and non-traditional (e.g., climate change, energy-food security, water shortage, and displacement of populations). ASEAN has limited capacity to deal with these issues. It needs the help of external power to secure peace and security.⁹⁹⁹ For traditional security conflicts in ASEAN, the U.S. has played a significant role since the cold war, the war on terror, and the maritime security in Malacca Strait and South China Sea.¹⁰⁰⁰ Especially in South China Sea disputes with China, ASEAN is incapable of providing sufficient defense, and it needs a balancing force that the U.S. military can offer.¹⁰⁰¹

The relationship between U.S.-ASEAN has changed during different U.S. administrations. During the Bush administration, Southeast Asia was labeled as the “second front” in the Global War on Terror (GWOT), particularly after the bombings in Bali in 2002 and Jakarta in 2003.¹⁰⁰² In the GWOT, the U.S. adopted a unilateralist stance and triggered tension with Muslim people in the region.¹⁰⁰³ The tension rose because the U.S. refused to accede to the Treaty of Amity and Cooperation of Southeast Asia (TAC), which requires all parties to respect each other’s sovereignty and refrain from using force and interfere with internal affairs. The American involvement in the region claiming the counterterrorism reason

⁹⁹⁷ Louis Mazel, *ASEAN-U.S. Relations*, in *ASEAN-US RELATIONS: WHAT ARE THE TALKING POINTS?* 6, 6 (Pavin Chachavalpongpun ed., 2012).

⁹⁹⁸ Even the cold war was ended, the US remains engagement in the Asia-Pacific because though the full scale war is unlikely, territorial disputes and confrontation remains: South China Sea, Taiwan Strait and Korean Peninsula. Collin S.L. Koh, *ASEAN’s View on the U.S. Military Role in the Region*, in *ASEAN-US RELATIONS: WHAT ARE THE TALKING POINTS?* 55, 60 (Pavin Chachavalpongpun ed., 2012).

⁹⁹⁹ *Id.* at 59.

¹⁰⁰⁰ Kesavapany, *supra* note 996, at 4.

¹⁰⁰¹ Koh, *supra* note 998, at 72.

¹⁰⁰² *Id.* at 61.

¹⁰⁰³ *Id.* at 62.

had been seen by some to cover for the geopolitical motive—counter China’s rising power.¹⁰⁰⁴ The U.S. considered ASEAN as a less strategic partner and preferred to have bilateral relations with the major Non-NATO allies such as Thailand and the Philippines rather than with the region as a whole.¹⁰⁰⁵

While the U.S. kept the distance, China increased its role in the region. As a result of China’s accession to TAC, the China-ASEAN relation in trade and security has increased. As the Obama administration felt the strong influence of China in the region, the “Pivot to Asia” or “Rebalance” strategy was initiated.¹⁰⁰⁶ President Obama personally committed to the region. He attended several ASEAN-centered forums such as the Asia Pacific Economic Cooperation (APEC) meetings and ASEAN Regional Forum (ARF) and decided to accede to the TAC.¹⁰⁰⁷ As a Secretary of the State, Hilary Clinton visited the region and ASEAN Secretariat numerous times including attending the ARF in 2010.¹⁰⁰⁸ The appointment of the first U.S. ambassador to ASEAN Affairs, Scot Marciel, has shown the recognition of U.S. Congress and the administration to strengthen the U.S.-ASEAN ties. As Marciel noted: “We look at ASEAN not only as an institution that is doing work in Southeast Asia, but as a regional and global partner.”¹⁰⁰⁹ The Obama administration’s moderate approach towards the security issues and the emphasis on diplomacy over military power distance itself from the Bush’s unilateralist stance and enhance activism involvement and flexibility in the region.¹⁰¹⁰ This decrease of

¹⁰⁰⁴ Seng Tan, *Between Balance and Community: America, ASEAN, the Security of Southeast Asia*, 6 INT. RELAT. ASIA-PAC. 37, 49-50 (2006).

¹⁰⁰⁵ U Myint Soe, *Shift in U.S. Policy Towards Myanmar*, in ASEAN-US RELATIONS: WHAT ARE THE TALKING POINTS? 99, 104 (Pavin Chachavalpongpun ed., 2012).

¹⁰⁰⁶ *Id.*

¹⁰⁰⁷ Minda Calaguin-Cruz, *Development in ASEAN-U.S. Relations*, in ASEAN-US RELATIONS: WHAT ARE THE TALKING POINTS? 10, 11 (Pavin Chachavalpongpun ed., 2012), 11.

¹⁰⁰⁸ Mazel, *supra* note 997, at 8.

¹⁰⁰⁹ Scot Marciel, *A New Era in the Long standing U.S.-ASEAN Relationship*, in ASEAN-US RELATIONS: WHAT ARE THE TALKING POINTS? 27, 28-30 (Pavin Chachavalpongpun ed., 2012).

¹⁰¹⁰ Robert Sutter, *The Obama Administration and U.S. Policy in Asia*, 31 CONTEMP. SOUTHEAST ASIA 189, 212 (2009).

tension leads to improvement in military relations—for example, the joining of Malaysia in the Cobra Gold military exercise in 2011.¹⁰¹¹

America's relation with the maritime member states and mainland member states of ASEAN is asymmetric.¹⁰¹² The U.S. trade and investment with maritime member states are far more substantial than with the mainland due to the historical and structural factors—the U.S. engagement as an ally with maritime member states during the Cold War and U.S. security interest concentrated in maritime of the region.¹⁰¹³ Plus, conflicts concerning human rights, democracy, and the rule of law are more intense in the relation between the U.S. and mainland member states.¹⁰¹⁴ According to the global interest and values of American liberal orders, the human rights violation and lack of democracy in ASEAN member states complicated the relations with the U.S.¹⁰¹⁵ The most significant issue that affects U.S.-ASEAN relations was the inability or the unwillingness of ASEAN to influence Myanmar's military government on democracy and human rights violations. To some, the entrance of Myanmar to ASEAN undermined the legitimacy of the organization.¹⁰¹⁶

2.2.2 The trade-environment linkage in U.S.-ASEAN relation

For a trading policy with its external relations, the U.S. has an objective to integrate environmental protection into trade negotiation and agreements. An environmental clause is included in various U.S.-led bilateral and multilateral trade agreements. This subpart discusses the effectiveness of environmental provisions in trade agreements to which the U.S. and ASEAN member states are the parties. The trade agreements in question are the U.S.-Singapore

¹⁰¹¹ Gunnery Sgt. Cindy Fisher, III MEF, *Cobra Gold 2011 kicks off in Thailand*, CPF (Feb.7, 2017), <https://www.cpf.navy.mil/news.aspx/000221>

¹⁰¹² Satu P.Limaye, *United States-ASEAN Relations on ASEAN's Fortieth Anniversary : A Glass Half Full*, 29 CONTEMP. SOUTHEAST ASIA 447, 453 (2007).

¹⁰¹³ *Id.* at 453-454.

¹⁰¹⁴ *Id.* at 454.

¹⁰¹⁵ *Id.* at 449.

¹⁰¹⁶ *Id.* at 457.

Free Trade Agreement (U.S.-SG FTA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Though having some flaws, the U.S.-SG FTA is the first and only FTA with the ASEAN member state that contains an environmental clause. It may serve as a first step towards the environmental integration in trade for ASEAN. The CPTPP, with four ASEAN member states as parties to it, deserves to be examined because it is a product of U.S.-led negotiation during the Obama administration, particularly its comprehensive environmental provisions. Even though the U.S. under Trump administration withdrew from the deal, there is a possibility for reconsideration under the new administration.

The U.S. has a significant role in ASEAN economic development through trade and investment cooperation and development assistance. Despite the rise of China, the U.S. is the largest economic market in the world, and it has been a significant destination for ASEAN exports and the provider of foreign direct investment.¹⁰¹⁷ ASEAN is also the fourth-largest export market for the U.S.,¹⁰¹⁸ and the increasing growth rate suggests that it will become more critical over time.¹⁰¹⁹ U.S.-ASEAN has initiated trade and investment cooperation. For instance, the ASEAN-U.S. Trade and Investment Framework Arrangement (TIFA) 2006—non-binding parameters jointly implemented to promote better trade and investment flow.¹⁰²⁰ In 2012, U.S.-ASEAN launched the Expanded Economic Engagement (E3) initiative to broaden U.S.-ASEAN cooperation and create jobs.¹⁰²¹ The Obama administration also announced “U.S.-ASEAN Connect” a strategic framework for economic engagement in business, energy, innovation, and policy with ASEAN.¹⁰²² Among many other U.S. assistance programs, the

¹⁰¹⁷ Kesavapany, *supra* note 996, at 4.

¹⁰¹⁸ *US-ASEAN Trade and Investment*, US-ASEAN BUSINESS COUNCIL (July 22, 2019), <https://www.usasean.org/why-asean/trade-and-investment> and *US-ASEAN 10 Investment Facts*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVES (Apr. 30, 2019), <https://ustr.gov/issue-areas/trade-organizations/association-southeast-asian-nations-asean/us-asean-10-trade-and>

¹⁰¹⁹ Michael G. Plummer, *US-ASEAN Relations in a Changing Global Context*, KAS, May, 8, 2017, at 139, 147.

¹⁰²⁰ Calaguin-Cruz, *supra* note 1007, at 11.

¹⁰²¹ The US-ASEAN Expanded Economic Engagement (E3) initiative, <https://2009-2017.state.gov/r/pa/prs/ps/2013/10/215235.htm>

¹⁰²² The US-ASEAN Connect, <https://asean.usmission.gov/connect/>

prominent assistance program is the U.S. Agency for International Development (USAID).¹⁰²³ USAID focuses on many developmental and transnational challenges including transnational crimes, promoting sciences and innovation, and capacity building in respond to disaster risks.¹⁰²⁴

While expanding trade and economic development with its external relations, the U.S. has also played importing role in integrating environmental protection into an external trade agreement. Since 1974, Trade Promotion Authority (TPA) or “Fast Track Authority” is the legislation defining the U.S. objectives for trade negotiation.¹⁰²⁵ The current status is the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.¹⁰²⁶ According to the Bipartisan Act Section 2 (a)(5) and (6), the U.S. trade negotiation objectives are “to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world’s resources”¹⁰²⁷ and “to seek provisions in trade agreements under which parties to those agreements ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade.”¹⁰²⁸ According to the Bipartisan Act Section 2 (b)(10), the principle of trade negotiation concerning labor and the environment:¹⁰²⁹

- (i) Ensure that the party to trade agreement adopt and maintain measures implementing its obligation under common multilateral environmental agreements;

¹⁰²³ The U.S. Agency for International Development (USAID), <https://www.state.gov/ASEAN/indexU.html>

¹⁰²⁴ USAID-ASIA, <https://www.usaid.gov/where-we-work/asia>

¹⁰²⁵ US Trade Promotion Authority (TPA), <https://fas.org/sgp/crs/misc/R43491.pdf> and <https://ustr.gov/trade-topics/trade-promotion-authority>

¹⁰²⁶ Facts on Bipartisan Congressional Trade Priorities and Accountability Act of 2015, <https://fas.org/sgp/crs/misc/IF10038.pdf>

¹⁰²⁷ Bipartisan Congressional Trade Priorities and Accountability Act of 2015, <https://www.congress.gov/bill/114th-congress/senate-bill/995/text>

¹⁰²⁸ *Id.*

¹⁰²⁹ *Id.*

- (ii) Does not waive or derogate from its environmental laws in a manner that weakens or reduces the protections afforded by those laws and in a manner affecting trade and investment between the U.S. and that party;
- (iii) Does not fail to effectively enforce its labor and environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade and investment between the U.S. and that party;
- (iv) **Strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;**

And

- (v) Seek provisions in trade agreements under which parties to those agreements ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade.

The environmental clause has been included in many U.S.-led trade agreements.¹⁰³⁰ For example, the North American Free Trade Agreement (NAFTA) is the first trade agreement with a binding environmental clause linking trade and the environment.¹⁰³¹

The U.S.-Singapore Free Trade Agreement (U.S.-SG FTA), signed in 2003, is the first FTA with member states of ASEAN containing an environmental clause. Though Singapore is the most developed country in ASEAN, the fact that the environment and labor issues are on the agenda represents a groundbreaking point from the developing countries' opposition on trade-environment linkage.¹⁰³² The U.S.-SG FTA recognizes that "economic development, social development, and environmental protection are interdependent and mutually reinforcing

¹⁰³⁰ US Bilateral and Regional Trade Agreements, USTR, <https://ustr.gov/issue-areas/environment/bilateral-and-regional-trade-agreements>

¹⁰³¹ See Linda J. Allen, *The North America Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential? An Empirical Study of Policy Effectiveness*, 21 *Colo. J. INT'L ENVTL. L. & POL'Y* 121, 121-99 (2012); and Linda J. Allen, *Reassessing the 'Green' in NAFTA*, 54 *J. WORLD TRADE* 557, 557-74 (2018).

¹⁰³² John Audley, *Evaluating Environmental Issues in the U.S.-Singapore FTA*, CEIP (2003), 1.

components of sustainable development, and that an open and nondiscriminatory multilateral trading system can play a major role in achieving sustainable development.”¹⁰³³

The environmental provision in Chapter 18: ¹⁰³⁴

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws. A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

Furthermore, the U.S.-SG FTA also incorporates the environmental exception of the GATT XX (b) and (g), which allows the parties to use environmental measures necessary to protect human, animal, plant life, and health and measures relating to the conservation of living and non-living exhaustible natural resources.

Nevertheless, there is a significant loophole regarding the rule of origin that can undermine environmental protection during the production and process methods (PPMs). According to the Rule of origin Article 3.1,¹⁰³⁵ it enables Singapore to export products made outside Singapore in neighboring countries such as Indonesia that may have a less stringent environmental standard to the U.S. market, and such nonparty third country does not need to adhere to the environmental provision.¹⁰³⁶ This causes concern over the environmental protection regarding the PPMs and that the FTA may not be fully adequate to reach the

¹⁰³³ The U.S.-Singapore Free Trade Agreement 2003, USTR, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf

¹⁰³⁴ *Id.* at Chapter 18 Environment

¹⁰³⁵ “ARTICLE 3.1 : ORIGINATING GOODS

For purposes of this Agreement, an originating good means a good:

- (a) wholly obtained or produced entirely in the territory of one or both of the Parties; or
- (b) that has satisfied the requirements specified in Annex 3A; or
- (c) otherwise provided as an originating good under this Chapter.

ARTICLE 3.2 : TREATMENT OF CERTAIN PRODUCTS

1. Each Party shall provide that a good listed in Annex 3B is an originating good when imported into its territory from the territory of the other Party.” *Id.*

¹⁰³⁶ Audley, *supra* note 1032, at 2.

sustainable goal. From a business point of view, this spillover effect is beneficial for the economic growth of other member states of ASEAN because Singapore may not have enough capacity to absorb American investment or enough producing capacity to ensure availability of export products to the U.S. market; thus, Singapore may source out the low-cost/labor-intensive production to neighboring countries.¹⁰³⁷ The U.S.-SG FTA cannot be a template for the U.S.-ASEAN agreement because of fundamental differences between Singapore and other member states.¹⁰³⁸ Singapore is the most developed in terms of technological advancement; thus, complying with the higher environmental standard in trade is not as contentious as the other member states. Therefore, the U.S.-SG FTA is at best serving as a baseline or reference point to the potential U.S. FTA with other ASEAN member states.

During the Obama administration, the focus on bilateral trade agreements with ASEAN member states had shifted towards a mega-regional trade agreement. The U.S. under the Obama administration led the Trans-Pacific Partnership (TPP) negotiation, but later Trump administration withdrew from the deal. Nevertheless, it is still interesting to examine this trade agreement because it has set the benchmark for trade-environment linkage in the trade agreement. First, it is a mega-regional trade agreement between developed and developing countries, diverse in interests and concerns, including a comprehensive environmental chapter affirming the strong commitment to protect and conserve the environment.¹⁰³⁹ Second, though the U.S. pulled out of the deal, it is still important to discuss this trade agreement in this context because it is largely the result of the U.S.-led negotiation. The environmental provision still inherits many similar traits of the vision and objectives led down by the U.S. TPA. Plus, there

¹⁰³⁷ Jose L. Tongzon, *U.S.-Singapore Free Trade Agreement : Implication for ASEAN*, 20 ASEAN ECON. BULL. 174 175 (2003).

¹⁰³⁸ *Id.* at 177.

¹⁰³⁹ *Environment in the Trans-Pacific Partnership : A Legal Analysis*, ICTSD Policy Brief (2016), V.

is a possibility for reconsideration under the new administration due to possible trade and environmental policy changes.¹⁰⁴⁰

Trans-Pacific Partnership (TPP) is a mega-regional trade agreement between 12 Pacific Rim countries—Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Malaysia, Vietnam, Singapore, and the United States of America.¹⁰⁴¹ It includes four member states of ASEAN. Signed in February 2016, it is the largest trade agreement to be negotiated outside WTO—constituting almost 40 percent of the global economy.¹⁰⁴² It is the expansion of the Tran-Pacific Strategic Economic Partnership (TPSEP) between Brunei, Chile, New Zealand, and Singapore, which entered into force in 2006.¹⁰⁴³ TPP was a cornerstone in the Obama administration’s economic policy in the Asia-Pacific.¹⁰⁴⁴ The U.S. sought to enhance the U.S.’s economic growth by engaging in the growing markets of Asia-Pacific and to counterbalance the expansion of China’s trading power.¹⁰⁴⁵ Nevertheless, after winning the presidency, President Trump withdrew from the TPP in January 2017, claiming that TPP is a

¹⁰⁴⁰ The sign of change can be seen when during Trump administration the US withdrew from Paris Agreement but the recent administration led by Biden announced to rejoin Paris Agreement once again committing itself to address climate change crisis. Drew Kann & Kylie Atwood, *Paris Climate Accord: Biden Announces US Will Rejoin Landmark Agreement*, CNN (Jan. 20, 2021), <https://edition.cnn.com/2021/01/20/politics/paris-climate-biden/index.html>

¹⁰⁴¹ *Trans-Pacific Partnership Pact Clinched, Fisheries Subsidies Cuts Targeted*, ICTSD Biores Vol.9 No.8 (2015), <https://www.ictsd.org/bridges-news/biores/news/trans-pacific-partnership-pact-clinched-fisheries-subsidies-cuts-targeted>

¹⁰⁴² *Id.*

¹⁰⁴³ Tran-Pacific Strategic Economic Partnership (TPSEP), http://www.sice.oas.org/tpd/tpp/tpp_e.asp

¹⁰⁴⁴ Overview of TPP, USTR, <https://ustr.gov/tpp/overview-of-the-TPP> and *Trump Executive Order pulls out of TPP Trade Deal*, BBC (Jan. 24, 2017), <https://www.bbc.com/news/world-us-canada-38721056>

¹⁰⁴⁵ “This agreement was meant to reduce or eliminate up to 18,000 tariffs on both agricultural and manufactured products, boosting trade, economic growth as well as political ties between the 12 countries. Former president Barack Obama and other TPP supporters believed that this deal could have helped the United States increase its influence over Asia-Pacific while countering China’s growth in power.” Peter Pham, *Why did Donald Trump kill the Big Free Trade Deal*, FORBES (Dec. 29, 2017), <https://www.forbes.com/sites/peterpham/2017/12/29/why-did-donald-trump-kill-this-big-free-trade-deal/#4e79699d4e62>

bad deal for Americans.¹⁰⁴⁶ Marking the policy change, Trump preferred the bilateral agreement rather than the multilateral one.¹⁰⁴⁷

Despite the withdrawal of the U.S., the remaining parties decided to carry on the trade pact with some revisions and suspensions on certain provisions. The pact reborn as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)—the TPP is incorporated and made part of this agreement.¹⁰⁴⁸ All 11 parties signed the finalized text in March 2018. The CPTPP enters into force on 30 December 2018.¹⁰⁴⁹

The Office of the United States of Trade Representative (USTR) claimed that TPP (now renamed as CPTPP) is the “most robust enforceable environment commitments of any trade agreement in the history” and the environmental chapter is an “historic opportunity to advance conservation and environmental protection across the Asia-Pacific.”¹⁰⁵⁰ Article 20, “Environmental Provision” of TPP, sets out the goal for trade-environment support. All parties are exposed to many environmental challenges: wildlife trafficking, illegal logging, illegal fishing, and marine pollution; thus, the agreement aims to prevent the “stuck-at-the-bottom” effect—the party lacks the political will to enforce the environmental law to achieve trade performance or attract investment.¹⁰⁵¹ The commitment is to “promote mutually supportive trade and environmental policies; promote high levels of environmental protection and effective

¹⁰⁴⁶ “Trump wasn’t entirely wrong. Companies from developed countries that signed up to the deal, such as Japan and the United States, would have outsourced to developing countries that have low-cost labor and fewer labor laws, such as Vietnam. In which case, unemployment in developed countries could have risen. But there’s a huge downside. In Vietnam, tax on imported cars (from Ford, Chevrolet, etc.) is a massive 70 percent. If tariffs on imported cars had been reduced or eliminated, then the U.S. car industry would have made huge gains. The same goes with the 40 percent tariffs on imported agricultural goods. These developing markets would have been treasure troves for American farmers if that tax was cut down” *Id.*

¹⁰⁴⁷ T.J. COLES, PRESIDENT TRUMP INC : HOW BIG BUSINESS AND NEOLIBERALISM EMPOWER POPULISM AND THE FAR-RIGHT, *WEST HOATHLY* 24 (2017) in Affabile Rifawan & Novi Amelia, *Two Majors Powers in Captivating Regional Influence and Dynamics : Comparing Foreign Policies of China and United States in Southeast Asia*, 4 CCPS 247, 257 (2018).

¹⁰⁴⁸ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Article 1.1 http://www.sice.oas.org/Trade/TPP/CPTPP/English/CPTPP_Text_e.pdf

¹⁰⁴⁹ Ankit Panda, *The CPTPP Trade Agreement Will Enter Into Force on December 30*, THE DIPLOMAT (Nov. 1, 2018), <https://thediplomat.com/2018/11/the-cptpp-trade-agreement-will-enter-into-force-on-december-30/>

¹⁰⁵⁰ TPP Fact Sheet, USTR, <https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf>

¹⁰⁵¹ *Id.* at 3.

enforcement of environmental laws; and enhance the capacities of the parties to address trade-related environmental issues, including through cooperation.”¹⁰⁵²

Despite the high ambition to effectively promote environmental protection in trade, the legal analysis from scholars, environmental groups, and the International Centre for Trade Sustainable Development (ICTSD) shows that these efforts have not been effective.¹⁰⁵³ From an environmentalist’s position, the environmental provision in TPP/CPTPP may not be as efficient as it is perceived to enhance mutually benefited conditions for trade and environment or prevent environmental damage caused by growing trade and economic activities. The main problems are the non-inclusion of meaningful MEAs, the lack of substantial obligations and liabilities for the party regarding implementation of MEAs, the troublesome dispute settlement mechanism, and the chilling effect of Investor-State Dispute Settlement provision (ISDS).

TPP sets out obligations to respect the Multilateral Environmental Agreements (MEAs), which are the MEAs all parties already ratified—Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), and the International Convention for the Prevention of Pollution from Ships (MARPOL). It did not reach out to the other MEAs that could significantly impacts trade-environmental linkages, such as the international agreements on climate change, regardless of the urgency and necessity of current climate circumstances. TPP does not expressly address the issue of climate change, but it acknowledges that the “transition to a low-emission economy requires collective action” and asks the parties to cooperate in the areas including “energy efficiency, clean and renewable energy sources.”¹⁰⁵⁴

¹⁰⁵² Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Article 20.2(1)

¹⁰⁵³ Chris Wold, *Empty Promises and Missed Opportunities : An Assessment of the Environmental Chapter of the Trans-Pacific Partnership*, International Environmental Law Project (IELP), Lewis & Clark Law School, 1-21 (2016); ICTSD, *Environment in the Transpacific Partnership : A Legal Analysis*, ICTSD (2016) ; CIEL, *The Trans-Pacific Partnership and the Environment : An Assessment of Commitments and Trade Agreement Enforcement*, CIEL 1-13 (2015); and Sierra Club, *TPP Text Analysis : Environmental Chapter Fails to Protect the Environment*, Sierra Club, Oct. 2015 available at <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/TPPanalysis.pdf>

¹⁰⁵⁴ TPP Article 20.15 (1)

As Chris Wold pointed out, the parties must have discussed the issue of climate change.¹⁰⁵⁵ The fact that TPP omitted climate change mitigating issues such as eliminating fossil fuel subsidies is a result of political and economic conflicts—the U.S. and ASEAN members like Brunei, Malaysia, and Singapore are the major oil and gas producers, refiners, and exporters. Considering the comparative advantage the parties to TPP/CPTPP have in fossil fuel trade, the non-inclusion of effective climate change mitigation measures is expected.

TPP does not set new substantial obligations for the parties but instead reaffirms the party's existing duty under the listed MEAs.¹⁰⁵⁶ The TPP provisions concerning CITES¹⁰⁵⁷ and wildlife conservation is weak as the party is only under the obligation to “combat” but not “prohibit” the illegal take, and illegal trade in wild fauna and flora¹⁰⁵⁸ and to “maintain” but not “improve” the capacity and institutional framework to promote sustainable forest management and wildlife conservation.¹⁰⁵⁹ It reaffirms that the party shall adopt, maintain and implement laws, regulations, and other measures to fulfill its obligations under CITES. The party cannot use the general exception to employ unilateral measures to create trade barriers for wildlife conservation. As the general principle of all free trade agreement that the parties shall agree to eliminate or reduce tariff and non-tariff trade barriers; however, the parties can take measures necessary to protect human, animal, or plant life and health, provided that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international

¹⁰⁵⁵ Wold, *supra* note 1053, at 17.

¹⁰⁵⁶ ICTSD, *supra* note 1053, at 4 and CPTPP Article 20.4

¹⁰⁵⁷ According to CITES Article VIII, the parties shall take appropriate measures to prohibit trade in specified animals and plants. These measures includes penalizing trade in or possession of such specimens. See Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Article VIII, <https://cites.org/eng/disc/text.php#VIII>

¹⁰⁵⁸ TPP Article 20.17: “Each party commits to combat the illegal take of, and illegal trade in, wild fauna and flora, including by fulfilling its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) , as well as through joint activities on conservation issues, including through cooperation activities among law-enforcement networks.” CIEL, *supra* note 1053, at 2 and TPP Article 20.17.

¹⁰⁵⁹ TPP Article 20.17(4)(b) and Wold, *supra* note 1053, at 11.

trade between the Parties.¹⁰⁶⁰ This general exception is similar to GATT XX (b), but the exception does not extend to include measures relating to the conservation of living and non-living exhaustible natural resources as in GATT XX(g). Thus, it does not allow the party to implement unilateral measures relating to the conservation of living and non-living natural resources of the party state.

In TPP, under Article 20.17.5, the party is required to take measures to combat the trade of wild fauna and flora that is illegal not only according to its law but also “another applicable law”—the law of the jurisdiction where the take and trade occurred.¹⁰⁶¹:

In a further effort to address the illegal take of, and illegal trade in, wild fauna and flora, including parts and products thereof, **each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party’s law or another applicable law**, the primary purpose of which is to conserve, protect, or manage wild fauna or flora. Such measures shall include sanctions, penalties, or other effective measures, including administrative measures, that can act as a deterrent to such trade.

This article has a high potential to combat the violation of the wildlife trade because it allows the party to take actions to address the wildlife trade that violates its own laws and another state’s law—a non-party law. This raises the bar for wildlife protection. Nevertheless, the new CPTPP has suspended the phrase “or another applicable law,” including the footnote 26,¹⁰⁶² because some parties felt they raised practical difficulties around the nature of evidence required, the appropriate authority to take action and knowledge of non-parties’ laws.¹⁰⁶³

Due to the coastal geographic nature, the parties are significant global consumers, producers, and traders of fisheries products from marine capture fisheries.¹⁰⁶⁴ Thus, the

¹⁰⁶⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Article 15.3

¹⁰⁶¹ TPP Article 20.17 (5) and footnote 26.

¹⁰⁶² CPTPP Annex 8

¹⁰⁶³ TPP and CPTPP the Differences Explained, New Zealand Foreign Affairs and Trade, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/cptpp-vs-tpp/>

¹⁰⁶⁴ ICTSD, *supra* note 1053, at 7.

provisions concerning fisheries management, conservation, and subsidies are important. According to Article 20.16 (3), parties are “encouraged to operate a fisheries management system that regulates marine wild capture fishing, and that is designed to (a) prevent overfishing and overcapacity; (b) reduce bycatch of non-target species and juveniles; (c) promote the recovery of overfished stocks for all marine fisheries in which parties’ persons conduct fishing activities.” The development of these systems is to be based on the “best scientific evidence available” and “internationally recognized best practice” as reflected in various multilateral agreements to which the parties already subscribe. The party also has to work towards improving international cooperation to address IUU.¹⁰⁶⁵ TPP prohibits the granting or maintenance of subsidies for fishing that negatively affect fish stocks in an overfished condition.¹⁰⁶⁶

There are two significant problems. First, the parties are only “encourage to operate” their fishery management system; thus, there is no substantive obligation. Second, the provision prohibiting fish subsidies in TPP does not prevent the problem of overfish or overcapacity because according to the term the party can continue to subsidize the fishing that negatively affect fish stocks as long as those fish stocks are not in an overfished condition. The provision may have positive impact to fish stocks that are in overfished condition but it does not apply to “the majority of fish stocks that are fully fished with no further room for expansion in catch.”¹⁰⁶⁷ Furthermore, there are limitations of TPP in marine animal conservation of sharks, marine turtles, seabirds, and marine mammals.¹⁰⁶⁸ The common exhaustion of shark species is caused by shark products trade, particularly shark fins. Due to the low reproductive rate and gradual growth, sharks are highly susceptible to extinction because many species cannot replenish the

¹⁰⁶⁵ CPTPP Article 20.16 (13)

¹⁰⁶⁶ CPTPP Article 20.16(5)

¹⁰⁶⁷ FAO, *The State of World Fisheries and Aquaculture*, 7 (2014) in Wold, *supra* note 1053, at 15.

¹⁰⁶⁸ Wold, *supra* note 1053, at 14-15.

population fast enough to cope with the exhaustion.¹⁰⁶⁹ The best to combat shark exhaustion is to ban the harvest, sale, and trade of shark products. By allowing shark trade, the TPP's parties like Malaysia, Vietnam, and Singapore are among the main exporters, importers, and consumers of shark fins and shark products.¹⁰⁷⁰ TPP gives leeway for the party and merely suggests that the party should "as appropriate" collect data or impose catch limits, mitigation measures, or ban finning.¹⁰⁷¹ For marine mammals such as whales and dolphins, TPP only directs the party to adopt measures according to international agreements to which the party is the party.¹⁰⁷²

The threshold for parties to bring claims is too high to be good for the environment. For example, CITES—the party must demonstrate that the failure to adopt, maintain or implement law relating to CITES affects trade or investment between the parties.¹⁰⁷³ The enforcement provision in TPP is weaker than in CITES itself—it develops a mechanism to impose trade sanctions on parties in case of non-compliance.¹⁰⁷⁴ For the TPP agreement requirement for Montreal Protocol, the violation must likely affect human health and the environment and affect trade and investment.¹⁰⁷⁵ Thus, "the violation of the TPP relating to Montreal Protocol will occur long after a party is subject to the Montreal Protocol's non-compliance procedure."¹⁰⁷⁶

Furthermore, the contentious clause of the Investor-State Dispute Settlement provision (ISDS) has caused concerns and paradoxical results regarding environmental protection. A common dispute settlement mechanism is a state-to-state process, but the ISDS Provisions in TPP is a dispute resolution mechanism allowing private investors of one party to submit a claim

¹⁰⁶⁹ Caty Fairclough, *Shark Finning: Sharks Turned Prey*, SMITHSONIAN INSTITUTE (Aug. 2013), <https://ocean.si.edu/ocean-life/sharks-rays/shark-finning-sharks-turned-prey>

¹⁰⁷⁰ Felix Dent and Shelley Clark, *State of the Global Market for Shark Products*, 590 FAO Fisheries and Aquaculture Technical Paper, 3 (2015) <http://www.fao.org/3/a-i4795e.pdf>; and Wold, *supra* note 1053, at 15.

¹⁰⁷¹ TPP Article 20.16 (4)(a)

¹⁰⁷² TPP Article 20.16 (4)(b)

¹⁰⁷³ TPP Article 20.17 (2) and Footnote 23.

¹⁰⁷⁴ Wold, *supra* note 1053, at 4.

¹⁰⁷⁵ TPP Article 20.5(1) and Footnote 5

¹⁰⁷⁶ Wold, *supra* note 1053, at 5.

to international arbitration against the government of another party for the alleged breach of the TPP's investment provisions.¹⁰⁷⁷ According to CPTPP, most parts of ISDS remain untouched, except the terms “investment agreement” and “investment authorization,” which are mostly used for mining and oil investment, have been suspended.¹⁰⁷⁸ Thus, the scope of the ISDS mechanism is narrower in the CPTPP because the suspensions in the Investment chapter preclude claims relating to investment contracts and approval. Under CPTPP, private companies who enter into an investment contract with a member state government will not be able to use ISDS clauses if there is a dispute in connection with such contract.¹⁰⁷⁹

Many disputes using the ISDS mechanism are the conflicts over a party's environmental regulations.¹⁰⁸⁰ ISDS gives the foreign private investors, claiming the loss of profit or obstruction to investment, the power to challenge the regulations issued by the party's government to protect particular interests such as public health, safety, and the environment.¹⁰⁸¹ The consequence of ISDS actions can lead to “regulatory chill”—the state roll back the efforts to advance its laws and regulations concerning national interest or environmental protection.¹⁰⁸²

For instance, in *Ethyl Corporation v. Canada* case, the investor invoked the investment provision Chapter 11 of NAFTA.¹⁰⁸³ Ethyl Corporation, a U.S. company, filed a claim to arbitration against the government of Canada for passing a Manganese-based Fuel Additives Act which imposes a ban on importation and interprovincial trade for the commercial purpose

¹⁰⁷⁷ TPP Chapter 9 Section B Investor-State Dispute Settlement

¹⁰⁷⁸ Matthew B. Goodman, *From TPP to CPTPP*, CSIS (Mar.8, 2018), <https://www.csis.org/analysis/tpp-cptpp>

¹⁰⁷⁹ Investment and ISDS, New Zealand Foreign Affairs and Trade, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/investment-and-isds/>

¹⁰⁸⁰ E.g., Jillian Kim, *Environmental Regulation and Investor State Dispute Settlement Clauses – OceanaGold and El Salvador*, GT (Nov.17, 2014), <https://www.gtlaw-environmentalandenergy.com/2014/11/articles/environment/environmental-regulation-and-investor-state-dispute-settlement-clauses/>; and Energy & Environment, ISDS BILATERALS (Mar.2020) <https://isds.bilaterals.org/?-climate-environment-&lang=en>

¹⁰⁸¹ Scott McAnsh & Amir Attaran, *Investor-State Dispute Settlements: Great for Business, Risky for the Environment*, ISDS BILATERALS (Feb. 22, 2017), <http://isds.bilaterals.org/?investor-state-dispute-settlements&lang=en>

¹⁰⁸² Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TEL TRANS. ENV'T L. 229, 229-50 (2018).

¹⁰⁸³ *Ethyl Corporation v. The Government of Canada*, UNCITRAL, <https://www.italaw.com/cases/409>

of Methylcyclopentadienyl Manganese Tricarbonyl (MMT). This gasoline-octane enhancer can cause irreversible neurotoxicity or other adverse health effects with sufficiently high exposure levels.¹⁰⁸⁴ The Manganese-based Fuel Additives Act was passed due to environmental concerns of vehicle emissions.¹⁰⁸⁵ Ethyl Corporation claimed that the Canadian law had expropriated the company's commercial interest; thus, Canada breached its obligation under the investment provision of NAFTA. As a result, the panel ruled in favor of the investor and found that the Canada measure is inconsistent with the agreement's provisions; thus, Canada agreed to settle and pay Ethyl Corporation \$13 million. Another case showing how ISDS impede the state's authority to regulate environmental protection is *Bilcon of Delaware et al. v. Canada*.¹⁰⁸⁶ In this case, Canada rejected the mining project of Bilcon in Bay of Fundy because, according to the environmental impact assessment, the blasting extraction of basalt (a rock used for construction) and the shipping will result in the destruction of the area rich in biodiversity and threaten several endangered marine species and the community core values.¹⁰⁸⁷ Thus, Bilcon filed a claim claiming that Canada violates the NAFTA rule on the minimum standard of treatment for foreign investors, and its environmental assessment was based on arbitrary, biased, capricious, and irrelevant considerations. Despite a disagreement from one of the arbitrators, the other two arbitrators ruled in favor of Bilcon and determined that the environmental impact assessment violated Canada's NAFTA obligation to afford Bilcon a "minimum standard of treatment."¹⁰⁸⁸

¹⁰⁸⁴ EPA Comments on the Gasoline Additive MMT, <https://www.epa.gov/gasoline-standards/epa-comments-gasoline-additive-mmt>

¹⁰⁸⁵ Cases filed against the Government of Canada, Ethyl Corporation v. Government of Canada, <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/diff-ethyl.aspx?lang=eng>

¹⁰⁸⁶ *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, <https://www.italaw.com/cases/1588>

¹⁰⁸⁷ Corporate Rights in Trade Agreements Attacking the Environment and Community Values, Sierra Club, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/0999_Trade_Bilcon_Factsheet_04_low.pdf

¹⁰⁸⁸ Stefanie Schacherer, *Clayton/Bilcon v. Canada*, IISD (Oct.18, 2018), <https://www.iisd.org/itn/2018/10/18/clayton-bilcon-v-canada/>

In conclusion, the integration of environmental provision in this mega-regional trade agreement is insufficient to achieve sustainable development and prevent environmental degradation due to trade and economic activities because the provision does not create effective and enforceable obligations for the parties.

2.2.3 The challenge of environmental integration for ASEAN and the U.S.

The U.S.-ASEAN relation is significant not only in economic and political dimensions but also in environmental consideration. Particularly with the fluctuation in U.S. administration, it is interesting to see the shift in U.S. foreign policy in trade and environmental issues and how it impacts the trade-environment development of ASEAN. This variability in the U.S. internal politics creates a range of uncertainty regarding the U.S.-ASEAN relations and the integration of environmental protection in trade. During the Trump administration, the U.S. employed an inward-looking policy and diminished its commitment to liberal norms diffusion and environmental integration in foreign relations. This led to less involvement with ASEAN but, at the same time, more comfortable ambiance with ASEAN leaders. With the new administration under Biden's leadership, the U.S. is expected to regain its strong position in liberal orders and environmental protection in its foreign relation. Thus, there will be more engagement and more pressure for U.S.-ASEAN relations in the political, economic and environmental context.

Satu Limaye laid down unique elements of the Trump administration that impacted on the relation with ASEAN: Transactionalism, Nationalism, and Nepotism. First, the “focus on ‘transactionalism’ or ‘deal-making’ and corollary diminution of commitment to a ‘liberal order’ approach to foreign relations including rules, norms, values, and institutions”¹⁰⁸⁹ resulting in less demand from the U.S. for devotion to “liberal” norms were welcomed to the more

¹⁰⁸⁹ Satu Limaye, *Sign are Taken for Wonders. 'We Would See a Sign': The Trump Administration and Southeast Asia*, 39 CONTEMP. SOUTHEAST ASIA 15, 16 (2017).

authoritarian states in the Southeast Asia region.¹⁰⁹⁰ Less pressure for democracy and human rights opened doors for closer ties and better cooperation with some member states. Thus, in a way, it restored “alliances ties that were held hostage by Obama administration’s human right and democracy agenda.”¹⁰⁹¹ For instance, the dispatch of Admiral Harry Harris, Commander of the U.S. Pacific Command (PACOM) to Cobra Gold military exercise in Thailand in 2017—the highest-level U.S. official to visit the country since the coup in 2014¹⁰⁹² and the meeting between Trump and Thai Junta leader in October 2017¹⁰⁹³ showed Trump’s willingness to embrace authoritarian regimes as long as it would be beneficial.

The political comfort that the Trump presidency offers to many Southeast Asia’s political leaders can be traced to the certainty that U.S. scrutiny and criticism of their performance on human rights, respect for democratic freedoms and the rule of law are likely to be negligible under Trump.¹⁰⁹⁴

The Trump administration did not put pressure on ASEAN over the concerns of military rule by the junta in Thailand, extrajudicial killing in the Philippines, corruption in Malaysia, civil rights oppression in Cambodia, or minority eradication in Myanmar. The absence of U.S. criticism on these matters was more than welcome for authoritarian regimes in the region.

Second, the “America First” approach resembles nationalism practice and the non-intervention principle of ASEAN member states. Trump’s focus on domestic interest showed that “it is less about what Trump’s America can offer Southeast Asia, but more about what the

¹⁰⁹⁰ *Id.*

¹⁰⁹¹ The US-Thailand FTA negotiation was frozen after Thailand coup in 2006 and also due to the farmers’ objections regarding the pharmaceuticals issues. Thitinan Pongsudhirak, *Southeast Asia and the Trump Administration : Between a Rock and a Hard Place*, 39 CONTEMP. SOUTHEAST ASIA 9, 11 (2017).

¹⁰⁹² Limaye, *supra* note 1089, at 17.

¹⁰⁹³ Panu Wongcha-um, *Trump-Prayuth Meet to Seal Normalisation of Thai-U.S. Relations*, REUTERS (Sep. 29, 2017), <https://www.reuters.com/article/uk-thailand-us-prayuth-trump/trump-prayuth-meet-to-seal-normalisation-of-thai-u-s-relations-idUKKCN1C40RT> and Matthew Pennington, *Trump Hails Stronger Ties in Meeting With Thai Junta Leader*, BLOOMBERG (Oct. 2, 2017), <https://www.bloomberg.com/news/articles/2017-10-02/trump-hosts-thailand-s-junta-leader-at-white-house>

¹⁰⁹⁴ Hamilton-Hart, *Deal-Makers and Spoilers*, 43-44 and James Traub, *Donald Trump: Making the World Safe for Dictators*, FOREIGN POLICY (Jan. 3, 2017), <https://foreignpolicy.com/2017/01/03/donald-trump-is-making-the-world-safe-for-dictators/>

region can offer Trump's America to benefit American people."¹⁰⁹⁵ His administration paid less attention to diplomatic forums such as regional meetings unless it would provide concrete beneficial outcomes for the U.S. interest.¹⁰⁹⁶ The inward-looking policy might mean less financial support and assistance in all areas: security and humanitarian.

Third, nepotism and conflict of interest were shown in "the singular, personal, and family-based" style of Trump governance.¹⁰⁹⁷ The conflict of interest in the Trump administration was another comforting element to ASEAN leaders—Trump's business ties and the formation of his team consisting of wealthy investors and business executives created an unprecedented conflict of interest, but this practice is familiar across the Southeast Asia region.¹⁰⁹⁸

Finally, the most prominent element of the Trump presidency that negatively affected the integration of environmental norms in trading policy was the anti-environmental protection gesture.¹⁰⁹⁹ An American national priority of putting economic growth over environmental protection was appreciated by many ASEAN leaders to the extent that they were not criticized and pressured for over-exploitation and weak environmental protection. Nevertheless, Southeast Asia is the region most vulnerable to environmental degradation and climate change impacts; thus, it needs financial and technological assistance to implement climate mitigating and adapting measures. ASEAN might not be able to anticipate help from the U.S.¹¹⁰⁰ The withdrawal of the U.S. from the Paris Agreement also relieved it from providing funds for

¹⁰⁹⁵ Ian Storey & Mustafa Izzuddin, *Roundtable: The Trump Presidency and Southeast Asia*, 39 CONTEMP. SOUTHEAST ASIA 1, 2 (2017).

¹⁰⁹⁶ Ian Storey & Malcolm Cook, *The Impending Trump Presidency and Southeast Asia*, 63 ISEAS Perspectives, Nov. 21, 2016, at 1, 5.

¹⁰⁹⁷ Limaye, *supra* note 1089, at 17.

¹⁰⁹⁸ Natasha Hamilton-Hart, *Deal-Makers and Spoilers: Trump and Regime Security in Southeast Asia*, 39 CONTEMP. SOUTHEAST ASIA 42, 44 (2017).

¹⁰⁹⁹ Fred Krupp, *Trump and the Environment: What His Plans Would Do*, 96 FOREIGN AFF. 73, 73 (2017).

¹¹⁰⁰ Margareth Sembiring, *The Rise of Trump and Its Global Implications—Trump's Impending U-turn on Climate Change: Worry for Southeast Asia?*, 307 RSIS Commentaries, Dec. 20, 2016, at 1, 2.

climate financing. This could also affect the U.S.-ASEAN environmental cooperation and assistance programs.¹¹⁰¹

Unlike the previous American liberal order, Trump's approach was closer to ASEAN practices and norms—less democratic, less protection for human rights and the environment but more economic-centered growth and nationalism—authoritarian capitalism.

For many elites in ASEAN member states, the Trump presidency was a “dual-edged” situation.¹¹⁰² Despite not having many choices, many ASEAN leaders expressed certain appreciation and interest in Trump's administration. President Rodrigo Duterte of the Philippines expressed admiration for Trump for his expressive insensitive performance.¹¹⁰³ Vice versa, Trump praised Duterte for his aggressive approach on drug wars.¹¹⁰⁴ For Indonesia, Joko Widodo, President of Indonesia, and some Indonesian elites showed positive reception towards Trump as Trump has a business connection in Indonesia.¹¹⁰⁵ On the other hand, the ruling elites also had concerns over the trade impacts due to Trump's foreign policy since the elites in the region rely on economic growth as their legitimacy to remain in power.¹¹⁰⁶ Thus, any negative impacts on trade growth would likely affect their positions in power. Trump's

¹¹⁰¹ Such as the US-Asia Environmental Partnership (AEP) for sustainable development, the US-ASEAN Technical Assistance and Training Facility (ASEAN-US TATF) and USAID Clean Power Asia for energy development. *Id.*

¹¹⁰² Hamilton-Hart, *supra* note 1098, at 42.

¹¹⁰³ Oliver Holmes, *Trump Hails Great Relationship with Philippines Duterte*, THE GUARDIAN (Nov. 13, 2017), <https://www.theguardian.com/us-news/2017/nov/13/trump-hails-great-relationship-with-philippines-duterte>

¹¹⁰⁴ *Philippines Deadly Drug Wars Praised by Donald Trump, Says Rodrigo Duterte*, THE GUARDIAN (Dec. 3, 2016), <https://www.theguardian.com/world/2016/dec/03/philippines-rodrigo-duterte-donald-trump-white-house-invite>

¹¹⁰⁵ Evi Fitriani, *The Trump Presidency and Indonesia : Challenges and Opportunities*, 39 CONTEMP. SOUTHEAST ASIA 58, 60 (2017). See also Jokowi Congratulates new US President Donald Trump, THE JAKARTA POST (Jan. 23, 2017), <https://www.thejakartapost.com/news/2017/01/23/jokowi-congratulates-trump.html> and Yudith Ho and Fathiya Dahrul, *Trump's Indonesia Partner Heads to Inauguration to Bolster Deals*, BLOOMBERG (Jan. 11, 2017), <https://www.bloomberg.com/news/articles/2017-01-11/tycoon-s-new-york-d-c-travel-plans-show-trump-s-balancing-act>

¹¹⁰⁶ Hamilton-Hart, *supra* note 1098, at 45.

extreme position towards immigrants and Muslims and the travel bans damaged America's image in Muslim Southeast Asia—Brunei, Malaysia, and Indonesia.¹¹⁰⁷

Trump's withdrawal from TPP was a major blow not only to Obama's strategy but also for many member states of ASEAN. Vietnam, expected to gain the most out of the TPP deal due to its great access to the U.S. clothing and auto parts market, was very disappointed with the withdrawal of the U.S.¹¹⁰⁸ Vietnam also aimed to strengthen ties with the U.S. to reduce its economic dependence on China, particularly considering its territorial dispute over the South China Sea.¹¹⁰⁹ On the contrary, other non-party countries such as Thailand, Indonesia, and the Philippines expressed some kind of relief for not having to be under pressure to join the agreement due to the fear of being left off and not having to undertake the obligations under the TPP.¹¹¹⁰ Bilateral trade agreement seemed to be the only channel to the U.S. market since Trump stressed his preference for it.¹¹¹¹ However, considering the U.S.'s prominent role during the TPP negotiation, its withdrawal negatively affected its leadership credential.¹¹¹² With the protectionism approach, the U.S.'s role diminished while China expanded its capacity and leverage in the region through its "One Belt One Road" project and Regional Comprehensive Economic Partnership (RCEP).¹¹¹³ The trade war with China—actions taken by the U.S. against unfair Chinese Anti-Dumping or Countervailing measures could have indirect effects on ASEAN suppliers to Chinese exporters.¹¹¹⁴ China products that the U.S. targeted are mostly produced by the production chains in ASEAN member states.¹¹¹⁵ Also, the safeguards put against the imports, such as importing standards, aiming to target Chinese importing products,

¹¹⁰⁷ Catharin Dalpino, *US Security Relations with Southeast Asia in the Trump Administration*, 39 CONTEMP. SOUTHEAST ASIA 3, 7 (2017).

¹¹⁰⁸ Storey & Cook, *supra* note 1096, at 3.

¹¹⁰⁹ *Id.*

¹¹¹⁰ Limaye, *supra* note 1089, at 19.

