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Legalization in EU trade agreements

Costs and benefits explaining the diverging progress of free trade negotiations with Singapore and Malaysia

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Abstract

The European Union is actively pursuing Free Trade Agreements in Southeast Asia. Among others, the EU has initiated bilateral trade talks with both Singapore and Malaysia in 2010. However, the success rate of these talks differs significantly. In 2014 the EU-Singapore FTA (EUSFTA) is ready to be ratified while the EU-Malaysia FTA (MEUFTA) negotiations are still ongoing. What can explain this diverging progress? This paper looks at more than content and focuses on legalization; this is the extent to which an agreement establishes legally binding commitments. Research on the impact of legalization on FTA negotiation processes has been limited. This paper aims to fill this gap and assesses the level of legalization of the selected EU FTAs and its impact on the negotiation process. The analysis firstly comprises an evaluation of the level of legalization of both future FTAs. In the EUSFTA there are strong obligations and a general application of the Dispute Settlement Mechanism (DSM), with only minor exceptions. The negotiations on the MEUFTA are still ongoing, but the EU's regulatory agenda is likely to aim for a similar level of legalization. Therefore, secondly, I review the perceived costs and benefits of engaging in either hard or soft legal arrangements. I claim that an explanation for the different speed of completion of these two FTA negotiations can be found here. The European Union and Singapore both have experienced negotiators and have a lot more to gain from establishing credible commitments through hard law. Whereas Malaysia prefers the flexibility and reduced sovereignty costs of soft law. Such conclusions on the impact of legalization are important for future EU negotiating strategies.

Keywords: Legalization, Free Trade Agreements, European Union, Singapore, Malaysia

Introduction

The European Union (EU) is a leading advocate of further and deeper liberalization of world trade and is pursuing these goals through Free Trade Agreements (FTAs) on the multilateral, interregional and bilateral level. Asian countries appear to be on top of the bilateral FTA agenda not only for the EU, but also for other trade powers such as the United States (US), China and Japan. Some authors have gone so far as to describe this FTA competition as a "*bilateral crusade"* (Hardacre & Smith, 2014: 102). Based on key economic criteria, the Association of South East Asian Nations (ASEAN) has been identified as one of the priority partners for the EU in the pursuit of FTAs (European Commission 2006: 11). This paper focuses on the FTA talks between the EU and two ASEAN member states in particular, namely the EU-Singapore FTA (EUSFTA) and the EU-Malaysia FTA (MEUFTA) negotiations. In 2010 these were the first two bilateral negotiations to be set up by the EU in the ASEAN region. The year 2014 brings an EUSFTA ready to be ratified (European Commission 2013a) while the MEUFTA negotiations appear locked in a stalemate (European Commission 2014a).

What can explain this different outcome in the negotiating process? This paper looks at legalization and its costs and benefits with the goal to understand the diverging progress of free trade negotiations. The international trade regime is indeed characterized by a considerable level of legalization (Goldstein & Martin, 2000) which is defined by Smith (2001: 81) as

> *"a process whereby the rules, or standards of behavior, in a given social setting are: (1) explicitly clarified (usually by written expression); (2) codified, or ordered in relation to other rules involving that setting and other settings; and (3) invested with the status of law, which involves legal (i.e. formal and justiciable) rights and obligations, toward other social actors."*

This legalization can be evaluated through a positioning on a hard versus soft law continuum, with hard law establishing high levels of obligation, precision and delegation (K.W. Abbott, Keohane, Moravcsik, Slaughter, & Snidal, 2000). The process of increasing legalization has been an important aspect of the new trade politics, as it is considered to be a response to the focus on behind the border measures, such as trade facilitation and procurement (Young & Peterson, 2006: 799; Zangl, 2005: 81).

However, so far, research on the legalization[1] of trade liberalization has mainly focused on the multilateral level of the World Trade Organization (WTO) (e.g. De Bievre, 2006; Poletti, 2011; Shaffer, 2006; Trachtman, 2007; Zangl et al., 2012). For the EU, its strategy of linking market access with other regulatory issues clearly benefited from the strong enforcement through the WTO's Dispute Settlement Body (DSB) (De Bievre, 2006). But, as bilateral negotiations became a priority alternative to the multilateral impasse, academic questions on the level of legalization of the EU's bilateral FTAs have yet to be answered (Baccini, Dür, Elsig, & Milewicz, 2011: 7). Moreover, the impact of legalization on the process of bilateral trade negotiations is hardly discussed in academic literature. For the EU, its strategy presented in *Global Europe* (2006) underscores a preference for comprehensive agreements, directing to 'regulatory convergence', 'provisions on enforcement' and 'implementation monitoring' (European Commission 2006: 11). A subsequent communication, *Trade, Growth and World Affairs* again refers to 'regulatory cooperation' and 'regulatory convergence' (European Commission 2010a). The European ambition (*Ibid*.: 12, emphasis added) is outspoken:

> *"As regards bilateral agreements, we will prioritise the implementation of free trade agreements, particularly in respect of the* ***regulatory component*** *and non-trade barriers. This will start with the EU-Korea free trade agreement, which includes ambitious commitments notably on* ***regulatory issues****, which can be* ***enforced*** *through expeditious dispute settlement or mediation"*

The empirical focus in this paper is on Singapore and Malaysia and is determined by both their importance in the region and the timing of the negotiations which are very much connected factors. When the EU switched from an interregional to a bilateral approach it was clear that negotiations with the most important partners would be set up first. Both negotiations are considered pivotal. Singapore is viewed as a reference point in all official communication, but also Malaysia is crucial: *"if it is not possible to conclude an agreement in Kuala Lumpur, how can we hope to negotiate with Thailand, Indonesia...? We can forget the rest"* (Interview No. 5). The comparison between the two countries also stresses the difference in negotiating with developed and developing/middle-income countries.

