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Prioritizing Integration Goals in the ASEAN Economic
Community in a Changing World

Stefano Inama and Edmund Sim

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Abstract

According to the Charter of the Association of Southeast Asian Nations (ASEAN), by 2015 ASEAN countries should have established the ASEAN Economic Community (AEC) to “create a single market and production base which is stable, prosperous, highly competitive and economically integrated” in paragraph 5 of Article 1.

Unfortunately, in its current condition, ASEAN is not well-prepared to undertake such ambitious objectives. ASEAN does not have strong regional institutions to deal with economic integration, unlike the EU. Nor does ASEAN have detailed legal agreements and robust dispute settlement procedures, unlike NAFTA. As a result, the AEC faces structural problems in dealing with regional economic integration, particularly the cross-pressures coming from the Trans Pacific Partnership (TPP) and the EU’s bilateral FTAs with individual ASEAN members.

This paper therefore advocates strengthening the ASEAN institutions and processes so that all of the AEC participants can interact in conjunction with the TPP and EU-ASEAN FTAs, and not become caught up in the cross-pressures of these modern FTAs. We present a series of potential reforms ranging from the modest to the ambitious that would allow the AEC to flourish and go beyond its current limitations. Ultimately that choice needs to be made by the ASEAN leaders themselves – but that choice needs to be made, and soon.

Keywords

AEC, ASEAN, TPP, trade integration.

I. Creating the Single Production Base in ASEAN in a Challenging Environment*

The Charter of the Association of Southeast Asian Nations (ASEAN),¹ notionally the foundational treaty of ASEAN, states that the aim of the region's economic integration into the ASEAN Economic Community (AEC) is to "create a single market and production base which is stable, prosperous, highly competitive and economically integrated" in paragraph 5 of Article 1. The "single market" and the "single production base" are correctly identified as two separate concepts in the Charter: (1) the "single market" for goods, services, labour, investment and capital, and (2) the "single production base."

In the opinion of the authors, the ASEAN Charter may have inverted the significance of the AEC's integration goals. Given the economic disparities and lack of economic cohesion among ASEAN members, both in terms of development and size, a single market should not be necessarily a first priority, at least in the near to medium term. The income gap between the ASEAN member with the highest GDP per capita (PPP), Singapore, and the ASEAN member with the lowest GDP per capita (PPP), Myanmar, remains at 50:1.² By contrast, the ratio in the EU of its highest GDP per capita member, Luxembourg, and that of its lowest, Bulgaria, is only approximately 7:1. Furthermore, the majority of ASEAN's population is in countries classified as Less Developed Countries (LDCs).

The concept of single production base aiming at establishing a more effective, harmonized production base through AEC measures when matched with the means provided by the ASEAN Charter appears to be a more realistic objective than a single market. The single production base will encourage foreign and domestic investment in production assets in ASEAN, with the resulting products both consumed within ASEAN and exported abroad. The general population in ASEAN will benefit to the extent that increased investment results in higher employment, wages and overall development. ASEAN leaders appear to understand this aspect of economic integration, as denoted by their repeated calls for greater involvement by small and medium-sized enterprises (SMEs) and ASEAN-owned businesses in regional integration. Without improved participation by this sector of ASEAN's economy, the benefits of regional economic integration will remain concentrated in limited segments of the economy that have already integrated, such as automobiles and electronics, which are mainly dominated by Japanese multinationals. Expansion of the regional economic integration efforts to all aspects of ASEAN society is also necessary for political and social stability within the regional bloc. In other words, expanding the coverage of the AEC "pillar" of ASEAN (using an ASEAN term) is necessary to support its other "pillars", the political-security and socio-cultural pillars.

Thus, focusing on the single production base will allow ASEAN to diversify its production base in terms of industries and participants. It also will allow ASEAN to be more competitive relative to other investment destinations such as China and India, which are ASEAN's most immediate competitors. Perhaps best of all, focusing on the single production basis is a more feasible and modest target for ASEAN policymakers with relatively fewer political and economic hurdles to surmount than a single market.

That is not to say that the single market should be disregarded. Rather, it is to say that the single market will progressively arise by its own accord based on the policies of ASEAN in developing the AEC. Companies and their employees involved in the single production base will have greater

* This paper is based on their book *The Foundation of the ASEAN Economic Community* (Cambridge 2015) (ASEAN Foundation), with necessary updates.

¹ Charter of the Association of Southeast Asian Nations, Singapore, 20 November 2007.

² Report for Selected Countries and Subjects, International Monetary Fund, available at www.imf.org/external/pubs/ft/weo/2012/01/weodata/weorept.

spending power in the single market, and suppliers who integrate to serve the single production base will also have greater efficiencies in selling to the single market.

Unfortunately, in its current condition, ASEAN is not well-prepared to undertake either of these AEC priorities. ASEAN does not have strong regional institutions to deal with economic integration, unlike the EU. Nor does ASEAN have detailed legal agreements and robust dispute settlement procedures, unlike NAFTA. As a result, the AEC faces structural problems in dealing with regional economic integration, particularly the cross-pressures coming from the Trans Pacific Partnership (TPP) and the EU's bilateral FTAs with individual ASEAN members. These comprehensive modern FTAs go beyond the current scope of the AEC and the ASEAN FTAs with China, India, Japan, Korea and Australia-New Zealand, as well as the intended scope of the Regional Comprehensive Economic Partnership (RCEP) that would consolidate those ASEAN FTAs. Without augmentation of the ASEAN institutions and processes, the AEC risks becoming a permanent two-tier system, one of "haves" (e.g., those ASEAN members who are part of the TPP and the EU-ASEAN FTAs) and the "have-nots" (e.g., those ASEAN members who are not).

This paper therefore advocates strengthening the ASEAN institutions and processes so that all of the AEC participants can interact in conjunction with the TPP and EU-ASEAN FTAs, and not become caught up in the cross-pressures of these modern FTAs. We present a series of potential reforms ranging from the modest to the ambitious that would allow the AEC to flourish and go beyond its current limitations. Ultimately that choice needs to be made by the ASEAN leaders themselves – but that choice needs to be made, and soon.

II. ASEAN's Institutional and Legal Limitations

The AEC has been more successful in developing the single production base, particularly in the aforementioned industries such as automobiles and electronics, thanks to the ASEAN Trade in Goods Agreement (ATIGA)³ and its predecessor agreements. Import duties have been reduced to zero for almost all ASEAN-originating goods. However, regional integration in other industries has been less intensive because of the persistence of non-tariff barriers and inconsistent implementation of the ASEAN agreements in the member states. In addition, the ATIGA is not a customs union but a preferential trading arrangement (PTA) that has not even notified to WTO under article XXIV, but instead is covered by the "Enabling Clause." A customs union is not feasible in ASEAN because a common external tariff cannot be agreed upon when two members (Brunei and Singapore) are free ports with zero import duties on almost all products. Because the ATIGA is a PTA, rules of origin, trade facilitation and other issues will continue to be potential sticking points for cross-border trade given that national borders still have meaning inside the AEC.

The continuing influence of national borders in the AEC also affects the creation of a single market in ASEAN. Non-tariff barriers such as industrial standards and other market access issues adversely affect the competitiveness of goods after they cross borders. Trade in services, investment flows and movement of natural persons are also affected by national policies. ASEAN's relative lack of a unified policy on competition, government procurement, subsidies, taxation, labour mobility and other issues accordingly present challenges to formation of a single market in ASEAN.

With the continuing influence of national borders in the AEC, effective regional integration of the production base and market requires some mechanism or institution to ensure that AEC measures are being implemented by the ASEAN member states. Yet ASEAN has neither developed sufficiently strong regional institutions such as the European Commission in the EU nor robust dispute resolution such as in NAFTA.

³ ASEAN Trade in Goods Agreement, Cha-Am, 26 February 2009.