¹¹¹¹ Walter Lohman, *The Trump Administration's Trade Policy and the Implication for Southeast Asia*, 39 CONTEMP. SOUTHEAST ASIA Vol. 36, 36 (2017).

¹¹¹² Plummer, *supra* note 1019, at 149.

¹¹¹³ Lohman, *supra* note 1111, at 41.

¹¹¹⁴ *Id.* at 39.

¹¹¹⁵ Storey & Cook, *supra* note 1096, at 4.

applied in a general manner to avoid contradiction with trade rules of WTO; thus, it would affect all exporting goods, including goods from ASEAN.¹¹¹⁶ These actions could face a challenge with WTO impacting the U.S. commitment to the organization.¹¹¹⁷

The biggest security issue between the U.S. and the region in the Trump administration was the U.S.-China relations—a severe clash between the two powers could undermine the “careful balance” ASEAN was trying to secure.¹¹¹⁸ As Acharya stated, ASEAN is the important geopolitical competition of the 21st century between the U.S. and China.¹¹¹⁹ ASEAN does not want the domination of one single superpower but the rebalance of the big powers and support of middle powers that allow more autonomy for the member states and ASEAN.¹¹²⁰ The security and stability of the region depended on Trump’s unpredictable stance; thus, ASEAN had to face the diminishing role of the U.S. and looked for alternative middle power allies such as Japan and India to balance the power with China. Less role of the U.S. in the region means two options: greater role of China or more role of middle powers such as Japan and Australia.¹¹²¹

The counterbalance of power is significant because the geopolitical contest in the region is whether democratic values and interests prevail over authoritarian inclinations.¹¹²² As Pongsudhirak expressed his concerns that “for the first time in nearly a century, America cannot be counted on to carry the burdens of leadership in Asia’s economic prosperity, geopolitical

¹¹¹⁶ Lohman, *supra* note 1111, at 39.

¹¹¹⁷ *Id.* at 40.

¹¹¹⁸ Dalpino, *supra* note 1107, at 6.

¹¹¹⁹ ACHARYA, *supra* note 839, at 56.

¹¹²⁰ Pongsudhirak, *supra* note 1091, at 14. *See also* Bates Gill et al., *The Dynamics of US-China-Southeast Asia Relations*, The United States Study Centre at the University of Sydney, June 2016, <https://www.ussc.edu.au/analysis/the-dynamics-of-us-china-southeast-asia-relations>

¹¹²¹ Storey & Cook, *supra* note 1096, at 5.

¹¹²² Another important key security issue rests upon the dispute in South China Sea. The diplomatic “rebalance” strategy of Obama had failed to halt the domination of China, especially in the South China Sea conflict—Philippines had challenged China over the claim in South China Sea at the Arbitral Tribunal at the Hague in January 2013 and won a legal case in 2016 with the ruling denying China “historical rights” and rebuking the environmental damage China had caused in the Spratlys; however, China ignored the ruling. China is winning in South East Asia by pitting the member states against each other—Cambodia against Philippines and appear to want to play only by its own rules. Thus, it will be irony if Trump who appear to have less engagement in ASEAN ends up having more effective measures for the regional balance of power. Pongsudhirak, *supra* note 1091, at 12.

stability and liberal democratic future.”¹¹²³ The diminishing role of the U.S. in the region affected the environmental governance of ASEAN because the authoritarian regimes in the region rely their legitimacy on non-democratic practice and unsustainable production and natural resources exploitation for trade and economic development. When the U.S. backed away from waging liberal democratic norms and integrating environmental norms, there are fewer prospects for democratization and less economic pressure for ASEAN to adopt the stricter environmental standard in its trading system.

At the beginning of Biden administration, there are signs indicating that the U.S. is coming back on a democratic and environmental agenda and more cohesive diplomacy with ASEAN.¹¹²⁴ Following the pre-election promise, the Biden administration reaches out to ASEAN allies, Thailand and the Philippines, aiming for stronger engagement in critical issues.¹¹²⁵ This outreach towards ASEAN is expected to continue due to several reasons.¹¹²⁶

First, Biden has an outward-looking view for foreign policy showing his beliefs in multilateralism and collective partnership—forming alliances and working with other international actors is the way to enhance American soft power and solve critical problems such as climate change or disease prevention.¹¹²⁷ Second, due to the China’s growing influence in the region, Biden may choose to re-engage with ASEAN to prevent China’s domination.¹¹²⁸ The ideology and trade wars with China put Southeast Asia in a strategic position for the U.S. For the battle of ideologies, since democracy promotion is the core tenet of U.S. foreign policy,

¹¹²³ *Id.*

¹¹²⁴ E.g., Joshua Kurlantzick, *What Will the Biden Administration Mean for Southeast Asia?*, WORLD POLITICS REVIEW (Nov. 30, 2020), <https://www.worldpoliticsreview.com/articles/29251/what-will-the-biden-administration-mean-for-southeast-asia>

¹¹²⁵ Sebastian Strangio, *Biden Administration Reaches out to Southeast Asian Allies*, THE DIPLOMAT (Jan. 28, 2021), <https://thediplomat.com/2021/01/biden-administration-reaches-out-to-southeast-asian-allies/>

¹¹²⁶ *The State of Southeast Asia: 2020 Survey Report*, ASEAN Studies Centre, ISEAS (Jan. 2020), https://www.iseas.edu.sg/wp-content/uploads/pdfs/TheStateofSEASurveyReport_2020.pdf

¹¹²⁷ Joseph R. Biden, Jr. *Why American Must Lead Again*, FOREIGN AFFAIRS (Mar./Apr. 2020), <https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again>

¹¹²⁸ Tommy Koh, *The Biden Administration: The Road Ahead for Asia*, ST (Jan. 21, 2021), <https://www.straitstimes.com/opinion/the-biden-administration-the-road-ahead-for-asia>

China, an authoritarian superpower, is a threat.¹¹²⁹ Last, President Biden was a Vice President during the Obama administration that had an engaging approach with ASEAN; thus, he is familiar with ASEAN. He will probably continue to enhance the diplomacy and strengthen the involvement in the region.¹¹³⁰

Biden's trajectory in ASEAN will face with greeting and dissenting because though ASEAN "welcome increased U.S. economic and security engagement with the region, they are less enthusiastic about Biden's emphasis on human rights and democracy promotion."¹¹³¹ For the plus side, ASEAN would appreciate Biden's approach, "tough without being egregiously provocative."¹¹³² towards China. ASEAN does not want the U.S. "to be too confrontational nor too accommodating towards China."¹¹³³ For instance, Indonesia having China as its biggest trade partner and the second-largest investor wants to maintain balanced relations with both the U.S. and China. Foreign Minister Retno Marsudi stated that "Indonesia did not want to get trapped by U.S.-China rivalry."¹¹³⁴ Furthermore, as his preference for free trade and globalization, Biden may consider joining CPTPP, which was the landmark achievement of the Obama administration.¹¹³⁵ Rejoining the CPTPP would be the sign that the U.S. wants to reclaim its leadership in the multilateral trade regime and counterbalance the mega trade deal Regional Comprehensive Economic Partnership (RCEP) between ASEAN and other trading

¹¹²⁹ Strangio, *supra* note 1125.

¹¹³⁰ Brad Nelson, *The 'Biden Doctrine' in Southeast Asia*, STRATEGIC REVIEW (Dec. 29, 2020), <https://sr.sgpp.ac.id/post/the-biden-doctrine-in-southeast-asia>

¹¹³¹ Cook & Storey, *supra* note 1096.

¹¹³² David Lampton, *Under Biden, America's China will be Tough Without Being Recklessly Provocative*, SCMP (Nov. 10, 2020), <https://www.scmp.com/comment/opinion/article/3108977/under-biden-americas-china-policy-will-be-tough-without-being>

¹¹³³ Biden approach towards China should be compatible with ASEAN desire—tough in political/military issues but at the same time enhance cooperation over the issues where the interests converge such as climate change and global health. Cook & Storey, *supra* note 1096

¹¹³⁴ *Indonesia To U.S., China: don't Trap us in Your Rivalry*, REUTERS, (Sep. 8, 2020), <https://www.reuters.com/article/us-indonesia-politics-foreign-minister-idUSKBN25Z1ZD>

¹¹³⁵ Tommy Koh, *supra* note 11128.

partners, including China.¹¹³⁶¹¹³⁷ Joining CPTPP would affirm the U.S. commitment to the Indo-Pacific region.¹¹³⁸

On the other hand, ASEAN will resist the U.S. promoting democracy, human rights, and environmental protection via trade. Biden administration places democracy and human rights at the center of the U.S. foreign policy and pledges to “honestly confront nations that are backsliding, and forge a common agenda.”¹¹³⁹ It is hard to forge this liberal agenda in ASEAN, where none of the member states is regarded as “free.” According to the Freedom House, in ASEAN, 6 countries are not free (Brunei, Cambodia, Laos, Myanmar, Thailand, and Vietnam), and 4 are partly free (Indonesia, Malaysia, Singapore, and the Philippines).¹¹⁴⁰ Lee Hsien Loong, Prime Minister of Singapore, expressed his concerns on Biden’s coalition of democracies that “not very many countries would like to join a coalition against those who have been excluded, chief of whom would be China.”¹¹⁴¹

Biden administration tends to strengthen the use of trade measures, particularly the inclusion of stringent environmental clauses in a bilateral or multilateral agreement. As a senator, Biden voted against the Peru trade deal in 2006, citing weak labor rights and environmental protection.¹¹⁴² Biden’s trade agenda calls for tariffs on imports that produce many carbon emissions and trade deals that include commitments to reduce emissions.¹¹⁴³ The

¹¹³⁶ Bryan Mercurio, *Biden on Trade : Same Policy, Different Tone ?*, EAST ASIA FORUM (Dec. 25, 2020), <https://www.eastasiaforum.org/2020/12/25/biden-on-trade-same-policy-different-tone/>

¹¹³⁷ The RCEP will be further discussed in the next section.

¹¹³⁸ The US strategy to reconsider the trade deal may be to criticize the existing agreement and propose some changes in negotiation before rejoining the revised agreement. The US employed this strategy for NAFTA, US-Korea FTA and US-Mexico-Canada Agreement USMCA). William Alan Reinsch, *Looking Ahead : How Will the Biden Administration Approach Trade ?*, CSIS (Jan. 15, 2021), <https://www.csis.org/analysis/looking-ahead-how-will-biden-administration-approach-trade>

¹¹³⁹ Biden, *supra* note 1127.

¹¹⁴⁰ *Countries and Territories*, FREEDOM HOUSE, <https://freedomhouse.org/countries/freedom-world/scores>

¹¹⁴¹ *The path ahead for US-China ties: PM Lee*, ST (Nov.18, 2020), <https://www.straitstimes.com/opinion/the-path-ahead-for-us-china-ties-pm-lee>

¹¹⁴² James McBride, *After Trump : What Will Biden Do on Trade ?*, CFR (Jan. 13, 2021), <https://www.cfr.org/in-brief/after-trump-what-will-biden-do-trade> ; and Doug Palmer, *Senate Approves Peru Free Trade Deal*, Reuters (Dec. 4, 2007), <https://www.reuters.com/article/us-usa-peru-trade-idUSWAT00852920071204>.

¹¹⁴³ Gavin Bade, *How Biden Would Use Trade Agreements to Fight Global Warming*, POLITICO (Oct. 14, 2020), <https://www.politico.com/news/2020/10/14/biden-trade-fight-global-warming-429495>

U.S. Trade Representative-designate Katherine Tai also stated that “climate issues would guide the Biden administration’s trade policy.”¹¹⁴⁴

As having the largest market globally, the U.S. has significant leverage to influence ASEAN sustainable production. Nevertheless, the existing environmental clause in U.S.-led agreements, though regarded as “groundbreaking,” still has loopholes such as in the U.S.-SG FTA and the CPTPP discussed earlier. Similar flaws appeared in the U.S.-Mexico-Canada Agreement. While the U.S. Trade Representative-designate Katherine Tai said it was a significant accomplishment for environmental protection, it remains silent on carbon emissions. Many environmentalists found its backdoor allowing companies to outsource the production elsewhere.¹¹⁴⁵ Therefore, it remains to be seen if the Biden administration will be able to employ more effective environmental trade measures and more stringent environmental clauses in trade agreements while balancing its political and economic interest in ASEAN.

2.3 The impacts of ASEAN-China relationship on environmental condition and regulations

As China opens up to the world, her position as a global superpower is creating an increasingly important new role in shaping global environmental politics. There is great interest and growing importance of China as a leading actor in the making of global environmental policies.¹¹⁴⁶

In this era, we are witnessing the slowdown in the economic growth of the western developed countries, but the solid economic momentum lies in Asia, particularly China. Since China expressed the “Go Global” strategy in 2001, it intends to become the global player and

¹¹⁴⁴ Adam Aton, *Biden Team Breaks with Greens over Trade Pact*, E&E NEWS (Jan. 13, 2021), <https://www.eenews.net/stories/1063722409>

¹¹⁴⁵ *Id.*

¹¹⁴⁶ Neil T. Carter & Arthur P.J. Mol, *China and the Environment : Domestic and Transnational Dynamics of a Future Hegemon*, 15 ENV. POLIT. 330, 330 (2006).

be number one in economic and global investment.¹¹⁴⁷ After the economic triumph, it can expand its influences in the military and global politics.¹¹⁴⁸ China's rapid industrial growth has placed a burden on its environment and natural resources—resource scarcity, water pollution, biodiversity loss, air pollution, and climate change.¹¹⁴⁹ Due to the large population, rapid economic growth and extended emission due to industrialization and export-led economy, China is the main engine of world economic growth and the major polluter in the world. To fuel the economic growth, China depends on 87% fossil fuel—coal is accounted for 67%, oil for 17%, and gas 3%.¹¹⁵⁰ As the world's most carbon-intensive country: “It is in China more than anywhere else that global climate change mitigation will be decided. If China does not participate in the global mitigation effort, its emission will continue to grow rapidly and will account for a rising share of global emission.”¹¹⁵¹ If China fails to participate substantially in the global climate mitigating effort, it will provide excuses for and diminish the political will of other states to act since their actions cannot avert the climate risks.¹¹⁵²

In the past, China and ASEAN shared a similar economic developmental path “grow now and clean later.” They both have enjoyed trade cooperation and rapid economic growth; however, the challenge in the 21st century is to bring their growth in line with environmental sustainability and cope with domestic and international environmental degradation to secure.¹¹⁵³ The influence of China on ASEAN trade and economic development has always been significant. The attempt of China to address domestic environmental problems and global

¹¹⁴⁷ Lloyd Thrall, *China's Expanding African Relations: Implications for U.S. National Security*, Santa Monica, Calif:RAND Corporation (2015), 10.

¹¹⁴⁸ Affabile Rifawan & Novi Amelia, *Two Majors Powers in Captivating Regional Influence and Dynamics : Comparing Foreign Policies of China and United States in Southeast Asia*, 4 CCPS 247, 249 (2018).

¹¹⁴⁹ JONATHAN WATT, WHEN A BILLION CHINESE JUMP—HOW CHINA WILL SAVE MANKIND OR DESTROY IT 122 (2010), in Frauke Urban et al, *An Analysis of China's Investment in the Hydropower Sector in the Greater Mekong Sub-Region*, 15 ENVIRON. DEV. SUSTAIN. 301, 303 (2013).

¹¹⁵⁰ Overview on China Energy Consumption, EIA (Sep. 30, 2020) <https://www.eia.gov/beta/international/analysis.php?iso=CHN>

¹¹⁵¹ Ross Garnaut et al., *China's Rapid Emissions Growth and Global Climate Change Policy*, in CHINA'S DILEMMA 170, 186 (Ligang Song & Wing Thye Woo eds., 2008).

¹¹⁵² *Id.*

¹¹⁵³ Cai Fung & Du Yang, *The Political Economy of Emissions Reduction in China : Are Incentives for Low Carbon Growth Compatible ?* in CHINA'S DILEMMA 226, 227 (Ligang Song & Wing Thye Woo eds., 2008).

climate change can affect the trade and environment of ASEAN member states. The stricter environmental domestic measures can impact outward foreign investment of Chinese companies and lead to pollution leakage to the Southeast Asia region. Since the demand remains, the supply will be sought elsewhere.¹¹⁵⁴ Thus, the discussion focuses on the shift of China's environmental governance and how it affects the economic-environment relations with ASEAN.

2.3.1 The trade development of ASEAN-China relation

In the past, China's role in the region was largely negative—communist insurgencies and military actions to claim disputed territories.¹¹⁵⁵ The relation has experienced drastic changes over decades: from threats during the Cold War to dynamic economic partners.¹¹⁵⁶ China established official contact with ASEAN in 1991 and became a dialogue partner in 1996. The ASEAN-China relation, especially in trade, has rapidly increased and is followed by many cooperation and summits.¹¹⁵⁷ There are five principles China uses as a basis for external relations: mutual respect for territorial integrity and sovereignty; mutual non-aggression; mutual non-interference in each other's internal affairs; equality and cooperation of mutual benefits; and peaceful coexistence.¹¹⁵⁸ China's unique approach to external relations is the non-interference in domestic politics, military practices, or other ethical values. This could be the reason why the relationship with ASEAN, apart from the conflict in the South China Sea, is more comfortable and rapid in cooperation and development. Since 2009, China has become

¹¹⁵⁴ For instance, the more stringent of domestic policies on deforestation after the 1998 floods, have driven the Chinese logging companies to operate abroad. G. Lang, *Deforestation, Floods, and State Reactions in China and Thailand*, in *THE ENVIRONMENTAL STATE UNDER PRESSURE* 195, 195-220 (A. Mol & F. Buttel eds., 2002), 195-220.

¹¹⁵⁵ Limaye, *supra* note 1012, at 459.

¹¹⁵⁶ Hing Vutha & Hossein Jalilian, *The Environmental Impacts of the ASEAN-China Free Trade Agreement for Countries in the Greater Mekong Sub-region*, IISD, Sept. 2009, at 1, 31.

¹¹⁵⁷ *Id.*

¹¹⁵⁸ Five Principles of Peaceful Coexistence in the Agreement on Trade and Intercourses between China and India (April 29, 1954), Ministry of External Affairs Government of India, http://www.mea.gov.in/Uploads/PublicationDocs/191_panchsheel.pdf

ASEAN's largest trading partner, and since 2011 ASEAN has become China's third-largest trading partner.¹¹⁵⁹

ASEAN-China Free Trade Agreement (ACFTA) was established in 2002. It was fully operational by 2010 with ASEAN 6—Singapore, Thailand, Malaysia, Indonesia, Brunei, and the Philippines—and by 2015 with Laos, Cambodia, Myanmar, and Vietnam.¹¹⁶⁰ ACFTA does not contain provisions discussing the environmental aspects of trade. Instead, the environmental cooperation between China and ASEAN is addressed in other initiatives and specific negotiations, and none of it is linked to trade.¹¹⁶¹ For instance, the scope of Greater Mekong Sub-Region (GMS) summits and the ASEAN+3 summits—covers a wide range of areas such as natural resources conservation, water resources conservation, protecting the marine environment, and environmental technology training.¹¹⁶²

The ASEAN motivations for ASEAN-China FTA are both economic and political. As China is a fast-growing economy with growing demand for goods and services, ASEAN sees it as a massive market for export destinations. The trade deal can go further than what can be achieved in WTO because China can provide special and preferential treatment and development assistance and extend the most favored nation benefits to non-WTO members (some ASEAN countries).¹¹⁶³ Thus, ASEAN views ACFTA as a speed track to recover its economic crisis.¹¹⁶⁴ In addition, a closer tie with China also means less dependence on the western powers (the U.S. and the EU) as China is flexible in terms of moral interests—China's interest focuses on doing business and disregard the political regimes or the situation within the internal affairs of its trading partners.

¹¹⁵⁹ *China's Growing Ties with ASEAN Opens up New Opportunities for Foreign Investment*, CHINA-BRIEFING (Aug. 7, 2015), <https://www.china-briefing.com/news/chinas-growing-ties-with-asean-opens-up-new-opportunities-for-foreign-investment/>

¹¹⁶⁰ Natividad Y. Bernardino, *The ASEAN-China Free Trade Area : Issues and Prospects*, Asia Pacific Network on Food Sovereignty Regional Workshop Papers (2004), 1.

¹¹⁶¹ Vutha & Jalilian, *supra* note 1156, at 37.

¹¹⁶² *Id.* at 36.

¹¹⁶³ *Id.* at 32.

¹¹⁶⁴ Bernardino, *supra* note 1160, at 5.

In the same way, China's motivations for FTA are both political and economic. The accession to WTO in November 2001 and the pressure from the U.S. are the driving forces for China to forge alliances with other developing countries.¹¹⁶⁵ During the Cancun WTO negotiation round, China allied itself with other developing countries.¹¹⁶⁶ China wants to strengthen ties with ASEAN for the geopolitical objective—to counter the U.S. containment strategy against China and counterbalance Japan's influence and to protect trade routes in the region.¹¹⁶⁷ For the economic purpose, as China is becoming an industrial economy, it wants to expand trade relations with ASEAN, and ASEAN can be its source for raw materials.¹¹⁶⁸

Another mega-regional trade agreement is Regional Comprehensive Economic Partnership (RCEP). It was launched in 2012 as an ASEAN-centric economic pact that includes all countries having FTAs with ASEAN—China, South Korea, Japan, India, Australia, and New Zealand accounting for 30 percent of global GDP over the quarter of world exports.¹¹⁶⁹ The objective of RCEP negotiations is “to achieve a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN's FTA partners” by aiming to lower trade barriers and improve market access for goods and services for businesses.¹¹⁷⁰ The objectives of RCEP are similar to the CPTPP but with greater flexibility—fewer disciplines on product and sectoral coverage.¹¹⁷¹

Similar to ACFTA, there is no environmental obligation. Since the U.S. is backing off from TPP, RCEP has taken the leading role in the mega-trade agreement as well as the influence of China over the region. The driving forces of this mega-trade agreement are ASEAN and

¹¹⁶⁵ *Id.* at 6.

¹¹⁶⁶ *Id.*

¹¹⁶⁷ *Id.*

¹¹⁶⁸ *Id.*

¹¹⁶⁹ Plummer, *supra* note 1019, at 146. See also Ganeshan Wignaraja, *Why RCEP Matters for Asia and the World*, East Asia Forum (May 15, 2013), <http://www.eastasiaforum.org/2013/05/15/why-the-rcep-matters-for-asia-and-the-world/>

¹¹⁷⁰ RCEP Guiding Principles, ASEAN, <https://asean.org/wp-content/uploads/2012/05/RCEP-Guiding-Principles-public-copy.pdf>

¹¹⁷¹ Plummer, *supra* note 1019, at 147.

China—China uses this venue to spread its influence in the region, similar to how TPP was initiated and negotiated.¹¹⁷² The lack of environmental inclusion in RCEP raises critical concerns over environmental degradation as a potential impact of increasing economic activities, especially in natural resources exhaustion. For instance, lower barriers in timber products without any protective measures to prevent unsustainable or illegal logging can intensify the deforestation.¹¹⁷³ Deforestation can result from the expansion of agricultural practice for cash crops, as discussed in palm oil production and trade. According to the interview given by Arthayudh Srisamoot, deputy permanent secretary at Thailand’s foreign ministry, there is an attempt to push forward the inclusion of environmental agenda as well as other social clause; however, such effort has met with resistance from many parties including China and Thailand.¹¹⁷⁴

2.3.2 Belt and Road Initiative: development or destruction

Besides trade agreements, China’s Belt and Road or One Belt One Road initiative (BRI) plays a significant role in economic cooperation and relation between China and ASEAN member states. The Belt and Road initiative is a Chinese infrastructure and investment program aiming to create a vast multinational economic zone and increase connectivity between China and countries or region along the BRI path.¹¹⁷⁵ Connectivity is the key goal for China to gain political and economic influences in certain regions and states.

ASEAN is the priority of the BRI due to its flourishing economies, geographical proximity, and position as a prominent economic partner with China. BRI targets to promote

¹¹⁷² Radley, *supra* note 835, at 670.

¹¹⁷³ Bo Li, *New Asia-Pacific Trade Agreement Lacks Protections for One-Sixth of World’s Forests*, WRI (May 2, 2017), <https://www.wri.org/blog/2017/05/new-asia-pacific-trade-agreement-lacks-protections-one-sixth-worlds-forests>

¹¹⁷⁴ *Environment, Labour Concerns Delaying China-Backed Free Trade Pact: Thai Diplomat*, FRANCE24 (Nov. 1, 2019), <https://www.france24.com/en/20190111-environment-labour-concerns-delaying-china-backed-free-trade-pact-thai-diplomat>

¹¹⁷⁵ Pradumna B.Rana & Wai-Mun Chia, *The Revival of the Silk and Roads (Land Conectivity) in Asia*, RSIS Working Paper No.272 (2014).

Chinese capital and technological investment into ports, rails, and other infrastructures in ASEAN member states to improve resource distribution, market integration, and better facilitation of trade and investment within ASEAN and beyond borders connecting ASEAN with China.¹¹⁷⁶ For instance, this initiative has already seen great achievements in railway construction in Malaysia, Thailand, Laos, and Indonesia and linkages with China.¹¹⁷⁷

The BRI offers both mainland and maritime ASEAN an opportunity to realize its significant needs for infrastructure investment and implement its Master Plan on ASEAN Connectivity (MPAC) 2025. “Based on the Asian Development Bank’s (ADB) data, the region’s infrastructure investment needs will total U.S.\$2.8 trillion (S\$3.68 trillion) between 2016 and 2030, or about U.S.\$184 billion annually.”¹¹⁷⁸

Is BRI a massive investment project, win-win cooperation? By considering the financial dependence, rising China’s influence in the region, and environmental risk associated with BRI projects, who is winning? To answer the questions, the discussion examines two megaprojects on China’s investment in infrastructure for energy production in ASEAN member states. As China is a global production and manufacturing hub, “the factory of the world,”¹¹⁷⁹ the rapid economic expansion leads to an increase in power demand to sustain the growth. China maximizes energy production using not only its domestic natural resources but also resources from ASEAN member states.

The first case is the investment in **coal-fired power plants** in the Southeast Asia region. China is the biggest coal producer as the country is endowed with cheap coal resources.¹¹⁸⁰

¹¹⁷⁶ *China's Belt & Road Initiative: Opportunities and risks for ASEAN*, ASIA INSURANCE REVIEW (Oct. 2017), <https://www.asiainsurancereview.com/Magazine/ReadMagazineArticle?aid=39940>

¹¹⁷⁷ Anushka Kapahi, *One Belt One Road: implications for ASEAN connectivity*, ATIMES (Dec. 12, 2017), <http://www.atimes.com/one-belt-one-road-implications-asean-connectivity-2/>

¹¹⁷⁸ Diana J. Mendoza, *The Belt and Road Initiative and ASEAN: Cooperation or Opportunism?*, BUSINESSWORLD (Nov. 12, 2018), <https://www.bworldonline.com/the-belt-and-road-initiative-and-aseancooperation-or-opportunism/>

¹¹⁷⁹ Urban et al, *supra* note 1149, at 302.

¹¹⁸⁰ Jessica Dillinger, *Top 10 Coal Producers Worldwide*, WORLDATLAS (June 14, 2020), <https://www.worldatlas.com/articles/the-top-10-coal-producers-worldwide.html>

Coal is the main energy source for China's economy and the main cause of China's air pollution and GHG emission—the combination of dust pollution and gas emission from coal mining and processing and atmospheric pollution from coal combustion.¹¹⁸¹ China or Chinese financial institutions are also the world's largest coal plant investors.¹¹⁸² China Development Bank, Export-Import Bank of China, and Japan Bank for International Cooperation are the leading investors in coal.¹¹⁸³ According to a research released in May 2017 by the Beijing-based Global Environment Institute, Chinese companies and banks involved in 240 coal-fired power projects in 25 of the 65 countries along the Belt and Road by the end of 2016.¹¹⁸⁴

The coal projects are largely concentrated in South Asia, Southeast Asia, and East Asia.¹¹⁸⁵ South Asia and Southeast Asia are the main locations accounting for 57.11% and 22.75% of the total Chinese coal-fired power projects participation along the Belt and Road.¹¹⁸⁶ Since 2010, the investment in South Asia has been decreasing while the investment in Southeast Asia is booming. In 2009–2012, India adopted the protective measures banning foreign participation in 11 power generator projects, imposed 21% import tax on power equipment, and canceled tax exemption for mega power generator projects leading to a sharp decrease in China's investment. During the same period, Southeast Asia experienced rapid economic growth—a rise in export and a vast inflow of foreign investment.¹¹⁸⁷ China's investment projects in Southeast Asia are mainly in Vietnam, Cambodia, Indonesia, the Philippines,

¹¹⁸¹ Kejun Jiang & Xiulian Hu, *Energy and Environment in China*, in CHINA'S DILEMMA 310, 315 (Ligang Song & Wing Thye Woo eds., 2008).

¹¹⁸² Major Chinese companies in coal investments are Power Construction Corporation of China, Harbin Electric Corporation, and China Energy Engineering Group. Huileng Tan, *China is Massively Betting on Coal Outside Its Borders — Even as Investment Falls Globally*, CNBC (Apr. 6, 2018), <https://www.cnbc.com/2018/04/06/china-is-massively-betting-on-coal-outside-its-shores-even-as-investment-falls-globally.html>

¹¹⁸³ Han Chen, *G20 Countries Financed \$8 Billion of Coal Overseas in 2016*, NRDC (Mar. 21, 2017), <https://www.nrdc.org/experts/han-chen/g20-countries-financed-8-billion-coal-overseas-2016>

¹¹⁸⁴ Ren Peng et al., *China's Involvement in Coal-Fired Power Projects Along the Belt and Road*, GEI, May 2017, at 1, 3, [http://www.geichina.org/upload/file/report/China%27s Involvement in Coal-fired Power Projects OBOR EN.pdf](http://www.geichina.org/upload/file/report/China%27s%20Involvement%20in%20Coal-Fired%20Power%20Projects%20OBOR%20EN.pdf)

¹¹⁸⁵ *Id.*

¹¹⁸⁶ *Id.* at 4.

¹¹⁸⁷ *Id.*

Malaysia, Laos, and Myanmar.¹¹⁸⁸ China participates in coal-fired power plant projects by four means: contracting is the major form of Chinese participation; equipment exportation: the second most common form; an outward investment; and bank loan.¹¹⁸⁹

China's motivation for coal investment beyond its borders derives from both international and domestic factors. In the domestic context, China has suffered severe health and environmental impact of coal use, particularly air pollution; thus, more stringent environmental measures are executed to limit the use of coal for energy generation. While there are abundant coal resources at home together with higher demands for electricity, China turns to its neighboring states, ASEAN, to invest in coal-fired power plants. In the global context, decarbonization becomes a significant economic-environmental movement to combat climate change problems. Many countries embrace environmental policies to cut down on carbon emissions. Most international financial institutions, such as the World Bank and European Investment Bank, shift their policies and set the standard for not granting loans to coal-fired power plants.¹¹⁹⁰ The global movement for the decarbonizing economy and promoting renewable energy, particularly in developed countries, provide the pressure for China to cut back on carbon use domestically and the incentive for China to pursue profits in coal investment beyond its border.

China started its Belt and Road project in 2013 to provide infrastructure development and advance mutually beneficial economic development; thus, the Chinese investment in coal-fired power plants in the Southeast Asia region has rapidly increased. **The rapid increase in coal-fired power plant investment projects in the ASEAN member states is the problem of carbon leakage.** When there is more coal at low prices available in the market because some

¹¹⁸⁸ Jeremy Hodges, *China's Funding for Coal Draws Scrutiny as Climate Concern Grows*, BLOOMBERG (Oct. 4, 2018) <https://www.bloomberg.com/news/articles/2018-10-04/china-s-funding-for-coal-draws-scrutiny-as-climate-concern-grows>

¹¹⁸⁹ Ren Peng et al, *supra* note 1184, at 4.

¹¹⁹⁰ *Id.*

developed countries shifted towards renewable energy, the demand for coal energy is growing in developing countries with dynamic economies.

The coal investment project undermines the capacity of ASEAN member states to develop further renewable energy even they have much of the potential. They are trapped with the cheap investment and old infrastructure.¹¹⁹¹ By investing coal beyond borders, China benefits from the appearance of a carbon reduction economy and cleaner environment at home, but it exports the emissions and environmental problems to other host states, in this case, ASEAN member states. The export of emission by China's coal investment also guarantees that the global emissions will remain the same or increase. The carbon trap undermines the climate change regime; therefore, international coal finance and investment have to be limited and controlled.¹¹⁹² The climate agreement has to tackle this loophole that links directly with the principle of "common but differentiate responsibilities."

The second type of BRI is the investment in **hydropower projects**. China is the world's largest hydropower developer. In Southeast Asia, Chinese institutions or China state-owned companies have been involved in investing, contracting, or financing about 125 dams in member states, accounting for 45% of all Chinese overseas dam investments.¹¹⁹³ Particularly in the Greater Mekong Sub-Region, there are more than 50 large hydropower projects in Cambodia, Laos, Myanmar, and Vietnam.¹¹⁹⁴ For instance, Sinohydro, a state-own enterprise, is China's largest dam construction. It plays a significant role in Cambodia, Vietnam, and Laos. It provides 27% of finance for Nam Ngum dam in Laos.¹¹⁹⁵ Another major player is China Southern Power Grid, a state-own company providing funds for the Sambor dam on the Mekong

¹¹⁹¹ Han Chen, *supra* note 1183.

¹¹⁹² https://sekitan.jp/jbic/wp-content/uploads/2016/11/Carbon-Trap_NRDC_final.pdf

¹¹⁹³ Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Thailand and Vietnam. International Rivers, 2011, List of China's Dam Building Projects in Southeast Asia. <https://www.eia.gov/todayinenergy/detail.php?id=12571>

¹¹⁹⁴ Frauke Urban et al, *supra* note 1149, at 301.

¹¹⁹⁵ See K. McDonald et al, *Exporting Dams :China's Hydropower Industry Goes Global*, 90 Journal of Environment Management 294, 294-302 (2009).

mainstream in Cambodia.¹¹⁹⁶ Mekong river runs from Yunnan Province in China through Laos, Thailand, Cambodia, and Vietnam. Mekong river, running from Yunnan Province in China through Laos, Thailand, Cambodia, and Vietnam, is the best choice for energy resources investment and diplomatic development because it is a natural link between China and riparian states.¹¹⁹⁷

China has environmental, economic, and political motives for dam investment in ASEAN member states. First, it fosters regional cooperation and creates interdependencies among the neighboring states; thus, strengthening China's role in the region. Second, overseas engagement in hydropower projects creates jobs for Chinese people and profits for Chinese companies contributing to China's economic growth. Third, by investing in hydropower projects in ASEAN member states, China secures its energy sources by importing cheap electricity generated by hydropower projects in host states back to China and at the same time avoids social¹¹⁹⁸ and environmental costs.¹¹⁹⁹ Last, hydropower arguably is a low-carbon energy generation; thus, it responds to climate change measures and positive impacts on China's overall carbon emissions.¹²⁰⁰ Frauke Urban et al. expressed that

“Hydropower offers an opportunity for China to reduce high dependency on coal and other fossil fuels thereby mitigating climate change, reduce air pollution, safeguard finite fossil fuel resources and enable sustainable development.”

For the side of ASEAN member states, the economic imperatives of the hydropower projects—the need for economic development using available natural resources take priority

¹¹⁹⁶ *Id.*

¹¹⁹⁷ Karen Bakker, *The Politics of Hydropower : Developing the Mekong*, 18 POLITICAL GEOGR. 209, 219 (1999).

¹¹⁹⁸ S.S. Hwang et al, *Anticipation of Migration and Psychological Stress and the Three Gorges Dam Project*, 65 CHINA SOC. SCI. & MED. 1012, 1012-1024 (2007).

¹¹⁹⁹ S. Hayashi et al, *Effect of the Three Gorges Dam Project on Flood Control in the Dongting Lake Area, China, in a 1998-Type Flood*, 2 J. HYDRO-ENVIRON RES. 148, 148-163(2008).

¹²⁰⁰ Frauke Urban et al, *supra* note 1149, at 320.

over environmental consequences.¹²⁰¹ China usually offers the “bundle aid”—trade and investment by providing finance loans for hydropower plants and link it to trade and other Chinese goods.¹²⁰² This complicates the affected states in expressing concerns over the environmental and ecological impacts of the dam’s construction along the Mekong.¹²⁰³ Laos has declared itself “the battery of Asia,” aiming to export most of its electricity production to neighboring countries like China and Thailand.¹²⁰⁴ The member states where the dams are constructed view hydropower development as a tool for poverty alleviation and economic growth acceleration. However, there is always a question about developmental equity—a just distribution of economic development. Most energies are generated to feed upgrowing urban and industrial areas that benefit a small group of people. In Laos, poor people living in rural areas have limited access to electricity; thus, the country is bearing only the cost of energy generation while the benefit is borne by other countries, large corporations, or small urban populations.¹²⁰⁵

ASEAN member states will bear negative social and environmental costs of hydropower dams. Social impacts include loss of land holding, population relocation, insufficient compensation, and loss of ways of living.¹²⁰⁶ Environmental impacts include flood control problems, land erosion, landslide, change in water flows, increased sediment rates, destruction of flora and fauna, geomorphological change, change of the ecosystem, and marine life affecting fisheries that are sources of rural livelihood. For example, the Lower Sessan II

¹²⁰¹ Everlyn Goh, *China in the Mekong River Basin: The Regional Security Implications of Resources Development on the Lancang Jiang*, 69 RSIS, July 2004, at 1, 7, <https://www.rsis.edu.sg/wp-content/uploads/rsis-pubs/WP69.pdf>

¹²⁰² Frauke Urban et al, *supra* note 1149, at 304.

¹²⁰³ *Id.* at 328.

¹²⁰⁴ Kristina Jönsson, *Laos in 2008: Hydropower and Flooding (or Business as Usual)*, 49 Asian Surv. 200, 202 (2009).

¹²⁰⁵ See, e.g., Xiaojiang Yu, *Regional Cooperation and Energy Development in the Greater Mekong Sub-Region*, 31 Energy Policy 1121, 1121-1234(2003).

¹²⁰⁶ William Adam, *The Social Impact of Large Dam: Equity and Distribution Issues*, Thematic Review I.1 prepared as an input to the World Commission on Dams, Cape Town (2000), <http://services.iriskf.org/data/articles/Document1115200600.5004389.pdf>

hydropower plant in Cambodia, once operating, may cause around 40,000 people living along the Sesan and Srepok rivers to lose their livelihood that is dependent on fishing and led to the eviction of almost 5,000 people from their villages.¹²⁰⁷ In Indonesia, the 510-megawatt hydroelectric dam on the Batang Toru River under Chinese loans may “irreversibly alter” the river’s ecosystem threatening not only the livelihood of thousands of people who live downstream but also the rare species of orangutan that are currently in danger of extinction.¹²⁰⁸

2.3.3 The potential development towards sustainable development

In the past, it is evident that China focused only on promoting economic growth, even if it was at the expense of the environment. During the Mao Zedong era (since 1950s), the economic plan was to maximize industrial production as much as possible to compete with the west with no mention of environmental matters nor public movement from civil society.¹²⁰⁹ Later, under Deng Xiaoping’s regime (the 1980s), China aimed to increase economic growth with the emphasis on GDP by producing and exporting to the global/west market.¹²¹⁰ The vast investment was put in industrial infrastructure and transportation but not environmental protection.¹²¹¹ By the nature of the communist regime, the state owns information; thus, the public has limited ability to learn and realize the negative consequences of heavy industrialization.¹²¹²

In recent years, there is a shift towards environmental sustainability.¹²¹³ Environmental and energy efficiency criteria are incorporated into national policies—The State Environmental

¹²⁰⁷ Mendoza, *supra* note 1178.

¹²⁰⁸ *Id.*

¹²⁰⁹ MATTHEW E. KAHN & SIQI ZHENG, BLUE SKIES OVER BEIJING : ECONOMIC GROWTH AND THE ENVIRONMENT IN CHINA 159 (2016).

¹²¹⁰ *Id.*

¹²¹¹ Wu Jing et al, *Incentives and Outcomes: China’s Environmental Policy*, NBER Working Paper 18754, 2013, at 1, 26-27, <http://www.ires.nus.edu.sg/workingpapers/IRES2013-004.pdf>

¹²¹² KAHN & ZHENG, *supra* note 1209, at 159.

¹²¹³ Gregory C. Chow, *China’s Environmental Policy: A Critical Survey*, Working Paper 1221, Princeton University, Department of Economic, Center of Economic Policy Studies, (2010), <http://www.princeton.edu/ceps/workingpapers/206chow.pdf>

Protection Administration (SEPA) was formed in 1998 and renamed the Ministry of Environmental Protection (MEP) in 2008.¹²¹⁴ The government has established targets for pollution reduction and energy efficiency. At the Copenhagen climate summit in 2009, China has pledged to reduce carbon emission to 40–45% by 2020, and later at the Paris climate change summit, China also expressed its intention to increase shares on renewable energy consumption to about 20% by 2030.¹²¹⁵ Though environmental targets had been incorporated into national policy in the late 1990s, they received much less attention and took a back seat to economic growth.¹²¹⁶ So in 2006, in order to provide incentives for officials to implement environmental mandates, the binding environmental targets have been included in officials' annual responsibility contracts, and they are essential criteria for the official promotion.¹²¹⁷

The interesting movement towards environmental sustainability is called Ecological Civilization or “shengtai wenming.” In 2007, it was introduced to China's Communist Party, President Xi Jinping endorsed it in 2013, and it gains traction in 2018 when the Constitution endorsed it.¹²¹⁸ It is written into China's Constitution as an ideological framework for environmental policies, laws, and education—promoting ecologically sustainable modes of resource extraction, production, and trade, inhabited by the environmental-friendly conscious and responsible citizens.¹²¹⁹ The key components are inseparable from technological, judicial, and political goals. The ideal is where the market economy and consumption continue to grow, and the technology and science have solved the environmental degradation.¹²²⁰ This important

¹²¹⁴ KAHN & ZHENG, *supra* note 1209, at 160.

¹²¹⁵ Jennifer Duggan, *China makes Carbon Pledge Ahead of Paris Climate Change Summit*, THE GUARDIAN (June 30, 2015), <https://www.theguardian.com/environment/2015/jun/30/china-carbon-emissions-2030-premier-li-keqiang-un-paris-climate-change-summit>

¹²¹⁶ See Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 376, 376-440 (2013).

¹²¹⁷ See Ran Ran, *Perverse Incentive Structure and Policy Implementation Gap in China's Local Environmental Politics*, 15 J. ENVIRON. POLICY PLAN. 17, 17-39 (2013).

¹²¹⁸ Mette Halskov Hansen et al, *Ecological Civilization: Interpreting the Chinese Past, Projecting the Global Future*, 53 GLOB. ENVIRON. CHANGE 195, 195 (2018).

¹²¹⁹ *Id.*

¹²²⁰ *Id.*

Chinese state-initiated principle becomes the ideological framework of the governmental development of new and stricter environmental policies and laws.¹²²¹

Lecture by Qian Yi, Tsinghua University's Centre of Ecological Civilization (2018), noted that humans have gone through three stages of civilizations: primitive civilization "fear of nature," agricultural civilization "relying on nature," and industrial civilization "conquering the nature." The next stage of civilization is eco-civilization, where economic growth, environmental protection, and global integration amalgamate into complete harmony.¹²²² While there are specific environmental needs that take precedence over economic development, the commitment to economic growth is a fundamental feature of ecological civilization.¹²²³ Zheng Xinsheng emphasized in the interview that eco-civilization was meant to be global vision built on the foundation of the culture of commerce, aiming to transform the world without changing the path of global capitalist economic development.¹²²⁴ As a result, the eco-civilization does not eliminate the commercial civilization, but "the two are mutually reinforcing, and ecological civilization evolves from the very basis of commercial civilization."¹²²⁵ By insisting on the harmonious traits between economic development and ecological sustainability, eco-civilization is well adapted to the capitalist world order.¹²²⁶

In the early phase, the eco-civilization was initiated as a cultural principle and ethic about the harmony of humans and nature, but after the President's endorsement, science and technology have become the major components of the vision impetus for the green future.¹²²⁷ To be specific, the technology used for the industrial revolution created environmental

¹²²¹ See Jorgen Delman, *Ecological Civilization Politics and Governance in Hangzhou :New Pathways to Green Urban Development ?* 16 ASIA-PACIFIC JOURNAL : JAPAN FOCUS 1, 1-21 (2018).

¹²²² Hansen et al, *supra* note 1218, at 199.

¹²²³ Edwin A. Schmitt, *The Atmosphere of an Ecological Civilization. A Study of Ideology, Perception and Action in Chengdu, China*, Ph.D. Dissertation Chinese University of Hong Kong (2016),74-111.

¹²²⁴ Interview in Qinghui Pang et al, *Taking the Idea of Ecological Civilization into the World :An Interview with Zhang Xinsheng from IUCN*, Xinhua News, 29 September 2016 in Hansen, *supra* note 1218, at 196.

¹²²⁵ *Id.*

¹²²⁶ Thomas Hylland Eriksen & Elizabeth Schober, *Economies of growth and Ecologies of Survival ?*, 88 ETHNOS 415, 415-22 (2018).

¹²²⁷ Hansen et al, *supra* note 1218, at 198.

problems globally, but the technology advancement is also regarded as a cure to solve such problems.¹²²⁸ The government expects the development of the green industry to lead advancement and economic transformation and turn green development into an entirely new form of national strength and an advantage in international competition.¹²²⁹ For example, the coal industry can be viewed as a “sunset industry” for not having a future in China, but with technological innovation such as the “clean coal technology,” coal can be sustainable.¹²³⁰ Xunpeng Shi believed that base upon current technology, the use of coal would increase waste-gas and carbon emission, but technical advancement can be accelerated by carbon pricing; thus, the carbon reduction technology will become viable.¹²³¹

Why did China shift its perspective and policy towards environmental sustainability? The regime shift can be the consequence of both domestic and international conditions. There are growing concerns and demands for a better environment from rising educated urban middle-class people in China. People are distressed by health problems associating with air and water pollution. Even though the authoritarian regime does not hold elections, the government, seeking to secure its power, has incentives to satisfy the desires of urban constituents because, according to history, the revolution comes when the population, to a fundamental extent, are deprived of their economic stability and healthy ways of living—lack of food and sustainable environment. “Promoting environmental issues may be a low-cost way to build loyalty among the people.”¹²³² Thus, environmental protection can be a significant government investment to improve people’s quality of life, gain popular support for the government, and secure social stability.¹²³³

¹²²⁸ *Id.*

¹²²⁹ *China is Rapidly Developing Its Clean-Energy Technology*, THE ECONOMIST (Mar. 15 2018), <https://www.economist.com/special-report/2018/03/15/china-is-rapidly-developing-its-clean-energy-technology>

¹²³⁰ Xunpeng Shi, *Can China’s Coal Industry be Reconciled with the Environment ?*, in CHINA’S DILEMMA 367, 367-68 (Ligang Song & Wing Thye Woo eds., 2008).

¹²³¹ *Id.* at 387.

¹²³² KAHN AND ZHENG, *supra* note 1209, at 162.

¹²³³ *Id.*

In the global context, China seeks political legitimacy by strengthening its environmental commitment to signify China's will and capacity to address the domestic environmental problems and take the leading role as a global player.¹²³⁴ China views environmental movement as a means to wield its soft power—to be a leading nation, keeping peace and promoting global public goods. If the world still views China as an environmental destructor, it compromises China's ultimate aspiration.¹²³⁵ For instance, during the Olympic Games 2008, the government ordered the interim closure of local factories and power plants to improve air quality to impress the world audience.¹²³⁶ Furthermore, the rest of the world is embracing environmental sustainability and low-carbon renewable energy. Consequently, China has market incentives to advance its technological production, embrace the “first mover” advantage in Asia, and gain economic imperative in green trade and energy.¹²³⁷ Today, China tightens its production and marketing bases for electrical vehicles accounting for two-thirds of electric vehicles worldwide.¹²³⁸ As for legal measures and incentives to sustain the rapid growth of electric vehicles, old vehicles running on combustion engines will be highly taxed or phased out, and in some cities, licenses are given only to electric vehicles.¹²³⁹

What does China's shift towards green development mean to external trade and investment? The question is whether the new stringent environmental law will be applied to external trade and investment relations in the future.

While China is integrating environmental protection into its national policy, such integration still lacks external trade and investment relations with ASEAN member states. The

¹²³⁴ See Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 365, 365-440 (2013).

¹²³⁵ KAHN AND ZHENG, *supra* note 1209, at 162.

¹²³⁶ Jim Yardly, *Cities Near Beijing Close Factories to Improve Air for Olympics*, N.Y. TIMES (July, 7, 2008), <https://www.nytimes.com/2008/07/07/sports/olympics/07china.html>

¹²³⁷ KAHN AND ZHENG, *supra* note 1209, at 162.