My research strategy involves a triangulation of sources. The main analyzed primary sources are the draft EUSFTA and Commission documents about the expected impact of both the FTAs. These are complemented with other academic work to construct the conceptual framework, and to analyze the content and format of the two agreements.

[1] Some authors prefer the term judicialization, but they tend to limit the scope of analysis to the dispute settlement mechanism of the World Trade Organization.

Finally, I use interviews in two ways. A first small sample of interviews had an exploratory purpose, for me to gain insight into the most important aspects and goals of both the EUSFTA and the MEUFTA. The second set of interviews enabled me to reflect on my findings with EU Commission staff, delegation members and business representatives. My goal is to add several interviews to my analysis in the upcoming months as some of the second set interviews pointed to interesting new elements.

The remainder of the paper comprises two parts. The following first part provides the conceptual framework. It evaluates the concept of legalization and provides the theoretical tools to analyze the level of legalization and its perceived costs and benefits. The second part evaluates the legalization level of the future EUSFTA and MEUFTA, assessing the three dimensions of legalization, namely obligation, precision and delegation. Furthermore, it lists the perceived costs and benefits for the EU, Singapore and Malaysia of engaging in hard versus soft legal arrangements, which we claim explains the different speed of completion of these two FTA negotiation processes. In the conclusions, we present our main findings and their implications for EU policy.

1. Conceptual framework: tools for analysis

1.1. Legalization: dimensions

Abbott et al. (2000) established a widely accepted framework for the analysis of legalization which *"does not prejudge the relative value of hard- and soft-law instruments"* (Shaffer & Pollack, 2010: 717). In the following I discuss both the dimensions of the original concept and the practical translation to an FTA context. Importantly, the conceptual framework in this research is not fixed at its outset, but allows for adjustments as the empirical findings bring up new elements. **Table 1** summarizes the content of the dimensions of legalization and the main criteria of an (initial) evaluation[2] of the EUSFTA and the MEUFTA.

The central feature of legalization is the variability of its three dimensions of obligation, precision and delegation on a continuum of hard to soft law. The dimension of obligation regards to the intent of the parties to create legally binding agreements, consisting of language formulating the clear intent to be legally binding (K.W. Abbott et al., 2000: 410). Precision concerns the scope for interpretation. Rules should be unambiguous and noncontradictory to reach a high level of precision. "*Vague or very general terms with no criteria for performance reflect an intent not to be legally bound"* (*Ibid.:* 414). The third

[2] My evaluation in this paper always refers to how the FTAs are situated on the hard versus soft law continuum, but does by no means aims to evaluate the value of legalization.

dimension of delegation has a range from an independent third-party dispute settlement mechanism to political bargaining. The resulting decisions can be legally binding or mere recommendations (*Ibid.:* 415-417).

These dimensions are not uncontested. It is argued that the Abbott et al. concept structure makes legalization solely *"dependent on obligation, that is, ultimately dependent on law"* (Belanger & Fontaine-Skronski, 2012: 252). Furthermore, the concepts of obligation and precision are mostly intertwined as most assessments of legalization deal with exactly the precision of obligations (Goodman & Jinks, 2004: 675, as mentioned in Belanger and Fontaine-Skronski 2012: 265). A low level of precision in describing the obligations limits the latter's hard law characteristics. I acknowledge these critiques and in this paper, these dimensions do not exist independently of each other, but are inherently connected. Enforceability comprises this view: it is impossible for an obligation to be enforced without a certain level of both precision and delegation.

This conceptual framework now needs translation to an FTA context. Obligation can range from strong regulatory cooperation and even convergence to merely a declaration on existing international conventions with no real commitment for ratification. Obligation and precision are closely linked when looking at the depth of FTAs (Horn et al., 2009: 5). Precision can on the one hand concern a listing of specific commitments on lowering tariff and non-tariff barriers. It can on the other hand also be a mere reference to broad and vague principles in international law. Delegation concerns the strength and functioning of the dispute settlement mechanism. Its hard law characteristics are based on the availability of third-party review, the legal bindingness of its decision and institutionalization (Jo & Namgung, 2012: 1044-1045). The institutional provisions in FTAs are crucial because of their impact on effective implementation (Kleimann, 2013: 3). For EU FTAs, delegation is organized through Government Consultations, a Panel of Experts or a Dispute Settlement Mechanism, ranging from low to high levels of delegation (Van den Putte, Orbie, Bossuyt, & De Ville, 2013: 39-40).