The closest AEC analogue to the European Commission, the ASEAN Secretariat, has virtually no powers over the ASEAN member states to cajole or compel compliance with AEC measures. Unlike the European Commission, the ASEAN Secretariat cannot investigate the behaviour of member states and must instead rely on self-reporting by the member states. Unlike the European Commission, the ASEAN Secretariat cannot initiate legal action against a member state; dispute resolution can only be initiated by another member state. Unlike the European Commission, the ASEAN Secretariat cannot propose policy measures or legal enactments. Unlike the European Commission, the ASEAN Secretariat cannot impose sanctions on a non-compliant member state. Instead, the ASEAN Secretariat's one tool is the potential to name and shame non-compliant member states in its AEC Scorecard, a report issued under its authority to report on implementation of AEC measures as per the ASEAN Charter.⁴ However, the ASEAN Secretariat has not used this authority in a meaningful way, choosing to report on the enactment of laws and regulations rather than conducting a qualitative analysis of implementation of those laws on a country-by-country basis.

The AEC similarly lacks effective dispute resolution based on rigorous treaty texts, such as exists in NAFTA. The AEC dispute resolution process has never been used and has little credibility within ASEAN. The ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM)⁵ was taken almost verbatim from the WTO Dispute Settlement Understanding, yet without providing for a proper timetable or sufficient resources to administer the EDSM. There are also serious questions over whether the EDSM decisions can be enforced within ASEAN, and even whether a member which has lost an EDSM arbitration procedure could appeal a result to the ASEAN Summit of national leaders and thereby seek a political resolution by the Summit instead. As a result, member states refrain from bringing their ASEAN disputes before the EDSM process and instead go to the WTO or alternative forums which have better enforceability track records.⁶ However, by relying on non-ASEAN agreements and norms to deal with issues within ASEAN, the member states undermine the credibility of not only the EDSM process but also the underlying AEC agreements themselves, as those agreements depend on the EDSM for their enforceability.

The weaknesses of both the ASEAN institutions and the ASEAN processes stem from historical factors. With only the exception of Thailand, the ASEAN members only recently became independent from their colonial masters. Newly-won sovereignty was something to be conserved rather than shared with others, whether other countries or a supranational institution. Furthermore, the entire ASEAN region was only unified as a single economy during World War II under Imperial Japan, and then only for a very short period of time. Just as important is the traditional "ASEAN Way" of operation, in which decisions require consensus and member states are reluctant to intervene or comment in the affairs of neighbouring ASEAN members. Hence delegation of sovereignty is neither seen as necessary nor as desired, as was the case in the EU. Unlike NAFTA, moreover, there was less acceptance of airing grievances through binding dispute resolution on a regional basis.

III. A Mismatch of Regional Integration Tasks with Institutional Tools

If AEC agreements cannot be enforced by other member states through the EDSM or the ASEAN Secretariat through its very weak authority, then do AEC commitments have any weight? This is the core issue facing ASEAN. With neither strong regional institutions nor robust dispute resolution, there is nothing in the AEC to hold the ASEAN member states accountable to their AEC responsibilities, particularly on issues related to market access and competition after goods, services, capital and people cross the national borders. That task is critical in the AEC, where national borders have a much greater impact on trade and investment within the bloc, as opposed to the EU or a nation-state where

⁴ ASEAN Economic Community Scorecard, <http://www.asean.org/publications/AEC%20Scorecard.pdf>.

⁵ ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Vientiane, 24 November 2004.

⁶ *ASEAN Foundation*, pp. 129-137.

national borders are less critical, due to the continuing impact of the ASEAN Way of consensus and non-interference.

The single production base, which mostly depends on the free flow of goods within ASEAN, has been easier to construct albeit mostly on tariffs and rules of origin with the limited tools available. ASEAN has been working on intra-regional trade in goods since the 1977 ASEAN Preferential Trading Arrangement,⁷ then the 1992 ASEAN Free Trade Area agreement⁸ and now the ATIGA, so the regional bloc has had much more time to work on trade in goods. Moreover, these agreements focused on preferential trade for goods crossing national borders. ASEAN's consensual approach was not such a limitation in such issues, as the focus was necessarily on cooperation among nation-states, at the borders.

However, further formation of the single production base will require further integration in trade in goods, as well as supporting services and investments. This integration will involve more post-border market access issues involving non-tariff barriers. For example, national industrial standards are inconsistent in ASEAN and often cited as a non-tariff barrier, such as in the steel industry. Dealing with non-tariff measures will require some mechanism to monitor, detect, investigate and sanction member states for creating such obstructions to the free flow of goods.

Even customs issues at the national border will become more complex and require such mechanisms. Companies will need to demonstrate that goods are ASEAN-origin products that qualify for preferential trading rates under the ATIGA. Currently this involves intensive scrutiny of the origin certificates, which are frequently rejected, thereby reducing the usage of the ATIGA. ASEAN plans to replace this system with self-certification by exporters, subject to verification after importation.⁹ Ensuring that the verifications are done properly also requires a level of cooperation among ASEAN member states, cooperation which would be easier and more effective with stronger regional institutions or legal processes.

The creation of the single market in ASEAN will require even more institutional support on a regional basis. Establishing a true single market with goods, services and financial products sold to a wider consumer market will require convergence of ASEAN member states' regulatory practices, if not their harmonization. Achieving this will require some system to monitor behaviour by ASEAN member states, investigate potential breaches of AEC commitments, and impose sanctions should the member states fail to comply. The current system does not do this. Rather, ASEAN is pursuing capacity building and best practices at the national level in intellectual property, consumer protection and competition rules. But without either strong regional institutions or robust dispute settlement rules to compel regulatory convergence or harmonization at the national level, the ASEAN member states risk going off in different directions. Furthermore, other areas of potential market disruption are not addressed at all, such as industrial subsidies, government procurement, taxation or completely free movement of natural persons (and not just skilled workers and professionals).

ASEAN in its current state cannot provide such support. The annual budget of the ASEAN Secretariat is about US\$ 18 million annually, hamstrung by the requirement that the member states contribute to its operation on an equal basis. Overall ASEAN expenditure is supplemented by funding from donor countries, but this runs the risk of potential reluctance to adopt positions and policy deliverables provided by donors. In any event, the relatively small number of personnel at the ASEAN Secretariat (currently 300 or so) find it difficult to deal with the 1000+ meetings held annually in ASEAN, much less exercise the very limited powers that the ASEAN Secretariat currently has.

⁷ Agreement on ASEAN Preferential Trading Arrangements, Manila, 24 February 1977.

⁸ Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992.

⁹ S. Inama and E. Sim, *Rules of Origin in ASEAN* (Cambridge University Press, 2015), pp. 76-86.

IV. Potential Institutional Solutions

Without improvements that improve predictability and clarity in the regulation of the AEC, private investors will not be convinced that the AEC is acceptable as a single production base for their operations. This is particularly necessary given that many of the issues involving the AEC involve post-border market access, which will require stronger ASEAN institutions that can monitor and address non-compliance with AEC policy. Furthermore, other issues related to border entry are complicated by ASEAN's not having established a customs union. On the other hand, ASEAN leaders do not want to push for greater supranational institutions, given historical and cultural biases in favour of non-interference and the "ASEAN Way" of consensus. Can ASEAN adapt its existing institutions to deal with the challenges? Or are wholesale revisions required? Will modifications to existing ASEAN agreements be sufficient or is a new treaty needed?

A. Status Quo

The ASEAN governments could elect to continue with the status quo. However, this would mean that we would continue to have unclear mandates and muddled analysis of policy issues. This situation has arisen because the current ASEAN system requires the ten member states to cooperate in forming a single production base and single market, but without a single regional authority to regulate the single market and single production base. ASEAN is definitely not a proto-state, but it has progressed beyond an informal grouping, thanks to the introduction of the ASEAN Charter.

Rather, ASEAN can be likened conceptually to a league of sports teams which have decided to cooperate and institute common rules for operation and cooperation. The ASEAN Charter provides the newly formalized fundamental principles of the sport (e.g., the size of the playing field and the equipment specifications), with the various subsidiary agreements providing the more detailed rules for contests. In this analogy, the ASEAN Secretary General operates "the league office," organizing meetings (or scheduling games, to follow the analogy) and coordinating activities, but without the mandate to compel compliance among the members. In this "sports league," the team "players" (ASEAN nationals) have no ability to invoke league rules or to seek relief when rules are breached; that remains entirely the province of each team's management (the ASEAN member state governments).