¹²³⁸ Daniel Shane, *China is Crushing Europe's Electrical Car Dream*, CNN BUSINESS (Oct. 30 2018), <https://www.cnn.com/2018/10/30/business/europe-lithium-electric-batteries/index.html>

¹²³⁹ Nick Butler, *Why the Future of Electric Cars Lies in China*, FT (Sept. 17, 2018), <https://www.ft.com/content/1c31817e-b5a4-11e8-b3ef-799c8613f4a1>

trade agreements, ACFTA or RCEP, do not contain environmental protection clauses. BRI projects in ASEAN member states, especially China's investment in coal-fired power plants and hydropower plants beyond its border, means that China is "free riding" by benefiting from economic activities without having to bear the social and environmental costs. Huang Wei, a climate and energy campaigner at Greenpeace East Asia asserted:

If China wants to enhance its leadership on climate and ecological civilization, Chinese companies and banks' investment must steer away from coal towards renewable alternatives such as wind and solar and help countries along Belt and Road to leapfrog from traditional development model that sacrifices environment for economic advancement.¹²⁴⁰

BRI is a massive program targeted to boost inter-connectivity, trade, and economic growth in Asia; it is supported by considerable resources from China's state funds and private sources. Hence, if BRI can integrate sustainable development agenda, it can be a game-changer because it has considerable potential to directly influence sustainable development in the trade and economy of developing states.

The Chinese government and private sectors established various policies, codes of conduct, and guidelines for environmental measures concerning overseas investment, including the Belt and Road Initiatives.¹²⁴¹ According to Boer, most documents are non-binding instruments served as policy guidelines, but some are legally binding documents with vague and unenforceable obligations.¹²⁴² For instance, the Regulation Measures of Enterprises Investing Overseas urges the enterprises to perform social responsibility for environmental protection actively, pay attention to ecological, environmental protection, and establish a good

¹²⁴⁰ Huileng Tan, *supra* note 608.

¹²⁴¹ Ministry of Commerce and Ministry of Environmental Protection, February 18, 2013, Foreign Investment Cooperation Environmental Protection Guide; http://www.ghub.org/cfc_en/?p=9225 ; and Environmental Risk Management Initiative for China's Overseas Investment 2017, <http://www.ghub.org/en/environmental-risk-management-initiative-for-chinas-overseas-investment-was-officially-issued-in-5-september-2017/>

¹²⁴² Ben Boer, *Greening China's Belt and Road : Challenges for Environmental Law*, SYDNEY LAW SCHOOL RESEARCH PAPER (2019), 16-18.

image of Chinese investors.¹²⁴³ The Guidelines for Environmental Protection of Foreign Investment Cooperation urge the upholding of the “concept of environmental friendliness and resource conservation, develop low carbon and green economy, implement sustainable development strategies and realize win-win for their own profit and environmental protection”¹²⁴⁴. For BRI plan and guidance, it promotes green BRI by prioritizing ecological civilization and green development and promoting the integration of strategies and plans with the countries or regions along BRI route.¹²⁴⁵ These documents did not provide concrete obligations and mechanisms for implementing the specified environmental concepts.¹²⁴⁶

Another problem is that China requires all overseas investment and development initiatives to conform to legal requirements, including environmental laws, in the host countries.¹²⁴⁷ This requirement does not help to elevate environmental practice or maintaining environmental protection in ASEAN member states. In fact, it could lead to a regulatory “race to the bottom.”¹²⁴⁸ First, the host countries in ASEAN have different environmental laws and legal standards ranging from the lax to the stringent; thus, the environmental approach will not be harmonious and implemented at the highest standards possible. Second, with the priority of economic interests in ASEAN host countries that are mostly developing countries, it is less likely that the strict environmental standard will be applied, or in the worst case, the environmental standard could be lowered to accommodate the foreign trade and investment.¹²⁴⁹

¹²⁴³ Regulation Measures of Enterprises Investing Overseas, National Development and Reform Commission, 26 December 2017, in force from March 1 2018, available at https://www.ndrc.gov.cn/zcfb/zcfbl/201712/t20171226_871560.html

¹²⁴⁴ Ministry of Commerce, Notice of the Ministry of Environmental Protection on Printing and Distributing the Guidelines for Environmental Protection of Foreign Investment Cooperation 2013, http://www.zhb.gov.cn/gkml/hbb/gwy/201302/t20130228_248632.htm

¹²⁴⁵ Guidance on Promoting Green Belt and Road, 8 May 2017, <https://eng.yidaiyilu.gov.cn/zchj/qwfb/12479.htm>; and Belt and Road Ecological Environment Protection Cooperation Plan, Ministry of Ecological and Environment (MEE), 15 May 2017, http://www.mee.gov.cn/gkml/hbb/bwj/201705/t20170516_414102.htm

¹²⁴⁶ Boer, *supra* note 1242, at 6.

¹²⁴⁷ The overseas investment should “abide by the provisions of the host country’s laws and regulations related to environmental protection.” Ministry of Commerce and Ministry of Environmental Protection, February 18, 2013, Foreign Investment Cooperation Environmental Protection Guide; http://www.ghub.org/cfc_en/?p=9225

¹²⁴⁸ See the discussion on the regulatory race to the bottom in chapter II part 3.

¹²⁴⁹ Boer, *supra* note 1242, at 5.

For example, according to the Code of Conduct of Private Enterprises' Overseas Investment Operation Article 28, the Chinese enterprises have to apply for environmental permits according to the host countries' environmental regulations, but in a case where the host country lacks relevant regulations, companies can refer to environmental standards adopted by international agencies or multilateral agencies.¹²⁵⁰ Nevertheless, it did not specify which agencies the parties should refer to, who can determine the choice of such environmental standards and whether it is mandatory to refer to those agencies.

The scale of Chinese investment in infrastructure under BRI has significant environmental impacts in the ASEAN host countries. As Boer suggested, the responsibility for meeting the highest possible environmental standard should be jointly implemented by both Chinese entities and their counterparts in the host countries by drafting a common approach and including an enforceable mechanism concerning environmental protection in BRI agreements and development contracts.¹²⁵¹

The China's challenge is to integrate a concrete mechanism for green development into its external trade and investment standard and become a major player in international environmental governance.

Conclusion

In conclusion, economic incentives are vital for environmental protection. Since the EU, the U.S. and China, and the EU are the three biggest economies of the world with substantial market and production bases playing crucial roles in ASEAN political and economic development, the harmonious approach for trade-environmental development of these three

¹²⁵⁰ Article 28 in Code of Conduct of Private Enterprises' Overseas Investment Operation, Jointly established by National Development and Reform Commission, Ministry of Commerce, the People's Bank, Ministry of Foreign Affairs and National Federation of Industry and Commerce, 6 December 2017, http://www.ndrc.gov.cn/gzdt/201712/t20171218_870751.html

¹²⁵¹ Boer, *supra* note 1242, at 15.

powers is the key factor to determine the future of ASEAN as well as the global environment. A fraction can cause leakage and undermine the attempt to influence the environmental protection of ASEAN member states through trade measures and agreement.

The EU and the U.S. favor integrating environmental protection in trade by using environmental trade measures or environmental clauses in trade agreements with ASEAN. In contrast, though China is progressing in its internal environmental governance, it still does not integrate environmental protection mechanisms in its trade agreement or economic investment with ASEAN. Bilateral or multilateral trade and investment agreements can be powerful vehicles for environmental integration as long as they entail substantive and enforceable environmental obligations. However, an environmental clause in a trade agreement is a product of negotiation and compromise; therefore, in most cases, it serves only as a declaratory statement with no actual obligations and consequences as political, economic, or other strategic interests take precedence. When used by an importing state with a large market as the EU, the unilateral environmental trade measure seems to be the most effective tool to generate environmental protection and sustainable production. However, its application can be challenged and need justification under WTO rules which will be discussed in the next chapter.

CHAPTER V

WORLD TRADE ORGANIZATION AND THE LEGALITY OF ENVIRONMENTAL TRADE MEASURE

INTRODUCTION

Global economic development through international trade has been a back bone of the globalized world. International trade agreements and organization, General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO), were established to facilitate international trade circulation and resolve trade-related disputes.¹²⁵² Existing side by side with the rising trade regime are the concerns towards the environmental degradation occurring from global trade expansion. Due to the complexity and transboundary nature of many environmental concerns, protecting the global commons¹²⁵³ and shared natural resources¹²⁵⁴ have become issues in the spotlight of the trade regime.

Sustainable development, having long-term economic development without jeopardizing the environmental condition, is desirable.¹²⁵⁵ However, it is difficult to achieve because economic development and environmental protection have been evolved in different paths. Therefore, in certain circumstances, when short-term political and economic policies drive a state's interests, both regimes are in conflict. Free trade competition in the international arena for economic development and the lack of global environmental regulators lead to many

¹²⁵² CHARLES S. PEARSON, *ECONOMICS AND THE GLOBAL ENVIRONMENT* 288 (2000).

¹²⁵³ The common can be defined as "physical or biological systems that lie wholly or largely outside the jurisdiction of any of the individual members of society but that are valued resources for many member of society. International commons of current interest include Antarctica, the high seas, deep seabed minerals, the electromagnetic spectrum, the geostationary orbit, the stratospheric ozone layer and the global climate system and outer space." ORAN R. YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* 20 (1994).

¹²⁵⁴ "Shared natural resources are physical or biological systems that extend into or across the jurisdictions of two or more members of international society. They may involve nonrenewable resources (for example, pools of oil that underlie areas subject to the jurisdiction of adjacent or opposite states), renewable resources (for example, straddling stocks of fish or migratory stocks of wild animals), or complex ecosystem that transcend the boundaries of national jurisdiction." *Id.* at 21.

¹²⁵⁵ Frances Harris, *Sustainable Development: Negotiating the Future*, in *GLOBAL ENVIRONMENTAL ISSUES* 275, 276 (Frances Harris ed., 2004).

environmental problems such as a constant increase of pollution emissions and low-environmental standards, both in domestic and international areas.

As there are no international environmental agencies that can impose command-and-control¹²⁵⁶ environmental regulation and enforcement over international communities, many countries take, either unilaterally or multilaterally, efforts to address environmental problems by using the market-based tool, trade-related measures.¹²⁵⁷ The rationale for the state to use trade-related measures is to obtain an environmental goal and level the competitive playing field.¹²⁵⁸ Trade-related measures are effective because they give incentives¹²⁵⁹ for complying and sanctions¹²⁶⁰ for not complying with certain environmental standard.¹²⁶¹ They can also be used to remove any competitive advantage an exporting state has due to its lower environmental standards (the non-internalization of environmental externalities). However, such measures are subject to an intense debate under multilateral trade agreements due to their trade-restrictive characteristics.¹²⁶²

This chapter discusses the role of the World Trade Organization in addressing the use of process and production methods (PPMs) measures in trade-related environmental problems.

¹²⁵⁶ Field & Field, *supra* note 326, at 212.

¹²⁵⁷ PETER UIMONEN & JOHN WHALLEY, ENVIRONMENTAL ISSUES IN THE NEW WORLD TRADING SYSTEM 66-67 (1997).

¹²⁵⁸ Trade measure aiming to achieve environmental goals can be in form of trade incentives such as exemption of tariff or quota credits or trade sanctions such as trade bans. Trade measure aiming to level the competitive playing field and protect the domestic industries can be in form of countervailing duty. MICHAEL TREBILCOCK ET AL., THE REGULATION OF INTERNATIONAL TRADE 658 (4th ed. 2013).

¹²⁵⁹ Chang argued that trade incentives such as financial inducements or subsidies create a perverse incentive and lead to more offensive or foot-dragging behavior in order to maximize the bargain. Trebilcock, Howse and Eliason added that in case of the global externalities or shared natural resources, the principle that victims should pay the bribe so that the polluter would comply seems impossible to defend on ethical and political ground. Nevertheless, the financial assistance for developing countries to adjust for higher environmental standard is necessary and justifiable on distributive justice grounds. HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM 19-25 (2008); and *Id.* at 660.

¹²⁶⁰ According to the study, the economic sanctions in the post-World War II period had overall success rate of about 32% in achieving the desired change in practice of certain states. The economic sanctions had potential to be successful in case where the alteration in targeted policy or practice was relatively modest and where the imposing state was more powerful and moderately in amicable relation with the effected state. GARY CLYDE HUFBUAER ET AL., ECONOMIC SANCTION RECONSIDERED: HISTORY AND CURRENT POLICY 91-98 (3rd ed. 2007).

¹²⁶¹ RAFAEL LEAL-ARCAS, INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL, BILATERAL GOVERNANCE 27 (2010).

¹²⁶² Andrea Bianchi, *The Impact of International Trade Law on Environmental Law and Process, in ENVIRONMENT, HUMAN RIGHTS & INTERNATIONAL TRADE* 105, 114-121 (Francesco Francioni ed., 2001).

The first part addresses a brief discussion on the characteristics of PPMs measures, WTO principles, and general exceptions concerning environmental protection. The second part analyzes the application of WTO rules on potential conflicts arising out of the unilateral use of PPMs measures by ASEAN trading partners. The chapter chooses three PPMs measures that can cause substantial effects and generate sustainable changes in ASEAN production and process methods because the products involved are the main exporting sectors of ASEAN trade. The analysis is made following WTO rules and jurisprudence set by the dispute settlement body in previous comparable cases. After discussing all cases, the second part concludes the current threshold for the legality of the PPMs measure.

The chapter argues that the use of trade measures, particularly process, and production methods (PPMs) measures, may violate GATT/WTO principles but can be justifiable under the GATT general exception clause on environmental grounds. WTO leaves enough space for states to adopt and regulate national policy for their environmental interests. However, due to the growing complexity of environmental concerns, further cooperation and negotiations are needed to set clear parameters for the legal extent of PPMs trade measures for both unilateral application and application under multilateral supports.

The analysis centers around PPMs trade measures because it argues that a well-designed PPMs measure can be an appropriate and effective instrument for environmental governance by correcting market failure and enhancing economic sustainability. If accompanied with clear parameters and management support, PPMs trade measures can induce compliance from the global community and be an effective forging tool for environmental protection policy improving social, environmental, and economic development in ASEAN and global context. To form alliances between the international trade law and international environmental law,

WTO can become the international body with twin objectives of trade and environmental policy, both for policy development and dispute resolution.¹²⁶³

1. THE ROLE OF WORLD TRADE ORGANIZATION

World Trade Organization recognizes that trade liberalization and environmental protection should be developed in a mutually supportive path according to the principle of sustainable development. Its role towards environmental protection in trade depends on to which extent it allows the use of environmental trade measures. In particular, the measure concerning the production and process methods (PPMs) is the subject of discussion because it is necessary for environmental protection but at the same time causes tension and controversy under trade rules as it can be trade protectionism in disguise. This part lays down the taxonomy of the PPMs measure, WTO trade principles, and the environmental exception.

1.1 **WTO and the environment**

General Agreement on Tariffs and Trade (GATT) was created in 1944 to lay down the groundwork for economic growth through open markets.¹²⁶⁴ As a result of the trade negotiation “Uruguay Round,” World Trade Organization (WTO) was established on January 1, 1995, forming a forum for implementing the multilateral trading system, negotiating new trade agreements, and resolving trade disputes.¹²⁶⁵ WTO’s cornerstone is to promote a liberal trading system without discrimination and protectionism. The term “environment” is not explicitly mentioned in the GATT treaty, but the Marrakesh Agreement establishing WTO recognizes the

¹²⁶³ JAMES K.R. WATSON, *THE WTO AND THE ENVIRONMENT : DEVELOPMENT OF COMPETENCE BEYOND TRADE* 97 (2013).

¹²⁶⁴ HUNTER ET AL, *supra* note 97, 1256.

¹²⁶⁵ World Trade Organization, Section on What is WTO ?, http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

principle of sustainable development.¹²⁶⁶ The Preamble of Marrakesh Agreement establishing WTO recognizes the need to ensure that economic growth and environmental protection should be evolved in a mutually beneficial and harmonized path according to the principle of sustainable development.

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of **sustainable development**, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.¹²⁶⁷

The speech by Pascal Lamy to the Climate Change Committee of the European Parliament in May 2008 supports that trade does not trump environmental priorities and sustainable development is one of the WTO objectives.¹²⁶⁸ One way to achieve sustainable development is to eliminate unsustainable production patterns and consumption by helping the market internalize all the costs, particularly environmental costs, as supported by Principle 8 of the Rio Declaration¹²⁶⁹ and Agenda 21.¹²⁷⁰ The protection of global common also required

¹²⁶⁶ WTO, 'Marrakesh Agreement', in the Legal Texts : The Result of Uruguay Round of Multilateral Trade Negotiations (Cambridge : Cambridge University Press, 1999), iii.

¹²⁶⁷ Marrakesh Agreement Establishing the World Trade Organization, https://www.wto.org/ENGLISH/docs_e/legal_e/04-wto_e.htm

¹²⁶⁸ "While the World Trade Organization does not have rules that are specific to the environment, to energy or to Climate Change per se, there is no doubt that the rules of the multilateral trading system — as a whole (i.e. the WTO "rule book") — are indeed relevant to Climate Change. In fact the Preamble the WTO Agreement explicitly mentions "sustainable development" as one of its fundamental objectives. Moreover the WTO rule book authorises its Members to give priority to environmental concerns, provided this is done in a non-protectionist manner. It is therefore not a case of trade "trumping" the environment." Pascal Lamy, 'A Consensual International Accord on Climate Change is Needed', speech to Climate Change Committee of the European Parliament, 29 May 2008, https://www.wto.org/english/news_e/sppl_e/sppl91_e.htm

¹²⁶⁹ Principle 8 of Rio Declaration : "To achieve sustainable development and a higher quality of life for all people, states should reduce and eliminate unsustainable pattern of production and consumption and promote demographic policies." <https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>

¹²⁷⁰ Agenda 21 Chapter 4 para 4.3 : "The major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production."

international cooperation,¹²⁷¹ challenging the competitive global trading system where national economic interest has always been a priority. Though these principles are not binding legal obligations, they signify that PPMs measures play a crucial role in realizing the sustainable development goal and can influence the justification of PPMs measure under GATT/WTO—the interpretation of WTO Dispute Settlement Body (DSB) should not extensively restrict national capacity to adopt PPMs measure.¹²⁷²

The international trade regime has been aware of trade and environmental considerations and potential conflicts since the 1970s.¹²⁷³ As regards to growing trade-environment concerns and a goal of sustainable development put forward in the World Summit, the WTO established the Committee on Trade and Environment (CTE)¹²⁷⁴ to identify the relationship between trade and environmental measures, make recommendations for modification of the rule of the multilateral trading system, and promote sustainable development.¹²⁷⁵

However, there are two parameters guiding CTE's work: WTO's competence in addressing trade-related issues and WTO's goal of safeguarding the principles of the multilateral trading system.¹²⁷⁶ First, WTO is not an environmental protection agency; therefore, its competence is limited to trade-related issues of environmental policies that have

¹²⁷¹ Principle 24 Declaration of the United Nations Conference on the Human Environment : “International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.”; and Principle 7 of Rio Declaration: “States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

¹²⁷² DAVID SIFONIOS, ENVIRONMENTAL PROCESS AND PRODUCTION METHODS (PPMs) IN WTO LAW 53 (2018).

¹²⁷³ WTO, Early Years : Emerging Environmental Debate in GATT/WTO, https://www.wto.org/english/tratop_e/envir_e/hist1_e.htm

¹²⁷⁴ See discussion on the environmental issues under WTO and CTE in Watson, *supra* note 1263, at 153-180.

¹²⁷⁵ WORLD TRADE ORGANIZATION, TRADE AND ENVIRONMENT AT THE WTO 5 (2004).

¹²⁷⁶ *Id.* at 6

a significant effect on trade. WTO does not involve in reviewing or setting national or global environmental policies or solving environmental problems.¹²⁷⁷ Second, believing that trade and environmental policies are complementary to the goal of sustainable development, WTO seeks to ensure that environmental policies are not barriers to trade liberalization and that trade policies are not obstructions of environmental protection.¹²⁷⁸

In order to avoid unilateral retaliation to counteract trade violations, the WTO established the Dispute Settlement Body (DSB),¹²⁷⁹ one of the most efficient dispute settlement systems in the international arena.¹²⁸⁰ The DSB is a central element in providing security and predictability to the multilateral trading system.¹²⁸¹ The PPMs regulation of WTO members can be challenged in DSB, and the three-person Panel will hold the hearing and decide the case within six months.¹²⁸² If the losing party appeals, the Appellate Body consisting of seven experts in international trade law who are appointed for a term of four years will review the case.¹²⁸³ WTO does not officially recognize stare decisis doctrine—the precedent does not bind the Panel and Appellate, but in practice, they refer to the legal reasoning of previous decisions.¹²⁸⁴ The current WTO dispute settlement system works effectively because the Panel and Appellate Body’s reports are automatically adopted unless the member states decide by consensus against the adoption.¹²⁸⁵ WTO abandoned the previous practice of GATT, where a single party can exercise a veto right against the final report.¹²⁸⁶

¹²⁷⁷ *Id.*

¹²⁷⁸ *Id.*

¹²⁷⁹ See discussion on the development of a judicialized international trade dispute resolution system at the WTO and The WTO dispute resolution mechanism in comparison to other international regimes in Watson, *supra* note 1263, at 11-61.

¹²⁸⁰ DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 234 (2nd ed. 2004); and HUNTER ET AL, *supra* note 97, at 1261.

¹²⁸¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) April 5, 1994, WTO Agreement. Art.3.2, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

¹²⁸² *Id.* at Annex 2, Article 3, 6-18 and 355.

¹²⁸³ *Id.* at Art. 17.1 and 17.2

¹²⁸⁴ WTO, AB Report, United States—Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (adopted 20 May 2008), paras. 158-162 and Japan—Taxes on Alcoholic Beverages, WT/DS8,10,11/AB/R (Adopted November 1, 1996), at section E13.

¹²⁸⁵ DSU, *supra* at note 1281, at Art.16.4 and 17.14.

¹²⁸⁶ HUNTER ET AL, *supra* note 97, at 1261-62.

Under Dispute Settlement Understanding (DSU), If DSB has ruled that national regulation or measure conflicts with WTO obligations, a member state must comply with the ruling—to remove such regulation.¹²⁸⁷ Suppose the losing party refuses to comply with the DSB ruling. In that case, the winning party may seek a DSB’s permission to impose a limited retaliatory trade sanction provided that such trade sanction is imposed in the same sector as that in which the losing party has violated its obligation under WTO.¹²⁸⁸

Despite the improvements of DSB, there is a concern regarding the role of DSB in addressing trade-environment issues. Due to the fact that WTO has not officially included environmental concerns in its main principle obligations, environmental concerns are only derogations of the principle. DSB is not initially designed for environmental dispute, and the Panel does not consist of environmental experts; therefore, it is believed to be an unsuitable venue because it may not give environmental factors enough weight.

Its rulings are subject to an intense debate that will be discussed further in the second section. The crucial question remains whether the present WTO system of dispute settlement body can produce outcomes that both trade and environment communities can accept.¹²⁸⁹

1.2 The taxonomy of PPM-based trade measures

The Process and Production Methods (PPMs) measure has been subjected to various research, but the issue remains problematic in international practice.¹²⁹⁰ The production and processing methods (PPMs) are the manner how products are made or how natural resources

¹²⁸⁷ DSU, *supra* note 1281, at Art.21, 1995.

¹²⁸⁸ *Id.* at Art.22

¹²⁸⁹ Winfried Lang, *WTO Disputes Settlement : What the Future Holds, in ASIAN DRAGON AND GREEN TRADE* 145,145-53 (Simon S.C. Tay & Daniel C. Esty eds.,1996), 145-153

¹²⁹⁰ *E.g.*, Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO : Debunking the Myth of Illegality*, 27 *YALE J. INT’L L.* 59 (2002); Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining “Unilateralism” in Trade Policy*, 11 *EUR. J. INT. LAW* 249 (2000); Sanford E. Gaines, *Process and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?*, 27 *COLUMB. J. ENVTL. L.* 383 (2002); AMBER ROSE MAGGIO, *ENVIRONMENTAL POLICY, NON-PRODUCT RELATED PROCESS AND PRODUCTION METHODS AND THE LAW OF THE WORLD TRADE ORGANIZATION* 125-249 (2017).

are extracted, grown, or harvested.¹²⁹¹ The trade measure concerning PPMs is directed to how the products are produced not to the nature of products itself.¹²⁹² According to the traditional trade premise, there are two kinds of PPMs measure: product-related and non-product-related:¹²⁹³

(i) The product-related PPMs measures are applied to assure the safety and quality of the end products, which could affect consumers. It concerns substances creating a health risk for consumers that leave a trace in the products, such as pesticide residue in the agricultural products or other toxic remains in food;¹²⁹⁴

And

(ii) The non-product-related PPMs measures are not related to the end product. They are applied to assure the achievement of environmental objectives such as the reducing GHG during the production process.¹²⁹⁵

The product-related PPM measures are not controversial and mostly fall within the scope of Technical Barrier to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) agreements¹²⁹⁶ such as food safety and sanitary standard.¹²⁹⁷ Non-product-related PPM trade measures do not focus on the end product's characteristics but rather the production stage. To

¹²⁹¹ NATALIE BERNASCONI-OSTERWALDER ET AL, ENVIRONMENT AND TRADE : A GUIDE TO WTO JURISPRUDENCE 203 (2006).

¹²⁹² For example, a law banning the importation of tuna fish is not a PPM but a law banning the importation of tuna fish caught by using a drift net is a PPM. Charnovitz , *supra* note 1290, at 230.

¹²⁹³ BERNASCONI-OSTERWALDER ET AL, *supra* note 1291, at 204. *See also* OECD Secretariat, *Processes and Production Methods (PPMs) : Conceptual Framework and Consideration on Use of PPM-Based Trade Measures*, OECD/GD(97), 137 (1997).

¹²⁹⁴ *Id.*

¹²⁹⁵ *Id.*

¹²⁹⁶ TBT Article 1 and SPS Article 1 covers measures seeking to protect life and health **within** the territory of the importing state ; thus, the non-product related PPMs would be excluded. Charnovitz , *supra* note 1290, at 65.

¹²⁹⁷ Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade : A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811, 811 and 865 (2002).

be precise, such measures aim to tackle the problem of the negative externalities from the production process.

PPMs measures can also be distinguished by its purpose. Charnovitz distinguished PPMs measures into two main types: Inward-looking measures aiming to address concerns within the territory and outward-looking measures aiming to address concerns locating outside the territory.¹²⁹⁸ The benchmark is whether there is still a territorial link between the regulating state and the environmental interest protected by such PPMs measure. For instance, the inward-looking PPMs measure aims to protect animal species that inhabit within the territory.¹²⁹⁹ The inward/outward-looking PPMs measure aims to protect a common environmental interest such as migratory animals or the earth's atmosphere.¹³⁰⁰ The outward-looking PPMs measure aims to protect environmental concern locating entirely outside the territory of regulating state.¹³⁰¹ The inward-looking measures addressing concern within the territory do not raise a jurisdictional problem.

The use of PPMs measure is crucial in an environmental perspective, but at the same time, it is controversial in economic perspective. It can be used as a defensive tool to protect the domestic environment and as an offensive tool, leverage, to influence the environmental standard of other countries.¹³⁰² From an environmental perspective, the producing and disposal method of the products are of the essence because the environmental damage, "ecological footprint,"¹³⁰³ usually occur during such process, not from the product itself.¹³⁰⁴ Many environmental externalities occurring from the production method in one country can affect national and global environmental concerns, such as emissions of GHGs affecting global

¹²⁹⁸ Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 689 (1998).

¹²⁹⁹ See discussion in EC—Asbestos case and the ban on single-use plastic in section 2.3

¹³⁰⁰ See discussion on US—Shrimp/Dolphin case and the EU's IUU in section 2.1

¹³⁰¹ See discussion on the EU's RED in section 2.2

¹³⁰² DANIEL C. ESTY, GREENING THE GATT : TRADE, ENVIRONMENT, AND THE FUTURE 105 (1994).

¹³⁰³ Charnovitz, *supra* note 1290, at 70.

¹³⁰⁴ UNEP-IISD, ENVIRONMENT AND TRADE : A HANDBOOK 53-57 (2nd ed. 2005)

climate change.¹³⁰⁵ PPMs measure ensures that the market takes into account environmental externalities.

Many international instruments recognize the significance of PPMs towards environmental conditions. For example, the World Charter for Nature approved by UN General Assembly in 1982 encourages states to “establish standards products and manufacturing processes that may have adverse effects on nature, as well as agreed methodologies for assessing these effects.”¹³⁰⁶ WTO itself endorses sustainable development. Sustainable production is part of the principle in the Marrakesh Agreement establishing the WTO (adopted after the Uruguay Round 1994), recognizing that trade should be consistent with the goal of sustainable development—trade liberalization should not undermine the environmental and social objectives.¹³⁰⁷

In line with the polluter pays principle,¹³⁰⁸ addressing negative externalities at the root cause using unilateral PPMs measure is the reaction correspondent with the failure to cooperate and address environmental problems in international environmental governance due to economic and political constraints.¹³⁰⁹ A state cannot be forced to participate in international

¹³⁰⁵ As regards to MEA aiming for the reduction of greenhouse gases (GHG), environmental trade measure can also be used to reduce the emission leakage. The emission leakage occurs when the decrease of emissions by members has been neutralized by the increase of emission by non-members. As a result, the overall emission of GHG stays the same or even worsens off if the numbers of non-members surmount. For example, while only certain developed countries agreed to reduce the CO₂ emission under Climate Change agreement, the other countries, with the desire to gain competitive advantages in international market, continue to pump up their economic activities and refuse to limit their CO₂ emissions. Eric Neumayer, *WTO Rules and Multilateral Environmental Agreements*, in *THE EARTHSCAN READER ON INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT*, 140 (Kevin P. Gallaher ed., 2000).

¹³⁰⁶ World Charter of Nature, U.N. Doc. A/RES/37/7, November 9, 1982, Article 21(b), 22 I.L.M. 455, 459 (1983).

¹³⁰⁷ Marrakesh Agreement Establishing the World Trade Organization https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

¹³⁰⁸ Principle 16 Rio Declaration: “National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” Due to the uncertain legal scope, the principle is viewed by scholars as international guideline “soft law” rather than a customary international law with binding effect. Though the state’s effort to internalize environmental cost is not required by legal obligation but it is recognized as legitimate by international community. SIFONIOS, *supra* note 1272, at 44. See also PATRICIA BIRNIE ET AL., *INTERNATIONAL LAW AND THE ENVIRONMENT* 323 (3rd ed. 2009).

¹³⁰⁹ Charnovitz, *supra* note 1290, at 70. See also the difficulties in forging multilateral environmental cooperation to achieve sustainable development in FELIX DODDS ET AL., *NEGOTIATING THE SUSTAINABLE DEVELOPMENT GOALS : A TRANSFORMATIONAL AGENDA FOR AN INSECURE WORLD* 128 (2017) and MACHARIA KAMAU ET. AL.,

environmental agreements and commit to addressing the global common.¹³¹⁰ It is the “Westphalian dilemma” where global cooperation for the common good is required, but the state’s sovereignty is a core hurdle.¹³¹¹ Thus, “the requirement of unanimity is in reality a recipe of inaction.”¹³¹² Since the effective enforcement of multilateral environmental agreements is difficult to achieve, using unilateral PPMs trade measure can solve the problems of free rider and the pollution leakage because it induces environmental compliance by changing the production process practice in other exporting states who may not be willing to participate in multilateral environmental governance.¹³¹³ The unilateral use of PPMs measures by powerful states can create a “race to the top,”¹³¹⁴ promoting a higher standard for production and process methods and compensate for the deficiencies of environmental multilateralism.¹³¹⁵

While PPMs measures can be used for achieving environmental and social values, there are many controversial issues: extraterritoriality, eco-imperialism, and trade protectionism. The key issue of PPM is the outward purpose—the activities of one country can have adverse environmental effects on a global scale.¹³¹⁶ The unilateral application of PPMs in a regulating state targeting the production practices of foreign states raises the questions of extraterritoriality

TRANSFORMING MULTILATERAL DIPLOMACY : THE INSIDE STORY OF THE SUSTAINABLE DEVELOPMENT GOALS 9 (2018).

¹³¹⁰ Most environmental harms are global problems and one country cannot tackle the problems alone; thus, international cooperation via multilateral environmental agreements (MEAs) is required. Nevertheless, MEAs have been formed upon voluntary consent of the members; therefore, they lack influential and self-enforcing power—they cannot influence or urge non-members to cooperate with the MEAs’ obligation or penalize non-compliance members. For instance, under the International Convention for the Regulation of Whaling (ICRW), the moratorium of commercial whaling has been established; however, it could not stop non-members such as Iceland or Norway from hunting whale for commercial purpose and it cannot put in force any penalizing measure against member such as Japan who continue hunting whales in the name of science as a disguised commercial whaling.

¹³¹¹ SIFONIOS, *supra* note 1272, at 36.

¹³¹² William D. Nordhaus, *Paul Samuelson and Global Public Good*, in SAMUELSONIAN ECONOMICS AND THE TWENTY-FIRST CENTURY 88, 92 (Michael Szenberg et al. eds., 2006).

¹³¹³ Jennifer A. Bernazani, *The Eagle, The Turtle, The Shrimp and the WTO : Implication for the Future of Environmental Trade Measures*, 15 CONN. J. INT. LAW 207, 211-12 (2000). See also the effectiveness of environmental trade measure in Montreal Protocol in DUNCAN BRACK, INTERNATIONAL TRADE AND MONTREAL PROTOCOL 51-59 (2018).

¹³¹⁴ DAVID VOGEL, TRADING UP : CONSUMER AND ENVIRONMENTAL REGULATION IN THE GLOBAL ECONOMY 248 (1997).

¹³¹⁵ BARBARA COOREMAN, GLOBAL ENVIRONMENTAL PROTECTION THROUGH TRADE : A SYSTEMATIC APPROACH TO EXTRATERRITORIALITY 7 (2017).

¹³¹⁶ Charnovitz, *supra* note 1290, at 62.

and interference of state sovereignty.¹³¹⁷ States, particularly developing states as ASEAN members, opposed the use of PPMs measure by developed states because it conflicts with their sovereign right over the exploitation of their natural resources according to their developmental policies, even though this right over natural resources is not exclusive but restricted by certain international environmental law such as the prevention of transboundary harm,¹³¹⁸ the equitable use¹³¹⁹ and the common concern.¹³²⁰ The concept of common concern of humankind indicates the interest of foreign states in managing environmental resources abroad.¹³²¹

The geographical distance between the regulating state and the affected state makes PPMs enforcement potentially arbitrary since the regulating state may consider all relevant environmental and economic aspects of the affected state.¹³²² PPMs can affect the exporting countries because it puts financial and technological burdens on small producers, particularly developing countries. After all, they have to adapt their PPMs according to the requirements of each importing country. PPMs have also received strong resistance from developing countries, including ASEAN member states because they are considered as eco-imperialism—the imposition of developed countries’ environmental values interfering with the exporting countries’ sovereignty.¹³²³ This claim corresponds to the fact that, in reality, only powerful

¹³¹⁷ According to the Westphalian principle of state sovereignty, state has full control over their territory and resources; thus, any exercise of jurisdiction or intervention from foreign states breaches this principle.

¹³¹⁸ The obligation to cause environmental harms to other states or the global common has been recognized as customary international law and by the international tribunal in Trail Smelter, Corfu Channel and Lac Lanoux cases. See Trail Smelter Case (United States v. Canada), 3 R.I.A.A 1905, 1911 ; Corfu Channel Case ICJ Report (1949), 1 ; and Lac Lanoux Arbitration, 24 ILR (1957) 101.

¹³¹⁹ The state’s sovereign power is not exclusive but required the balance of interest in case of common pool resources (shared natural resources and natural living resources that live in many countries) such as atmospheric resources, waterways, fisheries or migratory species. According to the Charter of Economic Rights and Duties of States adopted by the UN General Assembly : “In the exploitation of natural resources shared by two or more countries, each state must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interests of others. UNGA Resolution 3281 (XXIX) adopted on 12 December 1974. BIRNIE ET AL., *supra* note 1308, at 202.

¹³²⁰ SIFONIOS, *supra* note 1272, at 57-65.

¹³²¹ The most obvious example of “common concern” is climate change concern that is vital for the survival of humankind. The common concern recognizes the legitimate interest and common responsibility of states to participate in conserving resources of global significance. *Id.* at 130

¹³²² Jason Potts, *The Legality of PPMs under GATT : Challenges and Opportunities for Sustainable Trade Policy*, IISD, Feb. 28, 2008, at 1, 4.

¹³²³ Gregory Shaffer, *WTO Blue-Green Blues : The Impact of US Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future*, 24 FORDHAM INT. L. J. 608, 624 (2000) ; Tania Voon, *Sizing Up the*

states with large markets can efficiently exercise the use of PPMs and induce compliance from smaller and less developed states.¹³²⁴ Using trade leverage to bargain for environmental protection demonstrates an inherent economic inequity in the global trade system. It is often part of the treaty-making process, which is led by the unilateralism of powerful progressive states called “policy forging” by Laurence Boisson de Chazournes.¹³²⁵ Without clear parameters, PPMs measure can lead to unjust trade restriction, discrimination, and protectionism.¹³²⁶ For instance, the developed states with high environmental standard, which internalize the environmental cost and opt for sustainable production for domestic producers, may seek to impose the same production burden on foreign producers in order to protect domestic producers and eliminate the unfair competitive advantage that the exporting states with the lower environmental standard will have—to counter the environmental dumping and level the playing field.

There are four types of trade measures concerning PPMs:¹³²⁷ (i) Fiscal: financial incentives to promote the use of certain PPM such as taxes, tariffs or subsidies; (ii) Technical: eco-labeling and packaging requirements for PPMs; (iii) Quantitative: quantitative requirements or limits on trade for certain products concerning the compliance or non-compliance of PPMs such as trade bans or quotas on products produced by prohibited PPMs;

WTO : Trade-Environment Conflict and the Kyoto Protocol, 10 J. TRANS. L. POL. 71, 100 (2000); and NEUMAYER, *supra* note 416, at 15.

¹³²⁴ COOREMAN, *supra* note 1315, at 11. *See also* the discussion on the powerful markets, DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION (2008) and Frank J. Garcia, *Trade and Inequality: Economic Justice and Developing World*, 21 MICH. J. INT. LAW 975 (2000).

¹³²⁵ Laurence Boisson de Chazournes, *Unilateralism and Environmental Protection : Issue of Perception and Reality of Issues*, 11 EUR. J. INT. LAW 315, 317 and 325 (2000).

¹³²⁶ In spite of the benefit of trade measures in, the misuse of trade measure can be tantamount to a disguised trade barrier. Trade measure can be used as trade protectionism from the developed countries against developing countries. Without balancing between negative and positive consequences, the use of trade measure should be limited and should not be priority choice just because it is less expensive and complicated (compare to the long-term negotiation or providing and transferring technology). Furthermore, it is crucial to acknowledge that both trade and environment are equally important and the central objective is to bring harmonization to trade and environment regime as much as possible without prioritizing one regime over another. Magda Shahin, *Trade and Environment : How Real is the Debate ?*, in THE EARTHSCAN ON INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT, 213 (Kevin P. Gallagher & Jacob Werksman eds., 2002).

¹³²⁷ Potts, *supra* note 1322, at 8.

and (iv) Programmatic: policy measures such as procurement policy technical assistance on products, firms or country that implement the preferable PPMs. These measures can be challenged whether they violate GATT/WTO principles.

1.3 The principle of GATT and WTO

The original GATT, including specific agreements covering many trade-related issues, have been incorporated into WTO Agreement.¹³²⁸ Many specific agreements such as the Agreement on Technical Barrier to Trade (TBT Agreement) or the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) concluded during the Uruguay Round are part of the Trade Law.¹³²⁹ The TBT Agreement seeks to prevent member states from using technical regulations on the nature or content of products as disguised protection measures for domestic products and promote harmonization of technical regulations and standards.¹³³⁰ Under the SPS Agreement, member states can impose regulations concerning food safety and animal and plant health provided that such regulations are based on scientific evidence and necessary to protect human, animal, plant life, or health.¹³³¹

“WTO system is not a ‘free trade’ system at all, but a carefully constructed compromise between preferences for open markets and preferences for protection of national interests.”¹³³² According to Driesen, there are three types of free trade: trade free from discrimination, trade free from the coercion of governments, and trade free from any regulatory burden. WTO trade system should stand for trade free from discrimination.¹³³³ Therefore, the main objective is to reduce trade barriers among members and remove distortions in international markets to ensure

¹³²⁸ HUNTER ET AL, *supra* note 97, at 1257.

¹³²⁹ *Id.*

¹³³⁰ *Id.* at 1259

¹³³¹ *Id.*

¹³³² Gaines, *supra* note 1290, at 422 and Howse & Regan, *supra* at 1290, at 280-286.

¹³³³ David M. Driesen, *What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279, 279 (2000).

that goods and services are not discriminated on the basis of their national origins.¹³³⁴ The prohibited trade barriers can be tariff or non-tariff barriers.¹³³⁵ The non-discrimination principle is a cornerstone of GATT that two core obligations can portray: the Most Favored Nation (MFN) and the National Treatment.

Under the MFN obligation stated in Article I of GATT,¹³³⁶ member states of WTO have to treat “like products” importing from other member states of WTO the same way in terms of customs duties, taxes, and import rules and standards—member states cannot discriminate against or favor imported products from certain member states.¹³³⁷ If member states decide to give an advantage to an imported product from state A, member states also have to give the same advantage to like products from all other member states.

Under the National Treatment obligation stated in Article III of GATT, member states cannot treat imported products from other member states different from domestic like products.¹³³⁸ The regulating states have an obligation to ensure that exporting goods receive

¹³³⁴ HUNTER ET AL, *supra* note 97, at 1256.

¹³³⁵ For instance, Article XI prohibits the import and export quantitative restriction such as trade bans. As soon as the quantitative restriction is put in place, such measure is in breach of Article XI regardless of the rationale and discriminatory feature of such measures.

¹³³⁶ “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the **like product** originating in or destined for the territories of all other contracting parties.” https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art1_gatt47.pdf

¹³³⁷ PERTER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 318-319 (3rd ed. 2013).

¹³³⁸ GATT Article III:1 “The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, **should not be applied to imported or domestic products so as to afford protection to domestic production.**”

Article III:2 “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to **like domestic products**. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”

Article III: 4 “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded **treatment no less favourable** than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential

“treatment no less favorable” than the like domestic products.¹³³⁹ In other words, member states cannot impose internal regulations or tax on imported products to give an advantage edge for domestic like products. There are three requirements: the measure must be internal regulation; the product concerned must be like products; and the like imported products must not be treated less favorably than domestic products. This principle seeks to prevent discrimination between imported and domestically produced like products and give the import products equal opportunities to compete with like domestic products:¹³⁴⁰ “to avoid protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationship.”¹³⁴¹ It does not require identical treatment¹³⁴² but rather equality of competitive conditions between the like products.¹³⁴³ According to the Seal Product case, the Appellate Body held that the less favorable treatment would be determined by competition effects—whether regulatory distinction distorts the competition to the detrimental effects and whether these detrimental effects are related to the foreign origin of the measure.¹³⁴⁴

What are the criteria or requirements to determine the “likeness” of the products? Can PPMs be one of the aspects distinguishing the likeness of the products? Can the products be treated as “like” when the PPMs of one product are environmental-friendly manner while another is highly polluting?¹³⁴⁵

internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.”

https://www.wto.org/English/Docs/E/legal_e/gatt47_01_e.htm

¹³³⁹ GATT Article III : 4

¹³⁴⁰ United States—Standard for Reformulated and Conventional Gasoline (US—Gasoline), WT/DS2/R, Panel Report para 6.10.

¹³⁴¹ Korea—Taxes on Alcoholic Beverages, WT/DS75/AB/R, AB Report para. 120.

¹³⁴² The distinction in treatment can be de jure or de facto. Lothar Ehring, De Facto Discrimination in World Trade Law : National and Most-Favored-Nation Treatment—or Equal Treatment ?, Journal of World Trade Vol.36 No.5 (2002), 921.

¹³⁴³ European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (EC—Seal Products), WT/DS400/AB/R, AB Report para 5.108.

¹³⁴⁴ *Id.* at para 5.101.

¹³⁴⁵ For the purpose of this research, the discussion focuses on non-product related PPMs because the Panel and Appellate Body may interpret “likeness” in different manner in a controversial issue concerns genetically modified products which is product related PPM.

The key term “like products” are used in both MFN and National Treatment where WTO members must not discriminate against “like products” from exporting country or “like products” from different exporting countries. The scope of “like products” determines the violation under these obligations.¹³⁴⁶ The term “like product” is not defined by any GATT/WTO rules and varies from one provision to another¹³⁴⁷ and on a case-by-case basis¹³⁴⁸ which poses problems of legal uncertainty and uniform interpretation, making it difficult for the regulating states to understand the extent of its obligations.

The first approach by the GATT Panel is the objective approach focusing on the product characteristics.¹³⁴⁹ In Spain—Unroasted Coffee, in order to determine whether various types of unroasted coffee were like products under MFN obligation, the Panel focused on the characteristics of the products, their end uses, and the tariff regimes of other members and found that the organoleptic differences resulting from geographical factors (i.e., the taste, smell, aroma, etc.), cultivation methods, the processing of the beans, and the genetic factor were not sufficient reasons for products to be unlike and allow for different tariff treatment.¹³⁵⁰ The objective approach focusing merely on the characteristics of the products did not differentiate the PPMs.

¹³⁴⁶ MAGGIO, *supra* note 1290, at 73.

¹³⁴⁷ In GATT, the term “like products” appears in many Articles such as Art.I:1, II:2(a), III:4, VI:1(a), VI:4 or IX:1. Robert E. Hudec, *‘Like Product’ : The Differences in Meaning in GATT Articles I and III*, in REGULATING BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW, 101-102 (Thomas Cottier & Petros Mavroidis eds., 2000).

¹³⁴⁸ In Japan—Alcoholic Beverages, the Appellate Body stated that “The concept of ‘likeness’ is a relative one that evokes the image of accordion. The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of WTO agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. AB Report Japan—Taxes on Alcoholic Beverages, *supra* note 1284, at 21.

¹³⁴⁹ See Brazilian Internal Taxes, Working Party Report 1949 (First Report), para 7. In this case, local Brazilian conhaque and French cognac were considered as unlike because they have different additives and aromas.

¹³⁵⁰ BOSSCHE & ZDOUC, *supra* note 1337, at 326. See Spain—Tarriff Treatment on Unroasted Coffee (Spain—Unroasted Coffee), L/5135-28S/102 (adopted 11 June 1981), Panel Report para 4.6. See also European Communities—Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/RW (adopted 22 December 2008), AB Report para 190.

At the end of the GATT era, the Panel applied the “aim-and-effect” test resulting in narrower definition of likeness. The test aims to distinguish the regulatory intent of the measure—two products will be deemed like if the measure distinguishing the two products is based on discriminating and protectionist intent, which results in protectionist effects.¹³⁵¹ The objective of the “aim-and-effect” test is to interpret “likeness” according to Article III:1 that none of the trade regulations and measures shall be applied in a manner to afford protection to domestic production—the prohibition of discriminatory regulations and measures. This approach allows the differentiation of products according to PPMs. Robert Hudec observed that in order to distinguish the de facto discrimination and determine whether the regulation is discriminatory or not, it is inevitable to consider the “aim and effects” to see whether the aim of the regulation (i.e., regulatory intent) is protectionist and whether the imposed restriction put a disproportionate burden on the importing products.¹³⁵² A mere differentiation between domestic and imported like product is not discrimination by itself because a state may have legitimate reasons to impose different treatment.¹³⁵³ It is argued that regulatory choice should be included in the analysis of origin-neutral measures under Article III¹³⁵⁴—banning protectionism but leaving enough space for the nation to adopt a necessary policy to address legitimate non-trade concerns.

Later, WTO DSB rejected the aim-and-effect” test and endorse the competition-based approach in Japan-Alcoholic Beverages decision.¹³⁵⁵ In EC—Asbestos and Philippines—

¹³⁵¹ SIFONIOS, *supra* note 1272, at 105.

¹³⁵² Robert E. Hudec, *GATT/WTO Constraints on National Regulation : Requiem for an “Aim and Effects” Test*, 32 *The International Lawyer*, Symposium on the First Three Years of the WTO Dispute Settlement System (FALL 1998), 619-620. *See also* Amelia Porges & Joel P. Tratchman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37 *J. WORLD TRADE* 783, 783-99 (2003).

¹³⁵³ COOREMAN, *supra* note 1315, at 36.

¹³⁵⁴ Donald H. Regan, *Further Thoughts on the role of Regulatory Purpose under Article III of the General Agreement on Tariffs and Trade*, 37 *J. WORLD TRADE* Vol. 737,737 (2003).

¹³⁵⁵ The Appellate Body rejected the aim and effects test in Japan-Alcoholic Beverages decision by stating that the proof of trade effects is not required but the determination of “likeness” focuses on the Border Tax Adjustment factors—physical characteristics, end-uses, consumer perception and tariff classification. AB Report, Japan—Taxes on Alcoholic Beverages, *supra* note 1284, at 17-22.

Distilled Spirits, likeness under National Treatment obligation is “a determination about the nature and extent of a competitive relationship between and among products”—likeness depends on whether the products can sufficiently compete with one another.¹³⁵⁶ Thus, according to cases under both MFN and national obligations, all relevant criteria used to determine “likeness” are: (1) the physical characteristics of the products; (2) the product’s end uses; (3) consumer’s tastes and habits or consumers’ perceptions and behavior; and (4) the products’ tariff classification.¹³⁵⁷ This constitutes a competition-based approach implying the importance of market demands and customer preferences.