TABLE 1
DIMENSIONS[3] OF LEGALIZATION:
ENFORCEABILITY

Dimensions	**Evidence of hard law**	**Evidence of soft law**
Obligation: Intent	Intent to be legally binding: ➢ Clear legal language ➢ Strong regulatory cooperation and convergence	Negation of legally binding commitment: ➢ Ambiguous legal language ➢ No call for change of policy / commitment for ratification
Precision: Scope	Limited scope for interpretation: ➢ Listing of specific commitments	Broad scope for interpretation: ➢ Reference to broad principles in international law
Delegation: Dispute settlement	Third party decisions: DSM ➢ Legal effect of decisions ➢ Institutionalization	Political bargaining: Government Consultations ➢ Non-binding recommendations
Implementation	Implementation review through neutral committees	Implementation review through political committees

1.2. Legalization: costs and benefits

A high level of obligation, precision and delegation increases credibility of commitments, but also results in high initial transaction costs. The strong legal framework can reduce the costs for future interactions and deals with incomplete contracting. Firstly, hard law achieves credible commitments (B.1) among signatories of an agreement. The reciprocal commitments and nonsimultaneous performance in Free Trade Agreements resemble a Prisoner's Dilemma[4] in need of an assurance. Legalization enhances credibility and certainty by increasing the cost of violation, through potential countermeasures and reputational effects (K. W. Abbott & Snidal, 2000: 426-430). In other words, legalization raises the profile of the obligation to a public commitment (Smith, 2001: 84). Credibility

[3] Based on Abbott et.al (2000).
[4] Although cooperation in the real world goes beyond the binary choices of the Prisoner's Dilemma and deals with the distribution of costs and benefits of this cooperation (Shaffer and Pollack 2010: 731-732).

of the agreement can also be advantageous for internal purposes: binding successors or creating incentives for citizens to accept change (K. W. Abbott & Snidal, 2000: 426). This is how governments can push for domestic reforms in the context of trade negotiations (Baccini & Urpelainen, 2012). On the other hand, as binding legal agreements result in higher costs of violation, negotiating and drafting need great care. So high legalization entails certain transaction or contracting costs (C.1). In the definition I apply here these costs combine:

- *"Thinking about all the eventualities that can occur during the course of the contractual relationship, and planning how to deal with them*
- *Negotiating with others about these plans*
- *Writing down the plans in such a way that they can be enforced by a third party – such as a judge – in the event of a dispute*" (Hart, 1995: 680).

When parties negotiate a FTA they have to discuss the coverage beyond WTO commitments, organize several negotiating rounds and take time to draft the text in appropriate legal language. These initial transaction costs can be considerable, but an established legal framework reduces the transaction costs of future interactions (B.2). Hard legalization manages the application and enforcement of the agreed rules (K. W. Abbott & Snidal, 2000: 430-431) and gives clear guidelines for the future of the relations between parties. This involves the establishment of a DSM and other monitoring mechanisms and provides an ongoing forum for subsequent interactions (Shaffer & Pollack, 2010: 718).

De-legalizing the commitment in an agreement adds flexibility, reduces sovereignty costs and encourages individual and collective learning. The flexibility (B.1) of soft law leaves room for compromise, *"helping states deal with domestic political and economic consequences … and thus increasing the efficiency with which it is carried out"* (K. W. Abbott & Snidal, 2000: 445). This deals with the implementation gap, when the strong obligations of an agreement do not correspond with institutional and private sector capacities of a signatory (Chauffour & Maur, 2010). Living agreement instruments leave room for adjustments over time and should be

"…enabled to respond to implementation progress and identified challenges through a further specification or redefinition of policy objectives, complementary rule-making, and tailor-made resource dedication over time in a flexible manner; and settle disputes over non-compliance informally where they occur" (Chauffour & Maur, 2010: 48-49).

Another main element in the choice for soft legal arrangements are the reduced sovereignty costs (B.2). These costs include the loss of authority over internal decision-

making (K. W. Abbott & Snidal, 2000: 436-437). With respect to liberalization of trade, legal arrangements limit the ability of states to regulate their borders (requiring free passage of goods and/or capital) and to implement certain domestic policies (environmental regulations or rules on intellectual property). Sovereignty or autonomy costs can be reduced through arrangements that are nonbinding or imprecise, or do not give authority to third parties to delegate (Ibid.: 437-439). Lake (1999: 39) refers in this respect to governance costs arising *"from the direct and indirect value actors place on the residual rights of control, … embodied in the concepts of freedom, independence, and autonomy."* Moreover, when dealing with uncertainty, soft legalization provides for strategies of individual and collective learning (B.3) (K. W. Abbott & Snidal, 2000: 443). Information sharing leads to consensus building (Shaffer & Pollack, 2010: 709) and this adds to the effectiveness of agreements on trade liberalization, which is different from compliance. Moreover, soft law instruments are available to non-state actors (Ibid.: 719-720) making the learning process an exchange and expanding it to a large part of society. Finally, soft legal provisions on trade liberalization also have an important signalling function (B.4). It can show ambition (Chauffour & Maur, 2010: 51), without having to worry about strict enforcement (Shaffer & Pollack, 2010: 719). This ambition can be to engage in deeper integration in the future or to show the importance of other subjects beyond the hard law arrangements in the agreement.

2. Empirical analysis

2.1. Level of legalization

The EUSFTA: setting the bar for legalization

Singapore is one of the most open[5] and market-oriented economies in the world (WTO, 2012). The small country is very engaged in trade liberalization (**Table 2**), and its FTA partners include the US, China and Japan. Singapore is the most important trade and investment partner for the EU in Southeast Asia as the EU-Singapore trade relations cover a third of all EU-ASEAN trade in goods and services and three fifths of investment stocks (European Commission, 2013c: 2). Singapore requested early on to start negotiations on free trade with the EU. As one EU official puts it, *"Singapore had been knocking on our door for the last ten years"* (Interview no. 5). But, in 2004, the EU had refused to start negotiating with Singapore on an FTA, in *"absence of an economic case"* (Garcia, 2012a: 8).