If ASEAN can thusly be compared with a sports league, then its purpose is to promote its own popularity among potential "fans" (investors). Standardized and improved rules and operation should encourage more investment in ASEAN, and not in competitors such as China, Japan and the EU. Similarly, better play and exciting matches encourage fans to watch the sports league in person or via television or the Internet.

The difficulties in such an operation, where sovereignty remains with the teams' management (ASEAN national governments) and not with a "league office," are both external and internal in nature.

In external matters, ASEAN has been able to act in a united manner. In multilateral fora, ASEAN members coordinate, with the relevant ASEAN member representing the rest. For example, Indonesia speaks for ASEAN at the G-20. In FTA negotiations, the ASEAN members coordinate as a group. This occurred with the various FTAs that ASEAN negotiated and concluded with China, Korea, India, Japan and Australia/New Zealand. Using the sports league analogy, this coordination effort resembles the negotiations between television networks and sports leagues for broadcast rights.

However, when the coordination among ASEAN members does not meet the expectations of others, this arrangement can break down. This occurred in the EU-ASEAN FTA talks, which the EU abandoned in favor of bilateral FTA negotiations with individual ASEAN members such as Singapore. The EU cited insufficient institutional development in ASEAN as necessitating the shift. Again,

resorting to the sports league analogy, this is akin to individual teams breaking away from the league committees and striking their own deals with television networks.

In internal matters, the lack of authority to enforce sanctions or provide rewards limits the efficiency of ASEAN. Rather than use the existing ASEAN dispute resolution procedures, ASEAN members use more established alternative fora. Trade disputes between Malaysia and Singapore, and between Thailand and the Philippines, went to the WTO instead. Territorial disputes between Malaysia and Singapore, and between Indonesia and Malaysia, went to the International Court of Justice (ICJ) instead. Applying our sports league analogy, such occurrences are akin to teams resorting to court litigation rather than league internal procedures to resolve a dispute.

Even when disputes do not rise to the level of a legal action, they can adversely affect the institution. This happened when the July 2012 ASEAN Ministerial Meeting of foreign ministers failed to reach a consensus on its joint communiqué due to disagreements on how to address the South China Sea dispute with China. Lacking standing rules of procedure for the ASEAN Chair, Cambodia as ASEAN Chair decided not to issue a joint communiqué at all, putting the reputation of ASEAN at risk. This imbroglio almost repeated itself at the November 2012 ASEAN Summit, again resulting from the actions of the ASEAN Chair and the lack of limits and rules on how the ASEAN Chair can conduct the operations of the grouping. Using our sports league analogy, this would be similar to a team owner deciding to veto expansion of the league when all other members otherwise support expansion.

Investors also often express frustration that they cannot directly invoke dispute resolution and must depend on their national governments to do so. Often the national governments will decline to pursue dispute resolution due to other diplomatic or political reasons. Again, under our sports league analogy, this would be akin to players having to rely solely on their team management to resolve salary and rules disputes. Yet both in ASEAN and our sports analogy, disaffected participants have recourse: the players can go to another league with better pay and working conditions (and the fans can watch another league), and investors can abandon ASEAN for more attractive venues.

The real-world experience of the sports leagues is instructive. In the most successful leagues, such as the English Premier League in soccer, the league offices began with little or no authority and the players had little or no bargaining rights. Yet the teams learned that assigning authority to the league offices for negotiating broadcasting contracts increased the payments from the television networks. A stronger league office with disciplinary powers over both teams and players also improved the quality of play. With better working conditions and play, better players joined the leagues. Better players and quality of play led to more fans.

Throughout the evolution of the sports leagues, the teams have retained their ultimate sovereignty. They can always leave to join another league or negotiate their own marketing and broadcast rights. Some do. However, in successful leagues, teams understand that by sharing and pooling their sovereignty, the league becomes more attractive to players and fans. If ASEAN can learn and apply similar lessons, it too can be successful in its competition for foreign investment and trade.

B. Administrative Reform of the Institutions

If the status quo is not acceptable, the next incremental change would be to enhance the existing system through administrative reforms. This was proposed in December 2011 in a confidential report submitted to the ASEAN leadership (a copy of which is on file with the authors). Although many of the report's proposals ultimately were not adopted, they do address institutional deficiencies in the operations of the ASEAN institutions. Some proposals were eventually supported by the ASEAN High Level Task Force on Strengthening the ASEAN Institutions and Reviewing the ASEAN Organs, although the task force's report has yet to be approved by ASEAN's leaders.

The report reportedly proposed a comprehensive review of the roles of the ASEAN institutions, establishing a hierarchy of responsibilities for the entities, rules of procedure, as well as mechanisms

for resolving disputes among the ASEAN institutions. The report suggested that roles and relationships are currently blurred, resulting in confusion as to which entity is responsible for which aspect of ASEAN's governance.

The report also appeared to have called for additional capacity for the Committee of Permanent Representatives (CPR) of the member states, which sits in Jakarta at ASEAN headquarters, to deal with economic and socio-cultural matters. This reflects a sentiment among many ASEAN observers that the Permanent Representatives have a focus on political-security matters, limiting their ability to take on other work and preventing a shift in responsibilities from the many intra-ASEAN meetings to the CPR. Others have noted that the CPR has concentrated on administrative and budgetary matters at the ASEAN Secretariat, perhaps an instance of work filling the void left by an absence of responsibility. Indeed, often the CPR meets in almost continuous session, providing administrative oversight over the ASEAN Secretariat, to the point of frequently interrupting ASEAN Secretariat substantive work with administrative inquiries. However, the authors believe that if the Permanent Representatives are assigned economic matters, the ASEAN member states will respond by assigning more economically trained officials to their Jakarta missions. In other words, the ASEAN member states would respond to the needs of the situation. Also, giving the Permanent Representatives more work would help reduce their current focus on less critical internal administrative and budgetary matters. In any event, although there are Terms of Reference for the CPR, they are rather loosely drafted and could use some clarification. Notably, the High Level Task Force has agreed that the CPR needs both more responsibility and more capability in non-political-security matters.

The confidential report also reportedly called for greater use of Article 20.2 of the ASEAN Charter, which allows the ASEAN Summit to decide how a decision can be made in the absence of consensus. By extension, this would allow the ASEAN Summit to use majority or supermajority voting to decide matters, and not the ASEAN Way of consensus. Hence the confidential report apparently proposed that majority or supermajority voting should be used for routine and operational issues, and not consensus.

With regard to the ASEAN Secretariat, the confidential report suggested that the legal division should be strengthened. For the entire ASEAN Secretariat, salaries and career development should be competitive (*e.g.*, higher compensation), and the ASEAN Secretariat should have formalized regulations to govern staff and finances, the confidential report apparently proposed. According to reports, the confidential report also proposed a "Chief-of-Staff" for the Office of the Secretary General, and that all Deputy Secretaries General should be hired on open recruitment and not based on the rotation system as currently happens for two of them. The confidential report also reportedly asked for better information technology, project management, a stronger system for managing donor funds and the possibility of the ASEAN Secretariat establishing commercial entities for training and consultancy services on ASEAN (which might appear controversial but some ASEAN member states such as Singapore have had such government-sponsored consultancy operations).

Although the confidential report may appear to involve small stakes, institutional reform is the natural result of ASEAN's efforts to formalize its operations, as started by the passage of the ASEAN Charter. Even daily operations have been affected by the lack of legal and institutional clarity in the ASEAN institutions. Hence the confidential report raised issues which, if not addressed properly, will continue to hamstring the ASEAN institutions. ASEAN leaders should thus seriously consider what has been raised in the report.

Beyond what the confidential report has proposed, there are other administrative reforms that could improve the operations of the ASEAN institutions, particularly for AEC matters.

The ASEAN Deputy Secretary General for the AEC, or perhaps one or more of the ASEAN Secretariat division directors who are responsible for the AEC, should have a background in the private sector. Personal understanding of the issues arising from the private sector's interactions with

the AEC, particularly among the SME community, would help the ASEAN institutions better administer the AEC.