Can competitive relationships or customer preferences render the products unlike upon the basis of PPMs? To date, there is still no case and jurisprudence to answer the question explicitly.¹³⁵⁸

Upon the competition-based approach, unless the consumers distinguish the products by their production and process methods, the same products that are different only in terms of production and process method will be considered as “like” products.¹³⁵⁹ For instance, the question is whether the consumers distinguish the seafood product by the way it was harvested or farmed or distinguish the product by the emission produced during the production process. The informed customers may express references for environmental-friendly products and distinguish the products produced in a sustainable manner. In this way, the PPMs relate to the product as the customer preferences influence the market position; thus, even PPMs that do not

¹³⁵⁶ AB Report, European Communities—Measures Affecting Asbestos and Asbestos Containing Products, para 99, WTO Doc WT/DS135/AB/R (adopted April 5, 2001) and AB Report, Philippines—Distilled Spirits (2012), para 170.

¹³⁵⁷ BOSSCHE & ZDOUC, *supra* note 1337, at 327.

¹³⁵⁸ For instance, there are two cases concerning PPMs measures: Indonesian Automobile and Canada Automotive. In Indonesian Automobile, Japan, EC and US filed a complaint that Indonesia applied higher custom duties and sale taxes to import products when the exporting manufacturers did not use sufficient amount of Indonesian parts or labors. In Canada Automotive, Japan and EC filed a complaint that Canada provided the import duty exemption for an eligible corporation on the condition that it has manufacturing presence and sufficient value-added in Canada. Both cases, considering that no parties have invoked the general exception Article XX, the panel found that the measures were in violation of article I because they origin-based measures. These holdings may imply that a true origin-neutral PPM may be consistent with Article I. Para 10.29-30

¹³⁵⁹ Joel P. Tratchman, *WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe*, 58 HARV. INT'L L. J. 273, 281 (Spring 2017).

affect the physical characteristics are product-related PPMs¹³⁶⁰ and constitute a degree of differentiation in the products that have similar physical characteristics.

Nevertheless, it is argued that the customer preferences should not be the baseline for likeness determination because how customers choose the products does not depend only on social and environmental aspects, but they rely mainly on their financial status—the wealthier consumers could choose products according to their interest, but poor consumers will base their decision on the price.¹³⁶¹ Thus, there is nothing guaranteed that even the well-informed customers would change their product preferences based solely on the environmental aspects. The approach reflects consumer preferences and behaviors, but it fails to consider the information asymmetries and other externalities.¹³⁶² The competitive approach, in theory, would allow the differentiation of products by its PPMs but not in reality.

Tratchman pointed out that the rejection of the “aim-and-effect” test together with the competition-based approach to determine the likeness of the products leave no room for national regulation and misinterpret the prohibition of discrimination—the decision prohibits any regulations that have adverse effects on trade competition whether such regulations are discriminatory or not; therefore, the current jurisprudence is “hostile to legitimate regulatory distinctions”.¹³⁶³

In conclusion, PPMs are not yet recognized by the WTO jurisprudence as a factor affecting the “likeness” of the products. Products that differ only on the basis of PPMs will be considered as “like” under both obligations. Hence, if the regulating country uses regulations or trade measures to treat those products differently, it constitutes a discrimination violating WTO obligations and needs to be justified under the general exception Article XX.

¹³⁶⁰ Meredith A. Crowley & Robert Howse, *Tuna-Dolphin II: A Legal and Economic Analysis of the Appellate Body Report*, 13 *WORLD TRADE REV.* 321, 321 and 327 (2014).

¹³⁶¹ COOREMAN, *supra* note 1315, at 35.

¹³⁶² Tratchman, *supra* note 1359, at 278.

¹³⁶³ *Id.* at 284.

1.4 The general exception clause Article XX of GATT

*“The essence of environmental PPMs trade measure is to ‘discriminate’ between those comply with the PPMs and those who do not.”*¹³⁶⁴

Under GATT/WTO principles, member states are free to impose any trade-related national regulations as long as they do not contradict the non-discrimination principles described above. However, Article XX of GATT provides general exceptions to the non-discrimination principles. The use of trade-related measure that is inconsistent with the non-discrimination principles can be justified under the environmental grounds provided in Article XX.¹³⁶⁵

¹³⁶⁴ Gaines, *supra* note 1290, at 430-431.

¹³⁶⁵ Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Under Article XX, there are two exceptions on environmental grounds for trade-related measure:

- (i) Trade-related measures are necessary to protect human, animal, or plant life or health,¹³⁶⁶
- (ii) Trade-related measures relate to the conservation of exhaustible natural resources, provided that such measures are made effective in conjunction with restrictions on domestic production or consumption.¹³⁶⁷

Both environmental exceptions are subject to the introductory clause or the *Chapeau clause* of Article XX requiring that such trade-related measures must not be applied in a manner constituting arbitrary and unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.¹³⁶⁸ The permissibility of measures under Article XX must strike a balance between the right of members to invoke the exception and the duty to respect the obligations.¹³⁶⁹ The emphasis is placed on objectives and implements procedures of the disputed regulation and measure.

Article XX accepts that discrimination is acceptable if it is justified on the environmental ground and guard against arbitrary or unjustifiable discrimination. By focusing on the manner of how such trade measure is applied, the *chapeau clause* aims to screen out the use of trade-related measures as a protection mechanism for domestic products. Some countries may impose trade-related measure such as bans, quotas, or standards on imported products claiming that they are necessary for environmental protection. Nevertheless, those measures could be used as a disguised restriction on international trade to protect domestic production.

General Agreement on Tariffs and Trade Art XX, 1947, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited 20 March, 2019)

¹³⁶⁶ *Id.* at (b)

¹³⁶⁷ *Id.* at (g)

¹³⁶⁸ *Id.*

¹³⁶⁹ United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/R and WT/DS58/AB/R, para 106-107.

This could happen mainly when the importing state has a stringent environmental policy requiring the domestic manufacturers to internalize environmental externalities (using clean energy for production or cleaning waste before releasing it to the environment). Therefore, the price of domestic products is higher than the imported products from exporting countries that have less stringent environmental policies and do not take into account environmental externalities.

The importing countries may impose trade measures to eliminate the competitive advantages of cheap imported products and help the domestic products. Additionally, trade measure could be used in the case where the importing country wants to protect domestic manufacturers, especially small or medium manufacturers, who produce high-quality products in conventional ways (home-made/handmade products) from low-quality imported products manufactured by big industrialized manufacturers who can produce a massive number of products at a lower price.

Environmental protection serves only part of exceptions to the main obligations. Therefore, it is crucial to examine how far WTO panels are willing to allow justification under Article XX in light of environmental protection.

2. THE POTENTIAL APPLICATION OF WTO RULES ON ASEAN TRADE-RELATED ENVIRONMENTAL ISSUES

Under general exceptions Article XX of GATT, member states may impose environmental trade measures, even if it may create trade barriers and contravene non-discrimination obligations. If such measure is necessary to protect the environment or relates to the conservation of exhaustible natural resources, provided that such measure must be applied in a non-arbitrary and justifiable manner and must not be a disguised restriction in international trade. This part argues that WTO leaves sufficient space for environmental

protection through the imposition of PPMs measure. It analyzes three potential cases concerning the unilateral PPMs measures employed by the EU as an ASEAN trading partner—the rules to combat illegal, unreported and unregulated fishing (IUU), the phasing out of palm oil, and the ban on microplastic and single-use plastics. These PPMs measures directly affect ASEAN member states because they target the PPMs of ASEAN main exporting products. Each case of PPMs measure discusses the potential violation and possible environmental justification under WTO rules. By discussing WTO’s rulings of comparable cases, the discussion unfolds how the panel and Appellate Body interpret Article XX and set the thresholds for environmental justification.

2.1 The EU’s rules to combat illegal, unreported and unregulated fishing (IUU): Unilateral environmental trade measure based on multilateral environmental agreements¹³⁷⁰

The EU’s IUU regulation may constitute a quantitative restriction violating Article XI GATT, and it may be regarded as discrimination against “like products” violating the MFN obligation under Article I. This subpart unfolds how the measure can be justified under Article XX (g) by analyzing the thresholds set by the Appellate Body in the U.S.-Shrimp/Dolphin case concerning the inward/outward-looking PPMs measure with sufficient territorial nexus and solid multilateral supports for both its purpose and its application of trade measure.

2.1.1 Potential conflict and violation

The EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU) entered into force on 1 January 2010.¹³⁷¹ The EU’s IUU is a unilateral trade

¹³⁷⁰ See the discussion on the EU’s IUU application with ASEAN member states in chapter IV part 2.1.2

¹³⁷¹ 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,

measure principally aiming to protect fish stocks, species, and the marine environment.¹³⁷² It also aims to protect legitimate fishing operators who conduct sustainable fishing but lose their competitive advantage due to unfair practice that threatens food security and socio-economic conditions.¹³⁷³ As a precondition for the importation, all fishery products have to obtain the catch certificate confirming the legality and conformity of the fishing practice.¹³⁷⁴ All fishery products obtained from IUU fishing are banned from importation.¹³⁷⁵ Many ASEAN coastal member states have been affected by this trade measure—Cambodia was blacklisted in 2014, and several member states were given a yellow card as a warning to address the IUU problems in their countries.¹³⁷⁶ Suppose the situation is not improved after warning. In that case, the EU can decide to blacklist these countries, and all fishery products caught by vessels flying the flag of these countries will be prohibited from importation.

Article XI does not allow prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses, or other measures.¹³⁷⁷ Under the MFN obligation,¹³⁷⁸ WTO member states cannot discriminate against

available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02008R1005-20110309&from=EN> and Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009R1010-20130917&from=EN>

¹³⁷² See Council Regulation (EC) No 1005/2008 Article 3 for actions considered as engaging IUU fishing.

¹³⁷³ https://ec.europa.eu/fisheries/sites/fisheries/files/docs/publications/2019-tackling-iuu-fishing_en.pdf

¹³⁷⁴ Council Regulation (EC) No 1005/2008

Article 12 (2) To ensure the effectiveness of the prohibition established in paragraph 1, fishery products shall only be imported into the Community when accompanied by a catch certificate in conformity with this Regulation.

Article 12 (3) The catch certificate referred to in paragraph 2 shall be validated by the flag State of the fishing vessel or fishing vessels which made the catches from which the fishery products have been obtained. It shall be used to certify that such catches have been made in accordance with applicable laws, regulations and international conservation and management measures.

¹³⁷⁵ Council Regulation (EC) No 1005/2008 Article 12 (1) The importation into the Community of fishery products obtained from IUU fishing shall be prohibited.

¹³⁷⁶ https://ec.europa.eu/fisheries/sites/fisheries/files/illegal-fishing-overview-of-existing-procedures-third-countries_en.pdf

¹³⁷⁷ The General Agreement on Tariffs and Trade (GATT 1947) Article XI : No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

¹³⁷⁸ See the discussion on “like product” in section 1.2

or favor “like” imported products. The EU’s IUU measure is a non-product-related PPMs measure differentiating fishery products only by their harvesting methods, and as discussed earlier, the WTO jurisprudence still does not recognize PPMs as factors affecting the likeness of the products; thus, fishery products harvested in different manners will be considered as like products requiring same treatment under MFN rule. Therefore, the prohibition of importation on the basis of non-compliance to the EU’s IUU fishing regulations may violate Article XI GATT (quantitative restriction) and Article I MFN obligation and require justification under Article XX.

2.1.2 Environmental justification

Suppose the violation is established and the EU has to seek justification under Article XX (b) or (g), the PPMs measures aiming to protect fish stocks of IUU can be regarded as measure necessary for the protection of animal life and health or measure relating to the conservation of exhaustible resources.¹³⁷⁹

Under Article XX, trade measures necessary to protect the environment or relate to the conservation of exhaustible resources can be justified. What kind of trade measures can be justified under Article XX (b) and (g)? Does it include the trade measure concerning the production or processing methods of the product? According to WTO’s decision on the U.S.-Shrimp/Turtle case, the non-product-related PPMs measure can be justified under Article XX if applied in a non-arbitrary and justifiable manner according to the *chapeau clause*.¹³⁸⁰

¹³⁷⁹ In the case of slave labor (IUU), the moral exception under Article XX (a) can be used for social and human rights concern. See more Charnovitz, *supra* note 1298; and Angelica Bonfanti & Marta Bordignon, ‘Seafood from Slaves’: *The Pulitzer Prize in the Light of the UN Guiding Principles on Business and Human Rights*, 8 GLOB POLICY 498, 498-504 (November 2017).

¹³⁸⁰ Previously it was perceived that GATT/WTO rules prohibit non-product-related PPMs measure. This perception arose from the GATT’s decision on US-Tuna/Dolphin case in the early 1990s. In US-Tuna/Dolphin, a case where the United States banned the importation of tuna caught with techniques that results in an incidental kill of marine mammals in excess of U.S. practice, the panel concluded that U.S. importation ban on tuna concerned the process of tuna harvesting rather than tuna as a product and could not be qualified for justification under Article XX because of its extraterritorial application. This decision directed on the extraterritorial issue and did not rule that non-product-related PPMs measure cannot be justified under Article XX. The panel concerns

In U.S.—Shrimp/Turtle case, the U.S. law prohibited the importation of shrimp harvested in a way that might harm sea turtles unless the exporting countries were certified by the U.S. administration as having regulatory programs to prevent incidental mortality of turtle comparable to that of the U.S. (Turtle Excluder Devices or TEDs) or it was certified as having a fishing environment that did not pose a threat to sea turtles.¹³⁸¹

From this case, the Appellate Body established four significant elements for environmental justification under Article XX (g): what constitutes “exhaustible natural resources”?; where is the location of concerns (inward or outward/territorial or extraterritorial)?; whether the international community and multilateral instruments support the concerns and measure?; and whether the measure is applied in a non-arbitrary manner?

First, the Appellate Body interpreted the term “exhaustible natural resources” in an evolutionary manner by taking into account the **“contemporary concerns of the community of nations about the protection and the conservation of the environment.”**¹³⁸² Sea turtles are vulnerable marine resources, and many of them are accidentally caught by the shrimp trawl nets and drown.¹³⁸³ There are seven recognized sea turtle species listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and listed on the International Union for Conservation of Nature (IUCN) red list as vulnerable,

about the extra-jurisdictional interpretation of article XX because it would allow for unilateral measures and jeopardize the multilateral framework of GATT. The U.S. also failed to show that it had exhausted all possible options. The panel concerns is more about the unilateralism but unilateralism is not equivalent to extraterritoriality. *United States-Restrictions on Imports of Tuna*, panel report (DS21/R) circulated 3 September 1991 (Not Adopted) paras 5.27, 5.28 and 5.31. and COOREMAN, *supra* note 1315, at 68.

¹³⁸¹ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998),

¹³⁸² AB Report, U.S.—Shrimp, para 129. In U.S.—Gasoline, the Panel also held that clean air is considered as an exhaustible natural resources as it can be depleted. Panel Report, United States—Standard for Reformulated and Conventional Gasoline, WT/DS2/R (Adopted 20 May 1996 and modified by AB Report, WT/DS2/AB/R), para 6.37.

¹³⁸³ Information About Sea Turtles : Threats From Commercial Trawl Fishing, Sea Turtle Conservancy, <https://conserveturtles.org/information-sea-turtles-threats-commercial-trawl-fishing/>

endangered, or critically endangered. They are also listed as endangered and threatened under the U.S. Endangered Species Act.¹³⁸⁴

Second, the Appellate Body held that the U.S. measure could be justified under GATT Article XX by assuming that there was “**sufficient nexus**”¹³⁸⁵ between the exhaustible natural resource to be protected and the country enacting the environmental measure because the sea turtles migrated into U.S. water.¹³⁸⁶ Those seven species of turtle listed as endangered in the MEAs live along the U.S. coast and traverse through U.S. waters.¹³⁸⁷ They are migratory species and can be found throughout the world ocean. Likely, the harvest of shrimp products in exporting countries that caused turtle deaths affects the U.S. marine ecosystem. However, the extent of substantial effects or magnitude of impacts could not be obtained.

Third, while multilateral environmental agreements support the concern of turtle conservation, the U.S. trade measure in question is not. CITES supports sea turtle protection and conservation, but it does not require the use of trade measure.¹³⁸⁸ The Convention on the Conservation of Migratory Species and Wild Animals (CMS) recognizes the need to protect sea turtles by only emphasizing the significance of cooperation with all relevant parties.¹³⁸⁹ Cooreman noted that “the use of TED is required by the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC), a Caribbean/Western Atlantic regional agreement with only 12 signatories at the time, including the U.S.; but to which none of the complainants were signatories.”¹³⁹⁰ Though the U.S. cannot rely on IAC as the complaints were not a party to it, IAC can be taken into consideration to demonstrate that TED is used in other

¹³⁸⁴ Sea Turtle Species at Risk, FWS (Sep. 2007) <https://www.fws.gov/home/feature/2007/seaturtles2.pdf>

¹³⁸⁵ The sufficient nexus stated by the Appellate Body is likely to connect with the environmental grounds under Article XX—whether the regulating state employing PPMs measure has enough connecting ground to the environmental objectives it wish to protect. However, it is interesting to discuss in the future if such nexus can expand to include other social and moral causes such as fishing fleets employing slave or child labors.

¹³⁸⁶ AB Report, U.S.—Shrimp at para 133

¹³⁸⁷ Sea Turtle Species at Risk, *supra* note 1384.

¹³⁸⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) Appendix I.

¹³⁸⁹ The Convention on the Conservation of Migratory Species and Wild Animals 1979.

¹³⁹⁰ Inter-American Convention for the Protection and Conservation of Sea Turtles 1996. COOREMAN, *supra* note 1315, at 191.

jurisdictions.¹³⁹¹ To the very least, it has a multilateral touch and is not a unilateral measure used only by the U.S. The U.S. trade measure was “reasonably related to the ends” of conserving endangered species.¹³⁹² The “means and ends relationship” of banning shrimp imports and protecting the turtle was “close and real,” and the trade measure was “not inappropriately wide in its scope and reach.”¹³⁹³

Nevertheless, the U.S. measure was taken in an arbitrary and unjustified manner which was inconsistent with the *chapeau clause* of Article XX because the application of the measure “does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”¹³⁹⁴ One crucial question is whether the U.S. has made sufficient attempts to engage in “across the board negotiations with the objective of concluding bilateral or multilateral agreements.”¹³⁹⁵ The Appellate Body found that the U.S. failed to negotiate with the exporting countries and make administrative determination more flexible by considering exporting countries’ circumstances and providing an opportunity for the affected exporting countries to appeal.¹³⁹⁶ The U.S. should be more sensitive to the conditions in each affected exporting country since the exporting countries may have adopted other protective measures for turtle conservation. The process of banning did not meet the standard of transparency and fairness.¹³⁹⁷ Therefore, the legality of PPMs under Article XX depends both on environmental grounds and on its implementation.¹³⁹⁸

¹³⁹¹ COOREMAN, *supra* note 1315, at 191.

¹³⁹² AB Report, U.S.—Shrimp at 141.

¹³⁹³ *Id.* at para 141.

¹³⁹⁴ *Id.* at para 164-165 and 184.

¹³⁹⁵ *Id.* at para 166.

¹³⁹⁶ *Id.* at para 166, 171, 177-182.

¹³⁹⁷ In 2000, Malaysia complained that the U.S. did not correct the regulation to comply with the AB report; nevertheless, the Panel ruled in favor of the U.S. by stating that the US has made “serious good faith efforts to negotiate and international agreement, taking into account the situations of the other negotiating countries”. Malaysia appealed and AB upheld the Panel finding that the US was in compliance because the regulation provided sufficient flexibility to foreign countries and the Article XX does not require the regulating state to “anticipate and provide explicitly for the specific conditions prevailing and evolving in every individual WTO member”. WTO AB Report on United States Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/AB/RW (October 22, 2001), para 96, 149 and 153.

¹³⁹⁸ Charnovitz, *supra* note 1290, at 110.

Similar to the U.S.—Shrimp/turtle case, the EU’s IUU is an origin-neutral regulation applying to all exporting states; the IUU measure has both inward and outward looking purposes; and the nature of concern is shared among the international community. The measure aims to protect the sustainability of fish that can at one point migrate through the EU water; thus, it can establish a **sufficient territorial nexus**. Fish stocks are common exhaustible resources. The depletion of fish stock will have a direct, substantial, and foreseeable impact on the EU biodiversity, the marine ecosystem, and food supply chain.¹³⁹⁹

Furthermore, the concern over IUU fishing and fish stock depletion is widely recognized in regional and international forums.¹⁴⁰⁰ United Nations Convention on the Law of the Sea (UNCLOS) recognizes the principle of sustainable and shared use of the high sea.¹⁴⁰¹ The Food and Agricultural Organization (FAO) Compliance Agreement¹⁴⁰² and UN Fish Stock Agreement¹⁴⁰³ are binding agreement for broad fisheries framework. There are also soft law instruments such as the FAO Code of Conduct for Responsible Fisheries¹⁴⁰⁴ and many UN Resolutions on sustainable fisheries.¹⁴⁰⁵ The FAO 2001 Plan of Action is also a voluntary non-binding agreement to address IUU fishing by incorporating in national, regional, and international legal instruments.¹⁴⁰⁶

Two elements are significantly different from the U.S.—Shrimp/turtle case: the EU trade measure is supported by multilateral environmental agreements (MEAs), and such measure is applied in a non-arbitrary manner.

¹³⁹⁹ COOREMAN, *supra* note 1315, at 206.

¹⁴⁰⁰ FAO, *The State of World Fisheries and Aquaculture : Opportunities and Challenges* (2014) ; FAO/UNEP, *Report of the Expert Meeting on Impacts of Destructive Fishing Practice, Unsustainable Fishing, and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats*, September 2009, FOA Report No.932, FIRF/R932.

¹⁴⁰¹ United Nations Convention on the Law of the Sea (1982) Part III.

¹⁴⁰² The Food and Agricultural Organization (FAO) Compliance Agreement, <http://www.fao.org/3/X3130M/x3130m.pdf>

¹⁴⁰³ UN Fish Stock Agreement, <https://daccess-ods.un.org/TMP/1297468.69206429.html>

¹⁴⁰⁴ FAO Code of Conduct for Responsible Fisheries, <http://www.fao.org/3/v9878e/v9878e00.htm>

¹⁴⁰⁵ UN Resolutions on sustainable fisheries, <http://sdg.iisd.org/news/unga-adopts-resolution-on-sustainable-fisheries/>

¹⁴⁰⁶ The FAO 2001 Plan of Action, <http://www.fao.org/3/y1224e/y1224e.pdf>

First, the EU's IUU is mainly based on international and regional instruments. Catch certificates to identify the origin and vessel blacklisting are commonly used in Regional Fisheries Management Organizations (RFMOs).¹⁴⁰⁷ The FAO 2001 Plan of Action stated that “trade-related measures should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter, and eliminate IUU fishing, and only after prior consultation with interest states.”¹⁴⁰⁸ Thus, the measure can fall in the category of treaty obligation, MEAs authorizing trade measures, MEAs protecting concerns, or soft laws.

Second, the application of EU trade measures should be considered as justifiable. Before blacklisting and banning the fishery products from exporting countries, the EU provides a pre-identification step and opens a formal dialogue with the exporting countries to give a warning and an opportunity for the exporting countries to address the IUU problems.¹⁴⁰⁹ The dialogue continues even after the exporting countries got identified (red card) or blacklisted. To be delisted, the EU demands the state to comply with international obligations by adopting necessary legislation—demanding legislative change to be in accordance with international norms.¹⁴¹⁰ To do this, the EU does not impose new norms. Instead, it acts as an enforcer of international obligations.¹⁴¹¹ In this sense, the unilateral EU's IUU trade measure is a significant factor in solving the global fishery problem.¹⁴¹² It uses unilateral trade measures to incentivize

¹⁴⁰⁷ The International Commission for the Conservation of Atlantic Tunas (ICCAT), Inter-American Tropical Tuna Commission (IATTC), Indian Ocean Tuna Commission (IOTC), Western & Central Pacific Fisheries Commission (WCPFC), Northeast Atlantic Fisheries Commission (NEAFC), Northwest Atlantic Fisheries Organisation (NAFO) and the Commission for the Conservation of the Antarctic Living Marine Resources (CCAMLR) have vessel listing measures. Available at <https://www.iccat.int/en/>; <https://www.iattc.org/VesselDataBaseENG.htm>; <https://www.iotc.org/iotc-iuu-list>; <https://www.neafc.org/mcs/iuu>; <https://www.wcpfc.int/wcpfc-iuu-vessel-list>; <https://www.nafo.int/Fisheries/IUU>; and <https://www.ccamlr.org/en/compliance/illegal-unreported-and-unregulated-iuu-fishing>

¹⁴⁰⁸ FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para 66, <http://www.fao.org/3/a-y1224e.pdf>

¹⁴⁰⁹ Tackling IUU Fishing, EU, https://ec.europa.eu/fisheries/sites/fisheries/files/docs/publications/2019-tackling-iuu-fishing_en.pdf

¹⁴¹⁰ COOREMAN, *supra* note 1315, at 215.

¹⁴¹¹ *Id.* at 215-216.

¹⁴¹² Rashid Sumaila, *Trade Policy Options for Sustainable Oceans and Fisheries*, ICTSD and WEF, 17 (2016); and Margaret A. Young, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing*, ICTSD and WEF (2015).

other states to adopt sustainable fishery practice according to international standards by considering the other state's relevant circumstances and offering cooperation, necessary assistance, and management instruments.

Therefore, the EU's IUU scheme is likely to be consistent with WTO rules and should be justifiable according to Article XX (g).

2.2 The phasing out of palm oil under the EU's Renewal Energy Directive (RED): The extraterritorial effect of PPM-based trade measure

The phasing out of palm oil under the EU's Renewal Energy Directive (RED) may violate National Treatment or Most-Favored Nation principle (GATT Article I or III) because based on a competition-based approach, the measure may cause de facto discrimination in favor of domestic or other foreign like products. For the environmental justification, there is a question of the extraterritorial effect of PPM-based trade measure because a part of the measure's objectives aims to protect environmental concern locating entirely outside the territory of the regulating state; thus, there is no sufficient territorial nexus. The subpart unfolds the extraterritorial reach of the PPMs measure and how the RED measure can be justified under Article XX due to the obligations under multilateral environmental agreements.

2.2.1 Potential conflict and violation

Biofuel is a fuel derived from biomass such as plant or animal waste. There are two kinds: crop biofuel (the first generation) and advanced biofuels (second generation) made from sustainable feedstock such as animal wastes. The crop biofuel is the main ingredient for biofuel.¹⁴¹³ As discussed earlier in chapters III and IV, the detrimental environmental effects are the unsustainable production process of palm oil that intensifies deforestation and emission.

¹⁴¹³ See Satya Narayan Naik et al, *Production of First and Second Generation Biofuels: A Comprehensive Review*, 14 RENEW. SUSTAIN. ENERGY REV. 578, 578-597 (2010).

Due to higher demand for palm oil, palm oil cultivation vastly expands, causing agriculture of food crops to expand in non-crop lands. The expansion of land use for plantations and agriculture can diminish forest areas—the indirect land-use change (ILUC). There is a significant link between palm oil expansion and land-use change in high carbon stock areas—deforestation and peat drainage—in the Southeast Asia region, Indonesia and Malaysia in particular.¹⁴¹⁴ There is also evidence that palm oil plantations' concession was made on the peatlands in Indonesia, which would further cause higher emissions.¹⁴¹⁵

To mitigate the problem of unsustainable PPMs of biofuel crops, the EU's Renewable Energy Directive (RED)¹⁴¹⁶ sets the emission thresholds and land use requirements to grant tax credits to renewable fuel resources that fit the main sustainable criteria aiming for carbon saving and protecting biodiversity.¹⁴¹⁷ In March 2019, EC European Commission approved the delegated Act introducing a new approach to address emissions from indirect land-use change (ILUC) associated with the production of biofuels, bioliquids, and biomass fuels.¹⁴¹⁸ This

¹⁴¹⁴ E.g., Kimberly M. Carlson et al, *Carbon Emissions from Forest Conversion by Kalimantan Oil Palm Plantations*, 3 NAT. CLIM. CHANG. 283, 283-287 (2013); Kimberly M. Carlson et al., *Committed Carbon Emissions, Deforestation, and Community Land Conversion from Oil Palm Plantation Expansion in West Kalimantan, Indonesia*, 109 PNAS, May 8, 2012, 7559-7564, <https://www.pnas.org/content/109/19/7559/>; Fatwa Ramdani & Masateru Hino, *Land Use Changes and GHG Emissions from Tropical Forest Conversion by Oil Palm Plantations in Riau Province, Indonesia*, PLOS ONE (July 30, 2013), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0070323>; Petrus Gunarso et al, *Oil Palm and Land Use Change in Indonesia, Malaysia and Papua New Guinea*, Reports from the Technical Panels of the 2nd Greenhouse Gas Working Group of the Roundtable on Sustainable Palm Oil (RSPO) (2012); and Birka Wicke et al., *Exploring Land Use Changes and the Role of Palm Oil Production in Indonesia and Malaysia*, 28 LAND USE POLICY 193, 193-206 (2011).

¹⁴¹⁵ See discussion on palm oil plantation and conversion of peatlands in chapter III (Root cause of haze pollution).

¹⁴¹⁶ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L2001&from=EN> The original version was Directive 2009/28/EC of The European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=EN>

¹⁴¹⁷ Sustainability Criteria, EU, <https://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/sustainability-criteria>

¹⁴¹⁸ "ILUC emissions can occur when pasture or agricultural land previously destined for food and feed markets is diverted to the production of fuels from biomass. The food and feed demand will still need to be satisfied either through intensification of current production or by bringing non-agricultural land into production elsewhere. In the latter case, ILUC (conversion of non-agricultural land into agricultural land to produce food or feed) can lead to the release of GHG emissions, especially when it affects land with high carbon stock such as forests, wetlands and peat land. These GHG emissions can be significant and could negate some or all of the GHG emission savings of individual biofuels. In order to address this issue, the Directive sets national limits, which will gradually decrease to zero by 2030, for high ILUC-risk biofuels, bioliquids and biomass fuels produced from food or feed

means the phasing out of palm oil—palm oil will not be counted as targets of renewable energy in the EU and no longer qualified for tax exception. The EU member states can still import palm oil as it is not a ban, but without tax exemption, palm oil will have less advantage in the market, and the demand will likely decrease.¹⁴¹⁹

Does the EU's RED compatible with GATT/WTO?

The subpart argues that the measure under RED may violate National Treatment or Most-Favored Nation principle (GATT Article I or III). According to the competition-based approach, the measure may cause de facto discrimination in favor of domestic or other foreign like products.¹⁴²⁰ Lendle and Shaus share a similar view. They found that “the directive is mostly in line with obligations under GATT Agreement, though certain elements could likely be considered a violation of WTO's non-discrimination principle under both Article I and III. In the alternative, non-sustainable biofuel is subject to the restriction on importation within the European Union, which violates GATT Article XI.¹⁴²¹

crops for which a significant expansion of the production area into land with high carbon stock is observed. These limits will affect the amount of these fuels that can be counted when calculating the overall national share of renewables and the share of renewables in transport. Therefore, Member States will still be able to import and use fuels affected by the limits, but they will not be able to consider them as renewable energy and therefore they will not be able either to count them for their renewable targets.” Commission Delegated Regulation (EU) .../... of 13.3.2019 supplementing Directive (EU) 2018/2001 as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels. Available at https://ec.europa.eu/energy/sites/ener/files/documents/2_en_act_part1_v3.pdf

¹⁴¹⁹ The EU's RED is the source of trade conflict with Indonesia and Malaysia since palm oil biofuel imported from Malaysia is not qualified for the credit because its emission is only 19% less than the traditional fossil fuel. Without the credit, the palm oil biofuel cannot compete with the European rapeseed oil biofuel that qualified for tax credits. Malaysia criticizes the application of the directive as arbitrary and disguised trade protectionism or “green protectionism” which is contradict to WTO trade rules. The EU directive for the importation of palm oil aims to screen out the products not because of the products itself but for unsustainable production and process methods (PPMs) of such products. Meredith, *supra* note 958, at 403 ;and Fredrik Erixon, *Green Protectionism in the European Union: How Europe's Biofuels Policy and the Renewable Energy Directive Violate WTO Commitments*, ECIPE, 2009, at 1, 2 and 29, <https://ecipe.org/wp-content/uploads/2014/12/green-protectionism-in-the-european-union-how-europe2019s-biofuels-policy-and-the-renewable-energy-directive-violate-wto-commitments.pdf>

¹⁴²⁰ In contrast, Myhre stressed that the phasing out of palm oil may decrease demand for palm oil biofuels due to the fact that palm oil is no longer qualify for tax exemption under the RED but it cannot be considered as trade restriction under WTO agreements. Robert Myhre, *Memorandum on Phase Out of Palm Oil and Soy Oil as Biofuel Feedstocks-Analysis under WTO Agreements*, Myhre & Co Advokatfirma AS (February 14, 2019), <https://www.transportenvironment.org/sites/te/files/publications/notat4.pdf>

¹⁴²¹ Andreas Lendle & Malorie Schaus, *Sustainability Criteria in the EU Renewable Energy Directive : Consistent with WTO Rules ?*, ICTSD, 2010, at 1, 15.

First, since the RED aims at PPMs of the biofuels, biofuels that were treated differently only due to PPMs will still be considered as like products under both articles—in the eyes of trade rules, unsustainable produced biofuels and sustainable produced biofuels are like products that should not be treated differently. The second question is whether the sustainability criteria set by RED discriminate between domestic and foreign like products or between foreign like products. Is there a distinction made based on origin regarding advantage (Article I) or favorable treatment (Article III)? Since the regulation applies to both domestic and worldwide palm oil biofuels producers, regardless of the origins, there is no regulatory (de jure) discrimination; however, de facto discrimination can be established from both GHG emission saving and land use requirements.

For GHG saving requirements, the transport emission in calculating GHG emission could lead to origin-based discrimination because the transport emission of biofuels produced in the EU is by fact much lower than the imported biofuels. Most palm oil biofuels are produced in the Southeast Asia region, Indonesia and Malaysia. They require long-distance transportation; thus, the disadvantage is apparent.¹⁴²² The GHG saving threshold set at 35% is advantageous for the EU-grown crops (rapeseed, beets, or sunflower are around 38–40%) for biofuels and arguably designed to discriminate against foreign biofuels.¹⁴²³ However, if the threshold will be pushed higher to 50–60%, none of the biofuels will be eligible, so it is hard to make the argument that the regulation is designed to discriminate or favor a specific country.¹⁴²⁴

For the land-use requirements, Article 17(3) to (5) of the directive, there are three criteria for land use—biofuels cannot be grown in highly biodiverse land, land with high carbon

¹⁴²² *Id.* at 7.

¹⁴²³ Han Nicholas Jong, *Europe, in Bid to Phase Out Palm Biofuel, Leaves Fans and Foes Dismayed*, MONGABAY (Mar. 15, 2019), <https://news.mongabay.com/2019/03/europe-in-bid-to-phase-out-palm-biofuel-leaves-fans-and-foes-dismayed/>; Gayatri Suroyo & Fransiska Nangoy, *Indonesia to Challenge 'Discriminative' EU Directive on Palm Oil*, REUTERS (Jan. 31, 2019), <https://uk.reuters.com/article/us-indonesia-eu-palmoil/indonesia-to-challenge-discriminative-eu-directive-on-palm-oil-idUKKCN1PP0VW>; and Sara Stefanini, *EU Set to Tighten Rules on Palm Oil for Biofuels*, CLIMATE CHANGE NEWS (Apr. 2, 2019), <https://www.climatechangenews.com/2019/02/04/eu-set-tighten-rules-palm-oil-biofuels/>

¹⁴²⁴ Lendle & Shaus, *supra* note 1421, at 8.

stock, and peatlands.¹⁴²⁵ The requirements may cause de facto discrimination directly at palm oil produced mainly in Indonesia and Malaysia because most palm oil production has to be grown in the tropical climate region. All types of the environment listed in the land-use requirements are more inclined to be exploited for plantations. As discussed earlier, palm oil concessions in peatlands and other biodiverse forests are common in Indonesia and Malaysia.¹⁴²⁶ Thus, palm oil biofuels from both countries may not be sustainable according to the directive. Hence, the measure under RED may violate National Treatment or Most-Favored Nation principle of GATT Article I or III.

2.2.2 Environmental justification

In case of WTO's rules violation, the EU's RED may be justifiable under the general exception Article XX (g) as measures relating to the conservation of exhaustible natural resources, provided that the measure is applied in a non-discrimination and non-arbitrary manner according to the *chapeau clause*. The RED aims to protect the forest, climate, and other natural resources and species which are exhaustible natural resources from the unsustainable production of palm oil.¹⁴²⁷ Therefore, the measure is "reasonably related"¹⁴²⁸ to the conservation of exhaustible natural resources.

¹⁴²⁵ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L2001&from=EN>

¹⁴²⁶ Varada S. Shevade & Tatiana V. Loboda, *Oil Palm Plantations in Peninsular Malaysia: Determinants and Constraints on Expansion*, PLOS ONE (Feb. 20, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0210628>; Rhett A. Butler, *Palm Oil is a Major Driver of Peatlands Destruction in Indonesian Borneo*, MONGABAY (Apr. 27, 2012), <https://news.mongabay.com/2012/04/palm-oil-is-a-major-driver-of-peatlands-destruction-in-indonesian-borneo/>; Mike Gaworecki, *Peatland Emissions From Oil Palm Conversion Highly Understated: Report*, MONGABAY (July 15, 2015), <https://news.mongabay.com/2015/07/peatland-emissions-from-oil-palm-conversion-highly-understated-report/>

¹⁴²⁷ Tropical rainforest and clean air are exhaustible natural resources. See Panel Report, United States – Standard for Reformulated and Conventional Gasoline, WT/DS2/R (adopted January 29, 1996), para 6. 36 and Causes of Rainforests Destruction, Rainforest Conservation Fund, <https://www.rainforestconservation.org/rainforest-primer/3-rainforests-in-peril-deforestation/d-causes-of-tropical-rainforest-destruction/>

¹⁴²⁸ The term was used in US-Shrimp. The AP concluded that the US import ban of shrimp was "reasonably related" to the turtle conservation. AB Report, US—Shrimp at para 142.

Considering the threshold set by the U.S.—Shrimp/Turtle ruling, there are two issues to be addressed in this case: the location of concern and the multilateral support for the environmental purpose. These two factors are relatively connected. The more inward-looking PPMs measure is, the less multilateral support it needs for justification.¹⁴²⁹

The territorial connection of environmental concern or extraterritoriality is significant, mainly because RED is an inward/outward-looking PPMs measure for climate protection but an outward-looking PPMs measure for biodiversity conservation. The outward-looking PPM measure is problematic because it can be accepted if there is sufficient nexus to the regulating state. However, it is still unclear when the nexus will be considered sufficient.¹⁴³⁰ The question is whether WTO allows justification of the non-product-related PPMs measure intended to protect the environment or natural resource located entirely outside the territory of the states enacting such measure. What is the extraterritorial reach of PPMs measure under the environmental justification of Article XX?

First, it is necessary to distinguish between the extraterritorial exercise of enforcement jurisdiction (enforcement of jurisdiction abroad) and the extraterritorial effect of PPMs measure enforced within the state's territory. For PPMs measure, it is the matter of extraterritorial effect but not the extraterritorial enforcement.

In the view of international law, extraterritoriality refers to the exercise of jurisdiction (prescriptive, enforcement and judicial) outside a state's territory or jurisdiction.¹⁴³¹ PPMs

¹⁴²⁹ See discussion on taxonomy of PPMs measure in part 1.2 and implication of WTO rulings in part 2.4.

¹⁴³⁰ COOREMAN, *supra* note 1315, at 80. In Tuna II case under TBT agreement, the AB accepts that the legitimate regulatory goal may include the protection of dolphin outside the territorial jurisdiction of the regulating state (outward-looking PPMs) —even though this does not mean that the jurisprudence of Article XX will follow the same path allowing the justification of outward-looking PPMs, it is a step forward towards such direction. Tratchman, *supra* note 1359, at 299.

¹⁴³¹ The degree of intrusion depends on the type of exercised jurisdiction. There are three types of state jurisdiction: prescriptive jurisdiction is the power of state to enact the law and regulations; enforcement of jurisdiction is the power of state to enforce the law; and judicial jurisdiction is the power of state to adjudicate the disputes. To exercise these state's jurisdictions, there are five following principles : (i) The subjective territory principle, the most common basis of state jurisdiction, allows states to exercise jurisdictions over persons and activities within their territories; (ii) The effects principle or objective territorial principle allows states to exercise jurisdictions over actions or activities occurring abroad that have substantial effects within their territories; (iii) The nationality principle allows states to exercise jurisdictions over their nationals wherever they are; (iv) The universal principle

measure targets foreign production processes to address environmental concerns located probably outside the territory of the regulating state. However, the measure will be activated only when exporting countries seek market access of regulating country; thus, the regulating country is not prescribing the foreign activity, but only conditioning market access upon the compliance with their standard.¹⁴³² The prescription and enforcement of the regulation occur within the territory of the importing state. The producers in exporting countries are still free to choose their export markets, but if they choose to export to the regulating state's market, they need to comply with the standard. This way, PPMs measures do not regulate the production practice abroad. Instead, they affect or incentivize such production.¹⁴³³ Therefore, PPMs measures are not exercised extraterritorially, but they have extraterritorial effects.

According to Bartels, it is necessary to determine whether a measure is defined by something located or occurring abroad because a mere impact on activities abroad by such measure is not enough as all trade and economic policy and regulation will have some impacts abroad.¹⁴³⁴ By very nature of any economic or trade measure imposed by importing country, it will have certain effects on the exporting countries such as product standard and safety. For Meng, the measure is extraterritorial if the effects abroad are substantial, foreseeable, and not reasonable.¹⁴³⁵ He distinguished between extraterritorial measures and legislation with extraterritorial links—PPMs measure falls within the second category. PPMs measure is an

allows exercise of states' jurisdiction over universally condemned activities such as genocide, slavery, piracy or torture; and (v) The protective principle allows states to exercise jurisdiction over any actions, even committed abroad, to protect vital national interests. BERNASCONI-OSTERWALDER ET AL., *supra* note 1291, at 236; Andrea Bianchi, *Comment on Harold G. Maier—Jurisdictional Rules in Customary International Law*, in EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 74, 78 (Karl M. Meesen ed., 1996); COOREMAN, *supra* note 1315, at 85. *See also* Frederik A.P. Mann, *The Doctrine of Jurisdiction in International Law*, 111 REC. COUR. HAIL 1, 17 (1964); CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2nd ed. 2015); Jason Coppel, *A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law*, 6 LJIL 73, 73 (1993); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 468 (8th ed. 2012); and Michael Akehurst, *Jurisdiction in International Law*, BR. YEARB. INT. LAW 158 (1972-1973).

¹⁴³² COOREMAN, *supra* note 1315, at 54.

¹⁴³³ ERICH VRANES, TRADE AND THE ENVIRONMENT : FUNDAMENTAL ISSUES IN INTERNATIONAL LAW, WTO LAW AND LEGAL THEORY 174 (2009).

¹⁴³⁴ Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction : The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353, 379 (2002).

¹⁴³⁵ WERNER MENG, EXTRATERRITORIAL JURISDICTION IN PUBLIC INTERNATIONAL LAW 742 (1994).

“economic self-determination of States, i.e., of their freedom to reconcile economic needs with other political aims.”¹⁴³⁶ Similarly, Scott distinguished between extraterritorial measures and measures giving rise to territorial extension.¹⁴³⁷ All three approaches “imply that real extraterritorial measures are more intrusive to the jurisdiction and sovereignty of other states than measures with an extraterritorial effect or territorial extension.”¹⁴³⁸

As discussed above, the PPMs measure, in the sense of public international law, is not extraterritorial measure because the exercise of jurisdiction is clearly within the territory of the regulating state—the measures are applied at the border once the exporting countries seek the market access. Nevertheless, the question remains whether WTO rule and jurisprudence follow the principle of state’s jurisdiction of international law. The concept of state’s jurisdiction under WTO jurisprudence may be more limited than the state’s permissive jurisdiction and extraterritorial framework of international law.

Under the unadopted report of the U.S.-Tuna/Dolphin case, it was perceived that GATT/WTO did not allow the state to exercise its jurisdiction when the effect of such exercise is beyond its territory—the state’s jurisdictional exercise has extraterritorial effect. The Panel considered that the trade measure taken by the U.S. constituted a quantitative restriction on imports and could not be justified for environmental exceptions under Article XX (b) or (g) because of its extraterritorial application.¹⁴³⁹

In other words, the Panel stated that Article XX (b) or (g) does not have extraterritorial application, so it can be invoked only to protect the environment or natural resources located within the state’s territory. The Panel further stated that if Article XX (b) or (g) permitted

¹⁴³⁶ *Id.* at 752.

¹⁴³⁷ Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 96 (2014).

¹⁴³⁸ COOREMAN, *supra* note 1315, at 89.

¹⁴³⁹ In US-Tuna/Dolphin case, U.S. under Marine Mammal Protection Act (MMPA) banned the importation of yellowfin tuna caught with purse seine nets that could cause incidental death of dolphins, unless the exporting countries proved that they had program-regulating dolphin kill rate comparable to that of the U.S. See United States-Restrictions on Imports of Tuna, panel report (DS21/R)

member states to take trade measure in order to protect the environment outside its jurisdiction, each member state could unilaterally determine the conservation policies of other member states and those other member states would be forced to comply with such unilateral trade measure; otherwise, they would lose trading rights guaranteed by GATT.¹⁴⁴⁰ The Panel was concerned about the equity and impingement of state sovereignty because the U.S.-Tuna/Dolphin case involved the non-product-related PPMs measures employed to affect the exporting country's regulations and practice. By adopting non-product-related PPMs measure, the importing state imposes its ethic, value, and culture preference on the other exporting states.

Charnovitz argued that if the dissent attacks non-product-related PPMs measure for being intrusive because it aims at changing production practice in exporting countries, the same logic will apply to product-related PPMs dealing with product safety rules or even simple product standard such as automobile or food safety requirements.¹⁴⁴¹ The PPMs measure by itself, whether product related or not, should not be equivalent to protectionism and prohibited under WTO—the key question is whether the regulating country has justifiable environmental ground and whether the application of PPMs is in accordance with the nondiscriminatory principle.¹⁴⁴²

Despite the Panel's effort to maintain the stability of the trading system and the state's sovereignty, the decision of U.S.—Tuna/Dolphin was misguided. The type of measure taken by the U.S. was not exercised extraterritorially, though its effects were beyond territory.¹⁴⁴³ According to international law, the concept of extraterritoriality refers to a law or measure imposing on people or activities in a foreign country. In this case, the U.S. did not impose or

¹⁴⁴⁰ *Id.* at para 5.27 and 5.32

¹⁴⁴¹ “Since such normal standard setting cannot possibly be prohibited by WTO rules, the initial premise that WTO rules prohibit standard-setting that seeks to change foreign manufacturing practice must be faulty.” Charnovitz, *supra* note 1290, at 73-74.

¹⁴⁴² *Id.* at 74.

¹⁴⁴³ BERNASCONI-OSTERWALDER ET AL., *supra* note 1291, at 241.

enforce measures outside its territory.¹⁴⁴⁴ The U.S. did not forbid the use of purse seine net in catching tuna in other countries but did not allow the importation of the products from such harvest into the U.S. By holding that the U.S. exercised extraterritorial jurisdiction because of its effect rather than the exercise of jurisdiction itself, the Panel went beyond the international law and invented more restrictive definition of extraterritoriality.

Later, the Panel's assertion that Article XX did not cover trade measures with extraterritorial effect is ruled out by Appellate Body's decision in the U.S.-Shrimp/Turtle case.¹⁴⁴⁵ The Appellate Body found that:

The conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one of the exceptions (a)—(j) of Article XX.¹⁴⁴⁶

Thus, the presumption that importing state's measure requiring exporting states to comply with or adopt certain policies renders a measure incapable of justification under Article XX is an error in legal interpretation.¹⁴⁴⁷

Nonetheless, in U.S.-Shrimp/Turtle case, the Appellate Body held that PPMs trade measures requiring exporting states to comply or adopt certain policies could be justified under Article XX upon the finding that there was “**sufficient nexus**”—the protected migratory turtle species at issue migrated through U.S. water.¹⁴⁴⁸ The situation in U.S.-Shrimp/Turtle case is both inward and outward-looking since the turtle swim in and out of the U.S. territory. This

¹⁴⁴⁴ Steve Charnovitz, *The Environment vs. Trade Rules : Defogging the Debate*, 23 ENVTL L. 475, 495-96(1993).

¹⁴⁴⁵ United States-Import Prohibition of Shrimp and Shrimp Products ,WT/DS58/AB/R, 1998. However, the first adopted GATT/WTO stating that PPMs could be justified under Article XX is the US—Gasoline case where Venezuela and Brazil complained against the US regulation requiring the reduction of pollution base line while giving domestic refiners an individual baseline. The AB concluded that the baseline rule fit in the term Article XX(g) but the application violates the Chapeau clause. the first adopted GATT/WTO stating that PPMs could be justified under XX. U.S.—Gasoline Para 3.12 and 6.3. *See also* Charnovitz, *supra* note 1290, at 94.

¹⁴⁴⁶ AB Report US—Shrimp, at 121.

¹⁴⁴⁷ *Id.*

¹⁴⁴⁸ *Id.* at para 133

reasoning could work with other migratory species such as in the U.S.-Tuna/Dolphin case because “Mexican” dolphins could travel in and out of U.S. water.