TABLE 2

Engagement of Singapore
in FTAs / FTA negotiations[6]

Proposed/Under consultation and study	7
Framework Agreement (FA) signed	1
Under Negotiation	9
Signed but not yet In Effect	2
Signed and In Effect	21
Total:	**40**

The EU's approach to trade liberalization changed and in 2007, the EU aimed at agreeing on an interregional EU-ASEAN FTA. Due to its slow progress, negotiations in this framework were paused in March 2009 and a first round of negotiations on an EU-Singapore FTA started in March 2010. These were finalized in December 2012 and a draft text was presented in September 2013, although the negotiations on an investment chapter are still ongoing. The complete package (the FTA including chapter 9 on

[5] The Open Market Index assesses a country's openness to trade and FDI, the infrastructure for trade and the overall goals in trade policy (ICC, 2013). Singapore is among the most open countries in the world, with the second best score.
[6] Both bilaterally and as part of the ASEAN. Source: aric.adb.org/fta (last visit on August 26th 2014).

Investment Protection) will be presented for ratification by the European Parliament and the Member States[7] (European Commission, 2013b).

Box 1. Timeline for the EUSFTA.

May 2007: Launching EU-ASEAN interregional negotiations
March 2009: Pause in the EU-ASEAN interregional negotiations
December 2009: Green light for bilateral FTA negotiations, starting with Singapore
March 2010: First round of negotiations with Singapore
December 2012: Conclusion of the EUSFTA negotiations
September 2013: Agreement on draft text

When in force, the *"state-of-the-art"* agreement that is the EUSFTA (Kleimann, 2013: 5) will be a legally binding agreement covering a wide range of issues, with comprehensive schedules of liberalization and a bilateral Dispute Settlement Mechanism. According to the Commission's analysis, the EUSFTA will have obligatory rules that go beyond the WTO commitments on services and government procurement, provides a regulatory framework for many services sectors[8] and will foster and protect Foreign Direct Investment (FDI). The draft agreement describes the removal of many technical barriers to trade, for example in the electronics sector, and the protection of Intellectual Property Rights (IPR) and Geographical Indicators[9] (GI) (European Commission, 2013c: 3). My analysis has evaluated the different chapters in the draft EUSFTA. There are strong obligations and a general application of the Dispute Settlement Mechanism (DSM), with only minor exceptions. For every chapter, I have listed the content of the obligations, linked with their elements of precision, the implementation action plan and the coverage by the dispute settlement mechanism. Precision is established by defining the concepts applied, describing the scope of the obligation and providing schedules on time and products/services covered. Moreover, the appendixes in the draft EUSFTA provide for additional precision on specific commitments.

This dimension of precision and its impact on the concept of legalization deserve particular attention. It appears that a considerable level of precision may not result in limiting the scope of interpretation but in limiting the scope of application. For example, chapter 8 on services reaches a high level of precision through the establishment of a list

[7] Provisional entering into force is possible shortly after the backing by the Parliament.
[8] Through a positive list approach.
[9] This is one of the main accomplishments of the agreement for the EU (Interview No. 1).

of services and economic activities explicitly exempted from the agreement. This leads to a limited overall level of legalization. Bélanger and Fontaine-Skronski (2012: 266) point to this exact issue although Abbott et al. (2000: 412-413) did not label it as problematic. In the context of free trade obligations it does have a decisive impact. These two opposite effects of precision need special attention for the remainder of the analysis.

Legal enforceability can vary as legal language can be strong or weak. Box 2 provides examples of the different terminology in the agreement. The bulk of obligations in the EUSFTA is quite strong, but some obligations for example only entail a non-exhaustive list of potential dialogue initiatives (on electronic commerce) or a reasonable effort to comply with International Agreements (on trademarks).

Box 2. Legal language in the EU-Singapore FTA

Considering the legal language in the agreement, the following terms are distinguishable in "*creating legally enforceable obligations"* (Horn, Mavroidis, & Sapir, 2009: 16). The majority of the provisions in the EUSFTA are constructed as follows:

- Singapore **shall only require** such third party certification for the products listed in Appendix 4-A-2 (European Union & Singapore, 2013d).
- The following subsidies related to trade in goods and services **shall be prohibited …** (European Union & Singapore, 2013k).

Other terminology undermines any intent to be legally enforceable, as it is difficult to prove non-cooperation and lack of best endeavour (Horn et al., 2009: 16-17):

- The Parties **shall cooperate** on customs matters between their respective authorities in order to ensure that the objectives set out in Article 6.1 (Objectives) are attained (European Union & Singapore, 2013f).
- To facilitate discussion of the matter that is the subject of the consultations, each Party **shall endeavour** to provide relevant non-confidential information to the other Party (European Union & Singapore, 2013k).