The cross-cutting nature of certain issues involving more than one ASEAN pillar could also be addressed. Malaysian prime minister Najib Razak has proposed the possible creation of a fourth “pillar” of the ASEAN Community, in addition to the existing political-security, economic and socio-cultural pillars. The fourth pillar would deal with cross-sectoral issues which involve two or more pillars. The prime minister specifically identified climate change and transboundary haze (air pollution) as such issues, but other issues that come to mind include food security, public health (e.g., regulation of liquor and tobacco) and law cooperation. Prime Minister Najib’s suggestion is commendable, but the authors think it should be tweaked to make it more workable. Creating a fourth ASEAN pillar is probably confusing and could create another policy “silo”, which his proposal attempts to avoid. Alternatively ASEAN could keep the existing three pillars but create another ASEAN council of ministers that would deal with cross-sectoral issues. This could be called the “ASEAN Inter-Pillar Council” or the like. More importantly is that the ministers serving on this council should have a proper cross-sectoral perspective; they preferably should not be on the current ASEAN Community Councils. To maintain the cross-sectoral perspective that the ASEAN Summit of leaders itself has, this new council should be made up of ministers who report directly to the ASEAN leaders, at least in their own countries (the current ASEAN Coordinating Council of foreign ministers would maintain its necessary organizational role and support/coordinate this new Inter-Pillar Council). Hence instead of foreign ministers or economic ministers, the ASEAN Inter-Pillar Council would be made up of deputy prime ministers, vice-presidents, ministers in the prime minister’s office or even new “ASEAN” ministers. To do otherwise by populating the new council with existing economic or foreign ministers would risk continuing the current “silo” effects that currently exist in the ASEAN Communities.

A secured virtual network of officials from ASEAN institutions and ASEAN member states could be established on the Internet, allowing for electronic interchange of data and documentation. With that, the current practice of using unofficial (and unrecognized) Gmail and Yahoo! web-based e-mail for intra-ASEAN communications would end. The High Level Task Force does not adopt this proposal but does call for setting up devoted videoconference links in all ASEAN member states.

Also, the ASEAN member states could temporarily second up and coming officials to serve in the ASEAN Secretariat. The EU currently operates a similar program. Not only would this improve the talent pool for the ASEAN Secretariat, it could impart greater understanding of ASEAN within the ASEAN member states. A training institute for ASEAN Secretariat officials would also help improve capabilities.

Recordkeeping in the ASEAN Secretariat should be completely given over to an electronic system, with a larger, full time staff. For years the ASEAN Secretariat relied solely on a very small group of individuals who administered paper records. When the paper and personnel passed on, so did the institutional memory. This cannot be allowed to continue. The institutional memory is necessary not only to understand and interpret ASEAN agreements, but to avoid repeating past mistakes or even unnecessarily re-doing past decisions (one author is aware of a recent ASEAN initiative for the automotive industry that actually repeated a virtually similar ASEAN initiative undertaken in the Nineties; this was discovered only after an accidental discovery of the original paperwork in the ASEAN archives). The High Level Task Force does call for more documentary resources for the ASEAN Secretariat.

For that matter, the ASEAN Secretariat needs to maintain a database of its former officials so that they can be recalled to service when necessary. The European Commission does this, yet the ASEAN Secretariat is hard pressed to contact former staff who have only recently departed.

Finally, the current practice of limiting the service of ASEAN Secretariat staff (except for clerical staff recruited from Indonesia) should also end. If ASEAN Secretariat staff wish to make a career with

the ASEAN institutions, this should be encouraged, as the human resources are irreplaceable. In any event, the High Level Task Force does call for additional funding and staff for the ASEAN Secretariat.

Most of the ideas in the confidential report and elsewhere are frankly basic and would have been adopted by any ASEAN member state on its own or even fairly large sized corporations. The fact that they have not yet been adopted by the ASEAN institutions themselves is due largely to lack of funding and political will by the ASEAN member states to support them. However, the increasingly complex nature of running a 21st Century regional economic bloc dealing with issues of border and post-border market access needs 21st Century ASEAN institutions.

C. Better Implementation of Agreements and Rules

ASEAN could consider encouraging the development of indigenous ASEAN legal norms and institutions, as well as formalizing the hierarchy of ASEAN agreements and sources of laws. This would support the implementation and administration of existing ASEAN agreements.

1. Develop Indigenous ASEAN Law

After the signing of the ASEAN Charter in 2007, one would have expected the ASEAN member states to have embraced both ASEAN norms and ASEAN legal institutions. The Charter was intended to formalize both norms and institutions so that ASEAN could compete with other regional blocs and even nation-states. Although the Singapore-Malaysia Pedra Branca dispute¹⁰ before the International Court of Justice (ICJ) was already in progress when the Charter was signed, the ICJ was expected to give its decision shortly, and in any event perhaps territorial disputes could not have been expected to be given over immediately to ASEAN institutions and ASEAN legal norms. Yet in economic matters, one would have expected ASEAN norms and institutions have a greater role, given the lesser stakes involved and the more routine nature of economic regulation in ASEAN. Nevertheless, that did not happen in the first economic dispute that went to formal dispute resolution under the ASEAN Charter, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*¹¹, which involved issues on customs valuation. That dispute, which could have been resolved by the EDSM and invoked ASEAN agreements, instead involved the WTO DSU and WTO agreements.

That the Philippines elected to use the WTO dispute resolution procedure instead of the EDSM is quite understandable given the situation. The ATIGA was still in draft form in 2008, so the Philippines could not have invoked the customs valuation, national treatment and due process obligations contained in the ATIGA. However, the ATIGA's predecessor agreement, the AFTA definitely applied to the customs valuation issues and could have covered the national treatment and due process issues also involved in the dispute.

The real question arising from the above review is whether ASEAN member states will make the same choice when faced with economic disputes in the future. The ATIGA and other modern ASEAN agreements have a greater coverage of the potential issues, so the substantive grounds will be there. The more persistent question is the issue of ASEAN's institutional capabilities to process and resolve a dispute through the EDSM. Given that the EDSM itself is largely based on the WTO dispute

¹⁰ Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment, I.C.J. Rep. 2002, 625 (Dec. 17); Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks And South Ledge (Malaysia v. Singapore), Judgment, I.C.J. Rep. 2008, 228 (May 23). Also, on 5 September 2003 Malaysia submitted a Request for Provisional Measures to the International Tribunal on Law of the Sea (ITLOS) in relation to Singapore's land reclamation activities near their common maritime boundary. The ITLOS refused the request, finding that Malaysia had not demonstrated sufficient urgency. Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, 10.

¹¹ Thailand- Customs and Fiscal Measures on Cigarettes from the Philippines, AB-2011-1.

settlement procedure, the question does not necessarily lie with the language of the EDSM protocol. Rather it lies with the confidence within and without ASEAN in how ASEAN members will follow the EDSM and abide by its findings.

In fact, even in a non-adversarial context, ASEAN members resort to extra-ASEAN sources of law. For example, ASEAN members have often been reluctant to conduct cross-border customs inspections to verify whether goods qualify for ATIGA, despite the fact that ATIGA expressly authorizes such inspections. For inspection of automotive industry exporters, ASEAN members have been using a 1958 UN agreement on the automotive industry as legal justification for such inspections instead of the ATIGA itself. The 1958 agreement allows importing countries to confirm whether the products have been produced in the claimed country of manufacture. During such inspections, ASEAN authorities have also been checking the cost manufacturing statements and other data for compliance with ATIGA.¹²

Yet when Canada invokes international arbitration against the United States on countervailing duties on softwood lumber, Mexico uses WTO dispute settlement against US antidumping measures on oil pipe, Italy seeks an ICJ ruling against Germany on World War II reparations, or Argentina does the same against Brazilian antidumping measures on various products, the credibility of the EU, NAFTA or Mercosur is not questioned. So why does ASEAN's credibility get questioned when its members resort to extra-ASEAN legal fora?

The difference comes from history and expectations. The NAFTA and Mercosur countries are relatively well-settled in their sovereignty and legal foundations. The EU is even more secure and has well-established sources of EU law that can be invoked at all levels of the EU, including the national level. ASEAN is still quite young, with most of its members enjoying recently-won sovereignty in historical terms. In this context, the use of extra-ASEAN legal sources is understandable.