The same reasoning should apply to the RED measure aiming for climate protection. For climate protection purpose, it should constitute a “sufficient nexus” since part of the atmosphere that RED aims to protect is under the EU jurisdiction and the GHG emission caused by deforestation and peatlands conversion is a well-recognized global threat with multilateral supports, particularly the United Nations Framework Convention on Climate Change (UNFCCC) which led to the adoption of the Kyoto Protocol and the Paris Agreement with the objective to reduce the GHG emission.¹⁴⁴⁹ Indonesia and Malaysia are the parties to the Paris Agreement, but they do not have actual commitments towards reducing GHG emissions as they are listed as developing countries in the Non-Annex I list.¹⁴⁵⁰

In contrast, for biodiversity conservation and destruction of animal habitats, the species and its habitats to be protected by RED such as orangutans¹⁴⁵¹ are located completely outside the territorial jurisdiction of the EU. In this case, there is no territorial nexus between the regulating state and the environmental concern. For justifying the unilateral PPMs measure, it requires a substantial degree of supports from MEAs authorizing the use of trade measures to non-parties, a binding international customary law, or treaty obligations between relevant parties.

¹⁴⁴⁹ Article 4 of UNFCCC stated “ the Parties shall, in accordance with Article 10, take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change. This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.” <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> and https://unfccc.int/sites/default/files/english_paris_agreement.pdf

¹⁴⁵⁰ UNFCCC Non-Annex I https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf ; Parties and Observers, <https://unfccc.int/parties-observers> and Parties to UNFCCC, <https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states>

¹⁴⁵¹ Chris Packham, *Palm Oil Producers are Wiping Out Orangutans – Despite Multinationals’ Promises*, THE GUARDIAN (May 10, 2018), <https://www.theguardian.com/commentisfree/2018/may/10/palm-oil-orangutans-multinationals-promises-deforestation> and IUCN, *Palm oil and Biodiversity*, ICUN Issue Brief (June 2018) <https://www.iucn.org/resources/issues-briefs/palm-oil-and-biodiversity>

It can be argued that conservation of biodiversity is the common concern of humankind, but this principle is not yet accepted as customary international law. In this case, all potential disputed states (the EU, Malaysia, and Indonesia) are the parties of the Convention on Biological Diversity (CBC),¹⁴⁵² the most relevant MEA concerning the conservation of animal species and their habitats. The CBC objective is to conserve biological diversity and ensure the sustainable use of its components.¹⁴⁵³ Among other obligations, as the parties to CBC, the states shall “promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.”¹⁴⁵⁴

In sum, both environmental purposes of climate protection and biodiversity conservation have international supports from MEAs and treaties obligations. For climate protection purpose, there should be a sufficient nexus; thus, RED is arguably justifiable under the environmental grounds of GATT general exception Article XX, provided that the measure is applied in the manner according to the *chapeau clause*. There is no territorial nexus for biodiversity conservation, but there are treaty obligations under CBC; thus, the RED should be justifiable, provided that the concerned parties are those parties to CBC.

2.3 The ban on microplastic and single-use plastic products: The Necessity test

The subpart reveals two EU directives on plastic products and their compatibility with WTO’s rules. The regulation banning microplastic as ingredients may be compatible with WTO TBT agreement, but the regulation banning single-use plastic products may constitute a quantitative restriction and violate Article XI. The environmental justification can be made on the ground of necessity under Article XX (b) and conservation of exhaustible natural resources under Article XX (g).

¹⁴⁵² The Convention on Biological Diversity <https://www.cbd.int/convention/text/>

¹⁴⁵³ Article 1 of CBC

¹⁴⁵⁴ Article 8 (d) of CBC In-situ Conservation

2.3.1 Potential conflict and violation

There are two kinds of EU regulations concerning plastic production and importation: **a ban on microplastics in cosmetic products and a ban on single-use plastic.** The EU's ban on plastics is a product-related PPM that is different from the non-product-related PPM discussed earlier in IUU and the phase-out of palm oil under RED. Plastic as a product itself is a subject of trade ban and a cause of a marine pollution problem.¹⁴⁵⁵

For the ban on certain microplastics as ingredients of specific products, it is likely to qualify as technical regulation within the scope of the Technical Barrier to Trade Agreement (TBT Agreement). In contrast, the total ban of single-use plastic can violate quantitative restriction Article XI of GATT but justifiable on environmental grounds under general exception Article XX (b) and (g).

In January 2018, EC requested European Chemical Agency (ECHA) to prepare documents for initiating a restriction procedure on microplastic in cosmetic products—the EU restriction under the Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).¹⁴⁵⁶ Directive 2015/1535 “requires member states to notify any draft technical regulation in order to assess the effects of such regulation on the market.”¹⁴⁵⁷ France is the first EU member state to implement a restriction on the use of microplastics in cosmetic products and rinse-off personal care products such as cleanser and exfoliator.¹⁴⁵⁸

The measure restricting microplastic ingredients would probably qualify as a technical measure under the TBT Agreement. There is no de jure or de facto discrimination, either

¹⁴⁵⁵ Similar to the EC-Asbestos case.

¹⁴⁵⁶ The EU restriction under the Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), <https://echa.europa.eu/regulations/reach/understanding-reach>

¹⁴⁵⁷ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (2015) OJ L241/1 Art.5 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L1535&from=EN>

¹⁴⁵⁸ Loi n°2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages, TA n° 803 <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033016237&categorieLien=id>

between the import products or between domestic and imported products.¹⁴⁵⁹ According to TBT Preamble, the Agreement seeks to ensure that technical regulations do not create unnecessary obstacles to international trade.¹⁴⁶⁰ Technical regulation refers to an identifiable product, description of products characterizations, and demanding mandatory compliance.¹⁴⁶¹ Each country can regulate the characteristic of the products, such as the size of microplastic, the amount of microplastic, or the function of rinse-off products. At the same time, they can also take measures for protection of human, animal or plant life and health.¹⁴⁶² So the objective is to “strike the balance between, on one hand, the objective of trade liberalization and, on the other hand, Members’ right to regulate.”¹⁴⁶³ The main obligations under TBT are non-discrimination,¹⁴⁶⁴ no unnecessary obstacle to trade (not more trade-restrictive than necessary test),¹⁴⁶⁵ and grounding technical regulations on international standard.¹⁴⁶⁶

According to the competition-based approach used by WTO DSB, between two cosmetic products—one contains microplastic and another does not contain microplastic—will

¹⁴⁵⁹ Esther Kentin & Heidi Kaarto, *An EU Ban on Microplastics in Cosmetic Products and the Right to Regulate*, 28 RECIEL 254, 266 (2018).

¹⁴⁶⁰ Preamble of the Agreement on Technical Barriers to Trade, https://www.wto.org/english/docs_e/legal_e/tokyo_tbt_e.pdf

¹⁴⁶¹ EC—Asbestos para 70.

¹⁴⁶² “Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.” Preamble of the Agreement on Technical Barriers to Trade. Available at https://www.wto.org/english/docs_e/legal_e/tokyo_tbt_e.pdf

¹⁴⁶³ WTO AB, United States—Measures Affecting the Production and Sale of Clove Cigarettes (4 April 2012) WT/DS406/AB/R, para 174.

¹⁴⁶⁴ National Treatment and Most-Favored Nation are included in Article 2(1) of TBT “Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. Furthermore, products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards. They shall likewise ensure that neither technical regulations.”

¹⁴⁶⁵ TBT Article 2 (2) “Where technical regulations or standards are required and relevant international standards exist or their completion is imminent, Parties shall use them, or the relevant parts of them, as a basis for the technical regulations or standards except where, as duly explained upon request, such international standards or relevant parts are inappropriate for the Parties concerned, for inter alia such reasons as national security requirements; the prevention of deceptive practices; protection for human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological problems.”

¹⁴⁶⁶ TBT Article 2(4) and BOSSCHE & ZDOUC, *supra* note 1337, at 899.

likely be considered as like products because the general customers do not tend to distinguish those two products unlike. The ban on microplastic in certain products should not constitute de jure or de facto discrimination to favor domestic like products or between foreign like products if the measure “is designed and applied in an even-handed manner,”¹⁴⁶⁷ Kogan observed that “the approach of EC such as early notification, extensive consultation, revision, and negotiations to the adoption of REACH could explain the absence of challenges by non-EU WTO members.”¹⁴⁶⁸ Furthermore, the measure is probably not more trade-restrictive than necessary to protect human, animal, or plant life or health of the environment since there are no other ways to render the same effective result.¹⁴⁶⁹ For the International obligation and standard, France cited the Marine Strategy Framework Directive and Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) as microplastic is a threat to the aquatic environment.¹⁴⁷⁰ Marine pollution caused by plastic is a recent transboundary problem in the spotlight. There are rising international efforts to address the problem.

In March 2019, the EU Parliament approved a law banning many single-use plastic items such as bags, straws, cotton buds, and cutlery by 2021.¹⁴⁷¹ The regulation aims to reduce marine plastic litter as it poses “severe risk to marine ecosystems, biodiversity, and human health and damage activities such as tourism, fisheries, and shipping.”¹⁴⁷² According to the Directive (EU) 2019/904, the EU member states have to take measures to achieve a quantitative reduction and prohibit the placing on the market of the listed single-use plastic products. This

¹⁴⁶⁷ BOSSCHE & ZDOUC, *supra* note 1337, at 908; US – Clove Cigarettes para 182; and WTO AB, United States – Certain Country of Origin Labelling (COOL) Requirements (29 June 2012) WT/DS384/AB/R and WT/DS386/AB/R para 340.

¹⁴⁶⁸ LA Kogan, REACH and International Trade Law, in L. Bergkamp (ed.), *The European Union REACH Regulation for Chemicals : Law and Practice* (Oxford : Oxford University Press, 2013), 314

¹⁴⁶⁹ “Shall not be more trade restrictive than necessary to fulfill legitimate objective taking account of risks non-fulfillment would create.” TBT Article 2(2)

¹⁴⁷⁰ European Commission, Note for the Attention of Mr. G. Dancet, Executive Director, ECHA, Ref. Ares (2017) 5463573 (9 November 2017)

¹⁴⁷¹ Single-Use Plastics Ban Approved by European Parliament, BBC (Oct. 24, 2018), <https://www.bbc.com/news/world-europe-45965605>

¹⁴⁷² Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0904>

could mean quantitative restriction or a total ban on the importation of such single-use plastic products. These measures may violate the principle of quantitative restriction under Article XI.

2.3.2 Environmental justification

The EU's measure restricting or banning the importation of single-use plastic should be justifiable under the general exception Article XX on environmental grounds (b) and (g) as it is necessary to protect human and animal life, and it relates to the conservation of the marine animals and environment according to evidenced scientific research.¹⁴⁷³

Under Article XX (b), the trade measure must be **necessary** to protect human, animal, or plant life or health. What is “necessary”? In what circumstances will trade measure be considered as necessary?

Initially, GATT panel considered the term “necessary” to mean that trade measure could be justified only if it was an inevitable resort and the least trade-restrictive approach, and there were no other alternative GATT consistent measures available.¹⁴⁷⁴ Later, the WTO Appellate Body in the Korea—Beef case¹⁴⁷⁵ expanded the scope of necessary by stating that the necessary trade measure, according to Article XX, should be close to but need not be an “absolute necessary or inevitable” measure. The Panel defined the term “necessary” as:

The term necessary, in our view, refers to a range of degrees of necessity. At one end of this continuum lies “necessary” understood as “indispensable”; at the other end, is “necessary” taken to mean as “making a contribution to.” We consider that a “necessary” measure is, in this, continuum located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making contribution to.”¹⁴⁷⁶

¹⁴⁷³ See impacts of plastic and microplastic to human, animal and marine ecosystem in chapter III part 3.

¹⁴⁷⁴ BERNASCONI-OSTERWALDER ET AL., *supra* note 1291, at 149.

¹⁴⁷⁵ Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef (brought by US/Australia), Appellate Body Report (WT/DS161/AB/R and WT/DS169/AB/R) adopted 10 January 2001

¹⁴⁷⁶ *Id.* at para 161

Furthermore, the Appellate Body suggested three prominent factors to determine whether the trade measure is necessary or not. The first consideration is to which extent the trade-related measure contributes to the fulfillment or securing of compliance with the law or regulation.¹⁴⁷⁷ For example, the trade measure makes a great contribution to the compliance of environmental regulation—people comply with environmental regulation mainly because of the trade measure. The second consideration is the importance of the common interests or values protected by the regulation.¹⁴⁷⁸ The importance of the interest protected by regulations employing trade-restricted measures should outweigh the importance of free trade. The third consideration is to which extent the trade measure at issue restricts international trade.¹⁴⁷⁹

In brief, the trade measure tends to be considered as necessary when: **the measure has a significant contribution to the regulation compliance; the interest protected by such regulation prevails over the benefit of free trade; and the restrictive effect of the measure is slight and limited.**

In the EC—Asbestos case, the Appellate Body reaffirms the three criteria used to determine the necessity of trade measures and upheld a member state’s justification under Article XX (b).¹⁴⁸⁰ In EC-Asbestos, Canada claimed that the French ban on the manufacturing, sale, and importation of asbestos to protect **human health from the carcinogenicity of asbestos’** fibers violated “National Treatment” of GATT principle. Canada argued that France could have adopted a less trade-restrictive alternative measure such as control of asbestos use rather than an absolute ban.¹⁴⁸¹

Despite Canada’s argument, the Appellate Body confirmed that the measure was justified under Article XX (b), and member states had the right to determine their own levels

¹⁴⁷⁷ *Id.* at para 163

¹⁴⁷⁸ *Id.* at para 164

¹⁴⁷⁹ *Id.* at para 163

¹⁴⁸⁰ BERNASCONI-OSTERWALDER ET AL., *supra* note 1291, at 150.

¹⁴⁸¹ European Communities-Measures Affecting Asbestos and Products Containing Asbestos (brought by Canada), Appellate Body Report (WT/DS135/AB/R), adopted on 5 April 2001

of health protection.¹⁴⁸² The Appellate Body considered that there is no alternative measure to achieve the same end, which is less restrictive of trade than a prohibition.¹⁴⁸³ The proposed alternative from Canada would not achieve the same end—would not achieve the same level of health protection.¹⁴⁸⁴ By balancing and weighing important factors, the Appellate Body found that the ban on asbestos allowed France to stop the deathly health risk causing by asbestos.¹⁴⁸⁵ Only the control of asbestos use would not be enough for health protection, and the preservation of human life was the absolute importance.¹⁴⁸⁶

The EC-Asbestos case can serve as a comparative analysis for this case. Similar to the EC-Asbestos case, the ban on single-use plastic products is an origin-neutral, product-related, and inward-looking PPM measure unilaterally applied to protect animals and human within the territory.¹⁴⁸⁷ Considering the three thresholds of necessity and the EC—Asbestos ruling, the ban on single-use plastic products should be considered as necessary under Article XX (b). First, a trade ban or restriction on single-use plastic products contributes to the compliance of regulation that seeks to eliminate severe risks concerning marine animals' death and human health risks caused by plastic litter in the ocean.¹⁴⁸⁸ Second, the interest protected by such regulation—animal lives and human health—should prevail over the benefit of free trade. Third, there is no alternative measure that would achieve the same end result, which is less trade-restrictive than banning plastic products from the market.

Arguably, alternative measures can be taken to eliminate the problem of plastic litter in the marine environment, such as more effective waste management and recycling system.

¹⁴⁸² *Id.* at para 168

¹⁴⁸³ *Id.* at 172. In this case, the AB incorporated the new hurdle into XX(b)—the least trade restrictive test. See Charnovitz, 'The Law of Environmental "PPMs" in the WTO', 100.

¹⁴⁸⁴ EC—Asbestos at 173-174.

¹⁴⁸⁵ *Id.* at para 172

¹⁴⁸⁶ *Id.* at para 172

¹⁴⁸⁷ Arguably, it can be inward/outward looking measure since some marine animals can navigate outside EU's territory and plastic debris contamination is a transboundary problem. The ban on importation of plastic products may also impact the production of plastic products in the exporting countries.

¹⁴⁸⁸ See chapter III section 3.3 for the severe effects of plastic and microplastic on marine biodiversity and health risks for human.

Nonetheless, it is the internal matters of a state to determine the level of health protection and take measures necessary to address the issue. Eliminating waste sources by banning the sale of plastic products is one of the methods for waste management. The best waste management method is not to produce waste from the beginning. Moreover, with the current technological capacity, many single-use plastic products cannot be recycled. Even with good management, it is still possible to have plastic litter leakage from inland sources into the ocean, particularly the microplastic from the breakdown of single-use plastic products, the cleaning of synthetic clothing, or the production of plastic products.¹⁴⁸⁹ The current situation of plastic marine pollution is critical, affecting the global marine ecosystem and human food security; thus, it needs a prompt approach and cannot wait for technological innovation or better recycling capacity.

Therefore, the ban on single-use plastic products allows the EU to instantly decrease the substantial risks of marine animal death and potential health risk on humans. The less trade-restrictive method may not render the same efficiency. The subpart argues that the measure should be justifiable as a measure necessary for protecting human and animal life or health under Article XX (b).

Furthermore, the measure should also be justifiable under Article (g) because it relates to the conservation of marine animals and the environment. The term “relating to” in (g) is more flexible than “necessary” in (b), which requires a higher threshold of the necessity test.¹⁴⁹⁰ The objective of reducing marine litter and conserving exhaustible natural resources—marine animals and ecosystem—is well supported by multilateral instruments and the international community. UN Sustainable Development Goal 14 calls for reducing marine litter to conserve and sustainably use the oceans, seas, and marine resources for sustainable development. Other international agreements requiring the states to take measure reducing marine litters include the

¹⁴⁸⁹ See chapter III section 3.1 and 3.2 for the discussion on plastic pollution and its root cause.

¹⁴⁹⁰ See discussion in EC-Asbestos case

United Nations on the Law of the Sea (UNCLOS), Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention), the International Convention for the Prevention of Pollution from Ships (MARPOL), and Basel Convention on the control of transboundary movements of hazardous wastes and their disposal. Therefore, this inward-looking and origin-neutral measure with solid multilateral support should be justifiable under Article XX (g).

2.4 The implication of WTO' ruling on the legality of PPM-based trade measures

Apart from satisfying specific requirements in environmental exceptions, there are three benchmarks in determining the legality of unilateral trade-environment policy and measure: the origin neutrality of the measure, the extraterritoriality of the targeted environmental concern, and the level of multilateral support for the use of trade measure and environmental concern.

According to WTO rules and jurisprudence, all trade-related measures, whether purely product-related PPM or non-product-related PPM and whether aiming for domestic or foreign environmental concerns, have to be regulated in an origin-neutral manner. A country-origin measure will not pass the scrutiny of WTO DSB.

The domestic environmental policy, intended to control internal environmental conditions, usually is compatible with GATT/WTO rules because it does not apply extraterritorially, such as pollution control regulations, tax on gasoline at the retail level, standard on products, or emission trading regulation. For example, a tax on automobiles based on fuel consumption is compatible with GATT/WTO rules as long as it is applied in an origin-

neutral manner.¹⁴⁹¹ The country taxes automobiles differently based on fuel consumption and not based on countries where the automobile are produced.¹⁴⁹²

The country-origin-base PPM is, for example, the U.S. regulates an importation ban on shrimp from Thailand due to the presumption that Thai law does not require fishers to have turtle detectors. This unilateral imposition of country-based PPM could be incompatible with GATT/WTO rules because it could violate the *chapeau clause* of Article XX and would be considered arbitrary application even though it relates to preserving exhaustible natural resources. On the other hand, if the regulation only states that it bans the importation of shrimps when such shrimps are caught without turtle protection measures resulting in the accidental death of sea turtles, it could be compatible with GATT/WTO rules and justified under Article XX.¹⁴⁹³

However, PPMs measure is subject to debate due to its extraterritorial effect and unilateral application. Though being applied within the territory of the countries, the trade policy aims to influence the environmental policy of foreign countries.¹⁴⁹⁴ This trade-related environmental policy is controversial because it is a unilateral action of an importing country trying to impose its own environmental standard, cultural value, and objective on other countries. It is the issue of equity and protectionism. GATT/WTO Dispute Settlement Body

¹⁴⁹¹ As domestic tax on products based on its characteristics with neutral-origin manner can be compatible with GATT/WTO rules, the importing countries with stringent environmental policy may also use tax regulation to eliminate the competitive advantage of the products from the exporting countries with less stringent environmental policy that do not internalize negative environmental externalities into the price of the products. As the above example of automobile, the importing countries with the environmental policy aiming to preserve energy and reduce emission by producing energy-saving car must employ more advance and cleaner technology. As a result, the domestic energy-saving car may be more expensive than non-energy-saving car exporting from other countries. Steve Charnovitz, *Trade and Climate Change: Potential conflict and Synergies*, BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE, 12 (2003).

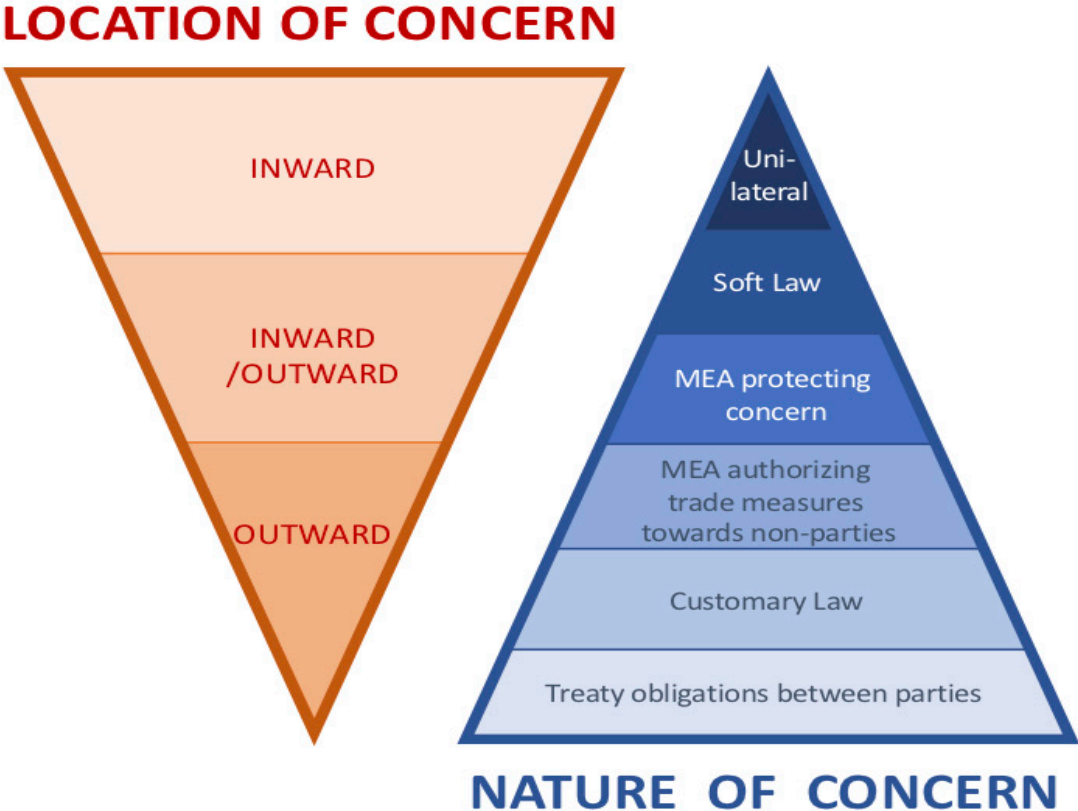
¹⁴⁹² According to Automobile Taxes case in 1994, a GATT panel held that energy efficient cars are not “like” heavy-gas-drinking cars so taxing those products differently do not violate the non-discrimination principle of GATT. *United States-Taxes on Automobiles*, panel report (DS31/R) circulated 11 October 1994 (Not Adopted).

¹⁴⁹³ See the discussion in U.S.—Shrimp/Turtle case

¹⁴⁹⁴ For instance, the tax or standard regulations on imports based on production and process method of the products (PPMs) not on the characteristics of the product itself may trigger the disputes because they affect the environmental policies of exporting countries even though they have been applied within importing countries. See the discussion in the U.S-Tuna/Dolphin and U.S.-Shrimp/Turtle cases.

puts more emphasis on trade-related environmental measures such as PPMs because they can be used as a disguised international trade restriction, either to protect domestic products or other political incentives.

For assessing the acceptability of PPMs, the WTO jurisprudence considers the location of environmental concerns addressed by PPMs and the nature of concerns on an international scale.¹⁴⁹⁵ Coorman suggests using the extraterritorial decision tree:¹⁴⁹⁶



The significant distinction is between inward-looking and outward-looking measures—the PPMs addressing activities and environmental concerns within the territory or outside the territory of the regulating state. The more PPM measure is inward-looking, the better opportunity regulating state has to establish a “sufficient nexus” for environmental justification. According to the effect jurisdiction principle, the outward-looking concern could still be an

¹⁴⁹⁵ COOREMAN, *supra* note 1315, at 132.
¹⁴⁹⁶ *Id.* at 131.

acceptable justification if the regulating state is substantially affected by the environmental impact from production and process activities abroad. Without environmental effects on the territory, it is unlikely that the purely outward-looking concerns will not pass the extraterritoriality threshold and cannot be justified under Article XX.¹⁴⁹⁷

Furthermore, it is necessary to determine whether the PPMs measure aims to protect the mutually shared environmental concern among international communities or merely a unilateral interest. According to Article 3.2 of DSU, WTO agreements should be interpreted in accordance with “customary rules of interpretation of public international law.”¹⁴⁹⁸ WTO agreement cannot be viewed in isolation from other international law.¹⁴⁹⁹ Article XX is to be read in the light of “contemporary concerns of the community of nations about the protection and conservation of the environment.”¹⁵⁰⁰ Therefore, if the environmental concerns are supported by international laws (treaty, customary international law, and MEAs), it constitutes an international recognition and helps to prove the necessity, non-discriminatory and protectionist intent of PPMs.¹⁵⁰¹ The more PPMs measure is required or authorized by different types of international law, the more opportunity it has to be compatible with WTO rules.

¹⁴⁹⁷ *Id.*

¹⁴⁹⁸ According to Vienna Convention on the Law of Treaties, if the treaties deal with the same subject matter, the later prevail between the parties of both treaties. When there is a conflict between two treaties, and one party is not a party to both treaties, the treaty that both parties have ratified prevail. 30 (4) and 30(2): Where the treaty specifies that it is not to be considered as incompatible with an earlier or later treaty, the provisions of the other treaty prevail. The earlier treaty would apply only to the extent that its provisions are compatible with the later treaty. The VCLT test has limited application to WTO and MEAs conflicts since both are complex and long-standing regimes with different objectives and substances. Many MEAs such as Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Montreal Protocol and Basel Convention were negotiated and established before the existence of WTO. Thus, it is argued that MEAs are “lex specialis” special system existing outside WTO: “the later law, general in character, does not repeal an earlier law which is special in character.” No conflict would arise since MEAs would override the general international trade obligation under WTO. The principle of lex-specialis does not appear in VLCT but has been recognized as a principle of treaty interpretation by the Permanent International Court of Justice in *Upper Silesia Minorities*, 1928 PCIJ Ser A, No.15 (1928). Vice Yu, *Discussion Paper on World Trade Organization and Multilateral Environmental Agreements*, UNVERÖFFENTLICHTES DISKUSSIONSPAPIER, GENF, unpublished paper, Geneva, Mar. 2002, 7; and Vienna Convention on the Law of Treaties.

¹⁴⁹⁹ Reformulate Gasoline case para 18.

¹⁵⁰⁰ US—Shrimp/Turtle case

¹⁵⁰¹ MEAs serve as harmonization tools for addressing environmental threats. Trade measures taken under MEAs are the results of multilateral cooperation to address global environmental concerns—the environmental concerns have been crystallized and shared among countries; thus, this reduces the disguised trade barrier or protectionism which is tend to arise when trade measure is taken unilaterally by one country. Members of MEAs have agreed

First, if the use of PPMs measure is required as an obligation by the treaty between the parties such as MEAs¹⁵⁰² or Free Trade Agreement containing social and environmental clause,¹⁵⁰³ such treaty can be used to determine **the necessity of measure**.¹⁵⁰⁴¹⁵⁰⁵ For instance, the restriction of trade on the ozone-depletion substances (ODS) according to the Montreal Protocol or on endangered species according to CITES may be justified under Article XX (g) or (b). The ozone layer or endangered species can be regarded as **exhaustible natural resources** in the meaning of Article XX (g). Furthermore, trade restrictions aiming to protect ozone layers and endangered species may be justified as **necessary** measures under Article XX (b) since the depletion of ozone layers and animal species adversely affects human, animal and plant's life and health. MEAs are the result of multilateral efforts. The obligations required by

upon using trade measures to address compelling global or transboundary environmental threats because they consider it as necessary and effective. *See e.g.*, Donald Goldberge et al., *The Use of Trade Measure in Select Multilateral Agreements*, UNEP, 17-23 (1995).

¹⁵⁰² Many multilateral environmental agreements (MEAs) incorporate trade measures as their enforcing mechanism, either to sanction those members who violate the agreements or to encourage non-members to join the agreements. Three successful MEAs relying on trade measures to achieve the environmental protection goals are the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention). For instance, the Montreal Protocol, with the aim to eliminate ozone-depleting substances (ODSs) such as Chlorofluorocarbons (CFCs) and Halons—the substances that destroy the ozone layer in the stratosphere shielding out ultraviolet radiation prohibits the imports and exports of ODSs between members and non-members. In Article IV of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the party has a right to ban import products of certain hazardous waste to its territory. CITES also becomes more on the topic because it incorporates more economically important sectors such as timber and fisheries. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, <http://www.cites.org/eng/disc/text.php#IV>; Duncan Brack, *Environmental Treaties and Trade*, in TRADE, ENVIRONMENT AND THE MILLENNIUM 321, 335 (Gary P. Sampson & W. Bradnee Chambers eds., 2nd ed. 2001); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), <https://www.basel.int/portals/4/basel%20convention/docs/text/baselconventiontext-e.pdf> ; The Montreal Protocol on Substances that Deplete the Ozone Layer Art. 4, 22 March 1985; and Daniel L. Goldberg et al., *Effectiveness of Trade and Positive Measures in Multilateral Environmental Agreements: Lessons from Montreal Protocol*, CIEL, Washington (1998).

¹⁵⁰³ EU-South Korea FTA Article 1.1 (g) and Article 13(6)

¹⁵⁰⁴ For treaty obligation, DSB cannot make decision on the violation of other agreements because every decisions must be based on WTO rules; however, such treaty can be used to determine the necessity of trade measure concerning PPMs. Article 30 VCLT also state that if there is conflict between GATT/WTO rules and other treaty, the latter treaty will prevail. *See* Article 30 and 31 VCLT; AB Report Mexico — Soft Drinks 2006, para 56; and WTO, EC — Measures Affecting Importation of Certain Poultry Products AB Report 1998, WT/DS69/AB/R.

¹⁵⁰⁵ For the choice of dispute settlement forum to settle trade-environment conflict. The CTE stance is that if both conflicting parties are parties to MEA, they should resort dispute settlement using mechanism under MEAs first and WTO will involve in case no resolution can be settled. But unlike WTO DSB, MEAs only have soft dispute settlement mechanism. CTE Report, WT/CTE 1, 1999 para 178 and see the discussion on the choice of dispute settlement forums in Watson, *supra* at 1263, at 132-152.

the MEAs prove the “necessity” of the PPMs measures under Article XX(b), the “relation to the conservation of exhaustible natural resources” under article XX (g), and the non-discriminatory intent to pass the *chapeau* test.

Second, environmental norms that have become customary international law can be solid justifications; however, there are very few environmental norms with consistent and uniform state practice believing that such practice is required by law (*opinio juris*).¹⁵⁰⁶ Even if the rule is considered customary international law, it is binding to all states, except for persistent objector states who have expressly demonstrated that they always have different practices.¹⁵⁰⁷ The common concern of humankind or the global common is not yet regarded as customary law since there is no constant practice and *opinio juris* on the matter.¹⁵⁰⁸

Third, if the regulating state applies PPMs trade measure authorized by MEAs towards the non-party state, regulating states cannot claim the treaty obligation. However, the MEAs can support analysis determining the common concern of the international community. If the environmental treaty has substantial membership, including a large number of WTO members, it is at the advantage of the regulating state because the concern to be protected receive comprehensive international support.¹⁵⁰⁹ If the MEA has limited membership, it will be more complicated to make the case.

Fourth, suppose trade measures are employed to protect environmental concern supported by the MEA, but the MEA does not require the use of trade measures, which is the

¹⁵⁰⁶ MALCOM N. SHAW, *INTERNATIONAL LAW* 72 (6th ed. 2008).

¹⁵⁰⁷ See e.g., Jonathan Charney, *The Persistent Objector Rule and the Development of Customary Law*, 58 BR. YEARB. INT. LAW 1 (1985); and Joel P. Tratchman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT'L L 221 (2010).

¹⁵⁰⁸ COOREMAN, *supra* note 1315, at 144.

¹⁵⁰⁹ For instance, the BASEL Convention requires the parties to prohibit the import of hazardous waste from non-parties. CITES does not permit trade of threatened species with non-parties unless there is a documentation equivalent to CITES permits. Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 95, 124 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); BASEL Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, Article 4.5; and Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243, 1973.

majority of MEAs.¹⁵¹⁰ In this case, the environmental objective is evident, but the discussion will be on the measure's design and application and the degree of international support considering the MEA's membership.¹⁵¹¹

Fifth, if PPMs measure is taken to protect environmental concern addressed in non-binding or soft law instruments such as UN Declarations, the question is whether such non-binding norms are widely recognized and accepted in the international community. If the international support is limited, the regulating state has to demonstrate that it receives detrimental environmental effects to justify the PPMs measure.

Last, the environmental concerns that have not yet received international recognition in the form of international law (hard or soft) require the highest scrutiny of justification for unilateral use of PPMs measure.¹⁵¹² The regulating state should demonstrate an element of bilateral or multilateral efforts to negotiate and address such environmental concerns with the disputed parties before applying the PPMs measure.¹⁵¹³ However, if such negotiation is not successful, the reasons for failure should be considered: whether there is disagreement on the environmental concern regarding its harmful effect and causes or the method of protection as Nolkaemper stated that “the preference for multilateralism does not affect the legality of unilateralism when agreements are only hypothetically available.”¹⁵¹⁴ The preference for multilateral action was reiterated in WTO rulings, but the conclusion of international agreement cannot by itself be a requirement for justification under Article XX.¹⁵¹⁵

¹⁵¹⁰ For instance the Kyoto Protocol, the agreement aims to protect global environmental problem without imposing binding commitments. Eric Neumayer, *WTO Rules and Multilateral Environmental Agreements*, in THE EARTHSCAN ON INTERNATIONAL TRADE AND SUSTAINABLE DEVELOPMENT 137, 141 (Kevin P. Gallagher & Jacob Werksman eds., 2002).

¹⁵¹¹ COOREMAN, *supra* note 1315, at 146.

¹⁵¹² *Id.* at 148.

¹⁵¹³ See the discussion on US — Shrimp/Turtle case

¹⁵¹⁴ Andre Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws : An Analysis of EC Ban on Furs from Animals Taken by Leghold Traps*, 8 J. ENVTL. L. 237, 251 (1996).

¹⁵¹⁵ WTO AB Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia WT/DS58/AB/RW (2001), para.124.

In conclusion, there are three significant thresholds for PPMs measure to pass environmental justifications under WTO rules: the neutrality of the measure, the location of concern, and the level of international recognition. The more outward-looking PPMs measure is (less territorial connection), the stronger level of environmental effects within the territory and the international recognition it needs to be justifiable. In a case where the international supports cannot be established for environmental concerns, a unilateral measure is likely to be justifiable if it is an inward-looking measure aiming to address environmental concern within the territory.

CONCLUSION

In the absence of an efficient multilateral environmental forum, unilateral imposition of PPMs can incentivize the trading community to adopt a higher environmental standard of production and lead to global benefits.¹⁵¹⁶ Especially for the global commons where we suffer from free-rider problems, trade measures can be an effective tool to induce states to comply with environmental norms.¹⁵¹⁷ When well designed, PPMs measure can correct market failure and enhance global economic efficiency.¹⁵¹⁸ The current WTO regime provides sufficient regulatory space for member states to employ PPMs measures to address their environmental concerns outside the territory of the regulating state when these concerns cause environmental effects in the regulating state and where multilateral efforts support unilateral action.¹⁵¹⁹

However, only developed states with large markets can take advantage of PPMs because the size of markets enhances the incentives to embrace PPMs.¹⁵²⁰ The market power is an

¹⁵¹⁶ The environmental management regime without trade leverage has proved to be less successful such as climate regimes. Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons : What We Can Learn From the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV.1, 104 (1999).

¹⁵¹⁷ *Id.* at 107.

¹⁵¹⁸ Charnovitz, *supra* note 1290, at 74.

¹⁵¹⁹ COOREMAN, *supra* note 1315, at 174.

¹⁵²⁰ Gaines, *supra* note 1290, at 427.

inevitable reality; nevertheless, the international support for multilateral solutions regarding the environmental concerns to be protected is a contributing factor to strengthen a rule-based approach for trade measures.¹⁵²¹ On the other hand, it is undeniable that powerful states have both capacity and responsibility to address global environmental concerns and lead the way for other developing states.¹⁵²² For instance, for climate justice, Carney identifies two types of responsibilities: the responsibility of the state to do its duty and the responsibility to induce other states who fail to comply with the rules to be back on track.¹⁵²³ Using trade leverage and market access as means to induce other states for the environmental purpose has to go together with the obligation to ensure that the imposed standard provides sufficient elements such as technical or financial assistance to aid producers who are not capable of complying with a higher standard.¹⁵²⁴ Therefore, the use of PPMs measure should be attached with the non-protectionist requirement, the transfer of know-how on green technologies, and financial assistance.¹⁵²⁵ The legality of PPMs is a stepping stone for creating stronger coherence between environmental protection and economic development through trade; nonetheless, WTO should set a clear scope of PPMs trade measures to create greater transparency, equity, and predictability.¹⁵²⁶

¹⁵²¹ Jonnathan Skinner, *A Green Road to Development : Environmental Regulations and Developing Countries in the WTO*, 20 DUKE ENVTL. L. & POL'Y F. 245, 265 (2010).

¹⁵²² For instance, EU as a large trading bloc has a strong footing to be a PPM regulator and its trading partners are likely to adopt its standards in order to access the EU market. See Anu Bradford, *The Brussels Effect*, 107 NW UL REV. 1, 50 (2012); and Sophie Meunier & Kalypso Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 J. EUR. PUBLIC POLICY 906, 907 (2006).

¹⁵²³ Simon Carney, *Two Kind of Climate Justice : Avoiding Harm and Sharing Burdens*, 22 J. POLIT. PHILOSOPHY 125, 134 (2014).

¹⁵²⁴ Thomas Cottier, *Renewable Energy and Process and Production Methods*, THE E15 INITIATIVE , at 1, 5, (2015); and Parker, *supra* note 1516, at 119.

¹⁵²⁵ For instance, the major flaw of Climate change regime is that there is no accords on burden sharing and tangible commitments for financial mechanisms, mitigation and protection methods, and appropriate sanctions for the free riders between “historic” emitters and “new” emitters. COOREMAN, *supra* note 1315, at 1 and 38.

¹⁵²⁶ Potts, *supra* note 1322, at 2.

CHAPTER VI

INTEGRATING ENVIRONMENTAL PROTECTION INTO ASEAN TRADING SYSTEM

INTRODUCTION

Due to rapid economic growth without environmental protection measures, environmental conditions are declining throughout Southeast Asia. Integrating environmental protection into the regional trading system is a crucial solution to create sustainable development—the pursuit of long-term economic development and environmental sustainability.¹⁵²⁷ The basic goals of economic policy are not only an efficient allocation or just distribution of productions but also a development on sustainable scale.¹⁵²⁸ To be specific, sustainable scale means that we must consume the energy and natural resources within the regenerative capacity, and we must not produce waste or pollution beyond the absorptive capacity of the ecosystem.¹⁵²⁹ It is vital not to focus on large-scale growth but overall development in terms of technical efficiency, environmental-friendly production, and social well-being.

The first part of the chapter reveals that it is a self-interest goal for ASEAN to pursue sustainable economic-environment development since the economy and environment are

¹⁵²⁷ The political goal of “sustainable development” has been adopted among 172 nations during the United Nations Conference on Environment and Development in 1992 in Rio (Brazil). Principle 3 of Rio Declaration reintegrates both needs of environmental protection and economic development by stating that the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generation. United Nations, Section on UN Conference on Environment and Development, The Earth Summit 1992, <http://www.un.org/geninfo/bp/enviro.html> ; United Nations Environment Program, Section on Environment for Development, Rio Declaration on Environment and Development 1992, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>

¹⁵²⁸ Herman E. Daly, *Problems with Free Trade : Neoclassical and Steady-State Perspectives*, in 147 TRADE AND THE ENVIRONMENT : LAW, ECONOMICS AND POLICY 151, 155-157 (Durwood Zaelke et al. eds.,1993).

¹⁵²⁹ Herman Daly in *Ecological Economics* 1990 emphasizes the “operational principles for strong sustainability”: (i) Renewable resources—all harvest levels have to be equal or less than the population growth rate; (ii) Pollution—waste discharge should be below the level of ecosystem capacity to assimilate (the discharge should be set close to zero); and (iii) Non-renewable resources—investment should be put in renewable substitute so it can kick in once the scarce resources are depleted. Herman Daly, *Towards Some Operational Principle of the Sustainable Development*, 2 ECOLOGICAL ECONOMICS 1, 1-6 (1990).

interdependent—one cannot function well without the good condition of another. In particular, most ASEAN member states have a resource-based economy. Member states’ economies mainly depend on natural resources services—tourism, extraction, cultivation, and exportation. The majority of populations are still poor and rely on natural resources and the environment for subsistence. Member states’ economic performance depends on the well-maintained environmental condition; thus, economic development has to integrate norms for environmental protection. The second part discusses how the authoritarian capitalism in member states’ regimes is an obstruction to environmental integration because it intensifies the strict application of the ASEAN Way or non-intervention rule and impedes the assimilation of human rights on environmental protection and civil participation. The third part proposes three structural reforms to enhance environmental integration: creating a separation of power, engaging civil society participation in the policy-making process, and establishing a particular environmental organ or environmental working group in the economic pillar.

1. WHY ASEAN NEEDS TO INTEGRATE ENVIRONMENTAL PROTECTION INTO ITS TRADING SYSTEM?

The reasons why ASEAN needs to integrate environmental norms into its trading system derive from both internal forces and external forces. For the internal reason, it is for the self-interest of ASEAN because the environmental integration will benefit the environment, economy, and security of the region. For the external causes, ASEAN cannot take a defensive approach against environmental integration while there are international movements towards sustainable development, and ASEAN’s major trading partners increasingly impose environmental protection in trade.

1.1 Internal forces: Adverse effects of existing economic approach and the first-mover advantage

Integrating environmental norms into economic development and trading system is vital for the regional environment, economy, and security. The existing economic approach causes detrimental environmental degradation, long-term economic loss, social inequality, and insecurity.¹⁵³⁰ The ASEAN resource-based economy will be most affected by environmental degradation such as resource depletion, climate change, soil degradation, and water pollution. Due to the vulnerability of the region to climate risks, it is apparent that if member states do not act now, they will bear the greater cost of adaptation and damage reparation, which will significantly damage the regional economy and security.¹⁵³¹ It is a self-interest or survival path for ASEAN to integrate environmental protection measures into its development approach.

It seems like an obvious choice, but it is a dilemma—economic growth or environmental protection. Many member states see environmental protection not as means for development but as a sacrifice.¹⁵³² In some instances, it is not without a logical basis. For instance, the production and export of plastic, the timber trade, the palm-oil trade. How to stop or reduce the production of plastic when the plastic industry is the key exporting sector of the region? How to save the forest when palm oil plantations or other cash crops need more space to maintain a high volume of exportation? How to stop using fossil fuel (e.g., oil, gas, coal) for production when states are blessed with abundant resources?

That is why member states take a separationist and defensive approach in environmental protection in trade because it can increase the cost of production and decrease trade competitiveness.¹⁵³³ The national political priority is economic growth through trade. Member

¹⁵³⁰ See discussion on environmental problems caused by rapid economic growth in chapter II and III.

¹⁵³¹ See discussion on climate change effects on South East Asia region in chapter III part 2.

¹⁵³² See discussion on the expectation of economic growth in chapter II part 1.

¹⁵³³ Manuel F. Montes & Francisco A. Magno, *Trade and Environment Diplomacy : Strategic Option for ASEAN*, 70 PAC. AFF. 351, 370-71 (1997).

states view environmental protection in the production process as a disincentive for such growth and aim for solving environmental problems without any interference or impact on trade competitiveness or economic development.¹⁵³⁴ The integration of environmental protection into the trading system also requires changes in the whole system, including infrastructure, production process, and other technological advancements that are more costly. Without strong political will, member states cannot enhance the capacity to handle such changes.

Despite the difficulties, integrating environmental protection will yield long-term and sustainable benefits. The early bird will gain a competitive edge and economic advantage in the international market, especially in the field of environmental-friendly markets.¹⁵³⁵ Member states who can advance the technological capacity and switch to sustainable production may also diversify their comparative advantages and break through the middle-income trap or the specialization trap.¹⁵³⁶

Higher environmental regulations set by the governments, both exporting states and importing states, can trigger technological innovations improving production and efficient energy use.¹⁵³⁷ For instance, by enacting energy management regulations in response to the energy crisis in the 1970s, Japan has driven companies to innovate highly energy-efficient systems.¹⁵³⁸ The Porter hypothesis also suggests that tightening environmental regulations will motivate technological innovation, benefiting both the economy and environment.¹⁵³⁹ Frankel considers that the Porter hypothesis also emphasizes the “first-mover advantage”—if the global trend is moving towards sustainable and environmental-friendly technology, the countries who

¹⁵³⁴ See chapter II part 1.1 and ASEAN Declaration on Environmental Sustainability 2012.

¹⁵³⁵ Paul Shrivastava, *Environmental Technologies and Competitive Advantage*, 16 SMJ 183, 183-200 (1995).

¹⁵³⁶ See the discussion in chapter II on ASEAN comparative advantage in part 1.1, the Environmental Kuznets Curve in 2.1 and the specialization trap in 2.2.

¹⁵³⁷ Shrivastava, *supra* note 1535, at 185.

¹⁵³⁸ Chihiro Watanabe, *Trends in The Substitution of Production Factors to Technology: Empirical Analysis of The Inducing Impact of The Energy Crisis on Japanese Industrial Technology*, 21 RES. POLICY 481, 481-505((1992).

¹⁵³⁹ Michael Porter & Class Van der Linde, *Toward the New Conception of the Environment Competitiveness Relationship*, 9 J. ECON. PERSPECT 97, 99-104 (1995).

develop or innovate such technologies first will have the competitive edge over the latecomers.¹⁵⁴⁰ This is proven to be true in many environmental-friendly technological trends flowing in the ASEAN market, such as electric cars, high-speed trains, renewable energy, degradable products, biochemical, or bioplastic.

In the region, the earlier players who can shift their economic development and trading policy towards the green movement will set an environmental production and process standard and other technical requirements for importing products. By exercising national jurisdiction towards sustainable production, member states will eventually take the lead in the region and influence other member states' policy. The actions of member states in their national jurisdictions may pave the ways for the improvement of ASEAN's efficiency to handle legal implementation and legal issues arising out of economic and environmental integration.

1.2 External forces: Multilateral movement towards sustainable development and the potential use of environmental trade measures.

Amid global and regional environmental crisis,¹⁵⁴¹ there is an international movement towards sustainable development by integrating environmental norms into the trading system. There are growing efforts to address environmental problems by including an environmental protection clause in trade agreements. Many significant trading partners of ASEAN member states have increasingly moved towards greening the production and process methods and imposing such standards on all importing products.¹⁵⁴² The environmental trade measures employed by trading partners with large markets significantly impact member states' trade-environment practice.

¹⁵⁴⁰ Jeffrey A. Frankel, *The Environment Globalization*, 10090 NBER, 2003, at 1, 12.

¹⁵⁴¹ See chapter III for the discussion on regional environmental problems caused by unsustainable production and process methods.

¹⁵⁴² See chapter IV for the discussion on trade-environmental measures used by importing countries to influence environmental practice in exporting states—the trade relation between ASEAN member states and the EU.

ASEAN member states view environmental trade measures as trade protectionism or disguised trade barriers.¹⁵⁴³ Especially if the measure is taken unilaterally by the developed countries to influence environmental standard in developing countries, it is usually regarded as green colonization or eco-colonialism:¹⁵⁴⁴

Foreigner from the north whose industrial grew by damaging the planet's delicate ecosystem, now seek to solve their environmental problems by limiting development in the south.¹⁵⁴⁵

Regulations on environmental standards, especially production and process methods (PPMs), are believed to be trade barriers under cover of environmental protection.¹⁵⁴⁶ What member states see is loss of competitiveness and loss of profits which lead to regulatory chill and defensive approach.¹⁵⁴⁷ The nationalist scheme applies to all sources of western ethics and values, including the role of environmental protection—environmental protection through sustainable trade is an imposition of western values towards the Asian way of living and exploitation of natural resources.¹⁵⁴⁸ Therefore, the idea of integrating environmental norms into trading policy, similar to the democratic liberal values and universal human rights, is likely to be considered as western inputs—neo-colonization by green trade—that impinge upon their power and state sovereignty.¹⁵⁴⁹

¹⁵⁴³ See discussion on the use of environmental trade measures and its legality in chapter IV and V

¹⁵⁴⁴ See for example the resenting reaction of Former Malaysian Prime Minister towards the use of trade measure on palm oil production in Chapter II part 1.1.