The application of the agreement shall be overseen by a Trade Committee co-chaired by the Trade Minister of Singapore and the European Commissioner for Trade. Four more specialized Committees will be established, all co-chaired by representatives of Singapore and the EU (European Union & Singapore, 2013p). I evaluate these as political committees. The Dispute Settlement Mechanism (DSM) deals with the enforcement of the agreement and reaches in this FTA a similar level of sophistication as the mechanisms in the FTAs with Chile, Mexico and Korea. It provides for the establishment of an Arbitration Panel when initial consultations should fail. This panel is quasi-permanent and is in this way different from the DSM in the WTO which has ad-hoc panels (Interview No. 7). Non-compliance with the Panel's ruling will result in the suspension of obligations at an equivalent level (European Union & Singapore, 2013n). Chapter 16 provides for a procedure of mediation to reach a mutually agreed solution to any concern a Party may have (EU & Singapore, 2013o). Notably, the chapters on Trade Remedies[10] (except section C on the Bilateral Safeguard Clause), on Competition and Related Matters[11] (except the article on Prohibited Subsidies), and on Trade and Sustainable Development are exempted from Dispute Settlement and the Mediation Mechanism (European Union & Singapore, 2013k-c-l).

In particular, chapter 13 on Sustainable Development consists overall of many soft law elements. This chapter in the first 'green' FTA (MFA Singapore, 2013; European Commission, 2012b) does not entail legal obligations. For example, there is no legal obligation to ratify the International Labour Organization (ILO) Conventions on Core Labour Standards (CLS)[12] but only a commitment to consulting and cooperating, as the partners see fit, on trade-related labour and employment issues of mutual interest (European Union & Singapore, 2013l: 2). In terms of legal commitment, it is off course *"very difficult to prove that a party has not cooperated"* (Horn et al., 2009: 16). Delegation is considered to be especially weak in this case, as these recommendations do not have legally binding consequences (Van den Putte, Orbie, Bossuyt, & De Ville, 2013: 40).

[10] The chapter mainly reconfirms existing WTO commitments, so dispute settlement about anti-dumping and countervailing measures is dealt with in a multilateral framework.

[11] The KOREU FTA has similar provisions, as South Korea also had its own established competition rules at the time of negotiation. Other EU FTAs do have enforceable obligations in this area, *"in 13 out of the 14 [analyzed] agreements that contain commitments in this area"* (Horn et al. 2009: 25). These obligations have mainly set a timeframe for the adoption of national laws and regulations on competition.

[12] Singapore has ratified six of the eight core Conventions, although only five are in force. The Abolition of Forced Labour Convention (No. 105) has been denounced in 1979. The Freedom of Association and Protection of the Right to Organize Convention (No. 87) and the Discrimination (Employment and Occupation) Convention (No. 111) have not been ratified.

The EUSFTA is considered to be the most comprehensive agreement that the EU has signed so far (Interview No. 2) and its legalization reaches a level near the hard law section of the continuum: the bulk of obligations in the agreement is quite strong. Although, my analysis finds sections that are lacking the intent to be legally binding and that are leaving a broad scope for interpretation. In addition, I argue that a high level of precision may result in a limited scope for application. Moreover, some of the chapters in the FTA are not covered by the DSM and the implementation of the agreement shall be overseen by political committees. Especially the Chapter on Sustainable Development is a soft law component of the FTA. The reasons for this particular balance are discussed in the next part of the empirical analysis.

The MEUFTA: the EU sets the regulatory agenda

Malaysia has been referred to as a reluctant bilateralist. Its move to bilateral agreements in 2002 was rather surprising as the country had criticized Singapore's bilateral initiatives with non-ASEAN members (Okamoto, 2006). Malaysia has refocused its international trade policy in pursuit of its 2020 economic strategy (WTO 2014), and has become a relatively open economy[13]. The country has several concluded FTAs both bilaterally and as part of ASEAN (**Table 3**).

TABLE 3

Engagement of Malaysia
in FTAs / FTA negotiations[14]

Proposed/Under consultation and study	7
Framework Agreement (FA) signed	1
Under Negotiation	5
Signed but not yet In Effect	2
Signed and In Effect	12
Total:	**27**

The negotiations on a bilateral Free Trade Agreement between the European Union and Malaysia were officially launched in October 2010. The Commission aims for a comprehensive agreement with, for the first time on the side of Malaysia, commitments on the sustainability dimension of trade liberalization (European

[13] The Open Market Index assesses a country's openness to trade and FDI, the infrastructure for trade and the overall goals in trade policy (ICC, 2013). Malaysia has an average openness, at a 30th place worldwide.
[14] Source: aric.adb.org/fta (last visit on August 26th 2014).

Commission, 2011). Initially, the goal was set to conclude the negotiations by the end of 2012 (European Commission, 2012c: 3), but the talks were paused in April 2012 so the Malaysian side could deal with its upcoming elections (European Commission, 2013e). Mandate difficulties were put forward as the main reason for the pause at the request of the Malaysian side (Interview No. 2, 3, 4, 5 & 6). The talks were relaunched by the end of 2013, but a date for a new negotiation round has not yet been set. One observer noted that the EU is now first finalizing talks with Vietnam (Interview No. 3). Nevertheless, the negotiation mandate has been expanded to complement the FTA with an investment agreement (European Commission, 2013f). The free trade negotiations are considered to have reached a half-way point. "*However, the most difficult issues remain to be resolved*" (European Commission 2014a: 2).