Nevertheless, some confidence does exist in ASEAN and should be fostered. It was demonstrated in the Preah Vihear border dispute between Cambodia and Thailand, through the general acceptance of Indonesia's role as ASEAN Chair in the dispute.¹³ This depended on acceptance of its role under the Charter.

Developing that confidence cannot be imposed on ASEAN. It will need continual, low-level nurturing and a growing acceptance of ASEAN-based legal norms and institutions as avenues of first resort, rather than of last resort. This has occurred in the political-security pillar of ASEAN, as ASEAN member states grew to accept ICJ litigation and Charter-based dispute settlement as acceptable alternatives to armed conflict. Similarly, ASEAN member states need to accept EDSM procedures and ASEAN economic agreements as acceptable alternatives to unilateral trade and investment provocations, and the resulting retaliations. ASEAN needs to apply the experience from its use of the ICJ, WTO and other sources of law to the implementation of an ASEAN-specific body of law and dispute resolution. Extra-ASEAN law can help establish the legal foundations of the AEC, but without an indigenous ASEAN source of law and order, investors will either be reluctant to increase their stake in the AEC or demand a higher return on investments. Not every dispute needs to go to the UN institutions, just like not every dispute in the US needs to go to the US Supreme Court or requires congressional intervention. ASEAN needs to adapt the extra-ASEAN norms of law and order for its own needs and uses.

¹² ASEAN Foundation at 158-159.

¹³ Sim, "The Outsourcing of Legal Norms and Institutions by the ASEAN Economic Community," *The Indonesian Journal of International and Comparative Law*, Vol. 1, No. 1 (January 2014), pp. 314-331.

2. Develop Hierarchy of Legal Norms

In addition to developing a concept of an indigenous ASEAN law, ASEAN can encourage the development of a hierarchy of norms within that law. The EU has similar principles that govern the applicability of EU law at the EU and national levels. At the top of the hierarchy would be agreements subject to ratification at the ASEAN member state level such as the ASEAN Charter and ATIGA. As ratified agreements, they are binding under international law, with relevant avenues for dispute resolution should an ASEAN member state not comply with their terms, including resort to non-ASEAN forums such as the WTO. In other words, these agreements are sufficiently vital to ASEAN that the member states want them to be legally binding on a continuing basis and not easily subject to later revision or revocation.

ASEAN members have other agreements that may or may not be ratified under their domestic procedures. Ostensibly an international agreement signed by the prime ministers of Malaysia or Singapore, which follow a Westminster parliamentary system, could be conceivably be viewed as binding international agreements ratified under domestic law. However, that would not be the case for the Philippines, where the issue of Senate ratification arises almost every time the Philippine president signs an international agreement. The issue also comes up less frequently under Thai and Indonesian law. On the other hand, Cambodia determines whether an agreement must be subject to domestic ratification based on the nomenclature applied to the agreement. Ratification thus is determined on a lowest common denominator basis, with many agreements using specific nomenclature or tailored subject matters to avoid domestic ratification if possible. In any event, one would not view such unratified but signed agreements as binding under international law.

Nevertheless, such agreements still have binding force as ASEAN commitments, if not as binding international legal commitments. Article 7.2(a) of the ASEAN Charter states that the ASEAN Summit of national leaders is “the supreme policy-making body of ASEAN.” Hence decisions and agreements made at the ASEAN Summit represent the final word on ASEAN matters – that is, until the ASEAN Summit decides otherwise at a later meeting. That would mean that unratified but signed agreements are binding as ASEAN commitments but are subject to later amendment or revision. This is not different from what happens in all forms of government, where the state makes policy decisions which can, and often are, later revised or amended. In either case, unratified but signed ASEAN agreements can be invoked by other ASEAN member states and should be allowed as the basis for invoking dispute resolution under the EDSM.

There are even more agreements and declarations made at the ASEAN Coordinating Council, the ASEAN Economic Community Council, and the various ASEAN ministerial bodies. What is the relative legal value of those agreements? Well, there seems to be a sentiment within ASEAN (including with some in the ASEAN Secretariat) that such agreements, if signed off at the ministerial level or otherwise backed by the authority of the ASEAN national leaders, would also be viewed as having some legal force and possibly could be invoked under the EDSM. In other words, if the political leadership of an ASEAN member state has directly authorized its minister to make a commitment to the other ASEAN member states, then that commitment has legal value in determining rights and obligations within ASEAN. That commitment may not have as much weight as one signed off by the national leaders, and it may be subject to later revision, but it still has some weight. This organic approach is consistent both with the structure of the ASEAN Charter and political realities within the region: all lines of authority go back to the national leadership of ASEAN.

Finally, there are agreements and commitments made by non-political officials such as the SEOM or at the various committee levels of ASEAN. Based on the foregoing, these agreements and commitments should be viewed as the lowest rung of the legal hierarchy, as they do not have such explicit endorsement by the ASEAN national leadership. They are useful for understanding how the ASEAN member states are administering and implementing their AEC commitments, but they should not be viewed as establishing binding obligations on ASEAN member states. Nevertheless, as they are

useful for investors to understand the administration of the AEC, it would be beneficial for ASEAN to make these agreements and commitments publicly available, as is the case for documentation coming out of the ASEAN Summit, Councils and ministerial bodies.

The foregoing hierarchy of legal norms is admittedly not as clear-cut as would be the case in more mature systems like that of the EU or the US. But it is still early days for the more formalized rule-based system introduced by the ASEAN Charter, so we should give ASEAN time to flesh out these and other legal issues (such as how domestic courts and institutions in ASEAN member states should apply these agreements and commitments). Ultimately, the AEC needs a transparent and comprehensible legal system in order to attract investment into the region.

3. Improved Dispute Resolution

As the previous sections indicate, ASEAN dispute resolution has not advanced much, with ASEAN member states preferring to use the WTO and other forums for disputes. Yet it should be understood that the primary actors in the AEC will be from the private sector. Economic activity depends on investors, producers and consumers. The private sector needs reassurance that should it encounter difficulties in the AEC, it can seek relief through dispute resolution. In nation-states the private sector can go to court, and in trading blocs like the EU it can go to supranational courts or tribunals.

The ASEAN Charter does not address this issue. Proposals to give private parties the right to seek dispute resolution were rejected in the drafting stage. The ASEAN Secretariat also does not have this right to seek dispute resolution, which limits its ability to enforce AEC compliance as described above.

Instead, the ASEAN Charter repeats that existing mechanisms will continue to be followed. This is potentially bad news for the private sector. The existing dispute resolution systems are bogged down by the need for “ASEAN Way” consensus among members and national governments reluctant to bring cases against fellow ASEAN members. Indeed, the national bureaucrats who may have caused the problem in the first place are involved in the dispute resolution process itself. These flaws are why the existing dispute resolution process is unused and unloved.

However, the ASEAN Charter does allow room for some reform. The ASEAN Charter states that unresolved disputes shall be referred to the ASEAN leaders’ summit. This option is an improvement over the limbo where many intra-ASEAN disputes currently reside. This language also allows the ASEAN leaders the flexibility to designate economic issues as not requiring absolute consensus. Allowing for majority approval of dispute decisions would improve the system, goes this view.

Alternatively, the ASEAN Charter could be interpreted to allow the ASEAN Summit to intervene in EDSM disputes only in very limited circumstances. Applying this approach would make it clear that ASEAN member states could not bootstrap their disputes to the ASEAN Summit by refusing to cooperate with the process. Even a single instance of that happening could undermine confidence in the EDSM and ASEAN’s intent to introduce a more formal rule of law into its operations. Perhaps a limited right of appeal to the ASEAN Summit could be retained, such as to deal with issues of natural justice (*e.g.*, in the case that the process has been subverted by extra-legal means). However, that should not arise except in very extreme circumstances.