¹⁵⁴⁵ LAWRENCE E. SUSSKIND & SALEEM H. ALI, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 98 (2ed. 2015).

¹⁵⁴⁶ See chapter IV and V for the discussion on trade-related environmental measures on PPMs and its legality according to WTO's rules. See also Kala K. Mulqueeny, *Regionalism, Economic Integration and Legalisation in ASEAN: What Space for Environmental Sustainability?* 8 ASIA PAC. J. ENVTL. L. 5, 12-14 (2004).

¹⁵⁴⁷ See discussion on the regulatory chill effect in chapter II part 3.2.

¹⁵⁴⁸ See discussion on the struggle for democratic values in chapter I part 1.2.1 and Asian Values and cultural relativism in chapter I part 1.2.2.

¹⁵⁴⁹ See discussion on environmental trade measures used by importing states to influence production and process methods in chapter IV and V. Particularly, the remark by Mahathir Muhammad, Malaysian Prime Minister in chapter IV section 2.1.3 page 29-31. He held a strong nationalist position towards the foreign influence in Malaysian environmental policy. He considered that to certain extent the environmental protection measures would hold back the economic growth and it is unfair for developing countries since it was the developed countries who polluted the planet from the outset. Another example is the remark made by Indonesian Environment Minister and a lawmaker in Indonesian parliament's legislative committee regarding the making of controversial Omnibus law (will be further discussed in the next section) stating that the opinions and participation in national policy by

Despite the resentment on the use of environmental trade measures, the incentive for market access automatically forces member states to comply with the environmental standards.¹⁵⁵⁰ Even if member states challenge the environmental trade measure as in violation of WTO rules, such measure still can be justified on environmental grounds. The WTO rules and jurisprudence leave sufficient room for the use of environmental trade measures.¹⁵⁵¹ It signifies that a significant change in ASEAN member states' economic development and production and process methods (PPMs) will happen sooner or later. Therefore, ASEAN has to embrace the changes and move towards a global and proactive approach integrating environmental protection into its trading system.

2. WHAT ARE THE BARRIERS FOR THE INTEGRATION?

This part unfolds two significant prerequisites for ASEAN environmental integration. Prior to the integration, ASEAN has to address two problems: the persistent authoritarian regimes in member states and the lack of human rights protection. These problems intensify the strict adherence to the ASEAN Way—the rule of non-intervention and state sovereignty—obstructing regional integration, civil participation, and effective cooperation for environmental protection. In contrast, the assimilation of democratic values can steer ASEAN towards people-centered regionalism, unlock the non-intervention impasse, and open doors for environmental norms integration.

environmental activists should be limited since they prioritize interest of foreign NGOs and their interest are not in line with national interest.

¹⁵⁵⁰ See chapter IV part 2.1.2 for discussion on the use of trade measure in fishing industry and palm oil production.

¹⁵⁵¹ See chapter V for the discussion on WTO rules on trade-environmental measures.

2.1 The dominant political regime of authoritarian capitalism in member states

The political regime in each member state affects how ASEAN evolves.¹⁵⁵²—whether it will evolve into deeper integration with enhanced engagement in every dimension or the relation remains superficial avoiding confrontational issues, particularly civil rights violation and environmental problems.¹⁵⁵³ The persistent authoritarian capitalism in member states’ political regimes prioritizes economic growth but ignores social and environmental dimensions, leading to environmental degradation, environmental injustice, and a larger social inequality gap.¹⁵⁵⁴ This non-democratic regime reinforces the ASEAN Way, the rule of non-intervention and state sovereignty, hindering the integration of ASEAN regionalism and the development of effective regional environmental governance.

The member states’ internal change of political regimes affects their positions on ASEAN regionalism. The member states’ internal change of political regimes affects their positions on ASEAN regionalism. For instance, Aung San, a nationalist leader of Myanmar,

¹⁵⁵² Politics, regime types or change of administration, in member states can affect how regionalism is formed, integrated and progressed. Apart from ASEAN, this can also be seen in the internal relation of the member states of European Union and the Brexit movement. In the midst of nationalism and far-right conservative movement, and under the leadership of Boris Johnson, the United Kingdom left the European Union on 31 January 2020, after 47 years of EU membership. Brexit in Brief, European Commission, https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/brexit-brief_en; Jessica Elgot et al., *Brexit: Boris Johnson To Override EU Withdrawal Agreement*, THE GUARDIAN (Sept. 20, 2020), <https://www.theguardian.com/politics/2020/sep/06/five-weeks-clinch-brexit-deal-uk-move-boris-johnson-to-say>; and Lizzie Dearden, *Brexit Making Far-Right Ideas Mainstream, Major Report Finds*, THE INDEPENDENT (Mar. 3 2020), <https://www.independent.co.uk/news/uk/home-news/brexit-far-right-boris-johnson-immigration-identity-tommy-robinson-a9369041.html>

¹⁵⁵³ LITTA, *supra* note 143, at 33.

¹⁵⁵⁴ The discussion on how prioritizing economic growth lead to environmental degradation, environmental injustice and social inequality can be seen in chapter II section 1.2. The discussion on undemocratic regimes in member states is in chapter I section 2.1.2. Examples of ASEAN environmental problems occurring from political and economic systems were discussed in chapter III. For other examples, Richard Tucker discussed the relationship of how authoritative regimes affect the environmental governance in the following countries: Brazil, Poland, Prussia, Zimbabwe, China, Czechoslovakia and Moravia (Eastern European Countries/ Latin America and Asia). He found that there is similar pattern of relationship between military and groups of civilian elites having mutual benefits :“power and wealth generally gravitated to joint military-civilian elites, frequently accompanied by rampant corruption. The personal wealth obtained by powerful people—insiders in autocracies but also cooperate executives in putatively democratic systems—has repeatedly been achieved by ruthless extraction of natural resources, constituting a major factor in environmental damaging operations.” He also found that “highly polluting industrial development took precedence, and environmental values were secondary or marginalized, with little space for public discontent or organizing until the late 1980s, through this varied significantly from one Soviet or Latin America regime to another.” Richard Tucker, *Conclusions and Perspectives, in ENVIRONMENTALISM UNDER AUTHORITARIAN REGIMES : MYTH, PROPAGANDA, AND REALITY* 214, 215 (Stephen Brain & Viktor Pal eds., 2019).

was a clear advocate for regionalism; however, the interest in regional cooperation collapsed with Aung San's assassination in July 1947 and the end of Myanmar's democratic experiment in March 1962 when Ne Win regime took power, suppressed all opposition, and take an isolationist stance in external relations.¹⁵⁵⁵¹⁵⁵⁶ In contrast, under Sukarno's regime "Konfrontasi," Indonesia's domestic politics led to expansionism and tensions among Southeast Asian states undermining regional cooperation. Sukarno imposed martial law in March 1957, abolished the constitution parliamentary system in 1959 and declared "Guided Democracy"¹⁵⁵⁷ which placed much power in his hands.¹⁵⁵⁸ Suharto's New Order was still in the form of authoritarian rule for national resilience to achieve internal stability and economic growth but favored regionalism as an essential tool for domestic goals.¹⁵⁵⁹ Suharto regime became an active supporter of the ASEAN's formation.¹⁵⁶⁰ ASEAN was seen as "a forum for the expression of Indonesia's leadership in the Southeast Asia."¹⁵⁶¹

Moreover, ASEAN is a state-centric regionalism. Member states' withholding position on environmental protection leads to weak regional environmental governance. Many authoritarian regimes in member states lack the political will to integrate environmental norms into states' practice. They prioritize economic growth because it serves as a tool to legitimize their ruling powers. Litta noted that "environmental resources have become a convenient

¹⁵⁵⁵ AMRY VANDENBOSCH & RICHARD BUTWELL, *THE CHANGING FACE OF SOUTHEAST ASIA* 341 (1966) in ACHARYA, *supra* note 16, at 113-127.

¹⁵⁵⁶ ACHARYA, *supra* note 16, at 127.

¹⁵⁵⁷ "Guided Democracy" was a term used to describe a managed regime which was not democratic in liberal modern definition. *E.g.*, M. C. RICKLEFS, *GUIDED DEMOCRACY, 1957-65* IN *A HISTORY OF MODERN INDONESIA SINCE C. 1300* 257-83 (1993); Jose Arsenio Torres, *The Political Ideology of Guided Democracy*, 25 *REV. POLIT.* 34, 34-63 (1963); and FREDERICK P. BUNNELL, 2 *GUIDED DEMOCRACY FOREIGN POLICY: 1960-1965 PRESIDENT SUKARNO MOVES FROM NON-ALIGNMENT TO CONFRONTATION, INDONESIA* 37-76 (1966).

¹⁵⁵⁸ ACHARYA, *supra* note 16, at 128.

¹⁵⁵⁹ *Id.* at 129.

¹⁵⁶⁰ Suharto had three goals to pursue regional cooperation: regional grouping is a proof of its shift of policy abandoning the Sukarno's Konfrontasi; it ensured domestic stability and legitimacy of the New Order; and Indonesia could take the leadership in ASEAN regionalism. *Id.* at 131.

¹⁵⁶¹ Franklin Weinstein, *Indonesia Abandons Confrontation*, Interim Report Series, Modern Indonesia Project, Southeast Asia Program, Department of Asian Studies, Cornell University, 1969, 87-88 in ACHARYA, *supra* note 16, at 175.

currency for governments in pursuit of political objectives.”¹⁵⁶²¹⁵⁶³ Economic interest is used as a distraction from democratic movement, human rights violation, and environmental considerations. Market-oriented economy helps to maintain the illegitimate power of member states’ authoritarian regimes, and those regimes focus on a rapid economic boost to maintain their power.¹⁵⁶⁴ As long as nationals enjoy the benefits of the economic policies and progress, it is unlikely that the non-democratic governments’ power will be challenged.¹⁵⁶⁵ This model has been successfully implemented in Singapore—a rich city-state where democratic and human rights practice can be questioned, but economic performance triumphs.¹⁵⁶⁶ Singapore’s success challenges the notion that only the western model of democracy gives rise to economic development.¹⁵⁶⁷ The standard set by Lee Kwan Yew inspired many non-democratic regimes in the region to follow the “authoritarian capitalism” path.¹⁵⁶⁸ Thus, the main focus of member

¹⁵⁶² LITTA, *supra* note 143, at 33; and Mark R. Thompson, *The Limits of Democratisation in ASEAN*, 14 *THIRD WORLD Q.* 469, 471 (1993).

¹⁵⁶³ See the discussion on democratic struggle in member states in chapter 1 part 2.1.2 and examples of environmental problems caused by political and economic interests in chapter III.

¹⁵⁶⁴ In principle, market economy should promote democracy by providing access to technology and communications that circulate democratic norms and democracy should strengthen economic development. By promoting economic growth, the rise of middle class that is secured and independent. Nevertheless, while every member states of ASEAN are moving towards open market competition in trade, non-democratic regimes remain in power with few significant social movements towards democracy. In ASEAN, market economy has been used as a tool to legitimize and maintain power of non-democratic regimes. Opposite from traditional perception, globalization through open market may possibly help sustaining the authoritative regimes in many member states. The open market economy and consumer society leads the people towards the competition in a market place—competing for commerce, employment, education, and wealth accumulation. The connection between market economy and authoritative regimes are previously discussed and examples are given in the first chapter pages 39-40 as one of the factors affecting democracy in ASEAN member states. See DANIEL T. GRISWALD, *TRADING TYRANNY FOR FREEDOM: HOW OPEN MARKET TILL THE SOIL FOR DEMOCRACY* 1(2004); and PAUL, *supra* note 154, at 125.

¹⁵⁶⁵ PAUL, *supra* note 154, at 473.

¹⁵⁶⁶ Sebastien Reyes, *Singapore’s Stubborn Authoritarianism*, *HARV. POLIT. REV.* (Sept. 29, 2015), <http://harvardpolitics.com/world/singapores-stubborn-authoritarianism/>; Nafis Alam, *How Lee Kuan Yew Transformed Singapore from Small Town into Global Financial Hub*, *THE CONVERSATION* (Mar.23 2015), <https://theconversation.com/how-lee-kuan-yew-transformed-singapore-from-small-town-into-global-financial-hub-39192> ; and Sal DeFrancesco, *The Curious Case of Singaporean Success*, *HARV. POLIT. REV.*(Oct. 7, 2015), <http://harvardpolitics.com/world/curious-case-singaporean-success/>

¹⁵⁶⁷ Dave Bengardi, *Singapore’s Challenge to Democracy*, *BERKELEY POLIT. REV.* (Oct. 12, 2015), <https://bpr.berkeley.edu/2015/10/12/singapores-challenge-to-democracy/> (

¹⁵⁶⁸ “Singapore’s authoritarian-capitalist regime has its own peculiar political arrangements that mesh with its economic policies. By combining a sense of national insecurity and dread of the unknown with the fear of government retribution, Singapore’s ruling party has implemented a special form of “Asian democracy” that can be identified as phobocracy. The rule-by-fear government of the People’s Action Party (PAP) regime judiciously combines a western democratic vocabulary with a particular set of traditional values that it claims are unique to Asia.” Christopher Lingle, *Singapore and Authoritarian Capitalism*, EDICIONS SIROCCO SL,1998, at 1, 2; and Tom

states is on promoting rapid economic growth to sustain regimes stability and substantial monetary benefits. The goal is to keep their economies on an upward scale and their citizens in a competitive open market, such as competing for employment, education, and wealth accumulation.

Furthermore, in many member states, the military may institutionalize itself forming an authoritarian government or install civilian government but remain, wholly or partly, influential in the political decision of governments and take control of natural resources exploitation.¹⁵⁶⁹ For instance, Myanmar's military regime has strong control over land and natural resources exploitation, extraction, and trade for financing its regime.¹⁵⁷⁰ The regime also consolidates control over large ethnic minority territories through a series of ceasefire agreements,¹⁵⁷¹ logging, agribusiness expansion, mining, and constructing hydro-power plants, particularly in Shan and Karen states.¹⁵⁷²

Ramlogan observed that the military is an impediment to sustainable development and environmental protection for several reasons. First, military service and investment expenses

Bailey, *How Singapore Married Dictatorship with Market Economy*, WORLD FINANCE (July 16, 2015), <https://www.worldfinance.com/special-reports/how-singapore-married-dictatorship-with-a-market-economy>

¹⁵⁶⁹ For example, Indonesia during the Sukarno-Suharto regimes had built strong governmental-military ties for both political and economic benefits. Particularly in the New Order, the regime consolidated its executive power by building a patronage system—building strong ties with supporters and military force using economic rewards and political concessions. The military, not only as investor but also as provider of security, involved in many economic activities such as logging, mining, and palm oil business. See discussion in chapter III section 1.2 (Root cause of haze problem). Moreover, in Thailand military has always played major role in Thai politics—either by forming military government after overthrown the elected civilian governments or giving direction in the back room. See also PAUL CHAMBERS & NAPISA WAITOOKIAT KHAKI CAPITAL: THE POLITICAL ECONOMY OF THE MILITARY IN SOUTHEAST ASIA (2017)

¹⁵⁷⁰ Douglas Batson et al., *Sharing the Wealth : Burma's Post-Military Rule and Natural Resource Governance*, SMALL WAR JOURNAL (Oct. 26, 2012), <https://smallwarsjournal.com/jrnl/art/sharing-the-wealth-burma's-post-military-rule-and-natural-resource-governance> ; Kevin M. Woods, *The Conflict Resource Economy and Pathways to Peace in Burma*, USIP , No.144 (2018), 5 https://www.usip.org/sites/default/files/2018-11/pw_144_the_conflict_resource_economy_and_pathways_to_peace_in_burma.pdf

¹⁵⁷¹ Military's incentive to use armed forces is to gain control over the natural resources in territorial of ethnic minorities. Jay Benson, *Blood Teak: How Myanmar's Natural Resources Fuel Ethnic Conflicts*, THE DIPLOMAT (Apr. 30, 2015), <https://thediplomat.com/2015/04/blood-teak-how-myanmars-natural-resources-fuel-ethnic-conflicts/>

¹⁵⁷² E.g., Jake Brunner et al., *Logging Burma's Frontier Forests: Resources and The Regime*, WRI (Aug. 1998), https://files.wri.org/s3fs-public/pdf/loggingburmasfrontierforests_bw.pdf ; Kevin Woods, *Ceasefire Capitalism: Military-Private Partnerships, Resource Concessions and Military-State Building in The Burma-China Borderlands*, 38 J. PEASANT STUD. 747, 747-770 (2011); and Yuki Akimoto, *Hydro-Powering the Regime*, 12 THE IRRAWADDY, 2004, https://www2.irrawaddy.com/article.php?art_id=3757

such as arms race or other infrastructure are much higher than research funds for environmental development.¹⁵⁷³ Military expenditures in ASEAN member states are vast compared to its GDP; particularly, Myanmar is among the highest spender per GDP in the region.¹⁵⁷⁴ Singapore, Indonesia, Thailand, and Vietnam are the biggest military spenders in the region.¹⁵⁷⁵ Heavy budgets were spent on arms imports.¹⁵⁷⁶ Military investment drains budgets and scientific manpower.¹⁵⁷⁷ Attention and budgets were heavily put into traditional security issues—territorial sovereignty, peace, and war; on the other hand, environmental problems that define the new scope of national security receive marginalized treatment.¹⁵⁷⁸ In 2019, Thailand’s total defense budget was approximately 207.3 billion Thai baht, but the budget appropriated to the environment department was approximately 4.2 billion Thai baht.¹⁵⁷⁹ Singapore’s defense expenditure was about SGD 14 billion, whereas the budget for the Ministry of Environment was around SGD 2.7 billion.¹⁵⁸⁰ In 2018, Malaysia spent about 3.47 billion U.S. dollars on military expenditure while only 453 million U.S. dollars on environmental protection.¹⁵⁸¹ In 2017, the military spending of Indonesia was about 8.8 billion U.S. dollars, but spending for

¹⁵⁷³ RAJENDRA RAMLOGAN, *THE DEVELOPING WORLD AND THE ENVIRONMENT: MAKING THE CASE FOR EFFECTIVE PROTECTION OF GLOBAL ENVIRONMENT* 169-170 (2004).

¹⁵⁷⁴ Defense expenditures in Southeast Asia in 2018 totaled \$40.8 billion, a 1.9% increase from 2017. Zachery Abuza, *Huge Army Spend is Self-Serving Folly*, THE BANGKOK POST (July 24, 2019), <https://www.bangkokpost.com/opinion/opinion/1717891/huge-army-spend-is-self-serving-folly>

¹⁵⁷⁵ Arief Subhan, *Defense Market in Southeast Asia*, THE ASEAN POST (Apr. 24, 2018), <https://theaseanpost.com/article/defence-market-southeast-asia>

¹⁵⁷⁶ Siemon T. Wezemen, *Arms Flow to Southeast Asia*, *Stockholm International Peace Research Institute*, SIPRI, 2019, https://www.sipri.org/sites/default/files/2019-12/1912_arms_flows_to_south_east_asia_wezeman.pdf

¹⁵⁷⁷ RAMLOGAN, *supra* note 1573, at 177.

¹⁵⁷⁸ Winter Wilson, *Environmental Science and National Security: Overcoming Barriers to Connecting Research with Policy*, NEW SECURITY BEAT (Jan. 31, 2020), <https://www.newsecuritybeat.org/2020/01/environmental-science-national-security-overcoming-barriers-connecting-research-policy/>

¹⁵⁷⁹ Total Budget Appropriation for National Defense And Environmental Protection in Thailand in 2020, STATISTA, <https://www.statista.com/statistics/1044561/thailand-budget-appropriation-of-national-defense-by-function/>; and <https://www.statista.com/statistics/1044642/thailand-budget-appropriation-of-environmental-protection-department-by-function/>

¹⁵⁸⁰ Singapore’s defense expenditure and the budget for the Ministry of Environment, SINGAPORE BUDGET, https://www.singaporebudget.gov.sg/docs/default-source/budget_2019/download/pdf/29-MEWR-2019.pdf ; and https://www.singaporebudget.gov.sg/docs/default-source/budget_2020/download/pdf/25-mindef-2020.pdf

¹⁵⁸¹ Malaysia Spending for Military And Environmental Protection, STATISTA, <https://www.statista.com/statistics/1038430/malaysia-military-spending/> ; and <https://www.statista.com/statistics/1166855/malaysia-government-spending-on-environmental-protection-by-method/>

environmental affairs was only about 95 million U.S. dollars.¹⁵⁸² Vietnam spent about 5.07 billion U.S. dollars on military budget compared to about 20 million U.S. dollars on environmental protection.¹⁵⁸³

Poor allocation of national budgets results in insufficient funds for investing in environmental research and development. For example, many member states tend to remain dependent on traditional cheaper and less environmental-friendly practice, technology, and infrastructure (e.g., coal-fired power plants, pesticides, and slash and burn land clearing).¹⁵⁸⁴ Besides, the military is a significant consumer of non-renewable energy resources: oil, gas, woods, minerals, land use for training, and weapon testing.¹⁵⁸⁵ Due to the secrecy nature and lack of transparency, military engages in natural exploitation causing environmental degradation in various corrupted means, such as constructing coal-fired power plants in Thailand and Indonesia without proper EIA or unsustainable logging and deforestation for timber trade in Myanmar.¹⁵⁸⁶ When the military involves in a project, it leaves no room for transparency, and it is almost impossible for public participation.

The authoritarian rules in member states hinder internal environmental protection and regional environmental governance because it intensifies the strict application of ASEAN Way practice. Due to the regimes' undemocratic practice and human rights violation, member states insist on their authority in internal affairs and defy all degrees of intervention. The rule of non-intervention based on the ASEAN Way is the major hurdle for deeper regional integration and

¹⁵⁸² Indonesia's Budgets on Environmental Affairs and Military Spending, STATISTA and CEICDATA, <https://www.ceicdata.com/en/indonesia/provincial-government-budget-by-sector-dki-jakarta/government-budget-dki-jakarta-environment-affairs> ; and <https://www.statista.com/statistics/1038365/indonesia-military-spending/>

¹⁵⁸³ Vietnam Spending for Environmental Protection and Military Expenditure, CEICDATA and TRADINGECONOMICS, <http://english.vietnamnet.vn/fms/environment/188530/ministry-seeks-higher-budget-for-environmental-protection.html> ; <https://www.ceicdata.com/en/vietnam/state-government-budgetary-account-hanoi/state-budget-hanoi-le-current-environment-protection> ; and <https://tradingeconomics.com/vietnam/military-expenditure>

¹⁵⁸⁴ See discussion on ASEAN energy production (coal and hydropower) and the related environmental problems in chapter II part 2.

¹⁵⁸⁵ RAMLOGAN, *supra* note 1573, at 178-179.

¹⁵⁸⁶ *Id.*

environmental norms implementation.¹⁵⁸⁷ The transboundary nature of environmental problems in the region complicates regional politics and challenges the fundamental of the ASEAN Way—national sovereignty and non-interference principle.

As discussed in the previous chapters,¹⁵⁸⁸ the ASEAN Way¹⁵⁸⁹ or the non-intervention principle in domestic affairs of member states emphasizes cooperation by consensus, which depends on national implementation rather than legal enforcement from a region-centered mechanism.¹⁵⁹⁰¹⁵⁹¹ This serves as a trust-building approach but lacks legal enforcement.¹⁵⁹²

In the past 40 years, ASEAN member states have ratified many multilateral environmental agreements, and ASEAN has established many regional environmental agreements.¹⁵⁹³ Nevertheless, the primary defect of ASEAN is not the lack of principles but the lack of enforcement of such principles. ASEAN environmental governance is full of non-legal binding “soft law” instruments,¹⁵⁹⁴ including unenforceable environmental declarations, statements, and charters; thus, the implementation to create a concrete plan is exceptionally

¹⁵⁸⁷ See chapter I part 2.1.1 for the discussion on ASEAN Way and see chapter III for the discussion on the ineffectiveness of ASEAN environmental governance in addressing environmental problems.

¹⁵⁸⁸ See discussion on ASEAN Way as normative challenge in chapter I part 2.1.1

¹⁵⁸⁹ More on ASEAN Way—ASEAN diplomacy, non-confrontational and non-interference. See DONALD E. WEATHERBEE ET AL., *INTERNATIONAL RELATIONS IN SOUTHEAST ASIA : THE STRUGGLE FOR AUTONOMY* 121 (2005); Hiro Katsumata, *Reconstruction of Diplomatic Norms in Southeast Asia : The Case for Strict Adherence to the ASEAN Way*, 25 *CONTEMP. SOUTHEAST ASIA* 104, 104-106 (April 2003).

¹⁵⁹⁰ Koh Kheng-Lian & Nicholas Robinson, *Regional Environmental Governance : Examining the Association of Southeast Asian Nations (ASEAN) Model*, in *GLOBAL ENVIRONMENTAL GOVERNANCE : OPTIONS & OPPORTUNITIES* 101, 104 (Daniel C. Esty & M.H. Ivanova eds., 2002).

¹⁵⁹¹ ASEAN was formed around the corner stones of state sovereignty and non-intervention principle. The conventional code of conducts for regional cooperation is the ASEAN Way. Koh, Robinson and Lye described the ASEAN Way as a kind of customary law—it is not written in any agreement but the norm is strictly followed by all member states. They behave accordingly because they believe it is an obligation required by ASEAN and once a member state breaches the ASEAN Way, the cooperation is compromised. The whole system from making policies to dispute resolution functions only through diplomatic channels—meetings, negotiations and consensus decision making. ASEAN Way emphasize three norms: non-interference; consensus decision making and non-binding norms; and using national institution and regulations rather than building a strong central regional bureaucracy. See Koh Keng Lian & Robinson, *supra* note 481, at 640-682; KOH KHENG-LIAN ET AL., *supra* note 531, at 23; and SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* (2002).

¹⁵⁹² Koh Kheng-Lian & Karim, *supra* note 111, at 316.

¹⁵⁹³ For example, ASEAN Agreement on the Conservation of Nature and Natural Resources 1985, ASEAN Agreement on Transboundary Haze Pollution 2002, ASEAN Agreement on the Establishment of ASEAN Centre for Biodiversity 2005, ASEAN Agreement on Disaster Management and Emergency Response 2005 and Mekong River Commission 1995 are parts of ASEAN environmental governance. LITTA, *supra* note 143, 42.

¹⁵⁹⁴ See KOH KHENG-LIAN, *ASEAN ENVIRONMENTAL LAW, POLICY AND GOVERNANCE : Selected Documents*, vol.1 and 2 (2009 and 2013).

challenging. The approach for regulatory implementation is fragmented due to differences in legal systems and political histories.¹⁵⁹⁵ Since ASEAN has no jurisdiction over member states, the linkage between trade and environment needs the consensus from all member states through a diplomatic conference that environmental issues in trade are usually ruled out. Even if the agreement is formed, there is no enforcement measure in case of non-compliance.¹⁵⁹⁶

Thus, there are no robust environmental legal frameworks for management and enforcement.¹⁵⁹⁷ The result is the failure of ASEAN to pressure member states to implement and integrate those environmental norms.¹⁵⁹⁸ ASEAN appeared to be a talk shop making rhetoric statements. It damages “the credibility of the organization in the eyes of the international community”¹⁵⁹⁹ and undermines the capacity of ASEAN to have a meaningful engagement in addressing environmental problems.

Nevertheless, the democratic transformation within member states signifies a movement towards the alteration of ASEAN Way interpretation—moving away from the strict application and allowing certain interventions. The nexus between democratic movement within member states and ASEAN regionalism can be seen in the attempt to push forward participatory regionalism by Thailand in the 1990s. The Philippines was an active supporter of Thailand’s proposal. This attempt led by Thailand and the Philippines reflects their democratizing domestic policies in such period.¹⁶⁰⁰

¹⁵⁹⁵ Boer, *supra* note 145, at 115.

¹⁵⁹⁶ In case of non-compliance, using trade measure—trade sanction used in some multilateral agreements or unilateral trade measure mostly used by developed countries to interfere the environmental regulations of developing countries—could be effective but will contradict to the non-interference principle of ASEAN because it is indirect mean of coercion.

¹⁵⁹⁷ The problem is lack of sanctions and compulsory dispute settlement body such as in Haze regime. See the discussion on Haze in Chapter III. See also Alan K. Tan, *The ASEAN Agreement on Transboundary Haze Pollution : Prospect for Compliance and Effectiveness in Post-Suharto Indonesia*, 13 N.Y.U. ENVTL. L.J. 647, 647-803 (2005).

¹⁵⁹⁸ Antonio P. Contreras, *Transboundary Environmental Politics in Southeast Asia : Issues, Responses and Challenges*, in ROUTLEDGE HANDBOOK OF THE ENVIRONMENT IN SOUTHEAST ASIA 147, 153 (Philip Hirsch ed., 2017).

¹⁵⁹⁹ ACHARYA, *supra* note 16, at 217.

¹⁶⁰⁰ Acharya noted that the post-Suharto Indonesia also voiced for a shift for a more nuance application of non-interference doctrine reflecting its democratizing domestic politics. Democratization process in Indonesia led to Indonesian push for human rights and democracy as fundamental principle of ASEAN in 2002-2003. Indonesia

Participatory regionalism was introduced by the Thai Foreign Minister and ASEAN Secretary-General, Surin Pitsuwan, under the Chuan Leekpai administration during its democratic regime in 1998.¹⁶⁰¹ The transboundary environmental issues or human rights violations were left unresolved to maintain non-confrontational relations. The affected states have to deal with the spillover effects, unable to solve the problem from the root causes. Feeling the urge to condemn human rights abuse in Myanmar¹⁶⁰² and solve the regional forest fires haze problem, Pitsuwan proposed the need for “flexible engagement” citing that issues affecting member states should be brought up and discussed by members without being regarded as interference.¹⁶⁰³ He insisted that flexible engagement does not violate the principle of non-intervention.¹⁶⁰⁴ It is an internal call to promote less absolute state sovereignty and allow neighbor intrusion and scrutiny of certain issues once deemed domestic.¹⁶⁰⁵¹⁶⁰⁶ The attempt was met with hesitation and dissent by the rest of the member states, who refused the progressive step towards modifying the ASEAN norm or any departure from non-intervention doctrine.¹⁶⁰⁷

believed that it should project its values and persuade its neighbors to change for the better but its efforts was faced with many opposition, especially from those member states that do not have democratic system. However, Katsumata found that Indonesia was still reluctant to change the interpretation of the non-intervention principle as witnessed by the fact that Indonesian Foreign Minister Ali Alatas expressed concerned that “the principle of non-interference is a very basic principle . . . [W]e can talk about certain problems like transnational crimes, but if you start talking [about] how a country must run affairs like . . . democratizing, or . . . human rights, then you are getting into trouble.” *Id.* at 245. See also Katsumata, *supra* note 174, at 239 and 242. (2004); and Stephen Powell, *ASEAN in Unprecedented Openness Debate—Philippines*, REUTERS (July 24, 1998).

¹⁶⁰¹ Thailand democratic regimes last between 1992- 2006: 1992-1995 under Chuan Leekpai administration , 1995-1996 under Banhan Silapa-acha administration , 1996 brief period under Chawalit Yongjaiyuth administration, 1996- 2001 under Chuan Leekpai administrative and 2001-2006 under Thaksin administration until the coup military intervention in 2006.

¹⁶⁰² Part of the incentive was that Thailand had to deal with drug trafficking and refugee flows from Myanmar due to the military junta’s policies against the minority. Amitav Acharya, *7 Democratization and the Prospects for Participatory Regionalism in Southeast Asia*, in *ASIAN REGIONAL GOVERNANCE : CRISIS AND CHANGE* 127, 134 (Kanishka Jayasuriya ed., 2004).

¹⁶⁰³ Ministry of Foreign Affairs , Thailand, “Press Briefing by H.E. Foreign Minister on Flexible Engagement, at Manila Hotel, Manila,” Press Release no. 705/2541, July 24, 1998.

¹⁶⁰⁴ Ministry of Foreign Affairs, Thailand, “Thailand’s Non-Paper on the Flexible Engagement Approach,” Press Release no. 743/2541, July 27, 1998.

¹⁶⁰⁵ As for an external call for changes, the abolition or reform of ASEAN Way has been always discussed as an obstruction for deeper integration, human rights protection and development in significant regarding security issues. See e.g., HAACKE, *supra* note 173; ACHARYA, *supra* note 175; and MELY CABALLERO-ANTHONY, *REGIONAL SECURITY IN SOUTHEAST ASIA : BEYOND THE ASEAN WAY* (2005).

¹⁶⁰⁶ Acharya, *supra* note 1602, at 134.

¹⁶⁰⁷ *Id.* at 135.

Maintaining the status quo is strongly preferred.¹⁶⁰⁸ No substantive change prevails. The ASEAN Way remains dominant in actual practice, particularly with the downfall of democracy and the rise of populism in the region during the present time.¹⁶⁰⁹¹⁶¹⁰

Why Thailand and the Philippines voiced for the change of ASEAN diplomacy during that period? Katsumata suggested that there are two explanations: conventional/rationalist and constructivist explanation.¹⁶¹¹ For rationalist explanation, the rise of economic crisis, security issues, and non-traditional security issues such as transboundary environmental problems,¹⁶¹² drug trafficking, and immigration boosted for the diplomacy shift. This perspective alone cannot explain why some member states are reluctant to support the idea of flexible engagement even when they were adversely affected by the problem, such as Malaysia was severely affected by the haze in 1997, but it was the strong proponent of the non-intervention rule.¹⁶¹³

The constructivist explanation can fill in this limitation. By the end of the Cold War, the global norm shifted towards democracy and human rights.¹⁶¹⁴ It is hard to draw the line to distinguish between domestic and international issues as many domestic issues have external elements, particularly in the environmental domain.¹⁶¹⁵ The significance of non-intervention rule decreased, whereas the norms of human rights and democracy rose.¹⁶¹⁶ In 1992, the participating states of Organization/Conference for Security and Co-operation in Europe

¹⁶⁰⁸ TAN HSIEN-LI, THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS : INSTITUTIONALISING HUMAN RIGHTS IN SOUTHEAST ASIA 148 (2011).

¹⁶⁰⁹ ASEAN Way was endorsed by the ASEAN Charter (Preamble, Article 2(2)(a)-(g) and 20).

¹⁶¹⁰ Although finally the member states managed to agree on the term “enhanced interaction” as discussed earlier in the first chapter part 2.1.1, the actual practice of non-intervention prevails.

¹⁶¹¹ Katsumata, *supra* note 1600, at 240-251

¹⁶¹² The main focus was the forest fire and haze in 1997 affecting Singapore, Malaysia, Brunei, and Philippines causing catastrophic damages across the region. Tay and Estanislao added that the environmental crisis caused by Indonesian fires give an opportunity for a more “open and frank discussion” and “exceptions must be found with regards to principle of ASEAN Way” Simon S. C. Tay & Jesus P. Estanislao, *The Relevance of ASEAN Crisis and Change, in* REINVENTING ASEAN 1, 11-12 and 19 (Simon S. C. Tay et al. eds., 2001).

¹⁶¹³ Malaysian Foreign Minister Abdulla Ahmad Badawi stated that moving away from non-intervention principle would lead a path towards disintegration. Stephen Powell, *ASEAN Debate on Democracy, Human Rights Hots Up*, REUTERS (July 26, 1998), <https://www.burmalibrary.org/reg.burma/archives/199807/msg00588.html>

¹⁶¹⁴ See the discussion on how democratic norm diffusion change in ASEAN after the end of Cold War in chapter I part 2.1.2.

¹⁶¹⁵ Katsumata, *supra* note 1600, at 246.

¹⁶¹⁶ *Id.* at 247.

(OSCE/CSCE) agreed that human rights issues could not be regarded as an entirely internal affair. Thus, collective intervention in case of human rights violation is legitimate and should not be deemed interference of state sovereignty because, in democracy, sovereignty is vested in the people, not in the state.¹⁶¹⁷

This notion is crucial for the integration of human rights norms within ASEAN. The human right norm held by the international community is a “liberal construct”—a construction of western liberal political thought believing that human is born with inalienable rights that a state should never violate.¹⁶¹⁸ In contrast, in ASEAN, member states are abided by the norms of state sovereignty, non-interference, and the Asian values with which human rights in a liberal construct seem to conflict to certain degrees.¹⁶¹⁹ ASEAN member states that do not internalize the democratic liberal values believe that sovereignty belongs to the state and external interference in any domestic matters is not acceptable.

Compared to other member states, the political regimes of Thailand and the Philippines at that period embraced the liberal values related to human rights and democracy influenced by the global normative shift. According to “Freedom in the World” annual comparative assessment of political rights (PR) and civil liberties (CL) in 1998, out of the highest score of 7 signifies the strongest restraints of political rights and civil liberties, Thailand scored 2 (PR) and 3 (CL) and the Philippines was also 2 (PR) and 3 (CL). In contrast, the score of the other member states who refused to loosen up the interpretation of the ASEAN Way signified the restrictions of their political rights and civil liberties. For instance, Malaysia’s scores were 5

¹⁶¹⁷ Conference for Security and Co-operation in Europe, “Helsinki Document 1992: The Challenges of Change, Helsinki Decisions,” Helsinki, July 9–10, 1992; and Gregory Flynn and Henry Farrell, “Piecing Together the Democratic Peace: The CSCE, Norms, and the ‘Construction’ of Security in Post-Cold War Europe,” *International Organization* 53:3 (Summer 1999), 523–528.

¹⁶¹⁸ TAN HSIEN-LI, *supra* note 1608, at 61-62.

¹⁶¹⁹ The Asian dilemma from cultural relativism was discussed in the first chapter section 2.1.3.

(PR) and 5 (CL); Indonesia's scores were 6 (PR) and 4 (CL); Vietnam's grades were 7 (PR) and 6 (CL); and Myanmar's ones were 7 (PR) and 7 (CL).¹⁶²⁰

Thus, the internalization of democratic liberal values within ASEAN member states contributed to the proposal of flexible engagement altering the ASEAN Way for more concrete regional integration. Thailand's push for flexible engagement also reflects its desire for "international recognition for its democratic credentials."¹⁶²¹ Pitsuwan repeatedly stressed that Thailand's political regime respects democracy, human rights, and transparency.¹⁶²²¹⁶²³ Scholars observed that ASEAN member states—particular those with authoritarian regimes and domestic problems concerning democracy, transparency and human right violations—would insist on the non-intervention rule to avoid external criticism.¹⁶²⁴

Another example showing how democratization helped loosen up the ASEAN Way was the comment on the human rights violation made by the President of the Philippines, Joseph Estrada, regarding the discharge of Anwar Ibrahim, the Deputy Prime Minister in the Mahathir Mohamad administration in 1998.¹⁶²⁵ After Anwar was fired after a dispute with the coalition leadership, he led significant protests against Mahathir's government. A year later, he was imprisoned for abuse of power. In 2000, he was convicted of sodomy and given an additional

¹⁶²⁰ FREEDOM HOUSE & ADRIAN KARATNYCKY, FREEDOM IN THE WORLD, 1998–1999: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES (1999), https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_1998-1999_complete_book.pdf

¹⁶²¹ Haacke, *supra* note 180, at 588.

¹⁶²² He stressed that flexible engagement "was needed for Thailand, whose government respected an open society, democracy and human rights" He also said that "Thai people should be proud that their country implements the policy of frankness and open engagement within ASEAN, as it clearly reflects a love of democracy, human rights and transparency." *Thailand Opposes ASEAN Non-Intervention Policy*, THE NATION (June 23, 1998) in Katsumata, *supra* note 174, at 247; and Marisa Chimprabha, 'Ground Rules' needed for Interaction, THE NATION (Jan. 5, 1999) in Katsumata, *supra* note 174, at 274.

¹⁶²³ In terms of liberal values, the policy of Thailand seemed to be relatively modest during Thaksin administration in 2001-2005 compared to Leekpai administration that initially proposed the flexible engagement in ASEAN. This can be seen in its foreign policy that was more passive towards Myanmar military junta as it sought to actively consolidate political and economic regional cooperation. See generally N. Ganesan, *Thaksin and the Politics of Domestic and Regional Consolidation in Thailand*, 26 CONTEMP. SOUTHEAST ASIA 33, 33-41 (2004).

¹⁶²⁴ Haacke noted that ASEAN member states, particular those having authoritarian regimes, insisted on the ASEAN Way as it help securing their regime. Katsumata pointed out that when a state has domestic issues and it does not want to receive international criticism, it would be unlikely to face direct discussion and collective engagement since interference from external forces may restrict its domestic policy, particularly on the issues of human right and democracy. Haacke, *supra* note 173, at 81-83; and Katsumata, *supra* note 174, at 242-43.

¹⁶²⁵ Amitav Acharya, *Southeast Asia's Democratic Moment*, 39 ASIAN SURV. 418, 430 (1999).

nine-year term. Despite the illegality of sodomy in conservative Muslim Malaysia, people were rarely convicted; thus, his case was widely seen as an attempt by the government to remove a political threat.¹⁶²⁶ Thailand also voiced the concern that the issue, though internal politics, can damage the unity of ASEAN.¹⁶²⁷

At the present time, the downfall of democratic values can be seen throughout the region.¹⁶²⁸¹⁶²⁹ The political leaders of Thailand and the Philippines converted their diplomacy back to the ASEAN Way and insisted on the strict application of non-intervention rule. President Rodrigo Duterte stressed the importance of non-interference in his opening speech at the 30th Association of Southeast Asian Nations (ASEAN) Summit 2017, two days after an international human rights organization urged regional leaders to stand against killings in the Philippines.¹⁶³⁰¹⁶³¹ Likewise, during the 50th ASEAN Foreign Ministers' Meeting on August

¹⁶²⁶ *Anwar Ibrahim, Jailed Malaysian politician, will get Royal Pardon Says Mahathir*, BBC (May 11, 2018), <https://www.bbc.com/news/world-asia-44079211>; *Anwar Ibrahim: A Long-Held Dream to Lead Malaysia*, BBC (Sept. 25, 2020), <https://www.bbc.com/news/world-asia-16440290>

¹⁶²⁷ *Anwar Trial Will Hurt Asean Unity—Surin*, THE NATION (Nov. 4, 1998) in Katsumata, *supra* note 174, at 242-43.

¹⁶²⁸ Freedom of the World report 2018 measures the political rights and civil liberties and no ASEAN member state is classified as “Free”. Though Indonesia was classified as “Free” for several years until 2014, it fell back to “Partly Free”. In 2017, half the ASEAN member states were categorized as “Partly Free”—Indonesia, Malaysia, Myanmar, the Philippines and Singapore and another half were categorized as “Not Free”—Brunei, Cambodia, Laos, Thailand and Vietnam. *Freedom in the World 2018*, FREEDOM HOUSE (2018), https://freedomhouse.org/sites/default/files/FH_FITW_Report_2018_Final_SinglePage.pdf; and Thitinan Pongsudhirak, *Authoritarianism is Accelerating in Southeast Asia*, NIKKEI ASIA (Jan. 1, 2018), <https://asia.nikkei.com/Editor-s-Picks/Looking-ahead-2018/Authoritarianism-is-accelerating-in-Southeast-Asia>

¹⁶²⁹ For instance, Vietnam and Laos continue to be one-party state with poor human rights and civil freedom—for instance, the disappearance of Sombath Somphone in Laos in 2012, and the arrest and detention in 2016 of five prodemocracy campaigners from the Vietnam National Self-Determination Coalition as they were seen as a threat by the ruling Communist party in Vietnam. Singapore uses of Internal Security Acts to detain suspects without charge or trial for long periods. It limit the abilities of citizens to engage in political debate and to challenge the ideologies of the dominant parties. See *Vietnam: End Repression Against Activists*, HRW (Oct. 3, 2018), <https://www.hrw.org/news/2018/10/03/vietnam-end-repression-against-activists>; *Singapore: End Broad Restrictions on Speech*, HRW (June 14, 2018), <https://www.hrw.org/news/2018/06/14/singapore-end-broad-restrictions-speech>.

¹⁶³⁰ Christian V. Esguerra, *Duterte stresses ‘Non-Interference’ in ASEAN*, ABS (Jan. 15, 2017) <https://news.abs-cbn.com/news/01/15/17/duterte-stresses-non-interference-in-asean>; and Jim Gomez & Tera Cerojano, *Facing Backlash on Killings, Duterte to find Solace in ASEAN*, AP (Apr. 28, 2017); <https://apnews.com/article/ac65b9800a744f6d9411ce0f59bbe428>

¹⁶³¹ President Rodrigo Duterte gave a speech at the 30th Association of Southeast Asian Nations (ASEAN) Summit 2017: “Relations bear fruit when they are based on mutual respect and benefit... Dialogue relations can be more productive, constructive, if the valued principle of non-interference in the internal affairs of ASEAN states is observed...The cornerstones form part of time-honored principles of international law: Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations and non-interference in the internal affairs of one another” Regine Cabato, *Duterte Highlights ASEAN Principle of Non-Interference*,

5, 2017, in Manila, the Thai Foreign Minister insisted that “ASEAN must respect each other’s sovereignty, must uphold non-interference.”¹⁶³² Thai Prime Minister Prayuth Chan-Ocha, the military junta, also expressed the absolute disagreement for any intervention in domestic politics by saying that “don’t open the door to foreign forces to interfere with our sovereignty. This is extremely dangerous.”¹⁶³³

A recent coup d’état staged by the army’s commander-in-chief, General Min Aung Hlaing, on February 1, 2021, is a major step backward for Myanmar’s democratic transformation and a democratic regression in ASEAN.¹⁶³⁴ While the international community condemned such military intervention, ASEAN’s response is marginal at best. It only released a statement to recall that the principle of democracy is enshrined in the ASEAN Charter, and reconciliation is needed to re-establish peace, stability, and normalcy in Myanmar.¹⁶³⁵ The reactions from member states vary from disapproval to complete silence.¹⁶³⁶ Indonesia and Singapore expressed their “grave concerns” and urged all parties to find solutions via dialogues.¹⁶³⁷ In contrast, Cambodia and Thailand take a hands-off approach stating that it is

CNN PHILIPPINES (Apr. 29, 2017), <https://cnnphilippines.com/news/2017/04/29/Duterte-ASEAN-speech-non-interference.html>

¹⁶³² Remarks by H.E. Mr. Don Pramudwinai, Minister of Foreign Affairs of the Kingdom of Thailand at the Opening Ceremony of the 52nd ASEAN Foreign Ministers’ Meeting Wednesday, 31 July 2019, Bangkok, Thailand, <https://asean.org/storage/2019/07/FM-THA-Remarks-at-AMM-52-Opening-As-Delivered.pdf>; *Thai Foreign Minister Stresses the Importance of ASEAN Unity*, THAILAND PRD (Aug. 8, 2017), https://thailand.prd.go.th/ewt_news.php?nid=5637&filename=inde

¹⁶³³ *Prayut will not quit, Warns Against “Foreign Interference”*, THAI PBS WORLD (Oct. 28, 2018), <https://www.thaipbsworld.com/prayut-will-not-quit-warns-against-foreign-interference/>

¹⁶³⁴ Russel Goldman, *Myanmar’s Coup, Explained*, N. Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/article/2021-myanmar-coup.html>; Jonathan Head, *Myanmar coup: Aung San Suu Kyi Detained as Military Seizes Control*, BBC (Feb. 1, 2021), <https://www.bbc.com/news/world-asia-55882489>; Hugh Bohane, *Myanmar Coup: The View From Yangon*, THE DIPLOMAT (Feb. 12, 2021), <https://thediplomat.com/2021/02/myanmar-coup-the-view-from-yangon/>

¹⁶³⁵ ASEAN Chairman’s Statement on The Developments in The Republic of The Union of Myanmar, <https://asean.org/asean-chairmans-statement-developments-republic-union-myanmar/>; Anna Malindog-Uy, *Myanmar Crisis: What Is ASEAN Doing?*, THE ASEAN POST (Feb. 10, 2021), <https://theaseanpost.com/article/myanmar-crisis-what-asean-doing>; and Sahil Mathur, *Myanmar’s Coup D’Etat: What Role for ASEAN?*, THE DIPLOMAT (Feb. 3, 2021), <https://thediplomat.com/2021/02/myanmars-coup-detat-what-role-for-asean/>

¹⁶³⁶ Dian Septiari, *ASEAN Voices Split over Myanmar Military Coup*, THE JAKARTA POST (Feb. 1, 2021), <https://www.thejakartapost.com/seasia/2021/02/01/asean-voices-split-over-myanmar-military-coup.html>

¹⁶³⁷ Sebastian Strangio, *Indonesia Leading ASEAN Push on Myanmar Coup*, THE DIPLOMAT (Feb. 18, 2021), <https://thediplomat.com/2021/02/indonesia-leading-asean-push-on-myanmar-coup/>; *Singapore expresses ‘grave Concern’ over Myanmar’s Political Crisis*, ST (Feb. 1, 2021), <https://www.straitstimes.com/singapore/singapore-expresses-grave-concern-over-myanmars-political-crisis>

an internal affair of Myanmar.¹⁶³⁸ Thailand's Prime Minister, the former military junta, Prayuth Chan-Ocha gave a brief interview stating that maintaining good relations with Myanmar is more important.¹⁶³⁹ The responses from member states and ASEAN confirm the strict adherence to the ASEAN Way.