Box 3: Timeline for the MEUFTA

May 2007: Launching EU-ASEAN interregional negotiations
March 2009: Pause in the EU-ASEAN interregional negotiations
October 2010: Launch of the EU-Malaysia FTA negotiations
December 2010: First round of negotiations with Malaysia
April 2012: Seventh round of negotiations, followed by a pause due to the upcoming elections
May 2013: Elections in Malaysia
November 2013: Partners consider the next steps

The negotiations cover an ambitious agenda (Pollet-Fort, 2010: 101) and the EUSFTA has been serving as a template for the content and format of the MEUFTA (European Commission, 2013c: 3;12). "*But in view of the different levels of development certain adjustments might be needed for other partners such as longer phase-in periods"* (European Commission, 2013g: 3). The comprehensive agreement will cover market access for goods, services and investment, and rules of origin (Yean, 2012b: 8). Priorities for the EU are regulatory initiatives in the field of IPR[15], competition[16] and procurement[17] (European Commission, 2011). Moreover, many of the Malaysian import restrictions are

[15] As Malaysia was on a US Watch List on IPR until April 2012: http://www.ustr.gov/about-us/press-office/press-releases/2012/april/ustr-releases-annual-special-301-report-intellectual (last visit: April 22, 2014).

[16] As Malaysia had no comprehensive competition law at the national level (Andreosso-O'Callaghan and Nicolas 2006: 38) until the Competition Act 2010 came into force in 2012 (Malaysia Competition Commission, 2014).

[17] As Malaysia still uses procurement *"to support national public policy objectives, such as encouraging greater participation of 'bumiputera'[people of the Malay race and other indigenous people] in the economy"* (Andreosso-O'Callaghan and Nicolas 2006: 37).

of a non-tariff nature (European Commission, 2007), emphasizing the need for technical rule-making, reaching a high level of precision, in line with the goals set out in *Trade, Growth and World Affairs* (European Commission, 2010a). An example is the Malaysian Protocol for Halal Meat and Poultry Production which has been debated before in the WTO Committee on Technical Barriers to Trade (WTO, 2014: 51). Furthermore, the Commission negotiators have been pushing hard for a high level of protection for geographical indications (European Commission, 2012c: 4). Malaysia has its own system of geographical indications, with 22 of them registered by November 2013 (WTO, 2014: 76-77). There has been progress in the negotiations on the enforcement part of the intellectual property chapter (European Commission, 2012c: 4), although the negotiations have proven to be considerably more difficult than with Singapore (Drexl, 2014: 266). In line with the Korea-EU FTA (KOREU FTA) and the EUSFTA, the MEUFTA will also establish a Dispute Settlement Mechanism to deal with differences on the interpretation and application of the agreement in the future. This is being negotiated in Working Group XII (MITI, 2012).

As negotiations are ongoing, the assessment of the legalization level of the MEUFTA can only be provisional. However, it is clear that in order to accomplish the targets provided by the European Commission, the MEUFTA will need a strong legal framework.

Conclusion

The large majority of issues covered by the EUSFTA are characterized by a considerable level of obligation and precision although I have pointed to the difference between scope of interpretation and scope of application. The dimension of delegation does consist of several soft law elements as some chapters are exempted from the Dispute Settlement Mechanism. However, the EUSFTA is overall a highly legalized agreement and I expect a similar legal framework in the MEUFTA consistent with the Commission's regulatory goals. The negotiations on the latter are still ongoing and could soon be surpassed by the agreement on a EU-Vietnam FTA. This paper argues that the increased level of legalization of EU FTAs in Asia has crucial explanatory value. The lengthy negotiations on the MEUFTA could point to Malaysia's opposition to the hard law characteristics of the proposed FTA. I elaborate on this claim in the next section, considering the costs and benefits of legalization for the EU, Singapore and Malaysia.

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TABLE 4

Costs and benefits of legalization, as described by K. W. Abbott and Snidal (2000). *Own interpretation on strength of effect.*

	European Union	**Singapore**	**Malaysia**
Benefits (B) and costs (C)			
HARD LAW			
(HB.1) Credible commitments	Insurance effect (++) ➔ Legal uncertainty (S) ➔ Effects TPPA (M) Non-simultaneous performance (M) (+)	Non-simultaneous performance (+)	Uncertainty of GSP (++) Domestic reforms (+/-)
(HC.1) Transaction / contracting costs	EU negotiating framework (-) Burden of argumentation (M) (-)	Experienced negotiators (+) USSFTA (+/-)	Mandate difficulties (++) Burden of argumentation (+)
(HB.2) Lower transaction costs future interactions	Forum for interaction (+)	Forum for interaction (+)	Forum for interaction (+)
SOFT LAW			
(SB.1) Flexibility			Reasonable reciprocity (+)
(SB.2) Reduced sovereignty costs	Authority over competition (+) Limited consensus within the EU (+)	Authority over competition (+) Non-binding commitments within political sphere (+)	Non-binding commitments (+)
(SB.3) Learning effect			
(SB.4) Signalling	Justification for free trade (+)		

2.2. Costs and benefits

THE EUSFTA: elements of converging preference on legalization

Both the EU and Singapore have a lot to gain from credible commitments. The EUSFTA will result in real Gross Domestic Product (GDP) growth, although unevenly divided among the partners: an estimated growth of a value of 550 million for the EU and 2.7 billion for Singapore (European Commission, 2013c). Performance is nonsimultaneous (HB.1**)** as, for tariffs on goods, the EU has negotiated a transition period of three to five years to realize full tariff elimination[18] while Singapore already applies zero Most Favoured Nation (MFN) duties (European Commission, 2013c: 34-35). This context provides the incentives for Singapore to push for the establishment of a hard law agreement as some of the concessions of the EU are only commitments in the future. Moreover, the zero tariff policy of Singapore made the EU consider a worst case scenario revealing the valuable insurance effect (HB.1) of the FTA and consequently the need for a high level of obligation, precision and delegation:

> *"Legally, any trade partner is free to revoke such factual voluntary openings. This creates some degree of legal uncertainty (HB.1) for the foreign business community. FTAs, therefore, typically endeavour to lock in a partner country's current openness, as a safeguard against any potential digression in the future"* (European Commission, 2013c: 29).