Furthermore, ASEAN could lay the groundwork for improved dispute resolution by naming a standing panel of experts to serve on panels, establish a code of conduct and procedure for cases, and expand the role of the private sector. The principle of nonjusticiability should be recognized for security and sociocultural matters to reassure ASEAN leaders that these sensitive issues would not be affected. Perhaps eminent person groups could be used on an informal basis to resolve disputes. The EDSM deadlines could be adjusted to reflect more realistic time frames closer to that provided by the WTO DSU. Finally, the ASEAN Secretariat’s legal division should be augmented with additional personnel and funding to support dispute resolution. Although the ASEAN Secretariat has established

virtual network of qualified staff outside the legal division who could assist with an EDSM matter on an *ad hoc* basis, permanent staff and dedicated funding would be better. Such small steps will help instill private sector confidence in the system as well as encourage more use of the system.

Reform of EDSM to make it more effective therefore should be seriously considered as a major ASEAN reform. As described previously, there are a large number of unratified ASEAN agreements which are not binding under international law and thus cannot be invoked in international dispute resolution, such as the WTO DSU. Such ASEAN agreements are dependent on the EDSM for their enforceability, but if the EDSM itself cannot be relied upon, their efficacy will be undermined.

4. Private Sector Right of Action

The most fundamental change to the EDSM would be to allow the private sector to invoke dispute resolution directly with regard to ASEAN agreements and other obligations. This would help reassure investors of their investments in the AEC. Private investors are able to invoke dispute resolution under national courts in nation-states like China and India, and they are also able to do so in the EU and NAFTA. Furthermore, the increasingly complex nature of economic issues, particularly issues dealing with market access after crossing the border, means that the private sector is much more likely to experience and identify problems than the ASEAN governments will. With their investments at stake, the private sector would be more likely to take action through dispute resolution – if they only could.

Indeed, Article 33 of the ASEAN Comprehensive Investment Agreement¹⁴ does allow for investor-state dispute resolution to be invoked by the private investor. The forum is also to be chosen by the investor. Yet the other ASEAN agreements such as ATIGA do not provide for private actors to invoke dispute resolution.

An argument that could be raised against creating such a private right of action would be that these ASEAN agreements do not directly affect private actors. As such, they should not have the right to raise claims with regard to these agreements. The authors would reply that the interpretation and application of ASEAN agreements do impact private actors directly. These actors should thus have some corresponding rights to invoke dispute resolution should their interests be adversely affected by the administration or interpretation of these ASEAN agreements. Allowing private actors to invoke the EDSM and involve themselves in economic disputes with ASEAN member states would also be seen as a less politicized issue, one without foreign policy implications and their attendant potential negative impacts on national sovereignty. Private actors raise similar claims before national courts and international investment arbitration panels on a daily basis without nation-states being worried about their sovereignty precisely because in those contexts the private actors have long had the right of action. By stepping aside, perhaps with safeguards such as a nonjusticiability clause to prevent “political” issues from being raised in dispute resolution, the EDSM could be enhanced in a way that benefits both private actors (by assuring them that their interests can be protected) and the ASEAN member states (by shifting some of the political costs associated with the implementation of the AEC to the private sector and ASEAN institutions, rather than currently shouldering all of the political costs).

5. Improved Feedback and Consultation

Besides the ability to invoke legal rights directly, the private sector also needs opportunities to interact with the policymakers responsible for the administration of the AEC. In nation-states the private sector can deal with the central government. In trading blocs the private sector can consult with supranational entities such as the European Commission in the EU.

¹⁴ ASEAN Comprehensive Investment Agreement, Brunei, 26 February 2009.

In ASEAN, private-public consultations on the operation of the ASEAN institutions are still largely *ad hoc*. To paraphrase Henry Kissinger's comment about the EU, "whom do I call when I want to call ASEAN" -- the ASEAN Secretary General? the Chair of ASEAN? the ASEAN Secretariat? Although the ASEAN Charter lays the groundwork for strengthening the role of the ASEAN Secretary General, continued efforts to improve his standing and that of the ASEAN Secretariat are necessary.

At the upper level of ASEAN, the ASEAN Charter provides for semi-annual meetings of ASEAN leaders, coordinating council meetings of foreign ministers, as well as ministerial council meetings dealing with economic, political-security and socio-cultural issues. Private-public consultations should be institutionalized at those meetings, and not limited to the annual business and investment summits.

The ASEAN Secretariat should increase its interaction with the private sector, and ASEAN members should ensure that their permanent representative delegations include experts who are well versed in the arcana of economic integration and can work with the private sector. Perhaps standing bodies involving both government and private sector representatives could be established. These could be organized at the industry level, interacting with ASEAN officials at the committee level and not just at the higher levels such as the ASEAN Summits and ASEAN ministerial meetings as occurs now. These standing bodies could operate not just at the times of meetings, but also virtually via videoconferencing or social media. With improved cooperation and communications, the private sector could have a more meaningful role in "grading" the ASEAN member states and institutions in the AEC Scorecard and in determining whether the ASEAN Blueprint goals are being met.

D. A Reviewed and Revised ASEAN Charter

Article 50 of the ASEAN Charter provides as follows:

"This Charter may be reviewed five years after its entry into force or as otherwise determined by the ASEAN Summit"

On the basis of this article an initiative for the review of the ASEAN Charter could be launched aiming at correcting the normative gaps present in the ASEAN architecture, a process that could have been invoked as early as 2013. The current institutional arrangements in ASEAN are not conducive to establishing an effective AEC. A truly single production base and a single market for goods, services and investments cannot operate properly when it is regulated by 10 separate ASEAN national governments, coordinated by an ASEAN Secretariat without authority other than moral suasion and peer pressure.

On the other hand, that does not mean that ASEAN would instantly accept a powerful supranational authority in the style of the European Commission. In the EU, the European Commission has broad powers to monitor, implement and sanction (the NAFTA Secretariat's powers are limited to the administration of dispute settlement procedures; although this means that the NAFTA Secretariat itself has less direct authority than the ASEAN Secretariat, the ability of private actors to invoke NAFTA dispute settlement means that even the indirect influence of the NAFTA Secretariat is greater than that of the ASEAN Secretariat). Although this would appear attractive to Western observers, ASEAN governments do not want an EU-style supranational government, even if they want a single market in Southeast Asia.

Nevertheless, the ASEAN Secretariat needs augmenting because it (and the ASEAN Secretary-General who heads it) is the only ASEAN institution which can be counted upon to act on behalf of the common goals of the AEC. The ASEAN national governments will almost always act on their individual national interests.

There are additional powers, which if assigned to the ASEAN Secretariat, would give the Secretariat more effective means of administering the AEC yet fall short of creating an authority that would have the full gamut of powers of the European Commission. Member states could determine how much delegation of sovereignty to the ASEAN Secretariat they are willing to live with. Hence the

ASEAN member states could provide that the ASEAN Secretariat be empowered with one or more of the individual powers that the European institutions currently have:

- **Right of oversight** -- The ASEAN Secretariat would be obligated to comment publicly in writing on all national and multinational measures affecting implementation of AEC goals and principles. The commentary and analysis would be couched in terms of what measures would best serve the development of the AEC as a single market. Over time, ASEAN Secretariat opinions would create a body of AEC commentary that would influence administration of the AEC. Currently this happens during ASEAN meetings but the ASEAN Secretariat staff is not obligated to make comments, and indeed has to be asked by an ASEAN member state before they can comment, and the comments are not recorded or publicized. Article 51 of the ASEAN Charter provides the ASEAN Secretariat with the power to interpret the Charter, upon the request of an ASEAN member state. The authors understand that some in the ASEAN Secretariat legal department are of the opinion that Article 51 thus provides a general authority for the ASEAN Secretariat to provide comment on all ASEAN documents (assuming an ASEAN member state requests comment), as they are derivative of the Charter, either directly or indirectly via the ASEAN Summit and its delegation of authority to the ASEAN institutions. Expanding this authority explicitly, such as by providing a standing request for the ASEAN Secretariat to comment on all measures that could affect the AEC, would provide a more certain legal basis for this practice of the ASEAN Secretariat.
- **Right of inquiry** -- The ASEAN Secretariat would have the right to inquire with ASEAN members on their implementation and administration of measures affecting the AEC. The member states would be obligated to respond to these inquiries. Currently the ASEAN Secretariat may make inquiries but the ASEAN member states are not required to respond.
- **Right of proposal** -- The ASEAN Secretariat would have the right to propose measures, on its own initiative, which would advance AEC goals and principles. Under current practice, ASEAN member states have asked the ASEAN Secretariat to provide policy proposals, but the ASEAN Secretariat does not have independent authority to present policy initiatives. Thus, all policy proposals in ASEAN are formally made by the request of the ASEAN member states. Of course, once this rubric is satisfied, the ASEAN Secretariat has indeed made policy proposals which have been developed under its own auspices, those of ASEAN member states, or even those of the donor countries which provide aid to ASEAN projects. However, by making independent proposals, the ASEAN Secretariat would create a body of work in support of the AEC that would not be viewed as biased towards any particular ASEAN member state (or donor country, for that matter). These proposals could be used as the basis for future policy proposals and eventually policy. ASEAN member states could of course reject, modify or enact the proposals, but their mere existence would provide an independent source of ideas that would advance the AEC.
- **Right to initiate action** – the ASEAN Secretariat could be empowered to initiate actions against ASEAN member states for failure to fulfill their obligations for the commitments undertaken under the ASEAN Charter. This kind of action would be modeled to the original article 169 of the EC Treaty 1957. In the case of ASEAN the roles played by the Commission could be replaced by the ASEAN Secretariat and the role of the European Court of Justice by the EDSM.
- **Right of sanction** -- The ASEAN Secretariat would have the right to impose sanctions on member states not in compliance with AEC goals and principles. Currently the ASEAN Secretariat only has peer pressure, adverse publicity and moral suasion as tools to enforce compliance with the AEC. Sanctions could include fines, authorization for ASEAN member states to suspend trade concessions, suspension of participation in ASEAN programs and other negative consequences.

Obviously acquisition of the last three powers would make the ASEAN Secretariat more like the European Commission. Indeed the combination of all of these powers would provide for an ASEAN

Secretariat with powers almost on a par with the European Commission. At this time, the ASEAN member states would not want such a powerful supranational entity. However, the authors list these individual powers to demonstrate the spectrum of additional powers that could be delegated to the ASEAN Secretariat (and there may be other powers not discussed above).

E. Improved Financial Support for the ASEAN Institutions

Another foundational issue that could be addressed is the funding of the ASEAN institutions, and in particular, the ASEAN Secretariat. Currently the ASEAN member states make equal contributions to the ASEAN Secretariat, without regard to population or economic development. Ostensibly this is to encourage consensus among the ASEAN member states, as equal contributions mean equal consideration during the policy making process.

Yet because funding contributions are limited by the amount paid by the poorest ASEAN member state, the ASEAN Secretariat has a relatively low annual operating budget, currently about US\$ 18 million. This of course hampers the ability of the ASEAN Secretariat to recruit officials, conduct research and oversee the AEC. By comparison, the European Commission and its related institutions have an annual budget in the billions but of course the Commission has much greater powers and responsibilities.

ASEAN has improvised around these limitations by outsourcing some activities either to entities such as the Economic Research Institute for ASEAN and East Asia (ERIA) or to trade assistance projects funded by ASEAN dialogue partners such as the US, EU, Australia and Japan. Under the current setup, the ASEAN Secretariat and the ASEAN member states develop project concepts and then ask the outside entities to conduct the project under their auspices. Furthermore, although the project may be technically limited to certain aspects of the AEC, the policy recommendations can be applied to other AEC matters. For example, an ASEAN-Australia-New Zealand FTA (AANZFTA) Economic Cooperation Work Programme project on certificates of origin may technically be limited only to the AANZFTA, but the principles can be applied to the ATIGA as well). In this way, much work has been achieved by the ASEAN institutions, despite their limited budgets.

The difficulty is that such outsourced policy projects may not necessarily have sufficient political or bureaucratic “buy in” by the ASEAN institutions and ASEAN member states. The terms of reference for these projects do explicitly state that the work product and information developed during the course of the project and strictly the property of ASEAN, not the donor parties or outside entity. Nevertheless, the necessary distance between these donor-funded work projects and the ASEAN institutions make it easier for the ASEAN institutions to reject their recommendations as being influenced by the donors (despite agreements to the contrary) or simply not having involved the ASEAN institutions sufficiently. This may be the case regardless of whether such “donor bias” is actual or only perceived.

These inefficiencies in the policy and administration of the AEC can be reduced or eliminated by the ASEAN member states’ increasing their funding of the ASEAN institutions and decreasing the dependence on the donor projects. Alternatively, ASEAN member states could agree to impose a surcharge on airline tickets or shipping containers, with the proceeds devoted to funding the ASEAN institutions (this was first proposed by Brunei in 2008). Not only would such funding be linked to the relative levels of economic activity in the ASEAN member states, but such a surcharge would encourage greater interest among the general public in the activities and operations of the ASEAN institutions, a beneficial institution-building effect. Reportedly the December 2011 confidential report proposes consideration of just such a surcharge.

In addition, ASEAN leaders should consider creating a stronger mechanism for the development of infrastructure in the lesser developed countries. The EU has structural and cohesion funds which redistribute funds to its lesser developed countries. Although there is an ASEAN Connectivity

Initiative which should eventually benefit the lesser-developed countries, ASEAN's main program for dealing specifically with the CLMV countries is the Initiative for ASEAN Integration, a programme established in 2000, whose objective is "Narrowing the Development Gap".¹⁵ It is not a direct transfer system however and emphasizes technical assistance and partnership with dialogue partners. Yet a direct transfer program of redistribution would encourage support for ASEAN, and also better link the ASEAN Socio-Cultural Community with the AEC. However, this is perhaps a longer-term goal for later consideration by the ASEAN leaders, as it would require the development of much stronger institutions to collect, administer and distribute the funds.

F. Greater Powers for Another ASEAN Entity

Alternatively, some of the above powers could be assigned to a new ASEAN entity or institutions. Using such an entity could also reduce sensitivities about supranational institutions, depending on how much authority is vested with the entity. Outside entities could also avoid the budgetary difficulties discussed above (although perhaps such issues should be addressed directly rather than by creating new institutions).

The difficulty with establishing new ASEAN entities stems from their separate nature. If ASEAN member states are less sensitive about decisions and opinions from an entity separate from the ASEAN Secretariat, they also might not accept the legitimacy of decisions and opinions from an entity that is not part of the ASEAN Secretariat. To the extent that the functions undertaken by these new ASEAN entities duplicate functions of the ASEAN Secretariat, then the legitimacy of the ASEAN Secretariat is reduced that much more. Furthermore, if creating these separate entities is intended to avoid the funding issue, perhaps it may be better to deal with the funding issue directly. In other words, creating separate ASEAN entities could be seen as masking the problem rather than dealing with the institutional problems already existing in the ASEAN system.

We discuss several concepts below:

1. Ombudsman/Public Advocate

One idea would be to establish an independent oversight body that would function as an inspector-general or auditor-general. The body could have powers of inquiry to investigate compliance with AEC measures by ASEAN member states. It could also have powers of oversight to issue opinions on the consistency of ASEAN member states' policies and legislation with AEC objectives. Similar entities exist in other regional bodies. For example, the Advocate-General in the EU was established to provide an opinion in European court cases and often provides an alternative view that of how the court should rule.

2. Permanent Eminent Persons Group (EPG)

Another idea would be to establish a permanent body made up of former government officials, academics and other highly respected ASEAN nationals, supported by a professional staff, which would monitor and comment on AEC developments. Such "eminent persons groups" have been repeatedly used in ASEAN's history, most notably in the drafting of the ASEAN charter itself. The use of such groupings is consistent with Southeast Asia's largely agrarian system, whereby major decisions and disputes in the kampong (village) were resolved by consulting with the local elders. A permanent eminent persons group would simply be a re-creation of this approach but on a regional basis. Decisions and analysis from this body could thus be more acceptable to ASEAN member states,

¹⁵ R. Severino, *Southeast Asia in Search of an ASEAN Community* (Institute of Southeast Asian Studies, 2006), pp. 70-73.

since its members would be well-respected members of ASEAN society, perhaps including former leaders.