Therefore, democratizing the authoritarian regimes in member states can be the first step to lower the bar of non-intervention principle and provide an opportunity for the ASEAN Way to be reconsidered. It can open doors for meaningful discussion, deeper integration, enhanced participation and effective implementation regarding significant regional issues. Notably, human rights violations and trade-related environmental issues will be openly and frankly discussed. The ASEAN Charter endorsed these core values of democracy, human rights, and sustainable development, but they are not yet internalized in member states. The discussion on the violation of such values is highly limited due to the non-interference practice. ASEAN has to open doors for a more flexible approach to enhancing cooperation on common regional interests as Tay stated that “non-interference cannot be maintained as an icon in the face of ecological disaster that knows no border.”¹⁶⁴⁰

2.2 The struggle for human rights on environmental protection and participation

The second obstruction for ASEAN integration of environmental norms is the lack of human rights protection. ASEAN endorses human rights protection, but it is not yet assimilated as Allison stated, “ASEAN is in the stage of human right promotion not human right protection.”¹⁶⁴¹ In the absence of human rights protection, civil participation in environmental

¹⁶³⁸ *Myanmar Military Seizes Power, Detains Elected Leader Aung San Suu Kyi*, REUTERS (Feb. 1, 2021), <https://www.reuters.com/article/myanmar-politics-int-idUSKBN2A11W6>; and Septiari, *supra* note 1636.

¹⁶³⁹ *Myanmar Junta Leader asks Thai Counterpart for Help on Democracy*, REUTERS (Feb. 10, 2021), <https://www.reuters.com/article/us-myanmar-politics-thailand-idUSKBN2AA0V7>

¹⁶⁴⁰ Simon Tay, *What Should Be Done about Haze ?* 26 *Indonesia Quart.*, 99-117, 225 (1998).

¹⁶⁴¹ ALLISON, *supra* note 801, at 191.

protection and management is inadequate. Without public participation, the decision-making process for economic and environmental policy is distorted.

Human rights and environmental protection are fundamentally linked as the environment is a prerequisite to the enjoyment of human rights. “The exercise of human rights help to protect the environment, which is in turn enables the full enjoyments of human rights.”¹⁶⁴² Human rights cannot be achieved in a degraded and polluted environment.¹⁶⁴³ By polluting the environment, the polluter violated human rights.¹⁶⁴⁴ Environmental conditions in each society help determine how people enjoy their fundamental rights to life, health, safe food, adequate housing, and traditional livelihood and culture.¹⁶⁴⁵

International laws, regional agreements, and national laws acknowledge the interrelationship between human rights and the environment and contain provisions on the right to the environment with different approaches—linking the environment to development or linking a sound environment to human health.¹⁶⁴⁶ The human right to life, health, and well-being are pronounced in Article 3 of the Universal Declaration of Human Rights: “Everyone has a right to a standard of living adequate for himself and his family, health, and well-being.”¹⁶⁴⁷ It received formal recognition in Stockholm Declaration principle 1:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.¹⁶⁴⁸

¹⁶⁴² John Knox, *Greening Human Rights*, OPEN DEMOCRACY (2015), <https://www.opendemocracy.net/en/openglobalrights-openpage/greening-human-rights/>

¹⁶⁴³ Dinah Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice*, A Background Paper for the World Health Organization, WHO Health and Human Rights Working Paper Series No 1, 2002, 4.

¹⁶⁴⁴ *Id.*

¹⁶⁴⁵ United Nations Environmental Program, *UNEP Compendium on Human Rights and Environment* (2004).

¹⁶⁴⁶ UNEP, *Compendium on Human Rights and Environment*, 35-46.

¹⁶⁴⁷ Universal Declaration of Human Rights, <http://www.un.org/en/universal-declaration-human-rights/>

¹⁶⁴⁸ Declaration of the United Nations Conference on the Human Environment, <http://www.un-documents.net/unchedec.htm>

The ASEAN Charter endorses the principle sustainable environment to ensure environmental protection for the well-being and welfare of the people.¹⁶⁴⁹ The ASEAN Human Right Declaration articulates that human has a right to an adequate standard of living including the right to safe, clean, and sustainable development—the right to development needs to meet the developmental and environmental needs equitably.¹⁶⁵⁰ Several ASEAN member states have constitutional protections for the environment—Cambodia, Indonesia, Thailand, the Philippines, Myanmar, and Vietnam.¹⁶⁵¹ The constitutions of the Philippines and Indonesia explicitly guarantee a right to a clean and healthy environment.¹⁶⁵² Thus, it is a well-established principle of international law that the protection of the environment is part of human rights—the environment should be protected for human interest.¹⁶⁵³

For ASEAN member states, nature has always been regarded as national property to be exploited for personal or national wealth. It is the “anthropocentric approach”—human over nature or humans' right to develop and exploit the environment to satisfy human needs and benefits.¹⁶⁵⁴ For rapid economic expansion in ASEAN, natural resources have been overexploited to the extent that it causes economic and environmental loss. Sustainable development became a national, regional, and global agenda.¹⁶⁵⁵ The concept of sustainable development still employs the “anthropocentric approach” as it highlights the significance of

¹⁶⁴⁹ ASEAN Charter Article 1.9 <https://asean.org/storage/images/archive/publications/ASEAN-Charter.pdf>

¹⁶⁵⁰ ASEAN Human Right Declaration Article 28F and 35 https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf

¹⁶⁵¹ KOH KHENG-LIAN ET AL., *supra* note 531 84-87; The Constitution of the Kingdom of Cambodia 1993 Chapter V Article 59; Constitution of the Republic Union of Myanmar 2008 Chapter I Section 45; and Constitution of the Socialist Republic of Vietnam 1992 (amended 2001) Chapter II, Article 17.

¹⁶⁵² The 1945 Constitution of the Republic of Indonesia Article 28 H(1) recognized the right to “good and healthy environment.” The 1987 Constitution of the Republic of the Philippines Article II Section 16 : state shall “protect and advance the right of people to balanced and healthful ecology in accord with the rhythm and harmony of nature.”

¹⁶⁵³ ICJ Judge Weeramantry in *Gabcikovo-Nagymacros Case* “The protection of the environment is...a vital part of contemporary human right doctrine for it is a sine qua non for numerous human rights such as right to health and the right to life itself”. BERTA ESPERANZA HERNANDEZ-TRUYOL & STEPHEN J.POWELL, *JUST TRADE : A NEW COVENANT LINKING TRADE AND HUMAN RIGHT* 87 (2009).

¹⁶⁵⁴ Borras, *supra* note 2, at 115.

¹⁶⁵⁵ “The 7th goal of the Millennium Development Goals: ensuring environmental sustainability aiming to address economic, social, environment dimensions of sustainable development through overarching framework of poverty eradication with enhanced environmental consideration.” *Id.* at 127.

sustainable use of natural resources for economic development to maintain a healthy environment for human well-being.¹⁶⁵⁶ According to this approach, member states can continue exploiting natural resources and polluting but within the regenerative capacity and absorptive level of the environment.

From the environmental right perspective,¹⁶⁵⁷ whether it is justifiable at all for the states to pollute for the sake of development. In particular, if polluting does not lead to development in terms of change in social welfare, alleviation standard of living, equitable allocation of wealth among people, is it still justifiable? Does nature have an equal right to coexist? As a step further from the human-centered approach of sustainable development, the “biocentric approach” or “eco-centric approach” views humans and the environment as ecological partners—nature has its own inalienable right, and human as part of nature has an obligation to conserve nature.¹⁶⁵⁸ If states continue to fail to sustain the economic-environment development, this perspective is argued to be significant for tackling massive environmental catastrophes. As Borrás articulated, “It is important to protect nature but not under the blanket of protecting human interest.”¹⁶⁵⁹

This subpart argues that the focus is on protecting the environment as it is vital for human survival because of two reasons. First, what is needed to be protected is not nature or the environment per se but the sustainable environmental condition for humans. Nature will remain in whatever polluted conditions, but such conditions may not sustain the lives of human beings. Second, ASEAN will not endorse environmental rights in the biocentric approach. It is

¹⁶⁵⁶ *Id.* at 115.

¹⁶⁵⁷ See literatures concerning different perceptions on environmental rights in C. D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. CAL. I. REV. 450 (1972); D. Shelton, *Human Rights, Environmental Rights, and The Right To Environment*, 28 STAN. J. INT’L L. 203 (1991); Frank Biermann, ‘*Earth System Governance*’ as a Crosscutting Theme of *Global Change Research*, 17 GLOB. ENVIRON. CHANGE 326, 326-337 (2007); Frank Biermann & Aarti Gupta, *Accountability and Legitimacy in Earth System Governance: A Research Framework*, 70 ECOLOGICAL ECONOMICS, 1856-1864 (2011); and FRANK BIERMANN, *EARTH SYSTEM GOVERNANCE: WORLD POLITICS IN THE ANTHROPOCENE* (2014).

¹⁶⁵⁸ Borrás, *supra* note 2, at 127-29 and 149.

¹⁶⁵⁹ *Id.*

not a viable approach because ASEAN cannot anticipate a foreseeable interest or a win-win outcome. Even with the endorsed human-centered approach with solid and tangible advantages, ASEAN still cannot fully integrate and implement it.

ASEAN and its member states are willing to implement cooperation regarding the second generation of human rights but not the first and the third generation. Karel Vasak characterized human rights in international law into three generations: the first generation is civil and political rights; the second generation is economic, social, and cultural rights; and the third generation is “solidarity rights,” including the right to healthy environment, minority rights, and right to ownership of the common heritage of humankind.¹⁶⁶⁰ The endorsement of human rights does not guarantee the actual implementation of the protection.

This problem relates back to the lack of democratic process and the dominant authoritarian powers in member states’ political regimes.¹⁶⁶¹ After the decolonization period, many countries in the region have suffered periodic political instability.¹⁶⁶² Democratic political and administrative systems are not well-founded, leading to the sudden changes or government removal by military coups. Therefore, the principles of democracy and human rights protection, together with the right to the environment under constitutions of ASEAN member states, are not stabilized and well-implemented since fundamental human rights have always been

¹⁶⁶⁰ Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, 30 UNESCO Courier, 29–32 (1977), <https://unesdoc.unesco.org/ark:/48223/pf0000048063>

¹⁶⁶¹ Perhaps democracy is not the best environmental friendly system since the public desire could go against strong environmental protection as we have witnessed in the recent global trend of climate-change deniers and ignorers. Furthermore, an unstable or a corrupted democratic system may not render the effective environmental policy if the system is corrupted and elected representatives or officials have connection with polluted industries. For instance, in France the strong protest occurred due to carbon tax initiated by President Macron administration to cut down more emissions for climate change mitigation. James McAuley, *Why are the ‘Yellow Vests’ Still Protesting in France? His Name is Macron*, WAP0 (Dec. 8 2018), https://www.washingtonpost.com/world/europe/why-are-the-yellow-vests-still-protesting-in-france-his-name-is-macron/2018/12/08/36488d00-fa2d-11e8-8642-c9718a256cbd_story.html?utm_term=.9f3c0388ebdc

¹⁶⁶² This insecurity is due to many reasons, including the lack of trust in democratic system, economic fluctuation, national extremists and conservatives, and bias against ethical values imposed by western or international community. See discussion on democratic and human right struggle of member states in Chapter I

jeopardized and violated by the political unrest.¹⁶⁶³ Thailand is an example of the lack of environmental rights and democracy due to internal political turmoil. Human's right to live in a healthy environment, the right to participate in the environmental movement, and the right to take legal actions against governmental entities were endorsed in the Thai constitution before the military coup in 2014.¹⁶⁶⁴ After the military junta took power, the latest version of the Thai constitution 2017 no longer contains such provisions.¹⁶⁶⁵ Several environmental regulations were amended by lowering environmental assessment standards to facilitate massive development programs.¹⁶⁶⁶

The violation of human rights is omnipresent in ASEAN member states.¹⁶⁶⁷ In non-democratic regimes, there is no guarantee of fundamental civil rights: freedom of expression,

¹⁶⁶³ For instance, Thailand's democratic and human right development has always been interrupted by consecutive military coups. The recent Constitution that is written under the junta's rule does not recognize or guarantee the right to clean and healthy environment for the people.

¹⁶⁶⁴ Constitution of Thailand 1997 and 2007 have similar provisions protecting human's right to good environment and environmental participation. For instance, the Constitution 2007 Section 85 (5) stated that it is the duty of the state to "promote, conserve and protect the quality of the environment under sustainable development principles, and to control and eliminate pollution which may affect health and sanitation, welfare and quality of life of the public by encouraging the public, the local communities and the local government organisations to participate in the determination of measures." Moreover in Section 67 it recognized citizen's right to participate in environmental movements: "The rights of a person to participate with the State and communities in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his health and sanitary condition, welfare or quality of life, shall be appropriately protected. Any project or activity which may seriously affect communities with respect to the quality of the environment, natural resources and biological diversity shall not be undertaken, unless its impacts on the quality of the environment and health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organised, and opinions of an independent organisation, consisting of representatives from private environmental and health organisations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity. The right of a community to take legal action against a government agency, State agency, State enterprise, local government organisation or other State authority which is a juristic person to enforce the performance of duties under these provisions shall be protected." http://web.krisdika.go.th/data/outside/outside21/file/Constitution_of_the_Kingdom_of_Thailand.pdf; and the Constitution of Thailand 1997 section 56, 59, and 79, <http://www.asianlii.org/th/legis/const/1997/1.html#C003>

¹⁶⁶⁵ Constitution of Thailand 2017 <https://www.krisdika.go.th/documents/67673/181643/CONSTITUTION+OF+THE+KINGDOM+OF+THAILAND+%28B.E.+2560+%282017%29%29.pdf/a9914565-1c6b-731a-89c7-ded35cbd2457>

¹⁶⁶⁶ *Thai Junta Slashes EIA Procedures on State Projects*, PRACHATAI (Mar. 9, 2016), <https://prachatai.com/english/node/5919>; Janjira Ponggrai & Chularat Sae, *Govt Defends Junta Order to Push Development Projects*, NATION THAILAND (Mar. 11, 2016), <https://www.nationthailand.com/national/30281296>; and *Thai Junta Scraps Regulations on Industries, Power plants*, PRACHATAI (Jan. 22, 2016), <https://prachatai.com/english/node/5789>

¹⁶⁶⁷ See the discussion on human rights violation in member states in chapter I part 2.1.3

public movement and participation, access to environmental information and assessment,¹⁶⁶⁸ and a fair trial and remedy.¹⁶⁶⁹ These procedural rights are the three pillars for “Environmental Democracy,”¹⁶⁷⁰ set forth in Principle 10 of the Rio Declaration and essential for environmental protection.¹⁶⁷¹ The suppression of these rights increases the tendency of environmental degradation and decreases the chances for reparation of such environmental damage.¹⁶⁷² Under the suppression of public participation, there are also distortions of development because not all voices can be heard as Herz stated, “Repressive regimes are not accountable to their

¹⁶⁶⁸ The access to information is essential for the quality of human’s life and for the governmental policy making process because having accurate environmental information and risk assessment of environmental damage allows citizens to make their choices and avoid any direct or indirect risks effecting their health or lives. The information available needs to be relevant, comprehensible, simple, and provided in a timely manner. Moreover, the procedure to obtain such information needs to be established without putting unreasonable costs to citizens. Existing side by side with the right to information is the state’s duty to gather environmental information, evaluate every economic activity, and duly notify the citizens any possible environmental risks. The right to information is closely linked to the right to participation: both of them are essential attribute of democratic process; thus, the concept of democratic state is worthless without the right to information that allows the citizens to base their civil and political decision upon by voting or express their will and opinions in public affairs. HUNTER ET AL., *supra* note 97, at 1390.

¹⁶⁶⁹ At the end citizens must have right to just and fair judicial recourses and remedy due to any illegal actions causing environmental harms to them. The recourses can be criminal, civil or administrative process. The key is to have a due process of trial, reasonable time frame, and legal basis that does not pose significant burdens to the injured parties so as to take away their right to justice or dissuade them from judicial recourse. For instance, in a case where an industrial factory is accused of releasing toxic waste to environment or using a chemical substance that can cause serious health risk to human, animal or plant life, a burden of proof to show significant environmental risk or damage or to show the link between cause and actions should not be posed upon the plaintiff or the injured party because a regular citizen is incapable, financially and technically, of making scientific risk assessment to prove such environmental risk or damage, especially when all specific information regarding the use of toxic compounds is in the hand of industrial company, the defendant. The burden of proof should be on the industry to prove otherwise since they have all the information regarding their activities and all the financial supports to conduct environmental risk assessment. *Id.*

¹⁶⁷⁰ Jesse Worker & Stephanie Ratté, *What does Environmental Democracy Look Like?*, WRI (July 29, 2014), <https://www.wri.org/blog/2014/07/what-does-environmental-democracy-look>

¹⁶⁷¹ Principle 10 of Rio Declaration “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Furthermore, under Article 25 of the International Covenant on Civil and Political Rights, the right to public participation allows citizens: (i) To take part in the conduct of public affairs, directly or indirectly through elected representatives; (ii) To vote and to be elected in a genuine periodic election which shall be by universal and equal suffrage and shall be held by secret ballots, guaranteeing the free expression of will of the electors; and (iii) To have access, on general terms of equality, to public service in his country.

http://www.unesco.org/education/pdf/RIO_E.PDF

¹⁶⁷² Certain human rights, especially access to information, participation in decision-making, and access to justice in environmental matters, are essential to ensure the environmental protection and good environmental decision-making. Public participation is crucial element for regulating environmental governance as it ensures that the state’s decision-making process echoes the interests of all concerned stakeholders and take into consideration all relevant information of environmental impacts. With no guarantee of public participation under the law, the environmental law implementation and enforcement cannot be secured.

people.”¹⁶⁷³ Therefore, the governmental position, policy, strategy concerning trade, economic development, or environmental measures may not reflect the majority of citizens on the equitable ground.¹⁶⁷⁴

The participation of civil society and environmental activists plays a crucial role in providing local communities with information regarding the environmental impacts and risks of a policy or development project. However, the non-democratic regimes in member states tend to limit the role of civil society, activists, and local communities. They centralize their power to make and implement environmental policy or economic policy that may significantly impact the environment.¹⁶⁷⁵ Local communities have limited, if not at all, power and funds to manage natural resources in their environment or participate in national projects that may affect their livelihoods and habitats. Their needs may not be taken into consideration when the governments exercise their legislative and executive powers. Some decisions made by the governments for economic growth could benefit only elite groups of people, but the environmental cost will be borne by all others who cannot take part in the decision.¹⁶⁷⁶

For instance, the Thai current military government is backed by the top 1% of elites and millionaires who control the mass market of the whole national production.¹⁶⁷⁷ Their relationship is mutually benefited,¹⁶⁷⁸ as witnessed by the government’s decision to delay the

¹⁶⁷³ Richard Herz, *Making Development Accountable to Human Rights and Environmental Protection*, American Society of International Law, Proceeding of the 94th Annual Meeting (2000), 216-217.

¹⁶⁷⁴ When making international agreements on trade or environment, it is limitation of international system where only states or supranational organizations are players. The regulations, policies, agreements made by the head of states has effects on all of their nationals so without democratic channel, there is no way that those decisions will reflect genuine desire of the people. The people has to bear the consequence of those decision without having a chance to take part in it even if those decisions lead to disasters.

¹⁶⁷⁵ See the discussion on development of coal-fired power plant projects and hydropower plants in chapter III for examples.

¹⁶⁷⁶ See the effects of trade growth without social and environmental consideration in chapter II.

¹⁶⁷⁷ For example, in Thailand, military junta formed a partnership with business conglomerates, Sino-Thai group, forming a platform through which big business companies can have a leading role controlling small businesses in their sectors. See Prajak Kongkirati & Veerayooth Kanchoochat, *The Prayuth Regime: Embedded Military and Hierarchical Capitalism in Thailand*, 6 TRANS 279, 279-305 (2018); and Peter Janssen, *Wealth Gap Remains Under Thai Junta Rule*, ASIA TIMES (Sept. 6, 2018), <https://asiatimes.com/2018/09/wealth-gap-remains-under-thai-junta-rule/> ;

¹⁶⁷⁸ In contrast with the perception that authoritative regimes may be efficient in strengthen environmental regulations because they do not need votes, the authoritative regimes may not reinforce the environmental

ban on the use of pesticides and chemical fertilizers¹⁶⁷⁹ and promote monoculture cash crops such as wide-scale corn and sugarcane production.¹⁶⁸⁰ Corn is a valuable cash crop for both domestic and export markets used for producing feeds for livestock. Within the domestic market, small farmers produce corns to supply giant food and livestock manufacturing businesses—one of them is Charoen Pokphand Group (CP) who has a strong connection with the junta.¹⁶⁸¹ The wide production of cash crops relates to the land burning and haze problem, particularly in the northern parts of Thailand, Myanmar,¹⁶⁸² and Laos.¹⁶⁸³ The government's measure to stop the fire is to simply forbid land clearing by fire without additional consideration of their economic incentives.¹⁶⁸⁴ The measure sanctioning local farmers cannot stop the fire when financial interest prevails.¹⁶⁸⁵ Instead, the government should only regulate the central policy for environmental sustainability of the food chain by disclosing all information about

protection so as to make them in a conflicting position with their elite supporters. In order to provide benefit for the businesses of their supporters, many trade related policies are destructive to the sustainable environment.

¹⁶⁷⁹ Sanitsuda Ekachai, *No Poison Paradise for Toxic Farm Chemicals*, BANGKOK POST (Sept. 28 2017), <https://www.bangkokpost.com/opinion/opinion/1332767/no-poison-paradise-for-toxic-farm-chemicals>; Pratch Rujivanarom, *No Ban on Commercial Toxic Agricultural Chemicals*, THE NATION (May 24, 2018), <http://www.nationmultimedia.com/detail/national/30346142>; and *Agrochemicals Unmasked: Fertilizer and Pesticide Use in Thailand and Its Consequences to the Environment*, GREEN PEACE (2008), <https://www.greenpeace.org/seasia/th/Global/seasia/report/2008/2/agrochemicals-in-thailand-eng.pdf>

¹⁶⁸⁰ *Farming Minister Promotes Corn Growth*, THE NATION (Aug. 22, 2018), <http://www.nationmultimedia.com/detail/national/30352714>

¹⁶⁸¹ See, e.g., Shawn W. Crispin, *Thailand's 'Five Families' Prop And Imperil Prayut :Clans Behind Kingdom's 'Big Five' Companies Thrive While Economy Slides and Disparity Widens*, ASIATIMES (Dec. 13, 2019), <https://asiatimes.com/2019/12/thailands-five-families-prop-and-imperil-prayut/>; Panithan Onthawon, *Government Regulators Greenlight CP's Acquisition of Tesco Operations in Thailand*, THAI ENQUIRER (Nov. 7, 2020), <https://www.thaienquirer.com/20491/government-regulators-greenlight-cps-acquisition-of-tesco-operations-in-thailand/>; Marimi Kishimoto, *Thai CP Group Wins Government Approval On High-Speed Airport Rail*, ASIA NIKKEI (May 29, 2019), <https://asia.nikkei.com/Business/Companies/Thai-CP-Group-wins-government-approval-on-high-speed-airport-rail> ;

¹⁶⁸² Particularly in Shan state of Myanmar, local farmers have farming contracts with the Thai conglomerate CP group. Kevin Woods, *CP Maize Contract Farming in Shan State, Myanmar: A Regional Case of a Place-Based Corporate Agro-Feed System*, BICAS Working Paper No.14 (2015) https://www.tni.org/files/download/bicas_working_paper_14_woods.pdf

¹⁶⁸³ *Maize, Land Use Change, and Transboundary Haze Pollution*, Green Peace (May 26, 2020), <https://www.greenpeace.org/southeastasia/publication/4117/maize-land-use-change-and-transboundary-haze-pollution/>

¹⁶⁸⁴ *Farmers Burn Straw Fields, Leaving Smoke-Filled Sky in Sisaket District*, THE NATION (Jan. 13, 2020), <https://www.nationthailand.com/news/30380487>

¹⁶⁸⁵ Pratch Rujivanarom, *Govt urged to help Farmers Shift Practices*, THE NATION (Apr. 8, 2019), <https://www.nationthailand.com/national/30367372>

production and process methods,¹⁶⁸⁶ providing concession maps, and requiring business accountability to discourage the purchase from unsustainable suppliers. For measure against burning, the government should vest its power and financial support to each province so that all relevant parties—local authority, villagers, and local farmers—can jointly discuss and seek an optimal solution that does not leave small farmers to bear all financial burden.¹⁶⁸⁷

Indonesian recent adoption of the new law is another example of the distortion of environmental rights. Indonesian students, environmental NGOs, and civil society groups have protested against new legislations, so-called Omnibus Law—the insertion of 174 articles into 79 existing statutes governing areas of taxation, investment, labor, and the environment.¹⁶⁸⁸ Omnibus law is argued to boost up investment and facilitating job creation.¹⁶⁸⁹ Omnibus law is argued to boost up investment and facilitate job creation. Nonetheless, many scholars and activists found that the law only benefits the elites—businesses conglomerates and politicians—so the oligarchy and big dirty businesses are getting stronger, particularly the mining and coal companies.¹⁶⁹⁰ It bluntly decreases environmental standards to prioritize

¹⁶⁸⁶ When given accurate environmental information regarding environmental impacts of economic activities such as environmental impacts of process and production methods of products or environmental cost of the products in the market, citizens will realize the actual environmental cost of such products and activities; therefore, they could gradually switch their preferences towards products or activities of sustainable sources. As a result, citizen's demand for more sustainable products and economic activities will be expressed directly through public movement or indirectly through the press or consumption behaviors which will be taken into account for law and policy making process.

¹⁶⁸⁷ Atchara Rakyatidharm, *Forest fire in the Context of Territorial Rights in Northern Thailand*, in *Communities in Flames: Proceedings of an International Conference on Community Involvement in Fire Management*, in FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS REGIONAL OFFICE FOR ASIA AND THE PACIFIC, BANGKOK (Peter Moore et al., eds., 2002), <http://www.fao.org/3/ac798e/ac798e0h.htm> ; Chaiyot Yongcharoenchai, *Amid Northern Haze, a Burning Desire for Wealth*, BANGKOK POST (Mar. 29, 2015), <https://www.bangkokpost.com/thailand/special-reports/511036/amid-northern-haze-a-burning-desire-for-wealth>

¹⁶⁸⁸ Max Lane, *Protests Against the Omnibus Law and the Evolution of Indonesia's Social Opposition*, ISEAS (Nov. 9, 2020), https://www.iseas.edu.sg/wp-content/uploads/2020/11/ISEAS_Perspective_2020_128.pdf ; and Phelim Kine, *Indonesia's New Omnibus Law Trades 'Green Growth' for Environmental Ruin*, THE DIPLOMAT (Oct. 14, 2020).

¹⁶⁸⁹ Edward Aspinall, *Indonesian Protests Point to Old Patterns*, NEW MANDALA (Oct. 12, 2020), <https://www.newmandala.org/indonesian-protests-point-to-old-patterns/>

¹⁶⁹⁰ Aulia Nastiti, *Why Indonesia's Omnibus Bill will not Create Jobs and only Strengthen the Oligarchy*, THE CONVERSATION (Oct. 20, 2020), <https://theconversation.com/why-indonesias-omnibus-bill-will-not-create-jobs-and-only-strengthen-the-oligarchy-147997>; Stania Puspa, *Jokowi and The Oligarchs: Indonesia's Elite set to win from Omnibus Bill*, GLOB SOUTH EAST ASIA (Oct. 13, 2020), <https://southeastasiaglobe.com/omnibus-bill-oligarchs-indonesia/>; and Hans Nicholas Jong, *Indonesian Officials Linked to Mining and 'Dirty Energy' Firms Benefiting from Deregulation Law*, MONGABAY (Oct. 26, 2020), <https://news.mongabay.com/2020/10/indonesia-coal-mining-energy-omnibus-deregulation-law-oligarch/>

economic growth. For instance, it removes strict liability from the Forestry and Environmental Law, eliminates the legal requirement that provinces have to maintain a minimum forest cover of 30 percent on provincial land, and empowers the government to give concession in forest and peatlands, which are currently protected by the moratorium.¹⁶⁹¹

Grita Anindarini from ICEL climate justice division stated that Omnibus law weakens three environmental rights—access to information, public participation, and environmental justice.¹⁶⁹² The environmental permit issued based on the environmental impact assessment document (AMDAL) can no longer be challenged. Omnibus law eliminates the public right to file an objection against the permit once it is approved.¹⁶⁹³ It also loosens requirements for environmental impact assessment for industrial and agribusiness projects as it abolishes the independent committee—consisting of environmental experts, public representatives, and NGOs.¹⁶⁹⁴ The former regulation guaranteed public participation from communities and civil society during the assessment process, but Omnibus law limits the participating right to only those directly impacted.¹⁶⁹⁵ Firman Soebagyo, parliament’s legislative committee, stated that the critics from NGOs who are not directly affected should be limited if they “aren’t in line with national interests.”¹⁶⁹⁶

Without the participation of civil society and environmental activists, the affected local communities may not be well informed of accurate environmental data until it is too late.¹⁶⁹⁷ In

¹⁶⁹¹ Laura Castello Sant, *Indonesian Omnibus Law: Prioritizing Economic Growth at the Expense of the Environment*, EARTH (Nov. 11, 2020), <https://earth.org/the-indonesia-omnibus-law/>; and Phelim Kine, *Indonesia’s New Omnibus Law Trades ‘Green Growth’ for Environmental Ruin*, THE DIPLOMAT (Oct. 14, 2020).

¹⁶⁹² Han Nicholas Jong, *Indonesia’s Omnibus Law a ‘Major Problem’ for Environmental Protection*, MONGABAY (Nov. 4, 2020), <https://news.mongabay.com/2020/11/indonesia-omnibus-law-global-investor-letter/>

¹⁶⁹³ Raynaldo Sembiring & Grita Anindarini, *Predicting Indonesia’s Environmental Protection Direction: What to Expect After the Omnibus Law?*, ICEL (Nov. 10, 2020), <https://icel.or.id/en/issues/predicting-indonesias-environmental-protection-direction-what-to-expect-after-the-omnibus-law/>

¹⁶⁹⁴ Usman Hamid & Ary Hermawan, *Indonesia’s Omnibus Law is a Bust for Human Rights*, NEW MANDALA (Oct. 9, 2020), <https://www.newmandala.org/indonesias-omnibus-law-is-a-bust-for-human-rights/>; Izzan Fathurrahman, *Development Under Jokowi Leaves Human Rights Behind*, NEW MANDALA (Oct. 25, 2019), <https://www.newmandala.org/jokowi-development/>

¹⁶⁹⁵ Jong, *supra* note 1692.

¹⁶⁹⁶ *Id.*

¹⁶⁹⁷ *Id.*

the case of the karst mountains of Kendeng in Central Java province, while the government supported the cement quarry and factory, local farmers in the area challenged the project's environmental permit in court, citing that they did not know the project's impact assessment until heavy machinery appeared on the site. It was activists who provide information on how this project would pollute their water sources.¹⁶⁹⁸

Thus, public participation is critical for integrating environmental protection in national policy and ensuring environmental justice, but not all participation is the same. Rodan distinguished several modes of participation: (i) individual political expression—an individual effort to directly or indirectly influence public policy and governance¹⁶⁹⁹; (ii) civil society expression—a collective and independent movement in forms of organizations, social groups, or unions¹⁷⁰⁰; (iii) societal incorporation—an institution providing channels for participants to influence public policy and debate but the state strategically control over the sorts of conflicts open to scrutiny;¹⁷⁰¹ and (iv) administrative incorporation—organized individual participation in state-controlled paths that “allow and depoliticize public policy” to drive social conflicts through institutions controlled by political-bureaucratic class.¹⁷⁰²

The participation in societal and administrative incorporation the participants do not contribute to democratic movement and tend to have an insignificant role in leading controversial social issues such as environmental protection because the participants cannot freely initiate issues on their terms. Particularly, administrative incorporation is a mechanism

¹⁶⁹⁸ *Id.*

¹⁶⁹⁹ The limitation and risks for harsh repression depends on the domestic regime in member state. For instance, Thailand still enforces Lèse Majesté law prohibiting any discussion or critics against the monarchy. In Vietnam, social bloggers were imprisoned for running ‘anti-state’ activities. GARRY RODAN, PARTICIPATION WITHOUT DEMOCRACY : CONTAINING CONFLICTS IN SOUTHEAST ASIA 34 (2018); Roy Greenslade, *Vietnamese Blogger Arrested for ‘Anti-State’ Articles*, THE GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/media/2014/dec/04/vietnamese-blogger-arrested-for-anti-state-articles>

¹⁷⁰⁰ RODAN, *supra* note 1699, at 35.

¹⁷⁰¹ “Under this mode, select civil society group and new state-conceived categories of social groups are incorporated principally to contribute to the refinement of the delivery of public goods and services rather than to engage in an open-ended debate over policy and reform options.” *Id.* at 37-38. See also Kanisha Jayasuriya & Gordon Rodan, *Beyond Hybrid Regimes : More Participation, Less Contestation in Southeast Asia*, 14 DEMOCRATIZATION 773, 783 (2007).

¹⁷⁰² RODAN, *supra* note 1699, at 39-49.

providing consultation and feedback platforms giving opportunities for direct engagement with state bureaucracies; thus, it does not promote citizen's democratic right because the conflicts over the policy are translated into an administrative issue about the implementation of policy.¹⁷⁰³ First, the complaints must be about the "process" of policy implementation—whether there is a defect in administration, malpractice, or corruption.¹⁷⁰⁴ Second, as the law does not allow for collective participation in the process, a citizen must individually submit petitions or letters of complaint to authorities.¹⁷⁰⁵ Examples can be seen in several mechanisms in Singapore, such as the Feedback Unit was established in 1985 and renamed in 2006 as Reaching Everyone for Active Citizenry@Home (REACH). REACH, run by the Ministry of Communications and Information, provides online platforms for "both complaints and suggestions about refinement of public policy, as well as for information gathering and dissemination on topics and issues of interest to authorities."¹⁷⁰⁶ As Rodan observed that it is participation without democracy—a state crucially, "control over who can participate—and on what issues and how—offers the possibility of expanding political space while narrowing the substantive issues open to contest."¹⁷⁰⁷

On the other hand, individual and civil society expressions have great contribution in influencing controversial political, economic and environmental issues; thus, they challenge the state political regime and interest of the elites. To a certain degree, their movement is likely to be suppressed in non-democratic regimes of member states such as Thailand, Cambodia, Vietnam, Myanmar, and Singapore.¹⁷⁰⁸ The struggle for more openness and space for political movement continues. In recent decades, the most expansive individual expressions are social media and online activities. On social media platforms, it can be hard to distinguish individual

¹⁷⁰³ *Id.* at 389.

¹⁷⁰⁴ *Id.*

¹⁷⁰⁵ *Id.*

¹⁷⁰⁶ *Id.* at 40.

¹⁷⁰⁷ *Id.* at 37.

¹⁷⁰⁸ *Id.* at 36.

expression from social activism.¹⁷⁰⁹

Key active environmental groups in member states, among others, are: Indonesian Center for Environmental Law (ICEL), an independent NGO involving in legal reform and environmental governance; Friends of the Earth International Indonesia, the largest and oldest environmental advocacy founded in 1980 focusing on conflicts over natural resources, indigenous rights, a marine ecosystem and deforestation¹⁷¹⁰; World Resource Institute Indonesia (WRI), an independent non-profit research organization working on economic-environmental issues¹⁷¹¹; Greenpeace Philippines working on environmental threats such as illegal logging, coal power plants project and waste importation¹⁷¹²; and Biodiversity Sustainable Agriculture Food Sovereignty Thailand Foundation (BioThai) founded through a collaboration between social activists, farmers, academics, government officials and the people of rural communities in order to study and develop public policies related to the management of natural resources, economic development, and culture, towards sustainable social development.¹⁷¹³

Despite certain degrees of constraints on civil liberties, the environmental groups still have influences in securing environmental justice and internalizing environmental norms into member states' economic policies and regulation. For instance, FTA Watch, BioThai,¹⁷¹⁴ and other civil society groups put up vigorous campaigns against Thai government's decision to join the massive trade bloc, the CPTPP trade agreement,¹⁷¹⁵ because though it may help accelerating trade growth, it may also have negative impacts on Thai small farmers, rights over

¹⁷⁰⁹ For instance in Thailand and Malaysia, many prominent bloggers have formal or informal links with opposition parties or nongovernmental organizations (NGOs). Their individual expression has significant influential effects. See Garry Rodan, *Southeast Asian Activism and Limits to Independent Political Space in Southeast Asia*, in *SOCIAL ACTIVISM IN SOUTHEAST ASIA* 22, 22-39 (Michele Ford ed., 2013), 22-39 ; and Meridith Weiss, *Of Equality and Irritation : New Agendas in Activism in Malaysia and Singapore*, 21 *Democratization* 867, 867-887 (2014).

¹⁷¹⁰ Friend of the Earth Indonesia, <https://www.foei.org/member-groups/asia-pacific/indonesia>

¹⁷¹¹ WRI Indonesia, <https://wri-indonesia.org/en/about>

¹⁷¹² Green Peace Philippines, <https://www.greenpeace.org/philippines/explore/>

¹⁷¹³ BioThai Foundation, <https://www.biothai.org/node/129>

¹⁷¹⁴ BioThai and other civil society groups also run campaigns and petitions to ban the use of hazardous agrichemicals such as paraquat and chlorpyrifos. <https://www.biothai.org/node/1441>

¹⁷¹⁵ See discussion on CPTPP agreement and its lack of environmental protection provision in chapter IV.

seeds and breeds, and access to medicine.¹⁷¹⁶ The Thai government decided to take a step back until certain differences are sorted out.¹⁷¹⁷¹⁷¹⁸ For many years, Greenpeace Philippines has actively urged the government to put climate action and justice in the center of governance and regulate corporate accountability—the fossil fuel industries.¹⁷¹⁹ Until November 2020, the House of Representatives adopted House Resolution No. 1377, declaring a climate and environmental emergency to ensure “enhanced and coherent climate actions in the executive and legislative agenda of the government.”¹⁷²⁰ Friends of the Earth voiced against the financing of coal-fired power plant project in Indonesia by the Japan Bank for International Cooperation (JBIC).¹⁷²¹ Later, the Japanese government pledged not to support the finance of coal projects overseas.¹⁷²²

In brief, to internalize environmental norms, ASEAN is required, along with assimilating democratic values, to shift human rights promotion to human rights protection,

¹⁷¹⁶ Civil society groups held series of press conferences and discussions the negative impacts of CPTPP trade agreement that the governments should take into consideration before finalize the deal. FTA Watch, *What Deputy PM Somkid Didn't Say: Disasters Loom Large as Thai Government Eager To Join CPTPP*, BIOETHAI (Feb. 20, 2020), <https://www.biothai.org/node/1448>; CSO Open Letter to Thailand's Prime Minister and the Chairperson of the Special Committee on the Study of the CPTPP's Impact Concerning Thailand's Position to Join the CPTPP, MAKE MEDICINE AFFORDABLE (Aug. 5, 2020), <https://makemedicinesaffordable.org/wp-content/uploads/2020/08/Open-letter-to-Thailand-CPTPP.pdf> ; and *Statement of Civil Society in Thailand on RCEP Negotiation and the Thai Government's Effort in Joining CPTPP*, FOCUS GLOBAL SOUTH (July 25, 2018), <https://focusweb.org/statement-of-civil-society-in-thailand-on-rcep-negotiation-and-the-thai-governments-effort-in-joining-cptpp/>

¹⁷¹⁷ The fact that the U.S. withdrew itself from the deal may also contribute to Thailand's hesitation to join the agreement. See Chapter IV part 2.2.2 for the discussion on CPTPP.

¹⁷¹⁸ *CPTPP Delay the Right Call*, BANGKOK POST (July 3, 2020), <https://www.bangkokpost.com/opinion/opinion/1945024/cptpp-delay-the-right-call>

¹⁷¹⁹ *Greenpeace to Pres. Duterte: Hold Corporations Responsible for Climate Impacts on Filipinos*, GREENPEACE (Nov. 12, 2020) <https://www.greenpeace.org/philippines/press/10213/greenpeace-to-pres-duterte-hold-corporations-responsible-for-climate-impacts-on-filipinos/>; Yeb Sano, *Justice in the Face of Extreme Climate Disasters*, GREENPEACE (Nov. 8, 2020), <https://www.greenpeace.org/philippines/story/10197/justice-in-the-face-of-extreme-climate-disasters/>; *Greenpeace Renews Calls for Climate Emergency Declaration as Super Typhoon Rolly Exits PAR*, GREENPEACE (Nov. 2, 2020) <https://www.greenpeace.org/philippines/press/10170/greenpeace-renews-calls-for-climate-emergency-as-supertyphoon-rolly-exits/>

¹⁷²⁰ *Greenpeace Lauds Lower House for Climate Emergency Declaration Push*, Greenpeace (Nov. 27, 2020), <https://www.greenpeace.org/philippines/press/10242/greenpeace-lauds-hor-for-climate-emergency-declaration-push/>

¹⁷²¹ *Stopping Coal Financing for Indonesia Crucial in the Fight Against Climate Change*, FOEI (Nov. 17, 2016), https://www.foei.org/press_releases/stopping-coal-financing-indonesia-crucial-fight-climate-change

¹⁷²² See interview of Shinjiro Koizumi, Minister of Environment of Japan with Financial Times in Robin Harding, *Japan Vows to Slash Financing of Coal Power in Developing World*, FT (July 23, 2020), <https://www.ft.com/content/482fa9e4-5eb5-4c61-a777-998993febae0>

ensuring the participation of individual, civil society groups, and local communities in the policy-making process. Harold Koh stated, “democracy and genuine respects for human rights remain the best paths for sustainable economic growth.” Without participation, who speaks for the people, majority, and minority? Whose interest counts? In the worst case, the environment is a sacrifice but not for the development of all nations but wealth for small groups of people.

3. HOW CAN ASEAN INTEGRATE ENVIRONMENTAL PROTECTION?

This part proposes potential reforms to the ASEAN structure to convert ASEAN democratic and human rights statements into practices and facilitate environmental integration. The strict application of the ASEAN Way or non-intervention rule is no longer suitable in the face of transboundary environmental problems. ASEAN needs to steer away from state-centric diplomacy and move towards a people-centered regionalism. First, ASEAN should have a separation of power, and ASEAN representatives should be democratically elected from the people of member states. Second, human rights to the sustainable environment should be protected by strengthening civil society and environmental NGOs' participation in the decision-making process. Third, ASEAN should reinforce the linkage between the environment and economic development by establishing a distinct environmental pillar or an environmental working group within the economic pillar. This particular organ should focus on three tasks: (i) strengthening environmental science with policy ensuring the compatibility of environmental protection and economic cooperation; (ii) incorporating environmental provisions in ASEAN trade agreements and economic development; and (iii) establishing a mechanism to address the economic incentives as the underlying cause of environmental problems.

3.1 Creating the separation of power and decreasing the dominant elite-led approach

The structure of ASEAN needs to be amended by creating a separation of power to decrease the dominant state-led approach. ASEAN should have a separation of power: executive power, legislative power, and judiciary power. These three powers can no longer be vested in one entity, the ASEAN Summit.¹⁷²³ The ASEAN representatives should be democratically elected from the people of member states. Without the separation of power and democratic engagement of ASEAN people, any integration in ASEAN is hardly feasible. When the concrete ASEAN structure is in place, environmental integration is foreseeable.

The structure and function of ASEAN have no contact with the ASEAN people. The nature of ASEAN is an elite-led and state-centric organization in which human rights and democracy are neither prerequisites for membership nor pursuing goals. The driving force is regime survival, and the development is determined by the states' political and security interests. Non-state actors play marginal roles.¹⁷²⁴ By having separation of power and national representative elections, people within member states can connect with ASEAN. It would lead to more transparency and more connection with the people. To ASEAN people, ASEAN has minimal role and significance to their lives. Research shows that the general public lacks awareness of ASEAN's existence.¹⁷²⁵

¹⁷²³ This problem was discussed in the first chapter regarding the structural challenges of ASEAN section 2.2. Under the Charter, the ASEAN Summit comprised of the head of the governments of member states acts as a one-stop service: legislative branch, executive branch, and judiciary branch. The Article 7 of the Charter states that ASEAN Summit comprising of the Heads of State or Government of Member States shall be the supreme policy-making body of ASEAN ; deliberate, provide policy guidance and take decisions on key issues pertaining to the realization of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies ; address emergency situations affecting ASEAN by taking appropriate actions ; and decide on matters referred to it under Chapters VII and VIII. For the decision-making by ASEAN Summit which comprises of the Heads of State or Government of Member States, under the Article 20, it shall be based on consultation and consensus. Where the consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made. In the case of serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision. ASEAN Charter Art.7.2(a), (b), (d), (e) and Art.20, 20.2 and 20.4

¹⁷²⁴ ACHARYA, *supra* note 16, at 222.

¹⁷²⁵ Christopher Roberts, *Affinity and Trust in Southeast Asia: A Regional Survey*, PEOPLE'S ASEAN AND GOVERNMENT'S ASEAN, 11 RSIS MONOGRAPH 84, 84-92 (2007); *Surveys on ASEAN Community*, ASEAN (Feb.

ASEAN entities function by the head of member states, foreign ministers, or representatives appointed by the member states.¹⁷²⁶ They are driving the policies and progress of ASEAN. In authoritarian regimes or in certain regimes where civil liberties and political rights are limited, the interests of states and their leaders do not always reflect, if not contradict, the interests of the people. The so-called Asian values they defend may not be the true values people believe in.¹⁷²⁷ The economic-environment developmental path they envisioned may not be the same one for the people. ASEAN may not be driven by the need and the benefit of Southeast Asian people.

As discussed earlier in previous chapters, the government's excuse for pursuing rapid economic growth is for national wealth and the well-being of its citizens; however, it is not always the case. In ASEAN, most member states having economic growth suffered from high inequality distribution of wealth.¹⁷²⁸ The majority of the people do not benefit from national growth but suffer from environmental consequences. With elections of ASEAN representatives, to the very least, there is hope that this fact could be voiced and heard. The final policies would reflect what ASEAN identity truly is. It helps to create the common feeling that we, the people, belong to ASEAN. ASEAN will no longer be a far-fetched elite-led talk shop.

To establish a separation of power and set parameters for the power vested in elected representatives from member states, the construction of the European Union with its long process of regional democratization can serve as a guideline for ASEAN.¹⁷²⁹

It took three wars and seventy years of EU construction to reach the vision of Victor Hugo, the Senator of the Second Republic of France and the author of "Les Misérables" who

2013), <https://www.asean.org/wp-content/uploads/images/2013/resources/publication/Surveys%20on%20ASEAN%20Community%20Building%20Effort%202012%20a.pdf>

¹⁷²⁶ See for example in ASEAN Charter Article 7 ASEAN Summit, Article 8 ASEAN Coordinating Council, Article 9 ASEAN Community Council, and Article 11 Secretary General.

¹⁷²⁷ See discussion on Asian Values and human rights violation in chapter I part 1.2.2 and 2.1.3

¹⁷²⁸ See discussion on impacts of economic growth and inequality distribution of wealth in chapter II section 1.2.

¹⁷²⁹ See discussion on similarity and differences between ASEAN and the European Union in chapter IV section 2.1.

depicted the famous “Liberty Leading the People.”¹⁷³⁰ In his speech in the Peace Congress of Paris on 26 December 1849, he addressed his belief in the unity and peace of European states by stressing that “all you nations of the continent, shall, without losing your distinct qualities and your glorious individuality, be blended into a superior unity and shall constitute a European fraternity, just as Normandy, Brittany, Burgundy, Lorraine, Alsace, have been blended into France.”¹⁷³¹

The construction and democratization of the European Union did not happen at once. Instead, it progresses little by little as envisioned by the French Foreign Minister Robert Schuman on May 9, 1950, “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”¹⁷³² The

¹⁷³⁰ VICTOR, HUGO, *LES MISÉRABLES* 12-21 (2013).

¹⁷³¹ “A day will come when arms shall fall from your hands. A day will come when war shall appear as impossible, and will be as impossible between Paris and London, between Petersburg and Berlin, between Vienna and Turin, as it would today between Rouen and Amiens or between Boston and Philadelphia. A day will come when you — France, Russia, Italy, England, Germany — all you nations of the continent, shall, without losing your distinct qualities and your glorious individuality, be blended into a superior unity and shall constitute a European fraternity, just as Normandy, Brittany, Burgundy, Lorraine, Alsace, have been blended into France. A day will come when the only fields of battle will be markets opening up to trade and minds opening up to ideas. A day will come when bullets and bombs will be replaced by votes, by universal suffrage of the peoples, by the venerable arbitration of a great sovereign senate which will be to Europe what Parliament is to England, what this diet is to Germany, what the Legislative Assembly is to France. A day will come when we will display cannon in museums just as we display instruments of torture today, amazed that such things could ever have been possible. A day will come when these two immense groups, the United States of America and the United States of Europe, shall be seen placed in presence of each other, stretching out their hands across the sea, exchanging their products, their arts, their works of genius.” The text was translated by from original speech in French by Victor Hugo to the Peace Congress at Paris 26 December 1849, <https://www.taurillon.org/Victor-Hugo-au-Congres-de-la-Paix-de-1849-son-discours,02448> ; Other versions of translated speech of Victor Hugo to the Peace Congress at Paris 26 December 1849 can be found at <https://trove.nla.gov.au/newspaper/article/12914658>

¹⁷³² The construction of the EU began with the Common Assembly of the European Coal and Steel Community as envisioned in the Shuman Declaration : “World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war. **Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.** The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries. With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part

EU has three main separated branches of power: the EU Commission, the EU Parliament,¹⁷³³ and the EU Court of Justice. When it was first created in 1951, the Parliament was constituted of appointed representatives drawn from the national parliaments of member states.¹⁷³⁴ It did not have any legislative power as it was only designed to be a purely consultative assembly.¹⁷³⁵ Their opinions were not binding. As the government of the European Communities, the EU Commission consisted of commissioners nominated by member states.¹⁷³⁶ Each member state appointed one commissioner. The President of the Commission was chosen by the chiefs of governments of the Member States.¹⁷³⁷ The Parliament was not consulted during this process.