I evaluate the contracting costs in the EU-Singapore context as not necessarily high. The European Commission has developed a clear framework for its trade negotiations, with structured negotiating rounds and pre-defined agenda setting (HC.1). Singapore also has a team of experienced negotiators. It was one of the first countries in the region to seek bilateral FTAs. The country for example negotiated a comprehensive FTA with the United States which is in effect since 2004. This agreement has already dealt with some of the contentious issues for the Singapore economy, thus lowering the contracting costs in the EUSFTA context (HC.1). For example, Singapore had its import duties[19] on beer from the US removed (Nanto, 2010: 6) which opened the door for equal concessions for beer imports from Belgium and the Netherlands (European Commission, 2013c: 35). But this effect is by no means one-sided. On several subjects the approach by the US is quite different from the EU's. On Geographic Indicators (GI's) Singapore was very much in the US camp (Interview No. 1) and the EUSFTA negotiations resulted in a pragmatic solution (Interview No. 6). Work and social policy provides another example of the different approach US and EU. The US-Singapore *"agreement requires*

[18] Some tariff lines for some fisheries and processed agricultural products are even exempted from liberalization (European Commission, 2013b: 34, footnote 28).

[19] Excise duties are 88 dollar per liter of alcohol, calculated according to the alcoholic strength. The Belgian Duvel beer for example contains 8,5% of alcohol (Government of Singapore, 2014). To import 100 liter of it to Singapowould cost 100 * 88* 0.085 = 748 dollar.

that parties shall effectively enforce their own domestic labor laws, and this obligation is enforceable through the Agreement's dispute settlement procedures" (US Trade Representative 2001) whereas the EUSFTA refers to the Core Labour Standards of the ILO. The EUSFTA as an end result shows that the experience in negotiating prevailed over conflicting approaches. Moreover, a strong legal agreement lowers transaction costs of subsequent interactions between the EU and Singapore. Both the FTA and the PCA provide for recurrent meetings in the future (HB.2).

The decision to exclude certain sections[20] of the EUSFTA from the application of the DSM has left some authority with the respective partners to decide on domestic policies (SB.2). The chapter on competition for example emphasizes the autonomy of the parties to develop and enforce its own competition law and limits the use of the DSM to the list of Prohibited Subsidies (European Union & Singapore, 2013k). It became clear that both sides did not find it desirable to have the individual decisions of the competition authorities be subject to review (Interview No.7). Another example are the non-binding characteristics of the chapter on sustainable development. The former has no direct benefit in for example an obligation to ratify the Conventions on Core Labour Standards as such issues touch the domestic political sphere (Interview No. 1). Sovereignty costs are reduced by limiting enforceability (SB.2) through both the legal language and the exclusion for the DSM. The European Union is not insisting on hard law provisions in this chapter either, as there is no consensus within Europe on what should be in them (Interview No. 1). For the EU, it provide a way to signal the importance it puts on universal labour and environmental standards (SB.4). Others argue that *"the EU has a greater need [than the US] to portray its PTAs [Preferential Trade Agreements] as not driven purely by commercial interests"* (Horn et al., 2009: 7).

The MEUFTA: flexibility and diverging preferences

I find several elements of how both partners in this FTA negotiations could benefit from credible commitments and a high level of legalization. Malaysia has recently been confronted with the uncertainty (HB.1) of voluntary trade concessions. As of January 1st 2014 Malaysia no longer benefits from the Generalized System of Preferences (GSP) and its exports are now subject to the MFN tariff (European Commission, 2013d). Malaysia was one of the biggest beneficiaries of the GSP (European Commission, 2007) and the system was crucial in shaping the EU-Malaysia trade relations (Pollet-Fort, 2010: 81). In 2011, the share of exports from Malaysia receiving GSP treatment was 17,1 % (Cuyvers, 2013: 20). The benefits of credible commitments are considerable as a FTA with the EU takes away this uncertainty and could

[20] As mentioned on page 11, the chapters on 'Competition and Related Matters' (except the article on Prohibited Subsidies), on 'Trade Remedies' (except section C on the Bilateral Safeguard Clause) and on 'Trade and Sustainable Development' are exempted from delegation through the DSM.

result in an estimated GDP increase of 11.7 billion for Malaysia (European Commission, 2011). The transformation of the Malaysian economy and the increasing flows of trade and investment since the 1980's also strengthened the European request for a strong trade framework (Pollet-Fort, 2010: 82). Moreover, the European policymakers realize there are competing processes (HB.1) leaded by the United States:

> *"Whereas in October 2010 Malaysia joined the Trans-Pacific Partnership (TPP), established in 2005 with a view to concluding a free-trade agreement which could have major consequences for EU trade policy; whereas the negotiations conducted by the TPP took a hugely important turn with the accession of the United States in February 2008, Mexico in June 2012 and Canada in October 2012.*" (European Parliament, 2013)

Another element of credible commitments is that they can support the push for domestic reforms. It could strengthen Malaysia's gradual unilateral liberalization of many of the services sectors or could motivate reforms in the field of procurement (HB.1). Malaysia's New Economic Model (2010) has a strategy to double its per capita income by 2020 and become more competitive, more market driven and more investor-friendly. Several domestic reforms are suggested to reach these goals, and the phasing out of the affirmative policies is the most contentious one (Yean, 2012a). One observer did note the link between the MEUFTA and the ongoing domestic changes on government procurement (Interview No.6). Further research into the internal political context is not provided here so the conclusions on the goals concerning domestic reforms on legalization preference are ambiguous.