Of course, the central difficulty with a permanent EPG would be the question of who would these eminent persons be, and who would select these persons. Also, could a permanent EPG find sufficiently qualified individuals with the necessary skills? Potentially the EPG would serve as a rival institution to both the ASEAN Secretariat and the ASEAN leadership. Hence there would be a great temptation for one or the other to control the selection process and place their own allies on the EPG. On the other hand, one could counter that this is exactly what happens anyway with the various EPGs and High Level Task Forces that ASEAN already uses in its operations, so this difficulty is not new. Rather, if the EPG takes on a greater, continuing role, then the likelihood of institutional capture by others is much higher.

3. Economic Support Institute

Another idea would be to establish a separate economic support institute which would serve as an independent repository of information related to the AEC. It also would conduct research on economic issues in ASEAN, providing economic research and support much in the same way that the Organization for Economic Cooperation and Development secretariat does for its member states. In this way, ASEAN could keep an eye out for emerging economic trends and make corresponding policy revisions.

ERIA has assumed some of these functions. ERIA, however, also has a remit beyond ASEAN to include coverage of China, Japan, Korea, India, Australia and New Zealand. In addition, its primary funding comes from Japan, and hence its work product could be viewed as skewed towards its donor parties' interests. This is not an insignificant issue, as Japanese companies have already largely integrated in ASEAN, particularly in the automobile and electronics industries, whereas the AEC needs to expand itself beyond this base. Then again, the same could also be said about the support provided to ASEAN finance ministers and the ASEAN Infrastructure Fund by the Asian Development Bank – another regional entity with a scope extending beyond ASEAN and largely funded by Japan.

V. Conclusion

Despite all of the institutional difficulties in the AEC, one must be reminded that ASEAN's regional economic integration is arguably the most successful regional economic integration project in the developing world. ASEAN actually operates much better than similar efforts in the Middle East, Africa, South Asia, Central Asia, South America and Central America. Hence to its credit, the AEC's primary comparisons are with regional economic integration projects led by developed countries, e.g., the EU and NAFTA.

Nevertheless, the AEC could be so much more, with the right adjustments to its institutions and processes. The structural difficulties in ASEAN, namely the continuing major influence of national borders, the ASEAN Way of consensus and non-interference, and member states' reluctance either to confront each other on AEC non-implementation or to strengthen ASEAN institutions, will undermine the potential of the AEC if not remedied. Otherwise, the AEC will remain a largely Japanese multinational-dominated production and supply chain, failing to provide economic benefits for the ASEAN Community at large.

The AEC faces even greater internal stresses brought on by the TPP and the progressive negotiation and implementation of EU FTAs with individual ASEAN members such as Singapore and Vietnam. ASEAN economic growth has been mostly led by an export based policy focused on major markets like the EU and the US. Until recently market access to these countries was granted under rather homogenous trade preference programs like the Generalized System of Preferences (GSP).

The TPP and the ASEAN-EU FTAs will dramatically change the terms of market access and the regulatory environment of the ASEAN countries that are parties to these agreements. Both the TPP and ASEAN –EU FTA, albeit to a varying degree, are next generation FTAs encompassing disciplines going well beyond the elimination of tariff and rules of origin to covering trade in services, investment and other regulatory issues related to market access.

Without a clear impetus on AEC goals of establishing a single production base in few years the ASEAN countries participating in the TPP and EU FTAs are likely to be more aligned in terms of regulatory policies with their partners in the TPP and with the EU than with other ASEAN members. This could result in a two-tier ASEAN: ASEAN first tier countries that are aggressively pursuing TPP participation and negotiations with the EU, and the second tier ASEAN countries of the LDC group, Cambodia, Myanmar and Laos that are relying on the existing GSP preferences or unilateral trade preferences to further pursue their export led growth policy. There are already signs that the changing market access and trading opportunities arising from the TPP and the EU FTAs is tilting the location of investments and manufacturing location in favour of the ASEAN first-tier countries. This trend is exactly the opposite of the concept of one single production base envisaged in the AEC.

For example, Cambodia is one of the few LDCs that have been able to increase exports through trade preferences with the EU and other major trading partners. More specifically Cambodia has been able to draw net gains from the trading opportunities offered by the reform of EU rules of origin that took place in 2011. Trade statistics show that in 2011-2013 period not only Cambodia has been able to increase its utilization of the EU preferences but has substantially increased its total exports to the EU. Cambodia has been able to begin its first steps towards diversification of its export basket by becoming one of the largest exporters of bicycles in few years mostly because of the EU reform of rules of origin. At the same time garment exports have risen.

Yet this bonanza may not last due to the changing trading environment. First the new EU GSP system that entered into force in 2014 (GSP 2014) provides for graduation of some ASEAN countries like Malaysia and Thailand. Second, under the new GSP regulation and contrary to past practice, graduation will entail that inputs from graduated countries like Singapore and Malaysia may no longer be used for ASEAN cumulation for qualifying goods for the trade preference rules of origin. Third and most importantly ASEAN countries are negotiating FTAs with the EU and the GSP 2014 provides that once the FTAs are concluded these countries will be excluded from GSP making their inputs ineligible for cumulation. This includes competitors such as Vietnam.

This process will have the following impact for Cambodia and other ASEAN LDCs:

1. FTAs entered by the EU with other ASEAN countries will provide in few years equivalent or better market access to ASEAN countries than to Cambodia, Myanmar and Laos.
2. Cambodia will be unable to cumulate with ASEAN countries while ASEAN countries will be able to cumulate among themselves and eventually with other Asian countries that have signed FTAs with the EU.
3. Once finalized the TPP may provide to Vietnam, being the most immediate competitor of Cambodia, better market access to the US market for garments, bicycles and a whole array of other products.

As it currently stands, the AEC agenda lacks the dynamism to provide further market access to ASEAN countries or a revision of ATIGA. Negotiations of the Regional Economic Comprehensive Partnership Agreement (RCEP) are progressing, however it still to be seen whether any additional market access will be provided in a timely and meaningful manner to Cambodia's exports. In any case RCEP does not involve the US and the EU and Cambodian exports are unlikely to be absorbed by the RECP market that is a rather a competitor to Cambodia than a possible importer. What is more likely is that the EU-ASEAN FTAs and TPP may be finalized much earlier than any substantial

improvement of regional market access like RCEP that could eventually offer market access opportunities for Cambodia in the medium term.

This brief analysis focusing on Cambodia provides a meaningful example on how the TPP and the EU-ASEAN FTAs could negatively impact the overall objective of a single production base unless the ASEAN institutions are given the necessary means to achieve the objectives by ASEAN leaders.

The authors therefore have proposed a variety of options for ASEAN's leaders to improve the governance of the AEC. Taken from the experiences of the EU, NAFTA and nation-states, they can continue the formalization and strengthening of the ASEAN institutions set forth in the ASEAN Charter. By doing so, ASEAN's leaders can perhaps take a lead from the EU or NAFTA, where the national leaders' delegation of authority to a regional institution (in the EU) or to the dispute resolution process (in NAFTA) have allowed them to shift the political costs to others (i.e., "blaming Brussels" in the EU) while reaping the political benefits of economic integration for themselves. As it currently stands, because the ASEAN leaders make all final decisions in the AEC, the political credit – and the political blame – all goes to the ASEAN leadership. Once ASEAN's leaders figure this out, they will pursue strengthening the ASEAN institutions and processes.

However, that process will take time, as ASEAN has its own operating pace and sense of direction. In all likelihood ASEAN's leaders will be selective in choosing which of the reforms and initiatives described above, and probably from elsewhere, to implement. The AEC will thusly follow its own path, on its own timing, different from that of the EU or of NAFTA, but in the best interests of its peoples nonetheless. This process will be rather frustrating to Western observers who are used to the "ever closer union" of the EU or the "Three Amigos" of NAFTA. Yet ASEAN has to determine its own path and make its own decisions for the AEC to have legitimacy. Hopefully, with a better understanding of the tasks involved, ASEAN's leaders will take the correct steps to achieve an AEC that benefits all of its citizens.

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