Though the Treaties of Rome ambitiously stated that the European people should directly elect the representatives of the Parliament, it needed the unanimous agreement of the European Council composing of the Ministers from all the Member States.¹⁷³⁸ The unanimity

and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification. (...) By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace. To promote the realization of the objectives defined, the French Government is ready to open negotiations on the following bases. A representative of the United Nations will be accredited to the Authority, and will be instructed to make a public report to the United Nations twice yearly, giving an account of the working of the new organization, particularly as concerns the safeguarding of its objectives. (...)” The translated version can be found on the official website of European Union https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en ; The text in French can be found in STÉPHANE LECLERC, LES INSTITUTIONS DE L’UNION EUROPÉENNE 24 (2005).

¹⁷³³ The name was changed from European Parliamentary Assembly to the current "European Parliament" in 1962.

¹⁷³⁴ The Treaty of Paris establishing the European Coal and Steel Community (ECSC) Article 20 and Article 21 <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-paris> ; and https://www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf

¹⁷³⁵ *Id.*

¹⁷³⁶ The Commission was named as “the High Authority” in the Treaty of Paris. Article 10: The governments of the member States shall designate eight members of the High Authority by agreement among themselves. These eight members will elect a ninth member, who shall be deemed elected if he receives at least five votes. https://www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf

¹⁷³⁷ Treaty of Paris Article 11: The President and the Vice President of the High Authority shall be designated from among the membership of the High Authority for two years, in accordance with the procedure provided for the designation of the members of the High Authority by the governments of the member States. They may be reelected. https://www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf

¹⁷³⁸ Treaty of Rome 1957 Article 138 Paragraphs 1 and 2 lapsed on 17 July 1979 in accordance with Article 14 of the Act concerning the election of the representatives of the European Parliament.: 1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage; and 3. The Assembly [European Parliament] shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. The Council shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in

was never achieved until 1979; for the first time, EU representatives were directly elected.¹⁷³⁹ As an elected body, the Parliament began to draft proposals addressing the functioning of the European Communities, but its votes remained non-binding for the Commission and the Council.¹⁷⁴⁰ It became unacceptable when the European Communities could enact regulations even if the people democratically opposed it. Eventually, in 1985, the ratification of the Single European Act marked the recognition of a legislative power granted to the Parliament—no regulation would be published without a positive vote of the European democratic assembly.¹⁷⁴¹

By the Treaty of Maastricht in 1992, the European Union and European citizenship were created. The power of the Parliament was enlarged as it has more substantial control of the executive branch and the member states' actions. The Parliament can dismiss the Commission at the qualified majority—two-third of the representatives.¹⁷⁴² It votes the budget, adopts the regulations, questions the Commissioners, and publishes an annual report of the EU actions

accordance with their respective constitutional requirements. Treaty of Rome, available at https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf; and the Act concerning the election of the representatives of the European Parliament, Official Journal of the European Community, No.L278/5 available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41976X1008\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41976X1008(01)&from=EN)

¹⁷³⁹ The first President of the elected parliament was Simone Veil. Her election at the presidency of the first trans-European democratic body was highly symbolic as she was a woman at a period of feminist emancipation and a survivor of the Holocaust when she was deported by Nazi German to Auschwitz concentration camp during the World War II. The Parliament became the symbol of the French-German reconciliation by the People in a fully democratic election.

¹⁷⁴⁰ Under the leadership of its President, the commissioners normally proposed the regulations to European Council composed of the Ministers from all the Member States. For instance, if the regulation was about environment, then it had to be unanimously adopted from a European Council composed of all the European Ministers of Environmental from all member states. Then, the Parliament was asked to give opinions and advices. However, whether the Parliament has positive or negative opinion, it did not have any legal impact on the publication of such regulations. This led to a political crisis during which the European Parliament refused at the beginning of the 80's to give its opinions on European regulations. According to the Treaties, since there was consultation with the Parliament, the Commission could not publish any regulation anymore. It led the European Union into general paralysis status. Treaty of Rome Article 43.2 : The Council shall, on a proposal from the Commission and after consulting the Assembly [European Parliament], acting unanimously during the first two stages and by a qualified majority thereafter, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make. https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf

¹⁷⁴¹ The Single European Act Article 6, https://eur-lex.europa.eu/resource.html?uri=cellar:a519205f-924a-4978-96a2-b9af8a598b85.0004.02/DOC_1&format=PDF

¹⁷⁴² Treaty of European Union Article 24 :If a motion of censure is carried by a two-thirds majority of the votes cast, rep-resenting a majority of the members of the European Parliament, the members of the Commission shall resign as a body. They shall continue to deal with current business until they are replaced in accordance with Article 10. In this case, the term office of the members of the Commission appointed to replace them shall expire on the date on which the term of office of the members of the Commission obliged to resign as a body would have expired. https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf

every year.¹⁷⁴³ In 2007, the Lisbon Treaty on the Functioning of the European Union, the democratization of the European bodies continued as the treaty states that the Commission shall be formed according to the EU general election's results and that the President of the Commission shall be the candidate of the party who won the election.¹⁷⁴⁴ After the Commission is formed, it requires confirmation and validation from the Parliament.¹⁷⁴⁵ Since 2010, every year, the President of the Commission has to make a State of the Union speech in front of representatives disclosing her/his political agenda for the next 12 months.¹⁷⁴⁶ The speech is opened to questions and creates a democratic debate between the executive and the legislative branches of the European Union.

The democratization of European Union, with elected Parliament having legislative power and control over the executive branch, has been a long journey. It took nearly 70 years to move from nominated representatives with limited advisory roles to elected representatives with real power representing the people and controlling the executive branch's actions and the member states.

It might not be possible for ASEAN to soon become, if not at all, like the EU—a supranational organization with its legal capacity, uniform or harmonized laws, and a dispute

¹⁷⁴³ Treaty of European Union

¹⁷⁴⁴ Treaty of Lisbon Article 1.18.7 to be inserted in Article 9D.7 of the Treaty of European Union: Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure. <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>

¹⁷⁴⁵ The Lisbon Treaty also installed a co-decision process to adopt any EU regulation. The Commission proposes the drafted regulation, the Council composed of the Ministers of the Member States –Senate like entity– adopt it at a qualified majority (65% of Member States shall agree, to protect “small countries”, and they shall represent 55% of the European population, to protect “big countries”; no more exception requiring consensus and/or unanimity) and an adoption by a simple majority of the EU Parliament (more than 50% of the representatives). See Article 1.17 to be inserted to Article 9 C of the Treaty of European Union <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>

¹⁷⁴⁶ https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses_en

settlement mechanism.¹⁷⁴⁷¹⁷⁴⁸ Despite its intention to remain as an intergovernmental organization, ASEAN's function can still be democratized. In ASEAN, there was a similar entity like the EU Parliament during the making of the ASEAN Charter. The Eminent Person Group—a group of prominent citizens, mostly ministers, from ASEAN member states tasked to draft and give opinions on the ASEAN Charter.¹⁷⁴⁹ Still, they were not elected, and their role was advisory at best.¹⁷⁵⁰ Taking the democratization of the EU as a guideline, ASEAN can, without losing its identity: (i) initiate the elections of representatives from member states and provide them with advisory legislative power; and (ii) separate the legislative, executive, and judiciary power. Initially, elected representatives can provide opinions regarding any ASEAN “soft laws” or policies. The elected representatives should be able to give endorsement to the nomination of the judiciary and executive entities. Eventually, member states should confer parts of their sovereignty to the ASEAN dispute settlement mechanism so its ruling on non-compliance issues could be binding. Non-compliance should be addressed with effective measures. With the opinion from elected representatives, the member states may agree upon which “soft law” instrument should be binding, taking into consideration the gravity and vitality of the issues.

The institutional democratic change may not guarantee the adoption of liberal values within member states; nevertheless, it put regional norm endorsed in the Charter into practice and may influence the member states' practice.¹⁷⁵¹ Little by little, the people, not just leaders

¹⁷⁴⁷ Chung Hung Lin, *supra* note 307, at 829-834.

¹⁷⁴⁸ The comparison analysis between ASEAN regionalism and European Union regionalism was discussed in chapter IV.

¹⁷⁴⁹ List of members of the Eminent Persons Group (EPG) on the ASEAN Charter, <https://www.asean.org/wp-content/uploads/images/archive/ACP-EPGMember.pdf>

¹⁷⁵⁰ The Eminent Person suggested majority voting where the consensus cannot be reached; nevertheless, the proposal was rejected by the Foreign Ministers at their Retreat in Siem Riep in 2007. The issue was discussed in the first chapter section 2.2.2. *See also* WOON, *supra* note 312, at 158.

¹⁷⁵¹ Pevehouse stated that norm change in regional institution may shape state's behavior; however, Poole believed “it cannot be assumed that states are more likely to embrace liberal democratic principles because of the adoption of regional norms”. JON C. PEVEHOUSE, *DEMOCRACY FROM ABOVE: REGIONAL ORGANIZATIONS AND DEMOCRATIZATION* 46 (2005); and POOLE, *supra* note 146, at 15.

in the name of member states, can express their voices for the future development of ASEAN, particularly in the economic-environmental path.

3.2 Assimilating of civil society and environmental rights: A people-centered ASEAN community with the participation from civil society, local communities, and non-governmental environmental organizations

ASEAN needs to move from state-centric to people-centric organization. It requires “a more defined and stronger space for civil society actors and processes that cross national boundaries.”¹⁷⁵² For people to have a sense of participation and ownership of ASEAN and ASEAN to have a significant impact on its people at large, non-state actors should be able to participate in determining policy priority, policymaking, and policy implementation.¹⁷⁵³ The projection of ASEAN cannot be centralized mainly on the vision of member states’ leaders.

The participation by independent civil society groups is pivotal to ensure that regional economic-environmental policy takes into account all social and environmental considerations. All voices must be heard to sustain development on the equitable ground. The role of civil society is prominent in dealing with trade-related environmental problems as economic incentives usually take precedence, particularly in ASEAN, where member states, constrained by national interest, have a dominant power to dictate the economic-environment development.

There are two possible modes of participation. First, ASEAN could give a consultative or advisory role for environmental non-governmental organizations (NGOs) and civil society groups to participate in policymaking and implementation. For instance, in trade agreement negotiation, environmental NGOs should be granted observation status and provide

¹⁷⁵² Contreras, *supra* note 1598, at 151.

¹⁷⁵³ NATALEGAWA, *supra* note 21, at 164-165.

environmental impact assessments.¹⁷⁵⁴ Second, when there are regional conflicts regarding trade-related transboundary environmental issues, ASEAN can seek environmental recommendations from the NGOs working and investigating the issue. Doing so would render a more relevant result because the negotiation, discussion, and decision-making process would be more objective, and every critical aspect would be taken into consideration.

ASEAN is a state-led organization. Elliot noted that, for network engagement, ASEAN has been the “instigator” leading the environment network for trans-governmental, consultation, knowledge building, coordination, and compliance.¹⁷⁵⁵ ASEAN fails to engage with a wide range of stakeholders, especially with civil society and the local communities.¹⁷⁵⁶ All interactions are intergovernmental with limited, if not at all, role of non-state actors.

The effectiveness and viability of ASEAN depend on the involvement of civil society. ASEAN People, not only states, should have a role in shaping regional policy and identity. Contreras named this interaction as a “Multi Stake-Holder Platform.”¹⁷⁵⁷ Acharya called it “Non-Official Regionalism.”¹⁷⁵⁸ Both terms refer to participation from civil society and local communities in regional platforms to have critical engagement between states and non-state actors, which is crucial to the legitimacy and identity of regionalism.¹⁷⁵⁹ It is a way to avoid states having dominant sources of power and authority.

¹⁷⁵⁴ For instance, WTO Committee on Trade and Environment (CTE) has granted an observation status to United Nations Framework Convention on Climate Change (UNFCCC) Secretariat to attend its negotiation sessions. Charnovitz, *supra* note 1491, at 19.

¹⁷⁵⁵ “Within ASEAN, networks have been tasked to build strategic networks and partnerships with the private sector, international institutions and civil society (the mandate of the ASEAN Centre for Biodiversity), to share knowledge and experience (the ASEAN Regional Knowledge Network on Forest Law Enforcement and Governance (ARKN- FLEG), the ASEAN Regional Knowledge Network on Forests and Climate Change (ARKN- FCC) and the ASEAN Forest Clearinghouse Mechanism (CHM)), and to enhance enforcement and compliance (the ASEAN Wildlife Enforcement Network (ASEAN-WEN)). These are, in effect, regional (and regionalized) forms of what would otherwise be recognized as global public policy networks.” Elliot, *supra* note 112, at 63.

¹⁷⁵⁶ *Id.*

¹⁷⁵⁷ Contreras, *supra* note 1598, at 153-154.

¹⁷⁵⁸ ACHARYA, *supra* note 16, at 258-259.

¹⁷⁵⁹ Badenoch stressed the importance of “multiple interest and complex human-environment interactions.” Morada stated that ASEAN will be more relevant if it opens up to the “participatory regionalism.” NATHAN BADENOCH, TRANSBOUNDARY ENVIRONMENTAL GOVERNANCE: PRINCIPLES AND PRACTICE IN MAINLAND

In ASEAN, there are two types of civil engagement: semi-official and non-official regionalism. For semi-official regionalism:

First, the Second Track or Track II group is a networking group of think tanks who have expertise directly on relevant issues. For instance, ASEAN Institutes for Strategic and International Studies (ASEAN-ISIS) is a state-sponsored network of think tanks that functions to provide ASEAN and the governments with policy inputs such as ideas on ASEAN FTA or ASEAN Regional Forums.¹⁷⁶⁰ The ASEAN Young Leader Programme is a networking forum for groups of young generation elites from various sectors to address challenging issues in ASEAN.¹⁷⁶¹ Second semi-official regionalism is in the field of education and culture. It is called “people-to-people” contact,¹⁷⁶² such as ASEAN Tourism Association (ASEANTA);¹⁷⁶³ ASEAN University Network promoting socio-cultural exchange and understanding;¹⁷⁶⁴ and the Southeast Asia Ministers of Education Organization (SEAMEO) providing scholarships to various universities in the region.¹⁷⁶⁵ These sociocultural training programs receive limited funds from member states. The educational sectors in ASEAN member states are dominated or controlled by the states; thus, there is limited space for private academic networking.¹⁷⁶⁶

Stone identified three important tasks of Track II group—they provide new cognitive structures or casual frames around the idea relating to regional construction; their dialogue helps

SOUTHEAST ASIA 2 (2002); and Noel Morada, *ASEAN at 40: Prospects for Community Building In Southeast Asia*, 15 ASIA PAC. REV.36, 36-55 (2008).

¹⁷⁶⁰ Hadi Soesastro et al., *Twenty-Two Years of ASEAN-ISIS: Origin, Evolution and Challenges of Track Two Diplomacy*, Jakarta: CSIS Indonesia (2006), <https://www.csis.or.id/institutional-partnership-regional/asean-isis>; and ACHARYA, *supra* note 16, at 259.

¹⁷⁶¹ The ASEAN Young Leader Programme, <https://commonpurpose.org/leadership-programmes/asean-leaders/>

¹⁷⁶² It is part of the ASEAN Connectivity concept developing intra-regional projects in three areas: infrastructure, institution and people. *See also* Elisa Fornalé, *ASEAN People-to-People Connectivity: The Role of The Mutual Recognition Regime*, 17 European Journal of East Asian Studies, WTI, https://www.wti.org/media/filer_public/b8/5f/b85f3bc6-0721-496c-b667-dfd2b9cdea97/peopleconnectivity_fornale_2018.pdf ; and Master Plan on ASEAN Connectivity, (Jakarta: ASEAN Secretariat, 2011), https://www.asean.org/storage/images/ASEAN_RTK_2014/4_Master_Plan_on_ASEAN_Connectivity.pdf

¹⁷⁶³ ASEAN Tourism Association (ASEANTA), <https://www.aseanta.org/en/pages/26390>

¹⁷⁶⁴ ASEAN University Network, <http://www.aunsec.org>

¹⁷⁶⁵ Southeast Asia Ministers of Education Organization (SEAMEO), https://www.seameo.org/Main_about/90

¹⁷⁶⁶ ACHARYA, *supra* note 16, at 260.

to diffuse norms and understandings; and they can help shape political choices in their home states regarding regional community through networking, collaboration, and involvement in their domestic politics.¹⁷⁶⁷ Nevertheless, this type of involvement is not fully independent. In most cases, think tanks involved are linked to their national governments and rely on governments to fund their academic activities. Harris observed that the Track II process depends on “consent, endorsement and commitment, often including financial commitment of governments.”¹⁷⁶⁸ The meetings also include participation from governmental officials, academics, and other non-official actors.¹⁷⁶⁹ Wanadi noted that although the Track II networking is a non-governmental academic activity where governmental officials also participate in private capacity allowing governments to test new ideas without making a binding commitment, in actual practice, most government officials have to act on national interest and concerns.¹⁷⁷⁰ Thus, their roles remain constrained.

The second type of civil participation is by non-official regionalism, which mainly consists of regional or transnational non-governmental organizations (NGOs)¹⁷⁷¹ and national civil society groups in specific areas such as environmental and human rights protection.¹⁷⁷² For example, the Asian Forum for Human Rights and Development (Forum-Asia)¹⁷⁷³ head office in Thailand supports the movement for human rights and democracy. Forum Asia is the most prominent NGO working on monitoring and reporting human rights violations, providing human rights educational activities, and managing fact-finding missions and trial

¹⁷⁶⁷ Diane Stone, *Networks, Second Track Diplomacy and Regional Cooperation : The Role of Southeast Asian Think Tanks*, paper presented to the 38th annual International Studies Association Convention, Toronto, Canada, 22-26 March 1997, 3.

¹⁷⁶⁸ Stuart Harris, *Policy Networks and Economic Cooperation in the Asia Pacific*, 7 *Pacific Review* 381, 390 (1994).

¹⁷⁶⁹ ACHARYA, *supra* note 16, at 259.

¹⁷⁷⁰ Jusuf Wanadi, *The Regional Role of Track Two Diplomacy: ASEAN, ARF and CSCAP*, in *THE ROLE OF SECURITY AND ECONOMIC COOPERATION STRUCTURES IN THE ASIA PACIFIC REGION*, 152 (Hadi Soesastro & Anthony Bergin eds., 1996).

¹⁷⁷¹ Acharya, *supra* note 1602, at 373-90.

¹⁷⁷² ACHARYA, *supra* note 16, at 261.

¹⁷⁷³ Asian Forum for Human Rights and Development (Forum-Asia), <https://www.forum-asia.org>

observation.¹⁷⁷⁴ In the environmental sector, there are several key non-official actors such as Towards Ecological Recovery and Regional Alliance (TERRA) based in Thailand is for environmental protection in Thailand, Laos, Cambodia, and Myanmar;¹⁷⁷⁵ The Access Initiative (TAI)¹⁷⁷⁶ network encompasses civil society groups around the world working to promote environmental democracy; and Thailand Environment Institution (TEI)¹⁷⁷⁷ is part of TAI network bases in Thailand focusing on environment and sustainable development issues.

Greenpeace Southeast Asia is one of the NGOs having vigorous roles influencing environmental protection in the region during the past 20 years.¹⁷⁷⁸ For instance, in 2002, Greenpeace, together with local communities, put up a social movement against a coal-fired power plant in Ban Krut and Bo Nok, Thailand.¹⁷⁷⁹ Their efforts paid off since the Thai government had to abort its construction plan. The same year, it supported the local communities opposing coal projects in Pulpandan, Philippines.¹⁷⁸⁰ In 2008, it lobbied and urged the Philippines to enact the Renewable Energy Bill to accelerate the development of renewable energy sources.¹⁷⁸¹ In 2011, after raising a dynamic campaign on forest fire and palm oil production, Greenpeace, along with other Indonesian NGOs, put much pressure on the

¹⁷⁷⁴ Forum Asia, *Human Rights in Asia* (Bangkok : Asian Forum of Human Rights and Development, 2001) ; Forum Asia, *Creating Asia : Flags of Human Rights, Seed of Freedom* (Bangkok : Asian Forum for Human Rights and Development, 2000).

¹⁷⁷⁵ ACHARYA, *supra* note 16, at 262-63; and Towards Ecological Recovery and Regional Alliance (TERRA), <http://www.terraper.org/home.php>

¹⁷⁷⁶ The Access Initiative (TAI), <https://accessinitiative.org/network/regions/south-east-asia>

¹⁷⁷⁷ Thailand Environment Institution (TEI), <http://www.tei.or.th/en/about.php>

¹⁷⁷⁸ Greenpeace Southeast Asia, <https://www.greenpeace.org/southeastasia/campaign/20years/>

¹⁷⁷⁹ *Edison Out: The Struggle to Stop Coal Fired Power Plants in Bo Nok and Ban Krut, Thailand*, GREENPEACE (2007), <https://www.greenpeace.org/usa/wp-content/uploads/legacy/Global/usa/report/2007/8/edison-out-the-struggle-to-st.pdf>

¹⁷⁸⁰ *Philippines: Greenpeace Applaud Province for Rejecting Coal for Renewable Energy*, ENERGY ASIA (Aug. 12, 2002), <https://energyasia.com/philippines-greenpeace-applauds-province-for-rejecting-coal-for-renewable-energy/>; Antonieta Lopez, *Greenpeace Back Protest vs Negros Power Plant Plan*, PHILSTAR GLOBAL (Aug. 5 2002), <https://www.philstar.com/nation/2002/08/05/170850/greenpeace-backs-protest-vs-negros-power-plant-plan> ;and *Burning Our Future: The True Cost of Building Coal-Fired Power Plants and The Case for Renewable Energy Alternatives*, GREENPEACE, <http://www.greenpeace.org.cn/china/Global/china/planet-2/report/2007/11/30439.pdf>

¹⁷⁸¹ *Greenpeace Urges Legislators to Enact Renewable Energy Bill*, GMA NEWS (May 28, 2008), <https://www.gmanetwork.com/news/news/nation/97783/greenpeace-urges-legislators-to-enact-renewable-energy-bill/story/> ; and An Act Promoting the Development, Utilization and Commercialization of Renewable Energy Resources and For Other Purposes, Republic Act No. 9513, December 16, 2008 <https://www.officialgazette.gov.ph/2008/12/16/republic-act-no-9513/>

Indonesian government to announcing a moratorium to prohibit the conversion of forest and peatlands for palm oil and logging concessions.¹⁷⁸² In 2016, it launched a petition in Malaysia demanding corporate accountability from Industrial Oxygen Inc (IOI) for its relations to forest destruction in Indonesia and transboundary haze.¹⁷⁸³ In 2017, it also installed an art piece resembling a dead whale choking out plastic debris on a local beach in the Philippines. This went viral and provoked regional and global attention on the impacts of plastics on the marine ecosystem.¹⁷⁸⁴ In 2018, through a series of investigations and petitions, Greenpeace urged a massive palm-oil producer, Wilmar International, to pay extensive attention to palm oil production and process methods.¹⁷⁸⁵ Wilmar pledged to clean up their supply chains by monitoring all of its suppliers and stop buying from producers who employ unsustainable cultivating methods and destroy the forest.¹⁷⁸⁶

The rise of NGOs in ASEAN corresponds with the global normative shift in the late 1990s. Due to the global normative shift towards democracy and internalization of liberal values in certain member states, it opened more space for political participation by civil society, mainly in Thailand, Malaysia, Indonesia, and the Philippines.¹⁷⁸⁷ This relates with the proposal of flexible engagement aiming to move ASEAN from state-society relations to more people-

¹⁷⁸² Campaigns on unsustainable palm oil production were launched since 2007. How the palm oil industry is Cooking the Climate, <https://wayback.archive-it.org/9650/20200516072848/http://p3-raw.greenpeace.org/international/Global/international/planet-2/report/2007/11/palm-oil-cooking-the-climate.pdf>; Giant Indonesian palm oil company announces plan to halt forest destruction, February 9, 2011 <https://www.greenpeace.org/usa/news/giant-indonesian-palm-oil-company-announces-plan-to-halt-forest-destruction/>

¹⁷⁸³ *Petition Delivery to Palm Oil Giant*, Greenpeace, <https://www.greenpeace.org/usa/major-palm-oil-company-promises-protect-forests/petition-delivery-to-palm-oil-giant-ioi-in-malaysia/>; and <https://www.greenpeace.org/southeastasia/press/1123/greenpeace-delivers-global-anti-haze-petition-to-palm-oil-giant-ioi-in-malaysia/>

¹⁷⁸⁴ *How Greenpeace Philippines—Dead Whale makes a Statement about Plastic Pollution*, Greenpeace, <https://campaignsoftheworld.com/outdoor/greenpeace-philippines-dead-whale/>; and <https://www.greenpeace.org/international/story/11871/the-ocean-plastic-crisis/>

¹⁷⁸⁵ *Breakthrough as World's Largest Palm Oil Trader Gives Forest Destroyers Nowhere to hide*, Greenpeace, <https://www.greenpeace.org/international/press-release/19898/worlds-largest-palm-forest-destroyers-nowhere-to-hide/>

¹⁷⁸⁶ Press Release Wilmar Leads Palm Oil Industry to be Deforestation-Free, http://media.corporate-ir.net/media_files/IROL/16/164878/News-Release-10-Dec-18-Wilmar-Leads-Palm-Oil-Industry-to-be-Deforestation-Free.pdf

¹⁷⁸⁷ See Sidney Jones, *The Organic Growth*, FEER, 23 (June 17, 1993); and ACHARYA, *supra* note 16, at 264.

centered relations and promote more civil society participation.¹⁷⁸⁸ The emergence of these NGOs already has significant implications for regional identity as it enlarges and echoes the demand for human rights and environmental protection in Southeast Asia.¹⁷⁸⁹ They disprove the member states' view that human rights protection is a western imposition on ASEAN affairs.¹⁷⁹⁰ For instance, regional NGOs noted that ASEAN leaders and foreign ministers often criticize western trade policy that links trade with human rights issues such as labor standards and environmental protection as trade protectionism tools. In contrast, they stressed that "ASEAN governments should be primarily held responsible for continued violations of workers' rights, the undermining of labor standards and degradation of the environment in their respective countries."¹⁷⁹¹

Officials, semi-official and non-official actors should be able to mutually participate in ASEAN regionalism—finding optimal solutions for the problems and policymaking. The civil society inputs should be taken into considerations. The mutual accommodation between officials and semi-official actors can already be seen on several occasions. For instance, ASEAN People Assembly (APA) held the first meeting in 2000 in Indonesia, bringing together governmental officials, Track II think tanks, and NGOs.¹⁷⁹² Furthermore, Solidarity for Asian People's Advocacy (SAPA), inaugurated in Bangkok 2006, has a working group on ASEAN and participate in the consultations over the drafting of the ASEAN Charter organized by the Eminent Persons' Group.¹⁷⁹³ SAPA organized the ASEAN Civil Society Conference (ACSC),

¹⁷⁸⁸ Acharya, *supra* note 1602, at 134.

¹⁷⁸⁹ ACHARYA, *supra* note 16, at 223.

¹⁷⁹⁰ *Id.*

¹⁷⁹¹ *Thailand : Right Activists Get Cold Reception*, BANGKOK POST, 26 July 1994, 10.

¹⁷⁹² It is the Track II initiative from ASEAN-ISIS. It is meant to be "a forum for debate, exchange of ideas, and generation of people-oriented policies on issues and problems facing the region among the various stakeholders and sectors. It also aims to foster dialogue and confidence building among policymakers, academe, think tanks and civil society groups in Southeast Asia on a range of traditional and non-traditional security issues, including human rights, human development and democracy." Noel M. Morada, *APA and Track 21/2 Diplomacy: The Role of the ASEAN People's Assembly in Building an ASEAN Community*, <https://library.fes.de/pdf-files/bueros/singapur/04601/2007-3/morada.pdf>

¹⁷⁹³ Solidarity for Asian People's Advocacy (SAPA) Working Group on the ASEAN Submission on the Economic Pillar for the Eminent Persons Group on the ASEAN Charter, 28 June 2006 Singapore, <https://www.alternative-regionalisms.org/wp-content/uploads/2009/07/sapasubmissionaseancharterecon.pdf>

having essential attention to the ASEAN Intergovernmental Commission of Human Rights 2009 (AICHR).¹⁷⁹⁴ SAPA claimed the credit for ensuring that the Term of Reference for AICHR contains a provision regarding human rights protection and not only human rights promotion.¹⁷⁹⁵

The gravity of environmental degradation, particularly in the field of trade-related problems, in the region, cannot be solved only by the state's authority or by inputs of officials and semi-official actors whose decisions are constrained by national economic interests. Due to its conformity with the state's authority and sovereignty, the contribution of officials and semi-official actors would be modest at best.¹⁷⁹⁶ Unlike the semi-official actors, the role of non-official actors in shaping ASEAN normative standards, especially in the field of environment, is of great magnitude as it can challenge member states' sovereignty and go beyond national constraints.¹⁷⁹⁷ As trade and environmental regimes in ASEAN, which are mutually dependent and equally important to sustainable development, have been evolved in a separate path with less consideration on relationship towards each other, they should be coordinated through an improvement of mutual understanding and institutional cooperation. The non-official actors such as environmental NGOs and other civil society groups should take prominent roles in addressing the issues and providing essential inputs—scientific facts, opinions of local communities, or expert advice.

3.3 Forming the fourth ASEAN pillar, “Sustainable Economic-Environmental development,” or an environmental working committee within economic and security pillars.

¹⁷⁹⁴ ASEAN Intergovernmental Commission of Human Rights 2009 (AICHR), <https://humanrightsinasean.info/cso-and-asean-forums/>

¹⁷⁹⁵ ACHARYA, *supra* note 16, at 266.

¹⁷⁹⁶ Acharya concluded that “the contribution of semi-official regionalism to the development of regional identity has been modest, if not entirely insignificant.” *Id.* at 261.

¹⁷⁹⁷ *Id.*

Although ASEAN recognized that economy and environment are mutually dependent, the environment takes a back seat in actual practice, and the regional cooperation in linking trade and environment is lacking. Therefore, to have an effective environmental integration and cooperation, ASEAN needs a structural redesign.¹⁷⁹⁸ ASEAN should construct a particular organ or a fourth pillar to address the internal and international environment-trade issues and sustainable development. This can be done by setting up an environment-economic pillar or setting an environmental working committee within the economic and security community.

As discussed earlier, ASEAN recognized that environment and economy are mutually dependent and commits to pursue sustainable economic development according to ASEAN Economic Community Blueprint 2025.¹⁷⁹⁹ In 2009 during the launch of Green ASEAN, the visions and political declarations for stronger environmental considerations in trade and investment deliberations to achieve the green economy was addressed by Surin Pitsuwan, the former Secretary-General of ASEAN.¹⁸⁰⁰

Yet, Koh Kheng-Lian and Md. Saiful Karim observed that “despite ASEAN acceptance of the environment as an issue in response to global environmental awareness, ASEAN states took a cautious approach in considering their national policies towards rapid growth and development and they responded to the global environmental protection movement with some reservations.”¹⁸⁰¹ Despite the initiatives, the environment takes the back seat in reality—for example, in most ASEAN Free Trade Agreements contain no environmental provisions.¹⁸⁰²

¹⁷⁹⁸ See similar view for economic integration and cooperation in Mulqueeny, *supra* note 1546, at 15.

¹⁷⁹⁹ AEC Blueprint 2025, https://asean.org/?static_post=asean-economic-community-blueprint-2025

¹⁸⁰⁰ Surin Pitsuwan, Speech by H.E. Dr. Surin Pitsuwan, secretary general of ASEAN, at the 42nd Anniversary of ASEAN, <http://www.asean.org/news/item/speech-by-he-dr-surin-pitsuwan-secretary-general-of-asean-at-the-42nd-anniversary-of-asean>

¹⁸⁰¹ Koh Kheng-Lian & Karim, *supra* note 111, at 324.

¹⁸⁰² Dosch, *supra* note 820, at 6.

Particularly the ACFTA, the trade for natural resource-based products between ASEAN and China increases, causing concerns over pollution and depletion of resources.¹⁸⁰³

All transboundary environmental problems that occurred from the expansion of economic activities and growing trade volume are security issues requiring regional cooperation as they are not truly internal affairs. The cooperation needs three dimensions: environment protection, regional security, and economic development. The environment consideration should be integrated into all areas of engagement. For instance, in response to the transboundary haze problem,¹⁸⁰⁴ ASEAN decided that this issue jeopardizes regional security affecting health conditions and the environment; thus, it forms part of the Non-Traditional Security (NTS) issue under the first pillar of the ASEAN Political-Security Community (APSC).¹⁸⁰⁵ This is believed to be a silver lining to help realignment the ASEAN Way because it requires enhancing cooperation.¹⁸⁰⁶ However, other transboundary environmental problems such as marine plastic pollution and climate crisis should also receive urgent treatment as they threaten regional security.

Apart from listing these environmental problems as NTS falling within the scope of APSC, the whole environmental governance should be redesigned. ASEAN environmental governance functions by specific committees on topics rather than the institutional design and structure affecting the outcome of environmental cooperation.¹⁸⁰⁷ Many environmentalists see that environmental issues deserve special attention.¹⁸⁰⁸ The ASEAN Civil Society Organization

¹⁸⁰³ Hing Vutha & Hossein Julian, *Environmental Impacts of ASEAN-China Free Trade Agreement on the Greater Mekong Sub-Region*, IISD (2018). See also discussion on ACFTA and the economic relation with China in chapter IV part 2.3.

¹⁸⁰⁴ See chapter III section 1 for the discussion on transboundary haze problem.

¹⁸⁰⁵ KOH KHENG-LIAN ET AL., *supra* note 531, at 128.

¹⁸⁰⁶ Henning Borchers, *ASEAN's Environmental Challenges and Non-Traditional Security Cooperation : Towards a Regional Peacekeeping Force ?*, 7 ASEAS 5, 17 (2014).

¹⁸⁰⁷ Mulqueeny, *supra* note 1546, at 15.

¹⁸⁰⁸ See ASEAN People Forum, *Civil Society Perspective on the ASEAN Socio-Cultural Cooperation* (2011)

(CSO) proposed creating the fourth pillar on the environment instead of having it under the socio-cultural pillar.¹⁸⁰⁹

In a separate environment pillar or environmental working group within the economic pillar, three tasks need to be developed to secure the environmental integration: strengthening science-policy connection,¹⁸¹⁰ incorporating environmental provisions in ASEAN trade agreements; and creating a mechanism to address environmental problems at its root cause.

First, strengthening the connection between environmental science and ASEAN trade-environment cooperation ensures the compatibility between environmental protection and economic activities. Environmental science and policy linkage should be fortified throughout the policy cycle—defining the issue, constructing alternatives, designing policy, decision-making, implementation, and evaluation.¹⁸¹¹ Across this cycle, different science-based activities can be performed catalyzing the evolution of environment-economic policy.¹⁸¹² When defining the problem and designing the policy, scientific inputs by scientists, researchers, lawyers, and other stakeholders can collaborate to address the problems and identify specific data gaps.¹⁸¹³ Civil society and environmental NGOs should be able to participate in this process. During the decision-making process, the opinion editorials (co-eds), a written commentary document identifying issues and solutions, can be published to the media for public attention and transparency.¹⁸¹⁴ ASEAN economic and environmental policy should no longer be negotiated and decided in a closed-door diplomatic style. During the implementation phase, similar to co-eds, open letters can be made by environmental and economic experts to

¹⁸⁰⁹ Koh Kheng-Lian & Karim, *supra* note 111, at 328.

¹⁸¹⁰ Contreras, *supra* note 1598, at 154.

¹⁸¹¹ Clare Wilkinson & Emma Weitkamp, *Engaging Policy-Makers with Environmental Science*, IES (December 2012), <https://www.the-ies.org/analysis/engaging-policy-makers>

¹⁸¹² Jonathan W. Moore et al., *Towards Linking Environmental Law and Science*, 3 FACETS 375, 375-391 (2018).

¹⁸¹³ E.g., William J. Sutherland et al., A Collaboratively-Derived Science-Policy Research Agenda, 7 PLOS ONE e31824 (2012); Megan S. Adam et al., *Toward Increased Engagement Between Academic and Indigenous Community Partners in Ecological Research*, 19 ECOLOGY AND SOCIETY (2014).

¹⁸¹⁴ Moore et al., *supra* note 1812.

criticize particular projects putting pressure on evaluation.¹⁸¹⁵ Finally, the effectiveness of environmental agreements should be examined, and retrospective analyses should be revealed if there are problems.¹⁸¹⁶ The role of environmental science aiming for long-term development for environmental protection would compensate the nature of policymakers who tend to determine what is best for national interest in the short-term period.¹⁸¹⁷

Second, environmental provisions should be integrated into ASEAN trade agreements. ASEAN common tradition is to avoid confrontational discussions on sensitive issues.¹⁸¹⁸ The environmental problem caused by trade is one of the inconvenient issues. While member states stand their grounds on respecting national borders and internal affairs, environmental problems have no border—they spread and affect the ecosystems throughout the region and the world. “Grow now, clean later” have caused many environmental problems in member states that proved to be transboundary; as a result, they become regional and global problems.¹⁸¹⁹ Thus, in trade negotiations, ASEAN has to discuss environmental issues and potential environmental risks caused by trade and economic cooperation.

Third, ASEAN has to incorporate a mechanism to solve the underlying economic cause of environmental problems. Regional environmental agreements serve as guidance having no binding effect unless the member states develop collaborative practice according to the agreement with the sense of obligation and adopt the principles into their domestic laws.¹⁸²⁰ The implementation depends solely on the consensus of the member states through its political cooperation rather than legal execution. The result is the ineffectiveness and lack of enforcement. When having a legally binding agreement with sanctions is not a feasible option,

¹⁸¹⁵ *Id.*

¹⁸¹⁶ *Id.*

¹⁸¹⁷ Richard V. Pouyat, *Science and Environmental Policy—Making Them Compatible*, 49 *BIOSCIENCE* 281, 282-286 (1999).

¹⁸¹⁸ Pavin Chachavalpongpun, *Flaws in ASEAN Community's Building Efforts*, *JAPAN TIMES* (Nov. 4, 2015), <https://www.japantimes.co.jp/opinion/2015/11/04/commentary/world-commentary/flaws-aseans-community-building-effort/#.XA8ulS17TeQ>

¹⁸¹⁹ See chapter III for the discussion on ASEAN environmental problems.

¹⁸²⁰ See discussion on regional cooperation and agreements to address environmental problems in chapter III.

ASEAN should create an alternative mechanism to address the problem at its root causes. For the environmental problems discussed earlier in chapter III, the underlying cause of the environmental problem is the economic incentives leading to unsustainable production and process methods. For instance, ASEAN Agreement on Transboundary Haze Pollution recognizes the economic incentives as the cause of the haze problem, but it did not provide an effective mechanism to eliminate such causes.¹⁸²¹

Most of the trade-related environmental problems in the region are caused by unsustainable production and process methods. The solution is inducing innovation of technology for sustainable production.¹⁸²² Not all member states have the financial capacity to achieve such technological advancement. Thus, ASEAN can develop a funding program to induce eco-innovation for green trade and economic development. For instance, ASEAN and Asian Development Bank established the ASEAN Infrastructure Fund (AIF) in 2011 to finance infrastructure development in the region.¹⁸²³ Similar funding programs can be established to provide incentives and opportunities for member states to strengthen sustainable practices.

¹⁸²¹ See for example discussion in chapter III part 2 concerning the ASEAN Agreement on Transboundary Haze Pollution.

¹⁸²² Due to a global market competition of trade, companies need to develop advance methods of production and improve quality of goods in order to have sufficient and efficient performance in the market. Trade can promote innovation of environmental technologies for production—with the international demand for higher environmental standard for production, producers from exporting countries will eventually adopt and develop higher environmental standard for production according to consumer-driven demand without government intervention. Esty and Gentry suggest that trade can accelerate the adoption of new technologies and practice management through the operation of multinational companies. Multinational companies can bring clean technology for production and practice from one country to another because they find it is more efficient to adopt a single set of management practice and clean technology to maintain a common standard and credibility. For technological transfer, there are two remarks: first, technological transfer from multinational companies may not benefit small and medium domestic producers due to Intellectual Property rights; second, the technology used for higher production outcome may or may not be environmental-friendly technology. New technologies may allow the producers to produce or harvest natural resources in a more profitable way—produce or harvest more goods by using less cost and fewer workforces; however, those technologies may be pollution intensive or may not take into account the sustainable aspects of the environment. Many industries in ASEAN member states are toxic intensive in nature of production such as the use of chemicals in textile industry, mining or petroleum industry. See DANIEL C. ESTY & BRADFORD S. GENTRY, *FOREIGN INVESTMENT, GLOBALISATION, AND THE ENVIRONMENT, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT* 161 (1997); CHARLES PEARSON, *MULTINATIONAL CORPORATIONS, ENVIRONMENT, AND THE THIRD WORLD* (Durham: Duke University Press for World Resources Institute, 1987); and Tussie, *supra* note 328, at 537.

¹⁸²³ ASEAN Infrastructure Fund (AIF), <https://www.adb.org/sites/default/files/publication/221281/asean-infrastructure-fund.pdf>

Three factors drive technological change: the supply side: technological capabilities,¹⁸²⁴ the demand side: market and consumer preferences,¹⁸²⁵ and the institutional and political side: environmental policy and fiscal systems.¹⁸²⁶ Apart from the market pull, governments play an indispensable role in providing incentives and assistance, thereby unlocking the financial barrier for the technological innovation.

With the financial support from the ASEAN fund, the governments of member states can provide funding for research and development (R&D), granting green public procurement and providing investment leverage. For instance, the government can fund several projects of R&D for eco-innovation and provide open data for all private sectors to utilize. It would help break the supply impasse since not all companies have sufficient funds to conduct such research. As government sectors are major consumers, they can use their purchase power to stimulate mass demand for sustainable production and consumption.¹⁸²⁷ Environmental tax schemes can also be an efficient tool to create incentives for green investment and innovation. Taxing pollution-intensive or emission-intensive products and giving tax exemptions for sustainable investments can considerably shift production and consumption patterns in member states.

¹⁸²⁴ Cristina T. Less & Monica Araya, *Environmental Innovation and Global Markets*, WPGSP for OECD, Feb., 22, 2008, 13, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=env/epoc/gsp\(2007\)2/final](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=env/epoc/gsp(2007)2/final)

¹⁸²⁵ Technological capabilities are physical and knowledge capitals that a company has to develop new products or process of production. WILLIAM J. BAUMOL, *THE FREE-MARKET INNOVATION MACHINE - ANALYSING THE GROWTH MIRACLE OF CAPITALISM* 15 (2002).

¹⁸²⁶ Serdal Ozusaglam, *Environmental Innovation : A Concise Review of the Literature*, ANDESE 2012/2 No.191-192, 22-23.

¹⁸²⁷ Public procurement for sustainable products and services can be seen in many countries. For example, the EU provided a guideline for environmental criteria that can be used for public procurement process. *See e.g.*, EU Green Public Procurement, EU https://ec.europa.eu/environment/gpp/index_en.htm; Buying Green: A Handbook on Green Public Procurement, EU, <https://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf>; and Going Green: Best Practice for Sustainable Procurement, OECD, https://www.oecd.org/gov/public-procurement/Going_Green_Best_Practices_for_Sustainable_Procurement.pdf

CONCLUSION

For its interest, integrating environmental norms into the trading system is an inevitable development path for ASEAN. Amid the regional and global environmental crisis, the international community moves towards environmental integration for long-term sustainable development; thus, ASEAN has to embrace the global approach and become a proactive player in the market. However, the authoritarian capitalism in member states' regimes is a significant hurdle for ASEAN environmental integration for three reasons. First, the regime prioritizes economic growth over environmental protection, and since ASEAN is a state-led regionalism, the environmental integration is not foreseeable. Second, human rights protection is lacking, particularly the right to participation and environment. Third, the regime intensifies the strict application of the ASEAN Way or the non-intervention rule, obstructing any engagement for solving transboundary environmental problems or participation for environmental integration.

Assimilating democratic values in ASEAN is a first step for the environmental norms integration as it loosens up the application of the non-intervention rule, allowing more meaningful commitments in addressing environmental conflicts. ASEAN needs a structural redesign to replace a state-centric with people-centric regionalism. It should create a separation of power with democratically elected representatives, enhance civil society participation in policy-making, and strengthen economic and environmental linkage by establishing a distinct environmental organ. This organ can facilitate environmental norms integration by working on three tasks: using environmental science to ensure that economic cooperation is compatible with environmental protection; incorporating effective environmental provisions in trade agreements; establishing a mechanism to address the economic incentives, which is the underlying cause of environmental problems. Since having sanctions for non-compliance is not an available option for ASEAN, the focus should be on providing monetary funds for member states to attain technological capacity for sustainable production.

CONCLUSION

The dissertation aims to discuss the integration of environmental protection in the ASEAN trading system within the limitation of the global trading system and environmental governance. Due to its economic expansion and environmental degradation, the Southeast Asia region serves as an exhibit of the crossroads between economic development and environmental protection. ASEAN is a regional platform that should potentially influence the environmental integration in member states' development goal.

As the discussion shows, the development approach of ASEAN member states prioritizes rapid economic growth over environmental protection with the expectation that it can grow now and clean up later. Due to economic growth expectations, the member states lack the political will to impose a more stringent environmental regulation on economic activities. In particular, regulating sustainable production and process methods can increase production costs and lower the competitive advantages in trade. In the end, this approach leads to environmental degradation, larger inequality gaps, and long-term economic loss. The environmental problems caused by unsustainable production and process methods in one member state to maximize advantages in trade competition are transboundary; thus, they become regional and global issues. Regional environmental agreements to address such problems are weak and ineffective due to the lack of enforcement and non-compliance caused by the ASEAN Way or the non-intervention rule. ASEAN did not provide an effective mechanism to address environmental problems at the root cause, which is the underlying economic interest.

The international community recognizes that sustainable production methods are one of the keys to sustainable development goals. Within the constraint of their internal politics and geopolitical interests, major trading partners of ASEAN, the EU, and the US, have progressively integrated environmental protection into their external trading policies. They

employed a unilateral application of environmental trade measures and an environmental provision in trade agreements to ensure a certain degree of environmental protection in trade. The environmental trade measure, particularly the PPMs measure, aims to induce sustainable production in ASEAN member states as exporting countries. The EU and the US use their large market access as leverage for environmental compliance. Despite its extraterritorial effect and potential violation of trade rules, WTO leaves sufficient room for the PPMs measure to be justified for environmental grounds. Thus, for its own interest, ASEAN should embrace environmental integration in trade.

However, within ASEAN regionalism, significant barriers are obstructing such integration. As many scholars already noted, ASEAN Way remains the stumbling block to regional integration and meaningful engagement in environmental governance. ASEAN Way, a norm used for shaping ASEAN construction, is a remnant from the post-decolonization period when the state's sovereignty is the supreme condition. The norm is supposed to be interpreted in an evolutive manner according to current regional concerns. Notably, the transboundary nature of environmental problems requires regional engagement, and such engagement should not be deemed as intervention.

The analysis in this dissertation also reveals a significant factor strengthening the strict application of the ASEAN Way and obstructing the alteration of its interpretation. ASEAN is a state-centric regionalism. ASEAN policy and implementation depend on the interests of member states. The political regimes in member states affect how ASEAN evolves. At this present time, it is the moment of democratic downfall and the rise of authoritarian power in ASEAN member states. For regimes' survival, the non-democratic regimes in member states prioritize rapid economic growth over environmental protection and neglect human rights protection, including the right to a healthy environment, civil liberties, and participation. The lack of liberal values and political instability in member states intensifies the adherence to

ASEAN Way as member states insist on their absolute sovereign rights in internal matters. This prevents environmental integration in ASEAN. Since liberal norms—democracy and human rights—are connected to environmental integration, assimilating such norms into member states' political regimes may loosen up the ASEAN Way/non-intervention rule application. Nevertheless, the internal governance of member states is beyond the scope of this dissertation.

For ASEAN environmental integration, it cannot depend on a state-led approach since member states' interests do not support the integration. The dissertation proposes that ASEAN has to embrace a people-centered approach and commit to a structural redesign to allow ASEAN representatives to be democratically elected and enhance participation from non-state actors, precisely the civil society and environmental groups, to ensure that the ASEAN policy-making process takes into account environmental consideration and reflects the interest of ASEAN people, not the states. Above all, ASEAN should create a particular environmental organ focusing its work on ensuring compatibility between environmental protection and economic development. Its functions should include strengthening environmental science in ASEAN policy, incorporating environmental protection clauses in trade agreements and negotiation, and creating a mechanism to address the underlying economic incentives of regional environmental problems.

This dissertation addresses the reasons for, the barriers to, and the possibilities for environmental integration in ASEAN. In the face of transboundary environmental problems, the issues of state sovereignty and non-intervention principle due to internal political governance of member states remain to be solved. Integrating environmental protection in economic development and trade is an inevitable path for sustainable development; however, the actual implementation is complex and requires further studies in a global context.

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