The pause of the negotiations is directly attributed to the mandate difficulties (HC.1) on the side of Malaysia which are the most important contracting costs in this case. I do not elaborate on this as such because the negotiations proved difficult even before the elections. Moreover, I cannot add this element when reffering to negotiations with other ASEAN members[21]. More important are the sensitivities, which I expect to find across Southeast Asia, concerning national soevereignty (SB.2). Here I find another element constructing the Malaysian preference for a soft law approach. A recurring statement is: *"This is how Malaysia does things"* (Interview No. 6). This aspect is my research goal for the upcoming months. The question is, does Malaysia want to exclude subjects such as GI's, IP or services liberalization altogether, or do they want to include them in a soft law framework? I expect to find evidence on this in the process of the failed negotiations on a Malaysia-US FTA.

Other elements already provide evidence for a diverging preference on legalization among the negotiating partners. Firstly, as mentioned above, the EUSFTA is a reference point for the FTAs

[21] Other ongoing FTA negotiations are the EU-Vietnam FTA (launched in June 2012) and the EU-Thailand FTA (launched in February 2013).

with other ASEAN member states. This has reversed the burden of argumentation. During the EU-ASEAN FTA negotiations, the EU had to find the arguments to convince its Southeast Asian partners to add something to the agreement. With the EUSFTA in place, the future partners such as Malaysia, Vietnam and Thailand will have to find strong argumentation for leaving something out of the agreements (Interview No. 1). I would classify this observation as lowering contracting costs for the EU but increasing them for Malaysia (HC.1). Secondly, the EU and Malaysia have a different view on flexibility and I point to how this shapes the preference for legalization. For the EU, allowing the phase-in of implementation of the FTA is as flexible as it gets. But as it was argued above, nonsimultaneous performance creates the need for even stronger credible commitments (HB.1), thus strong legalization. In the case of Malaysia, flexibility means reasonable reciprocity (SB.1). It is Malaysia's explicit goal not to seek equivalent obligations (Pollet-Fort, 2010: 101) as the difference in the level of development between the two partners is still significant. The European side in response has put emphasis on the importance of GI's, regulatory practices and intellectual property and does not consider these to be linked to development (Interview No.4).

Conclusion

Preferences about the level of legalization are different for Singapore and Malaysia due to their specific costs and benefits. Why is the EUSFTA a strong legal document? Because the EU and Singapore wanted it to be. They both benefit from hard law as they seek credible commitments and a framework for future interactions. Moreover, the contracting costs during the negotiations on the EUSFTA were considerably low as experience and pragmatism took the upper hand. On specific issues the legal strength was weakened by non-enforceable legal language or the exemption from the DSM. It allows the parties to signal importance or it leaves decision making at the domestic level, reducing sovereignty costs. Malaysia seeks a balance between hard and soft law, as they feel strong about the benefits of soft law. They seek the benefits of flexibility and are outspoken about the importance of national sovereignty. The preference for a lower level of legalization is not one sided because Malaysia has to deal with the uncertainty of openness of the EU market as the GSP system ended. They would also benefit from hard legalization in that respect. Seeking the right balance between soft and hard law has proven to be a time-consuming activity.

Concluding remarks

The level of legalization is only one dimension of a trade agreement and its negotiations. But it is an important one as I have argued that the preference for either hard or soft law is crucial at the negotiating table. These preferences are shaped by specific costs and benefits. Singapore and the European Union have converging preferences on legalization while Malaysia has a different perspective. I believe that the MEUFTA negotiations are difficult not because Malaysia is opposing a framework for GI's, IP or services liberalization, but because the strict enforcement in the EU's approach is contradicting their definition of flexibility.

This paper can still be improved in two ways. Firstly, several observations point to an overall process of increased legalization in EU FTAs since *Global Europe*. My goal is to substantiate this claim with examples from the FTA with Korea but also Chile, Mexico, and maybe Canada. As a result, it would make the contrast in preference between the EU and Malaysia even stronger, and it allows a more brief presentation of my own analysis on Singapore. Secondly, I plan to collect more data from interviews in the upcoming months. Especially on Malaysia some of my observations remain ambiguous.

Legalization and its impact on trade negotiations is also important for ongoing trade talks in the ASEAN region and elsewhere. The European hard law approach might prove to be too focused on enforcement while negotiating partners such as Thailand, and in the future Indonesia and the Philippines, put much more emphasis on flexibility and national sovereignty.

Interviews

	Institution	Time and place
Interview No.1	European Commission	February 3rd 2014, Brussels
Interview No.2	Business Singapore	August 19th 2014, Ghent (Skype)
Interview No.3	Business ASEAN	August 22nd 2014, Ghent (Skype)
Interview No.4	European Commission	February 3rd 2014, Brussels
Interview No.5	EU Delegation	January 23rd 2014, Ghent (Telephone)
Interview No.6	Embassy of Malaysia	February 4th 2014, Brussels
Interview No.7	European Commission	August 20th 2014, Brussels

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